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ALLAHABAD SERIES

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(2022)04ILR A7
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE VIKRAM D CHAUHAN, J.

Jail Appeal No. 55 of 2019

Sanjay ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Ashok Kumar Tripathi (AC), Sri Sunil Singh, Sri Vivek Singh

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

Criminal Law- Indian Evidence Act, 1872- Section 27 - Recovery of alleged *danda* employed by the accused after two months of the incident from an open field- What is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.

Mere discovery of the alleged weapon of assault, pursuant to disclosure of the same by the accused, is in itself not sufficient to bring home the charge against the accused. The burden lies on the prosecution to establish that the recovered article was employed in the commission of the offence. (Para 23)

Criminal Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Augustine Saldanha Vs St. of Kar. (2003) 10 SCC 472

2. Surinder Kumar Vs U.T, Chandi.(1989) 2 SCC 217

3. Mustkeem @ Sirajudeen Vs St. Of Raj. 2011 (11) SCC 724

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

1. Heard Sri Sunil Singh and Sri Vivek Singh, learned counsels for the appellants and Sri Vikas Goswami, learned counsel appearing for the State and perused the lower court record with the assistance of the respective counsels.

2. The instant appeal has been filed against the judgment and order dated 3 January 2018 passed by the Additional Sessions Judge, Court No. 4, Kanpur Dehat, whereby, appellant has been convicted under Section 302 IPC and sentenced to life imprisonment with fine of Rs.20,000/-. On default of deposition of fine, appellant shall serve additional six months rigorous imprisonment.

3. The incident is of 6.3.2016, at about 9:00 p.m. and F.I.R. came to be lodged after the death of the deceased on 10.3.2016, at about 12:30 p.m. The informant/complainant (P.W.-1) is the brother of the deceased. It is alleged that his younger brother Ajay (deceased), aged about 20 years, on the day of *terhavi* ceremony, on 5.3.2016 all brothers had assembled for the ceremony. His elder brother Sanjay with the intention to kill the deceased assaulted him with *danda* in front of the house at the municipal tap; deceased incurred severe head injury on the head, face and back; deceased was carried to the

hospital at 2:00 a.m.; on 10.3.2016 he succumbed to the injuries. Scribe of the report is Rohit Singh who was not examined by the prosecution. The post-mortem on the body of the deceased was conducted on 10.3.2016 at 4:15 p.m. The following anti-mortem injuries on the dead body of the deceased are noted:

External examination−

Deceased was of average built, his height at 160 cm. Dried blood was present inside left ear. Rigor mortis was present in the upper and lower part of the body.

External Injuries−

1. 4 cm stitched wound going through left ear bone towards posterior part of the head, bone on the back part was found to be fractured when stitch was opened. Temporal bone on the back of the nose was found to be fractured.

2. Abrasion measuring 2 cm x 1 cm at a distance of 2 cm from the right eye

3. Abrasion measuring 7 cm x 3 cm present towards left part of the back along with swelling.

4. Abrasion measuring 2 cm x 2 cm on the front part of left leg one cm below the knee.

Internal Examination−

swelling present in brain membrane, brain was lacerated and clotted blood was present, 16/16 teeth present, mouth, tongue, internal part of the neck, larynx, thyroid cartilage were normal. Wind pipe was having a hole for inserting tube. Ribs and food pipe were normal, lung membranes and lungs were congested. Right part of the heart was filled with blood, left part was empty, big blood vessels were normal, 100 grams of liquid food was present in the stomach, digested food was present in small intestine along with gases, gases and faecal material was present in the large intestine. Liver was congested, gall bladder was semi filled, spleen, pancreas and both lungs were congested, urinary bladder was empty. Reproductive organs were normal.

Opinion−

The death occurred due injuries on the head, approximately one day ago.

The ante mortem injuries are possible by a hard and blunt object. Post mortem commenced at around 4.15 in the afternoon and ended at 4.45.

4. The panchayatnama was conducted on the body of the deceased on 10.3.2016 at 12:30 p.m. As per panch witnesses, elder brother (accused) of the deceased caused injury with *danda*. After investigation, charge sheet came to be submitted. The accused was summoned under Section 302 IPC to stand trial.

5. The prosecution examined in all six witnesses, Vinod Kumar (PW-1) brother of the deceased, Smt. Shanti Devi (PW-2) mother of the deceased, Head Moharrir Dhruv Chandra (PW-3), Dr. Avadhesh Kumar (PW-4), S.I. Anoop Kumar Dubey (PW-5) and S.H.O. Ravindra Kumar Tiwari (PW-6). PW-1 and PW-2 are the witnesses of fact and rest of the witnesses i.e. PW- 3 to PW- 6 are formal witnesses.

6. The following documents were exhibited:

1.	F.I.R.	10.03.16	Ex. Ka. 2
2.	Written Report	10.03.16	Ex. Ka. 1
3.	General Diary		Ex. Ka. 3
4.	Recovery Memo of Blood Stained & Plain Earth	10.03.16	Ex. Ka. 5
5.	P.M. Report	10.03.16	Ex. Ka. 4
6.	Panchayatnama	10.03.16	Ex. Ka. 6

7.	Final Form/Report	04.06.16	Ex. Ka. 13
8.	Site Plan with Index	10.03.16	Ex. Ka. 4
9.	Site Plan with Index	10.05.16	Ex. Ka. 12

7. The accused on being confronted with the prosecution evidence, in his statement under Section 313 Cr.P.C., denied the charge; he further stated that he has been falsely implicated as he had earlier lodged FIR against the accused for having caused injury to his wife. He demanded trial.

8. The informant/complainant (PW-1) in examination-in-chief stated that on 5.3.2016, on the *terhavi* ceremony of his father he had come from Delhi; he is employed in a company at Delhi; accused is his younger brother and rickshaw puller; deceased, the youngest brother, also had come from Delhi. On 6.3.2016 at about 9:00 p.m., deceased Ajay had gone to the municipal tap to fetch water; at that moment, accused came on the spot with *danda*, with an intention to kill the deceased, consequently, caused several assault on the deceased. He further stated that wife of the accused had died two years back, accused suspected that she succumbed to burn injuries due to the deceased. After 10 months of the incident accused had lodged FIR against the deceased. This is the reason that accused was inimical towards the deceased. He further stated that the injured was carried to the hospital where he succumbed to the injuries at about 2:00 a.m. Thereafter, a report was lodged, scribed by Rohit Singh.

9. In cross-examination, PW-1 stated that he along with two other brothers had come to the village to attend *terhavi* ceremony of his father. There was no dispute amongst the brothers on the day of the ceremony. He further stated that the incident is of 7.3.2016 at about 9:00 p.m. The municipal tap is at 40 steps from the house; it was a dark night and there was no electricity; deceased had gone to fetch water from the municipal tap. He (PW-1) was at his house. He further stated in his cross that on reaching the spot, 30-40 people were present; there was some dispute going on between the deceased and the accused; he further stated that he reached the spot after the on going dispute and saw that his brother Ajay (deceased) lying unconscious. PW-1 placed his unconscious brother on his lap. On specific query, he stated that he had not seen as to whether the accused was present at the spot or not. He further stated that he had not seen accused of having caused injury with *danda* upon the deceased. Thereafter, he stated that he carried the injured to Akbarpur govt. hospital where he stayed for an hour, thereafter, injured was carried to a hospital at Kanpur on reference. He further stated that scribe of the report, Rohit Singh had not read out the report to him; PW-1 stated that he merely put his signature on the report. He further stated that the police officials had not recorded his statement and if it has been recorded then he is not aware. On a suggestion he stated that he signed the report on the asking of Rohit Singh; while writing the report he was not in a stable mental state.

10. In nutshell, the statement and cross-examination of PW-1 reflects:

i) the alleged incident occurred at the municipal tap;

ii) PW-1 reached the site of the incident post occurrence;

iii) accused was not present;

iv) it is a dark night, no electricity;

v) 30-40 residents of the locality present;

vi) PW-1 states the probable motive.

11. PW-2, Shanti Devi, mother of the deceased stated that she has four sons, three of them work at Delhi; on 5.3.2016 her family assembled for *terhavi* ceremony of her husband; on 6.3.2016, younger son Ajay (deceased) while fetching water form municipal tap, accused and the deceased entered into an altercation; deceased fell down on the brick road and incurred injury. She further stated that wife of the accused died two years earlier suffering burn injury; accused suspected the deceased and had grudge against him; it is for this reason that on the night of 6.3.2016, at about 9:00 p.m., accused inflicted injury with *danda*; she then stated that deceased succumbed to the injury due to falling on the brick road. She further stated that police officials has not recorded any statement of hers.

12. In cross examination, PW-2 stated that she is an illiterate lady; she resides in a thatched hut separately from the house of her sons which is 10 houses away, outside the village. At the time of incident she was at her hut; some unknown person informed her that some altercation took place between her sons; she further stated that around 10:00 p.m. she reached the spot, deceased was not present; none of her sons were present. She further stated that she had not seen the accused and deceased indulging in maarpeet. On query by the court, she stated that her deceased son received several injury on the right side by falling on the ground. However, she had not seen him falling. On information form others she reached the spot and found her son lying on the ground. Her sons Vinod and Pramod had taken the injured son to the hospital; she further stated accused had not gone to the hospital as he had committed the offence.

13. The statement and cross-examination of PW-2 shows:

i) statement of PW-2 is on hearsay information;

ii) she reached the spot after the incident;

iii) she did not find any of her sons;

iv) the cause of death of her son is by falling on the brick road;

v) she states the probable motive.

14. Dr. Avadhesh Kumar (PW-4), conducted the post-mortem on the body of the deceased. The injuries found on the body of the deceased has already been noted earlier. In cross-examination, PW-4 stated that ante-mortem injuries was received by the deceased one day earlier, possibly caused by hard and blunt object. It is noted in the impugned judgment that the defence counsel did not appear to examine the witness, nor seek adjournment. Accordingly, examination of PW-4 was closed.

15. The Trial Court upon considering the statement of prosecution witnesses and documentary material convicted the accused under Section 302 IPC.

16. It is submitted by learned counsel for the appellant that the ingredients of the offence under Section 302 IPC is not made out taking the prosecution evidence on face value; motive set up by the prosecution is that death of the wife of the accused that occurred two years prior to the incident and accused suspected deceased for the death of his wife. As per prosecution case, it is

proved that the incident took place while fetching water form municipal tap at a public place; it could be a case of sudden quarrel; the intention to cause injury to kill deceased is not borne out from the prosecution evidence taken on face value. It is further submitted that neither PW-1 nor PW-2 were present on the spot at the time of incident; they clearly stated that they had not found the accused present on reaching the spot; PW-1 categorically stated that he had not seen the accused causing injury with *danda* upon the deceased. PW-1 and PW-2 reached the spot post occurrence of the incident. In this backdrop it is urged that even taking a case that the accused had caused injury by hard and blunt object, finding could not travel beyond Section-304 Part-II IPC. It is further urged that the finding returned by the trial court is per-se perverse, the presence of the accused on the spot at the time of the incident is not proved; the fatal injury on the head of the deceased could have been caused by falling on the brick road as testified by PW-2.

17. In rebuttal, learned A.G.A. submits that conviction of the accused has been proved by the prosecution beyond reasonable doubt; witnesses of fact deposed that the accused had caused injury with *danda* at the municipal tap; motive had been clearly spelled out; conviction is based on statement of occular witness which is duly corroborated by medical expert opinion.

18. We have given our thoughtful consideration to the rival contentions and have carefully gone through the record with the assistance of learned counsel for the parties. On careful reading of the testimony of prosecution witnesses of fact, it is evident that in examination-in-chief one of the witness (PW-1) stated that injury was caused by the accused with "*danda*'. The other witness (PW-2) stated that the injury was caused by falling on the brick road. The motive assigned is that accused suspected the deceased being the cause for the death of his wife. In cross-examination both witnesses admitted of having reached the spot of the incident after the injury was caused to the deceased; PW-1 found the deceased lying unconscious. He further stated that 30/40 persons of the locality had assembled on the spot but accused was not seen on the spot. In other words, PW-1 had not seen the incident, nor the accused of having caused injury, nor, was he present on the spot. PW-2, mother of the deceased, stated that she lives separately outside the village in a thatched hut. Some unknown person informed her of the incident, followed by a quarrel between the brothers. She stated in cross-examination that on reaching the spot neither the deceased nor the accused was present on the spot; she reached after an hour of the incident. She, however, stated that injury was caused as the deceased fell down on the ground and his head hit the brick road. It is a dark night and no electricity. No independent witness was examined.

19. Learned counsel for the appellant has placed reliance on the decision rendered in ***Augustine Saldanha Vs. State of Karnataka1,*** wherein, it has been held:

"In the scheme of the IPC culpable homicide is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes

three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304."

20. In ***Surinder Kumar Vs. Union Territory2,*** it has been held that:

"To invoke Exception 4 to Section 300 I.P.C. four requirements must be satisfied, namely (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion, and

(iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly."

21. Admittedly, as per prosecution case, injured/deceased was carried to government hospital at Akabarpur, PW-1 along with injured stayed for one hour and on reference by the government hospital, injured was carried to the hospital at Kanpur. Prosecution has not produced the examination report of the injured so as to prove whether injury caused upon the deceased was by a blunt object or sharp weapon or by any other weapon. As per post-mortem report conducted after four days of the incident, stitched wounds were found on the body and the report is based on examining the external and internal injury after opening the stitched wounds. In the circumstances, it is urged that opinion of the medical expert that injury possibly could have been caused by hard and blunt object cannot be taken as a definite opinion. Injury could have been caused either by a sharp weapon or by falling on the bricks as per testimony of PW-2.

22. Further, it is urged that the recovery of alleged *danda* employed by the accused was recovered on 10.05.2016 i.e. after two months of the incident from an open field. In the circumstances, it is urged that *danda* being very common in a village, therefore, it cannot be said that the recovered *danda* from an open place, after two months, was employed in commission of the offence. Further, even taking the prosecution evidence on face value, the ingredients of the offence under Section 302 I.P.C. is not made out. It could be a case of sudden quarrel at the municipal tap, but that is not the prosecution case. Further, as per testimony of the prosecution witnesses, there was no electricity and it was a dark night; the prosecution witnesses admittedly were not present at the site. None of the residents of the locality (about 30-40 person) who had gathered at the place of incident, was examined to corroborate the prosecution case. The finding reached by the trial court is not

sustainable in the backdrop of the prosecution evidence. We, therefore, find that the prosecution has utterly failed to prove the case beyond reasonable doubt.

23. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution. (Refer: **Mustkeem @ Sirajudeen vs State Of Rajasthan3)**

24. Suspicion, however, strong is not sufficient to be taken as proved. The conviction and death sentence imposed on the accused is totally unsustainable in law, therefore, appeal is liable to be allowed and the impugned judgment and order of conviction and sentence is liable to be set aside.

25. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same. (Refer:**Devi Lal vs The State Of Rajasthan4)**

26. The jail appeal is **allowed.** The impugned judgment and order of conviction and sentence is set aside. The appellant Sanjay is directed to be released forthwith, if not required in any other offence.

27. The appellant on being released the mandate of Section 437-A Cr.P.C. to be complied.

28. Let the lower court record be sent back to court below forthwith along with a copy of this judgment, for ascertaining necessary compliance.

(2022)04ILR A13
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.04.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE DINESH PATHAK, J.

Jail Appeal No. 116 of 2019

Chatthoo Chero ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Mohit Behari Mathur (A.C.)

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

Criminal Law - Indian Evidence Act, 1872- Sections 102 & 106 – Code of Criminal Procedure, 1973- Section 313- The burden not being discharged by the accused and no explanation given by him in Section 313 Cr.P.C. St.ment is concerned, it is trite law that only after the prosecution discharges its burden of proving the case beyond reasonable doubt, the burden would shift on the accused. The fact that a defence may not have been taken by an

accused under Section 313 Cr.P.C. again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything.

The burden of proving a fact said to be especially within the knowledge of the accused shifts upon him only after the prosecution has discharged its initial burden of proving its case beyond any reasonable doubt and merely because the accused has failed to give any credible explanation in his St.ment u/s 313 Cr.Pc would not absolve the prosecution from its burden to prove its case.

Evidence Law - Indian Evidence Act, 1872 - Sections 106 & 26 - The homicidal death of the deceased had taken place in the room in which the appellant, admittedly, as per the testimony of the witnesses of fact, was not present at the time of occurrence. The appellant came to be convicted on his confessional St.ment and the recovery of the assault weapon on his pointing out. The confessional St.ment will not be read against the appellant and the conviction would not rest on the recovery of the assault weapon alone in the backdrop of the St.ment of the witnesses and the cite plan showing that the room of the deceased was accessible to one and all, including, strangers. The door of the room was open being summer month. Grown up children i.e. sons and daughters were also present; the witnesses of fact and independent witnesses have not been able to prove that the relation between the appellant and his wife was strained.

Where it is not proved that it was only the accused who was present inside the home at the time of commission of the alleged offence, then the accused cannot be convicted on the basis of his confession recorded before the police as the same is inadmissible in evidence.

Evidence Law - Indian Evidence Act, 1872- Section 8- Motive- There is no motive for commission of the offence. In this backdrop to shift the burden upon the appellant under Section-106 of Evidence Act, on mere suspicion to explain how the incident happened, prosecution has primarily shifted the burden of proof upon the accused to prove his innocence. In a case based on circumstantial evidence, motive assumes great significance. It is not as if motive alone becomes the crucial link in the case to be established by the prosecution and in its absence the case of prosecution must be discarded. But, at the same time, complete absence of motive assumes a different complexion and such absence definitely weighs in favour of the accused.

Although motive forms an important link in a case based on circumstantial evidence but complete absence of motive would be a relevant fact in favour of the accused.

Evidence Law - Indian Evidence Act, 1872- Section 27- Conviction only on the basis of recovery-The conviction of the appellant rests on recovery of the assault weapon on his pointing out. The knowledge of the accused that he has hidden the crime weapon and recovered it in the presence of the Investigating Officer (I.O.) and other witnesses, followed by his information is not sufficient to link the appellant with the commission of the offence without there being a motive and the link/ connection of the appellant at the relevant time he being present in or around the room of the wife- Section 27 of the Evidence Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 is the information leading to discovery and not any opinion formed on it by the prosecution. The recovery of the crime weapon in the facts of the case in hand

was made after five days, though the accused is the complainant and was present throughout the investigation but the crime weapon has not been linked with the commission of the offence.

Settled law that only that part of the disclosure of the accused will be read which distinctly refers to the subsequent recovery. Where there is absence of motive and the accused is found to be absent at the place and time of the commission of the offence, then merely upon a part of his disclosure, his conviction would be illegal. (Para 27, 28, 30, 31, 32, 35, 36, 38, 39, 41, 42, 46)

Criminal Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Sunil Kundu Vs St. of Jharkhand (2013) 4 SCC 422

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

3. Sharad Birdhichand Sarda Vs St. of Mah. (1984) 4 SCC 116

4. Suresh Chandra Bahri Vs St. of Bihar AIR SC 2420

5. Babu Vs St. of Kerala (2010) 9 SCC 189

6. Pulukuri Kotayya Vs Emperor 74 IA 65: A 1947 PC 67

7. K. Chinnaswamy Reddy Vs St. of Andhra Pradesh & anr. AIR 1962 SC 1788

8. Mustkeem @ Sirajudin Vs St. of Raj. (2011) 11 SCC 724

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

1. Heard Sri Mohit Behari Mathur, Amicus Curiae, for the appellant and learned A.G.A. for the State.

2. The instant appeal has been filed against the judgment and order dated 22.06.2019 passed by Additional Sessions Judge, Fast Track Court, Sonbhadra, in Sessions Trial No. 66 of 2014 (State Versus Chatthoo Chero) under section 302 I.P.C., convicting the appellant.

3. As per prosecution case, the appellant/complainant lodged F.I.R. being Case Crime No. 120 of 2014, under section 302 I.P.C. on 30.04.2014, at 10.05 a.m. alleging that as per usual routine the family after taking dinner retired to sleep. The wife of the complainant/deceased (Shakuntala Chero), aged about 42 years, alongwith infant child, aged about three years, went to sleep at the DHABA behind the house. The complainant and his other two sons and two daughters slept in the DHABA on the opposite side of the house. In the morning, his son Kamlesh went behind and saw his mother (deceased) lying dead on the cot; there was blood all over and he ran and informed the complainant.

4. It is alleged that some unknown person caused injury on the neck by a sharp weapon. The incident occurred in the night of 29/30.04.2014. The panchayatnama was conducted on the same day commencing 11.10 a.m. The complainant is one of the witnesses to the Panchayatnama.

5. As per the opinion of the Panchayatnama witnesses, some unknown person caused injury on the neck by a 'tangi' (axe). The Station House Officer (SHO) Ravindra Bhushan Maurya alongwith two constables visited the site of the incident on 04.05.2014, he found the complainant present. On interrogation, the appellant/complainant confessed having committed the offence at about 3.00 a.m. in the morning of 30.04.2014 by Kulhari (axe) slaughtering the neck of his wife. The accused/complainant informed the

Investigating Officer (I.O.) that he is prepared to recover the crime weapon which he had hidden nearby after the incident. Accordingly, the accused/appellant was taken into custody at 13.00 hours, the I.O. and other officials alongwith independent witnesses followed the accused who recovered the axe. Post Mortem on the body of the deceased was conducted on 01.05.2014 at 3.00 p.m. The injuries noted are as follows:-

Anti-mortem injury

1. lacerated wound 7 cm x 2 cm on left neck, depth 9 cm. and 6 cm. below the left ear; neck bone fracture;

2. urinary bladder empty, uterus empty; dal and rice 200 gm. was found in the stomach, body weight 50 kg, aged about 42 years;

6. Forensic lab report notes that human blood was found on axe (kulhari), Kathari (thick Blanket), cord of cot, blouse, broken piece of glass bangles.

7. The prosecution to prove the charge in all examined 11 witnesses, 7 witnesses of fact and rest formal witnesses. The documentary evidence relied upon by the prosecution is marked Ex.-Ka-1 to Ex.-Ka-8.

8. Rajpati (P.W.-1) aged about 22 years, daughter of appellant- accused, reiterated the F.I.R. version and stated that the incident is of 29/30.04.2014, she alongwith her sister (Savita) was sleeping in a room, in another room her mother along with her younger brother (Vimlesh) was sleeping which is on the rear of the building. Her father (accused) alongwith her two brothers Santosh and Kamlesh were sleeping at the Dhaba on the opposite side of the building. Her brother went to pick mahua in the morning. P.W.-1 further stated that she proceeded towards the hilly area for answering nature's call; after sometime, her sister and brother returned and they saw her mother lying on the cot, and blood on the floor. Some unknown person had caused injury on the neck with an axe. In cross-examination, she stated that she was unaware as to who caused the injury. She, however, stated that there was some quarrel with her neighbour Rajnath Bharti. She further stated that the door of the house was open being the month of summer.

9. Savita (P.W.-2) aged about 28 years, daughter of the appellant-accused stated that the incident had occurred two years earlier, it was summer month. She and her brother Kamlesh were sleeping with their father in open place in front of the house; her mother (deceased) and younger brother Vimlesh were sleeping at the rear portion of the house. Before sunrise, she and her brother Kamlesh went on the western side of the house to pick mahua; on return, she found the neck of her mother slit and there was blood everywhere; mother had died. She expressed her ignorance about the person who could have caused the injury. She was declared hostile. In cross-examination by the prosecution, she stated that some quarrel took place with Rajnath Bharti @ Raju, their neighbour.

10. Kamlesh (P.W.-3), aged about 15 years, son of appellant-accused, stated that he has two brothers and two sisters. He further stated that in the morning, he saw that his mother was lying dead; blood was flowing from her neck; the neck was cut; his father was also present. He further stated that it transpires that Raju had committed the offence; Raju is resident of

the same village; wife of Raju and his mother used to quarrel and fight; the family of Raju is involved in the crime. He further stated that his father has been falsely implicated and is in jail. In cross examination, he stated that his family lives together happily and there was no quarrel between his mother and father.

11. Santosh Kumar (P.W.-4), son of Nageshwar Vishwakarma, aged about 21 years an independent witness, stated that he knew the deceased and the appellant; she died at her home; he visited them in the morning and saw the deceased lying on the cot; neck was cut; on the floor there was pool of blood; axe was employed in causing the injury; the appellant was present at the house; he was not aware as to who could have caused the injury.

12. Anil Kumar (P.W.-5), independent witness, on hearing hue and cry, went to the house of the appellant; the deceased was lying dead in the house of the appellant; when he reached Santosh (P.W.-4) was present along with appellant/accused.

13. Jai Kumar (P.W.-6) stated that the appellant is his Mama, the deceased his Mami; on receiving information of the incident, he went to their house; body of the deceased was lying; Administration was present; he further stated that he saw that the neck of the deceased was cut; panchayatnama was prepared in his presence; the appellant was also present. Sharp weapon was employed in causing injury.

14. Asha (P.W.-7) wife of Jai Kumar, stated that the appellant is her Mamiya Sasur (Maternal Father-in-Law), she received information on mobile; she accompanied Jai Kumar (P.W.-6), on reaching the house of the appellant she saw the body of the deceased; appellant was present; she was not aware as to who caused the injury; she had signed the panchayatnama but was not aware what was written in the document.

15. The statements of the witnesses of fact and independent witnesses reflect:

(i) the deceased succumbed to homicidal death;

(ii) the incident occurred in the night between 29/30.04.2014;

(iii) appellant along with his family members were present in the premises;

(iv) the neck of the deceased was injured by a sharp weapon;

(v) no motive has been spelled rather the relation between the husband and wife was cordial;

(vi) the witnesses of fact suspected their neighbour;

16. Head Constable Radhey Shyam Maurya (P.W.-8) stated that he registered the F.I.R. on 30.04.2014 (Crime Case No. 120/2014) under section 302 I.P.C. on a written complaint of the appellant against unknown person. He prepared the chik F.I.R. The information was duly recorded at 10.15 a.m. In cross examination, he stated that F.I.R. was promptly registered; the appellant himself had delayed in informing the Thana.

17. S.O. Indra Bhan Singh Yadav (P.W.-9) claims to be the scribe of the report as informed by the appellant. After reducing the information in writing the appellant put his thumb impression. He also put his signature on the Tehrir (information). In cross-examination, he stated that he visited the site, the appellant

is illiterate, therefore, on his request, he reduced the complaint to writing.

18. Dr. Sanjeev Verma (P.W.-10) deposed that he conducted the post-mortem on the body of the deceased on 01.05.20214 at 3.00 p.m.; deceased was aged about 42 years; rigor mortis was present; lacerated wound 7cm x 2cm on the left side of the neck, 9 cm in depth, 6 cm below the ear-neck bone fractured; sharp cut injury found; time of death is approximately 36 hours earlier; cause of death is due to shock and haemorrhage resulting from excessive bleeding. In cross-examination, he stated that a single assault was caused; repeated assault was not made.

19. Inspector Ravindra Bhushan Maurya (P.W.-11) stated that he received the investigation of the crime on 30.04.2014 and on the said date the formalities i.e. copy of chik, copy of report, Panchayatnama, statement of appellant-complainant, inspection of site, collecting blood stained soil and plain soil, piece of Kathari (thick blanket) was done and statement of witnesses was recorded.

20. Investigating Officer, P.W.-11, further, deposed that he recorded the statement of the witnesses who informed that on 22.04.2014 appellant attempted to hang himself and his daughter was screaming; Santosh Kumar Vishwakarma (P.W.-4) and Anil (P.W.-5) persuaded the appellant to climb down the tree. The rope was removed from the neck of the appellant; appellant was taking the extreme measure as there was some dispute with his wife with regard to his earnings; wife was not returning Rs. 2,400/- and Rs. 1,500/- of his earnings; similar statement was recorded of P.W.-4 and P.W.-5 with regard to the incident of attempt to suicide. He further stated that Gauri Shanker Chero informed him that the appellant and his wife was not having cordial relationship. The appellant was a moody person; he attempted to commit suicide but was rescued by the villagers; the appellant could have done anything on not receiving his money from his wife; it can be said that appellant caused injury to his wife. Appellant could have caused injury under the influence of alcohol/ ganja.

21. P.W.-11 further stated that on 04.05.2014 supplementary statement of the appellant was recorded, he confessed commission of the offence stating that at about 3.00 a.m. between the night of 29/30.04.2014, he caused injury to his wife on the neck with an axe. The appellant was taken into custody, the crime weapon was recovered at his pointing out from the rear Dhaba hidden between the wall and covered roof (Chhajan/Chhajja). Crime weapon was recovered in the presence of independent witnesses; the statement of the accused and other witnesses was videographed; some of the witnesses to the Panchayatnama (Ganga Yadav) stated that the appellant was habitual consumer of ganja; for quite some time accused was having strained relationship with his wife. Appellant confessed the commission of the crime. After investigation on 06.06.2014 charge-sheet was filed against the appellant under Section 302 IPC. He further stated that after confession and discovery of the crime weapon the appellant accused was formally arrested and brought to Thana at about 3.15 p.m.; the site plan was prepared; other recovered items like clothes etc. was sent to Forensic Science Laboratory (FSL) for examination. In cross-examination, he stated that the crime weapon was recovered after 5 days of the incident.

22. The appellant-accused on being confronted with the prosecution evidence

and the incriminating documentary material, in statement under section 313 Cr.P.C. denied the charge stating that he has been falsely implicated; wrong investigation was done; a false charge-sheet was filed; recovery of crime weapon was wrongly proved. He further stated that he had not killed his wife; he has been implicated falsely; the entire trial is based on wrong and false documents. He declined to produce any evidence in defence.

23. The trial court on considering the statement of the witnesses of fact, the documentary evidence and the recovery of the crime weapon at the pointing out of the appellant from his house, the presence of human blood on the axe and the clothes and other accessories of the deceased, was of the opinion that the prosecution proved the charge beyond reasonable doubt. Accordingly, convicted and sentenced the accused for life.

24. On closely and carefully analysing the statement of the witnesses of the fact the following circumstance is duly proved:

i. that the deceased, wife of the appellant succumbed to injury caused on the left side of the neck by an axe;

ii. that her body was found in the room where she went to sleep along with her younger son;

iii. that the crime weapon (axe) was recovered on the information and pointing by the accused;

iv. that children, including, adult children (P.W.-1 and P.W.-2) of the deceased and her husband were present on the premises in the night of the incident between 29/30.04.2014;

v. that the cause of death by a sharp weapon has been duly proved by the medical expert opinion P.W.-10;

vi. FSL report shows presence of human blood on the axe.

25. The time of death as per the confessional statement of the accused (3.00 a.m.) corroborates with the medical expert opinion i.e. 36 hours prior to the post mortem.

26. The trial court convicted the appellant and held him guilty of the offence placing reliance on Section 106 of the Evidence Act. It is noted in the impugned judgment that since the offence was committed in secrecy within the house of the appellant and his presence at the relevant time is proved, the onus would shift upon the appellant to explain as to how the incident had occurred. Since no explanation was forth-coming in the statement of the appellant recorded under Section 313 Cr.P.C., the trial court convicted the appellant.

27. The burden not being discharged by the accused and no explanation given by him in Section 313 Cr.P.C. statement is concerned, it is trite law that only after the prosecution discharges its burden of proving the case beyond reasonable doubt, the burden would shift on the accused. It is not necessary to reiterate this proposition of law with authorities.

28. The fact that a defence may not have been taken by an accused under Section 313 Cr.P.C. again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything.

29. In **Sunil Kundu v. State of Jharkhand1,** Supreme Court observed :

"28. ... When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt." ***(Refer: Anand Ramachandra Chougule v. Sidarai Laxman Chougala and others2)***

30. If an offence takes place inside the privacy of a house and in such circumstances where the assailant has all the opportunity to map and commit the offence at the time and in circumstances of his choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, is insisted upon by the Courts.

31. In such circumstances, in view of the Section 106 of the Evidence Act, there will be a corresponding burden on the appellant to give a cogent explanation as to how crime was committed. The corresponding burden would also be on the inmates of the house, as to how the crime was committed.

32. As pointed out that Section 106 of the Evidence Act, is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.

33. Similarly, in **Vikramjit Singh v. State of Punjab3** Supreme Court reiterated: (SCC p. 313, para 14)

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

34. The question that arises is as to whether prosecution was able to prove the incriminating circumstances beyond reasonable doubt. The prosecution case is based on circumstantial evidence. The homicidal death of the deceased had taken place in the room in which the appellant, admittedly, as per the testimony of the witnesses of fact, was not present at the time of occurrence. A close scrutiny of the cite plan shows that appellant alongwith his two children was sleeping at the southern end of the thatched house which is marked "C". Moving further immediately south of the building the daughter was sleeping at spot marked "B", further south of the premises is the thatched house and still further extreme south is an open space where goats are tied and beside it is a room where the deceased was found murdered on the cot. Further, south of the room is road followed by open land and a house. On East, West and North, the thatched house is surrounded with open land and towards

extreme North the hilly area is depicted. The room where the body of the deceased was found is adjacent to a road; ingress to the room is through a single door from outside the building; the room is not connected through the house. The room where the accused was sleeping and the room where the deceased was sleeping is not interconnected through the thatched house. The accused would have to cover the distance from outside the house i.e. through the open land to reach the room of the deceased. As per the cite plan, room of the deceased was accessible to any person being adjacent to the road and surrounded by open land; the door opens to the surrounding open land. Further, the prosecution evidence shows that the building is a Dhaba, meaning thereby, that the place is accessible to public and the deceased was sleeping at the outer Dhaba adjoining the public road. There is no boundary wall; the open space (land) around the house leads to the hilly area accessible to public/strangers.

35. In the backdrop of the cite plan, the prosecution has not been able to establish the missing link i.e. connecting the presence of the appellant at the time of commission of the offence at about 3.00 a.m. in the night between 29/30.04.2014. As per prosecution case several persons were present in the house along with the appellant. The appellant came to be convicted on his confessional statement and the recovery of the assault weapon on his pointing out. The confessional statement will not be read against the appellant and the conviction would not rest on the recovery of the assault weapon alone in the backdrop of the statement of the witnesses and the cite plan showing that the room of the deceased was accessible to one and all, including, strangers. The door of the room was open being summer month (per P.W.-1).

36. The circumstance proved by the prosecution is that the appellant was not alone with his wife in the house when she was murdered. Admittedly, grown up children i.e. sons and daughters were also present; the witnesses of fact and independent witnesses have not been able to prove that the relation between the appellant and his wife was strained; the theory of strained relationship driving the appellant to commit suicide few days earlier of the incident for money was not proved by the witnesses examined by the prosecution, including, independent witnesses. The motive has not been proved nor assigned for commission of the offence.

37. The position of law is well settled that the links in the chain of circumstances is necessary to be established for conviction resting upon circumstantial evidence. This has been articulated in one of the early decisions of the Supreme Court in **Sharad Birdhichand Sarda v. State of Maharashtra4.** The relevant paragraphs reads thus:

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

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

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

*Court in **Shivaji Sahabrao Bobadev. State of Maharashtra** where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]*

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be' and "must be' is long and divides vague conjectures from sure conclusions."

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

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

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

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

38. In the present case, it is not the case of the prosecution witness that accused was seen either at the room of the deceased or moving towards the room where his wife was lying or the appellant moving out of the room of his wife at about 3:00 a.m. This material circumstance was relevant which the prosecution did not prove having regard to the location of the room of the deceased as shown in the cite plan. As noted earlier, the deceased was sleeping in a room which was not connected from within the house; the room was accessible to any person, including, all the family members. The room has single door opening in the open and the road. Appellant was not seen around the room of the deceased at the time of the alleged incident. There is no motive for commission of the offence. In this backdrop to shift the burden upon the appellant under Section-106 of Evidence Act, on mere suspicion to explain how the incident happened, prosecution has primarily shifted the burden of proof upon the accused to prove his innocence. The recovery of the weapon on the pointing out of the accused is one circumstance in the chain of circumstances, but that should connect the accused with the offence, which is missing. The prosecution failed to prove that in the night between 29/30 April 2014, he alone had accessed the room of the deceased. In absence of such an evidence there is scope/room for several probabilities. Suspicion, however, grave cannot take the form of proof.

39. In a case based on circumstantial evidence, motive assumes great significance. It is not as if motive alone becomes the crucial link in the case to be established by the prosecution and in its absence the case of prosecution must be discarded. But, at the same time, complete absence of motive assumes a different complexion and such absence definitely weighs in favour of the accused.

40. Now so far as the submission on behalf of the appellant/accused that in the present case the prosecution has failed to establish and prove the motive and therefore the accused deserves acquittal is concerned, it is true that the absence of proving the motive cannot be a ground to reject the prosecution case. It is also true and as held in **Suresh Chandra Bahri v.**

State of Bihar5, that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. However, at the same time, as observed by the Supreme Court in **Babu v. State of Kerala6,** absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. In paras 25 and 26, it is observed and held as under :

*"25. In **State of U.P. v. Kishanpal7**, this Court examined the importance of motive in cases of circumstantial evidence and observed :*

"38. ... the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.

39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.'

*26. This Court has also held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. **(Vide Pannayar v. State of T.N.8,)"***

*12. In the subsequent decision in **Shivaji Chintappa Patil vs. State of Maharashtra9,** this Court relied upon the decision in Anwar Ali1 and observed as under:-*

*"27. Though in a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances. The motive... ..." **(Refer: Anwar Ali vs. State of Himachal Pradesh10)***

41. The conviction of the appellant rests on recovery of the assault weapon on his pointing out. The knowledge of the accused that he has hidden the crime weapon and recovered it in the presence of the Investigating Officer (I.O.) and other witnesses, followed by his information is not sufficient to link the appellant with the commission of the offence without there being a motive and the link/ connection of the appellant at the relevant time he being present in or around the room of the wife. The cite plan clearly shows that the room where the wife was sleeping is not connected through the house, the room is accessible from open land on three sides of the house, as well as, from the road. In other words, the room of the deceased can be accessed by any person just not the appellant or the other inmates residing in the house.

42. With regard to Section 27 of the Evidence Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to

establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 is the information leading to discovery and not any opinion formed on it by the prosecution.

43. The various requirements of Section 27 of Evidence Act, can be summed up as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by accused's own act.

(4) The persons giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

44. As observed in **Pulukuri Kotayya Versus Emperor11**, it can seldom happen that information leading to the discovery of a fact forms the foundation of the prosecution case. It is one link in the chain of proof and the other links must be forged in manner allowed by law. To similar effect was the view expressed in **K. Chinnaswamy Reddy versus State of Andhra Pradesh and another12.**

45. Under Section 27 of the Evidence Act, mere recovery of the blood stained weapon (axe) cannot be construed as providing acceptable proof for the murder without there being any substantive evidence. The Supreme Court considered this aspect in the case of **Mustkeem @ Sirajudin Versus State of Rajasthan**13, as under:

"23. The AB blood group which was found on the clothes of the deceased does not by itself establish the guilt of the Appellant unless the same was connected with the murder of deceased by the Appellants. None of the witnesses examined by the prosecution could establish that fact. The blood found on the sword recovered at the instance of the Mustkeem was not sufficient for test as the same had already disintegrated. At any rate, due to the reasons elaborated in the following paragraphs, the fact that the traces of blood found on the deceased matched those found on the recovered weapons cannot ipso facto enable us to arrive at the conclusion that the latter were used for the murder." ***(Refer: Jeeva Versus State of Rajasthan14)***

46. The recovery of the crime weapon in the facts of the case in hand was made after five days, though the accused is the complainant and was present throughout the investigation but the crime weapon has not been linked with the commission of the offence.

47. Having regard to the prosecution evidence and the testimony of the independent witness, the trial court committed an error in convicting the appellant merely on the strength of recovery of the crime weapon on the pointing out of the appellant. The finding reached by the trial court is perse perverse, no reference or reliance was placed on the cite plan i.e. the room of the deceased was accessible to the public and not connected from inside the house. The offence, having regard to the cite plan cannot be set to have been committed in secrecy of the house by the appellant. The prosecution was unable to prove that appellant alone was accessible to the room of the deceased, further, whether he was seen either accessing the room of the deceased or leaving the room at the alleged time of the commission of the offence by any other person. This was a relevant material circumstance to connect the appellant in commission of the offence. Further, motive has also not been proved which was relevant in the given case solely based on the circumstantial evidence.

48. The jail appeal is **allowed**. The impugned judgment and order of the conviction and sentence is set aside. The appellant **Chatthoo Chero** is directed to be released forthwith, if not wanted in any other offence.

49. The appellant on being released the mandate of Section 437A Cr.P.C. to be complied.

50. Let the lower court record be sent back to the court below forthwith along with a copy of this judgment, for ascertaining necessary compliance.

51. We record our appreciation in assistance rendered by the learned Amicus Curiae. The counsel fee assessed at Rs. 20,000/- to be released to the learned Amicus Curiae.

(2022)04ILR A25
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.04.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 813 of 1997
Alongwith
Criminal Appeal No. 1169 of 1997
Alongwith
Criminal Appeal No. 1038 of 1997

Rajpal Singh ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri A.N. Srivastava, Amicus Curiae, Sri Himanshu Giri, Sri Kunwar Ajay Singh, Sri P.K. Singh, Ms. Neelam Giri, Sri P.K. Srivastava, Sri Somesh Khare

Counsel for the Respondent:
A.G.A.

Evidence Law - Indian Evidence Act, 1872 - Section 3- Case of circumstantial evidence - In a case which rests on circumstantial evidence, the law postulates two fold requirements; Firstly, that every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond all reasonable doubt; Secondly, that all the circumstances must be consistent only with the guilt of the accused and totally inconsistent with his innocence.

Settled law that in a case resting upon circumstantial evidence the prosecution has to prove all the links in the chain of circumstances,

which should establish the guilt of the accused beyond any reasonable doubt.

Evidence Law - Indian Evidence Act, 1872- Sections 3 , 7 & 106- Last seen theory- The principle is based on the provisions of Section 106 of the Evidence Act which lay down that when any fact is established within the knowledge of the person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. However, Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution- If the prosecution has succeeded in proving the fact by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

The last seen theory rests upon Section 106 of the Evidence Act in as much the burden of proof is cast upon the accused to explain the facts especially within his knowledge to explain the homicidal death of the person last seen in the company of the accused but the prosecution has to first establish that the deceased was last seen in the company of the accused beyond all reasonable doubt.

Evidence Law - Indian Evidence Act, 1872- Sections 3 , 7 & 106- Last seen theory- P.W.-1 was told by someone that the deceased was seen with some persons on the date of his missing- His statement of last seen of the deceased in the company of the accused is not found clinching as it cannot be said that the deceased was exclusively in the company of the accused persons. The lapse of time between the point when the accused and the deceased were seen together with an unknown person and when the deceased was found dead is not so minimal as to exclude the possibility of any supervening event involving the death at the hands of another. The possibility of any person other than the accused appellants being the author of the crime cannot be ruled out.

In order to establish that the deceased was only in the company of the accused, it has to be proved that the time interval between last having seen the deceased in the company of the accused and his death was so minimal that would exclude the possibility of any other person being involved in the death of the deceased.

Evidence Law - Indian Evidence Act, 1872- Section 24 - Extra judicial confession is a weak piece of evidence. There must be some very good reason for making the disclosure by the accused to the witnesses for the Court to place reliance on such an evidence.

Settled law that extra judicial confession is a weak type of evidence and the same cannot be relied upon for convicting the accused.

Evidence Law - Indian Evidence Act, 1872- Section 114(g) - In the matter of non-examination of the Investigating Officer, the legal position is that there can be no universal straight jacket formula that the non-examination of the Investigating Officer per se vitiates the criminal trial. It would depend upon the facts of the particular case as to whether the non-examination of the Investigating Officer had caused prejudice to the accused. The accused appellants have been seriously prejudiced on account of non-examination of the Investigating Officer and this omission has created a deep dent in the prosecution case.

Non examination of the investigating officer would not be fatal for the prosecution unless it is shown that the same has resulted in serious prejudice to the defence.

The cumulative effect of the prosecution evidence, thus, is that the witnesses of the prosecution have not been found trustworthy; the contradictions in their testimony remained unexplained for non-examination of the Investigating Officer; the chain of circumstances putforth by the prosecution has many loose links which could not be connected to each other. (Para 42, 43, 44, 45, 56, 59, 60, 73, 75, 78)

Criminal Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Nizam & anr Vs St. of Raj. (2016) 1 SCC 550

2. Ganpat Singh Vs St. of M.P (2017) 16 SCC 353

3. Bodhraj @ Bodha Vs St. of J & K (2002) 8 SCC 45

4. Pakkirisamy Vs St.of T.N. 1997 (8) SCC 158

5. Sahadevan & anr. Vs St. of T.N. 2012 (6) SCC 403

6. St. of Karn. Vs Bhaskar Kushali Kotharkar & ors. (2004) 7 SCC 487

7. Ram Dev & anr. Vs St. of U.P. 1995 Supp (1) SCC 547

8. Bahadur Naik Vs St.of Bihar (2009) SCC 153

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Subhash Chandra Sharma, J.)

1. Heard Ms. Neelam Giri and Sri Himanshu Giri learned counsels for the appellant Rajpal Singh, Sri Kunwar Ajay Singh learned Amicus Curiae appearing on behalf of appellants Manoj and Munna Ram @ Baba in the connected appeals and Sri Rajan Prasad Mishra learned A.G.A for the State respondents.

2. These appeals are directed against the judgment and order dated 08.05.1997 passed by the IIIrd Additional District & Sessions Judge, Kanpur Dehat in S.T. No.104 of 1992 and S.T. No. 417 of 1992 arising out of Case Crime No.191 of 1991 under Section 302, 201, 120-B IPC, P.S. Rasoolabad, District Kanpur Dehat whereby three accused/appellants namely Manoj, Rajpal Singh and Munna Ram @ Baba have been convicted of the offence under Section 302 read with Section 34 & 120-B IPC and punished for life imprisonment. The accused/appellants have also been convicted under Section 201 IPC and punished for additional five years rigorous imprisonment. Both the punishments are to run concurrently.

3. The first information report is in the nature of a written report submitted by Jeet Singh (P.W.-1) on 27.12.1991 at about 10.30 A.M. reporting that the dead body of his brother Vijay Pal Singh was found on the Chakroad near the field of Shambhu Pandit hidden in a 'paddy Payar'. It was stated therein that the deceased Vijay Pal Singh used to work in Rasoolabad and to come back daily from the workplace in the evening. On 23.12.1991, when he did not return home, he was looked after everywhere. At the time of search, the first informant came to know that the deceased had consumed liquor with some people on 23.12.1991 near the Usri Nursery and after that he had never been seen. The blood stained body cloth (अँगोछा) of the deceased was found on the Chak road near the field of Shambhu Pandit and besides that the 'Paddy Payar' was lying. Being suspicious, when 'Paddy Payar' was turned over, dead body of Vijay Pal Singh was found hidden in it. The injuries on the body of the deceased seem to have been caused by an object like Axe (कुल्हाड़ी).

4. On the said report, the police had reached the spot, recovered blood stained and plain earth on 27.12.1991. The inquest was conducted on the same day which commenced at about 11.15 AM and concluded at about 12.20 PM. The postmortem was conducted on 28.12.1991 at about 01.00 PM. The injuries found on the person of the deceased were lacerated wounds on the forehead 6 cm x 2 cm left upper arm, chin, elbow and multiple abrasions on whole of the body. The proximate time of death was reported about 4-5 days and the cause of death was hemorrhage due to ante-mortem injuries.

5. At the outset, we may note that the genuineness of the police papers namely the chik report, the recovery memo of blood stained and plain earth, inquest report, the recovery memo of blood stained clothes of the deceased, the charge sheet as also the postmortem report was admitted by the defence and an endorsement to that can be found on the said documents. The formal proof of these documents was, thus, dispensed with and they were exhibited as Exhibit Ka-6, Exhibit Ka-10, Exhibit Ka-16, Exhibit Ka-17, Exhibit Ka-18, and Exhibit Ka-19; respectively.

6. Apart from the above papers, other documentary evidences on record are two written reports; one given by Laakhan Singh son of Mulayam Singh and another allegedly given by Chatrapal Singh son of Jaahar Singh as also a recovery memo dated 09.01.1992. The genuineness of these documents was not admitted by the defence and they are sought to be proved by the prosecution witnesses in their oral testimony. The Investigating Officer of the case and other formal witnesses had not entered in the witness box and the prosecution sought to prove its case by five witnesses of fact.

7. The charges were framed against the accused persons namely Manoj and Rajpal under Section 302 read with 34 IPC Section 201 IPC and Section 120-B IPC, whereas by a separate order, charge had been framed against the appellant Munna Ram @ Baba of hatching a conspiracy to commit the murder of Vijay Pal Singh alongwith Manoj and Rajpal in furtherance of common intention of all accused punishable under Section 120-B IPC. The accused appellants denied the charges and demanded trial.

8. Amongst five witnesses of fact, PW-1 Jeet Singh (brother of the deceased) is the first informant; PW-2 Rakesh Awasthi is the witness of last seen of deceased Vijay Pal Singh with appellants Manoj and Rajpal Singh and one more person; PW-3 Vishwa Nath Singh entered in the witness box as a witness of Extra judicial confession of appellants Manoj and Rajpal Singh who met him before the incident on 23.12.1991 at about 04.00 PM; PW-4 Chatrapal Singh is another brother of the deceased and PW-5 Laakhan Singh entered in the witness box to prove the conspiracy and a recovery allegedly made at the instance of appellant Munna Ram @ Baba.

9. The written report given by PW-1 in the police station on 27.12.1991 after discovery of the dead body of his brother Vijay Pal Singh, had been proved by him being in his handwriting and signature as Exhibit Ka-1. In the examination-in-chief, PW-1 stated that on the fateful day, deceased Vijay Pal Singh had left his house for his workplace at about 07-7.30 AM but did not return home. They kept on searching for him and then one boy Mahesh of the village informed PW-1 that he heard screams of "Bachao Bachao"

near the Nursery of village Usri. All of them, then, went to search the said place. The blood stained body cloth (अंगौछा) belonging to deceased Vijay Pal Singh was found lying at the chak road near the field of Shambhu Pandit. The dead body was found hidden in the 'Payar' of paddy in the field of Shambhu Pandit. There were injuries of a sharp edged weapon on the forehead and chin. After the recovery of the body, PW-1 went to the police station to lodge the first information report and then he met Pradeep, Rakesh Awasthi (PW-2) who told him that they had seen deceased Vijay Pal Singh alive in the company of appellants Rajpal Singh and Manoj near the Nursery and both the appellants were carrying sharp edged weapons in their hand which was like kulhari (axe).

10. PW-1 then narrates the motive of the appellant Rajpal Singh to commit the crime by saying that deceased Vijay pal Singh had mortgaged his field to Rajpal about two years back and Rajpal made him a Guarantor in a loan taken by his friend Vinod Kumar Singh. Vijay Pal Singh had received notices from the bank as the loan remained unpaid. On account of that fact, the mortgaged land was occupied by deceased Vijay Pal Singh. The appellant Rajpal was carrying grudges against the deceased due to that fact. The papers pertaining to the mortgage of the field of Vijay Pal Singh were filed in the Court and the signature of deceased Vijay Pal Singh on the same was proved as Exhibit Ka-2.

11. A separate motive was assigned to appellant Manoj that he had purchased the bicycle of the deceased for Rs.160/- but did not pay the sale consideration nor returned the bicycle.

12. In cross, PW-1 was questioned on the information given to Chatrapal, his another brother and when crossed on the alleged report given by Chatrapal to the police officer, PW-1 further stated that he had given the written report (Exhibit Ka-1) to the police officer on 22.12.1991 at about 09-10 AM and no one told him to have witnessed his deceased brother between 23.12.1991 and 27.12.1991. The report was lodged by him after discovery of the body and after lodging of the report, he came to know that his brother had consumed liquor with some people near the Usri Nursery and, thereafter, he went missing.

13. Noticeable is the deposition of PW-1 when he says that the Investigating Officer had never recorded his statement in relation to the incident and that the Investigating Officer had recorded statement of his brother Chatrapal Singh. PW-1 had denied the suggestion that the murder was committed by some other person than the accused appellants.

14. From the statement of PW-1, it is evident that he had proved the factum of lodging of the first information report after recovery of the dead body of his brother Vijay Pal Singh on the information given by some villager, which was concealed near the Usri Nursery and also assigned motive to accused Rajpal Singh and Manoj for committing the crime.

15. PW-2 Rakesh Awasthi is the witness who stated that he had seen the deceased Vijay Pal Singh alongwith appellants Rajpal, Manoj and one more person. As per the statement of PW-2 in the examination-in-chief, while he was going his home from Rasoolabad alongwith one Pradeep Dubey in a tempo, at about 07.00 PM, he had seen Rajpal, Manoj, Vijay Pal

Singh (deceased) alongwith one more person standing near the Nursery. They were talking and Rajpal and Manoj were carrying Kulhari. He could identify the fourth person who was standing with them if came before him. Vijay Pal Singh was carrying his bicycle while talking to the appellants. PW-2 stated that he had seen them in the light of tempo. In the morning of 27.12.1991, he came to know that Vijay Pal Singh was murdered and his body was found near the Nursery. He and Pradeep then went to the house of Vijay Pal Singh and from there they went to the Nursery where the body was discovered. The fact that they had seen the deceased alive with the appellants before he went missing was intimated by them to Chatrapal (another brother of the deceased). A report was then scribed by Chatrapal on the dictation of Pradeep. The said report was then signed by PW-2 Rakesh Awasthi and Pradeep as also Chatrapal. This report was shown to PW-2 who had proved it being the same report and it was exhibited as Exhibit Ka-3.

16. In cross, PW-2 was confronted on the point that two caretakers were residing in the Nursery which was a government Nursery and the road wherefrom they had allegedly seen the appellants alongwith the deceased was a busy road. The reason for PW-2 and another witness Pradeep traveling together in the tempo was explained by him. PW-2 when confronted as to why he did not intimate the fact of last seen to the first informant Jeet Singh, it was explained by PW-2 that when he came to know about the discovery of the dead body on 27.12.1991 at about 06.00 AM, he reached the house of Vijay Pal Singh at about 07.00 AM where he met Chatrapal and the first informant Jeet Singh was not there. He then went to the place of recovery of the dead body alongwith Chatrapal and there also he did not meet Jeet Singh. He remained at that place uptill 12.00-01.00 PM. When he reached at the spot police was already present, he was made the inquest witness. After the dead body was sealed and sent for the postmortem, the report Exhibit Ka-3 was scribed. PW-2 then stated that he had informed of having seen the appellants and the deceased together to Chatrapal when they were in the village. PW-2 stated that the Investigating Officer had interrogated him on 27.12.1991 and two and three times thereafter. He could meet the first informant Jeet Singh around 10.00-10.30 AM on 27.12.1991. PW-2 denied having information of the motive assigned to the accused Rajpal and also that he was not travelling in the tempo on 23.12.1991 and did not cross the place at about 07.00 PM. He had denied having not seen the appellants and the deceased together near the Nursery.

17. PW-3-Vishwa Nath Singh is the witness who stated that on 23.12.1991 while going somewhere, when he reached near the Nursery, he found appellants Manoj and Rajpal standing on the Medh of the field of Vijay Pal Singh. They both called him and told that Vijay Pal Singh would die from their hands as he was not paying their money. The appellants Rajpal and Manoj also told that if they caught Vijay Pal Singh on that day he would not be spared. PW-3 stated that on hearing that he did not give much attention and without saying anything to them he proceeded to his destination which was Malkhanpur. The reason given by PW-3 for not confronting the appellants Rajpal and Manoj is that they were carrying Kulhari in their hands. In the evening, he came to know that Vijay Pal Singh did not reach home and later his dead body was found near the Nursery.

18. This witness, in cross, admitted that his house was opposite the house of

Vijay Pal Singh and he and Vijay Pal Singh belong to one family. He did not disclose the reason for going to Malkhanpur and stated that when he reached back home from Malkhanpur,Sun was already set. He came to know at about 10.00 PM on that day itself that Vijay Pal Singh did not reach back home but stated that he did not talk to the first informant Jeet Singh. He had denied having information that villagers were carrying searches for Vijay Pal, the deceased. The explanation for this was offered by PW-3 with the assertion that he went to Hardoi to meet his daughter on the next morning, at about 06.00 AM, and returned back to his village in the evening of 27.12.1991. He then came to know about the recovery of the dead body from the place near the Nursery and immediately went to the said place where he met the first informant Jeet Singh.

19. PW-3 then stated that he stayed near the dead body throughout the whole night. The Investigating Officer had sealed the body at about 04.00 AM (in the morning) and then he alongwith the first informant Jeet Singh, Chatrapal and other persons went with the dead body which was sent to Kanpur around day time. After the dead body was sent to Kanpur he came back to the village. PW-3 stated that he did not talk to the Investigating Officer at the place of the incident and for the first time he disclosed the confession of the appellants to Jeet Singh. The statement of PW-3, according to him, was recorded by the Investigating Officer after 10 to 12 days of the incident.

20. PW-4 is Chatrapal Singh, another brother of the deceased who was living in Kanpur at the time of the incident. He stated that he came to know about the death of his brother Vijay Pal on 27.12.1991 and then reached the village alongwith the person who gave him information. When he reached near the Nursery, the police was preparing papers relating to the body. He met Pradeep Singh at that place who had disclosed him of having seen the deceased with the appellants. Later, he came to know that the conspiracy for murder was hatched by appellant Munna Ram @ Baba and that fact was disclosed to him by Laakhan Singh on 09.01.1992. They all then went to the hut of Munna Ram @ Baba on 09.01.1992 who confessed that he could make recovery of bicycle and Shoes of the deceased. PW-4 Chatrapal stated that at the time of the recovery of shoes and bicycle of the deceased at the instance of appellant Munna Ram @ Baba, the Investigating Officer was present and the memo of recovery was prepared by the Investigating Officer at the spot. After preparation of the same, it was read over to them and he and other witnesses then put their signatures. This recovery memo was proved by PW-4 as Exhibit Ka-4. The report given by Laakhan Singh in the police station on 09.01.1992 was also proved by him having written before him and bearing his signature as Exhibit Ka-5.

21. In cross, PW-4 stated that an application was given by him to the investigating officer on 27.12.1991 at the spot before the dead body was sent for postmortem, which was written by him at about 09.00-9.30 AM but the said application was not proved by this witness saying that it was not available on the record.

22. PW-4, in cross, had shown ignorance about the time when he gave the report dated 27.12.1991. He, however, clarified that he did not include the name of Munna Ram @ Baba in his report given on

27.12.1991 as he was not aware of the conspiracy hatched by him by that time.

23. We may note at this juncture, that the prosecution did not show the application 'Exhibit Ka-3' to PW-4 Chatrapal in the Court and the said application was exhibited on the statement of PW-2 as a signatory. The discussion in this regard will be made in the later part of the judgment.

24. PW-4 further stated that he remained in the village for about 15 to 20 days and reiterated that on 09.01.1992 while he was talking to Laakhan Singh (PW-5), they all went to the hut of Munna Ram @ Baba which was barely 2 to 2.5 km from the village. The Investigating Officer also reached at the hut of Munna Ram @ Baba at about 06.30 AM and from there they all went to the place wherefrom bicycle and shoes were recovered. The recovery was made from a place which was about 150 to 250 meters away from the road, whereas the body was found from a place about 100 meters away from the road. When confronted about the recovery and that the recovery memo was prepared in the police station, PW-4 admitted that the entire proceeding was conducted in the police station. The report regarding recovery was given by Laakhan Singh on 09.01.1992 which was signed by him. PW-4 then stated that the Investigating Officer had recorded his statement on 09.01.1992 itself at the spot of the recovery and before that day the Investigating Officer did not interrogate him. When confronted as to why the fact of recovery being made in the presence of the Investigating Officer had not been mentioned in his previous version under Section 161 Cr.P.C., PW-4 stated that the reason was not known to him.

25. PW-5 Laakhan Singh is the witness who was produced by the prosecution to prove the conspiracy hatched by three appellants namely Rajpal, Manoj and Munna Ram @ Baba.

26. As per the statement of PW-5, he went to the hut of Munna Ram @ Baba on 23.12.1991 at about 10.00 AM to meet him. On that day, he gave donation on the asking of Baba for the construction of his hut which was Rs.50/-; 2-3-4 persons were sitting in the hut of Baba and they were having Charas. Amongst them, he could identify Manoj, Rajpal and Baba and one more person was there who was not known to him. PW-5 had also identified appellants Manoj & Rajpal present in the Court. He then stated that he evesdropped on the conversation of appellants Manoj, Rajpal with Munna Ram @ Baba when they were saying that they had agreed to the suggestion of Munna @ Baba that they would kill Vijay Pal Singh on that very day but they had no weapon with them; the accused Munna Ram @ Baba then told that he had Kulhari and it was enough to kill Vijay Pal Singh and that they can come in the evening to take Kulhari. PW-5 stated that after hearing that he went to Rasoolabad from where he had to go to Kanpur for some business purpose. When he came back to the village, he came to know about the murder of Vijay Pal Singh, he then disclosed the above noted facts to the family members of the deceased. They all then went to the hut of Munna Ram @ Baba where he could not be found. They then kept on making enquiry privately and on 09.01.1992 when they met Baba in his hut, they nabbed and threatened him that he would be killed. It was then Baba disclosed about the place where bicycle and shoes of deceased Vijay Pal Singh were concealed. The recovery of the above two articles was

made at the instance of appellant Munna Ram @ Baba who was nabbed by PW-5 alongwith Chatrapal, Puttan Khan, Vijay Bahadur and many other villagers and was then taken to the police station. The report exhibited as Exhibit Ka-5, was proved by this witness (PW-5) being in his handwriting and signature carrying thumb impression of the witnesses.

27. PW-5 stated that the said report was prepared by him and given in the police station alongwith the recovered articles namely bicycle and shoes of the deceased. The accused Munna Ram @ Baba was also handed over to the police at the same time. The recovery memo exhibited as Exhibit Ka-4 was then shown to this witness and he had proved his signature on the same. Lakhan Singh (PW-5) stated that his house was located in front of the house of PW-1 Jeet Singh. On being confronted as to why he did not disclose the conspiracy hatched by three accused persons to anyone prior to 09.01.1992, PW-5 explained that he did not mention the said fact as he thought that the accused persons were talking under intoxication of Charas and could not think that they would actually commit murder. PW-5 also stated that he went to Kanpur on 23.12.1991 and after coming back to village on 27.12.1991 when he met Chatrapal he was not aware that the report of the murder had already been lodged in the police station and that against whom the said report was lodged.

28. On being confronted about his version in the written report exhibited as 'Exhibit Ka-5' that he knew about lodging of the first information report of the incident, PW-5 had denied his statement in the said report. PW-5 then stated that he was interrogated by the Investigating Officer and denied the suggestion that he knew that Munna Ram @ Baba was interrogated by the police earlier. PW-5 had denied suggestion of enmity or fight with accused Manoj and Rajpal and also denied the suggestion that he did not hear anything on the date of the incident and that the report 'Exhibit Ka-5' was written by him being of the community of the deceased. PW-5 had also denied the suggestion that he did not go to the hut of Munna Ram @ Baba and that he was making statement at the instance of Jeet Singh, the brother of the deceased.

29. It may be relevant to note, at this juncture, that the alleged recovered articles namely the bicycle and shoes of the deceased were not produced in the Court and as such were not identified by those persons in whose presence they were allegedly recovered at the instance of accused Munna Ram @ Baba.

30. After going through the statements of the prosecution witnesses, it may also be pertinent to note, at this stage itself, that the entire case rests on circumstantial evidence of last seen, extra judicial confession, recovery of certain articles belonging to the deceased at the instance of one of the appellant Munna Ram @ Baba and the written reports regarding the last seen and recovery of articles given to the Investigating Officer by PW-4 and PW-5, during the course of the investigation.

31. Before dealing with the arguments of the learned counsel for the appellants, we also find it apposite to go through the case diary as the Investigating Officer of the case had not been produced in the witness box. The reason being that in a case of circumstantial evidence, the evidence collected by the Investigating Officer to crack the case assumes significance. We

have already noted above that the papers prepared and proved by the prosecution witnesses (PW-1 to PW-5) were not admitted by the defence and were exhibited on the testimony of these witnesses. As to what extent the witnesses have been able to prove those documents would be subject matter of further deliberation while analyzing their testimony.

32. It is pertinent to note, however, that the case diary reveals that the Investigating Officer at Parcha No.'1' extracted the Chik report, the written report dated 27.12.1991 of the first informant and a written report given by Chatrapal (in the margin) that two witnesses namely Pradeep Kumar Dubey and Rakesh Awasthi had lastly seen the deceased with the accused persons namely Manoj and Rajpal and noted that the copy of the written report given by Chatrapal had been enclosed in the case diary. It further discloses that the statement of the first informant was recorded before the inquest and preparation of the site plan as also the recovery of the blood stained and plain earth on 27.12.1991. The case diary dated 27.12.1991 also disclose that the accused Munna Ram @ Baba was interrogated as his hut was located near the Nursery. His version there is that the accused Manoj & Rajpal used to come to his hut to have Charas in the evening and he used to borrow money from them to buy Gaanja. On 23.12.1991, the accused Rajpal and Manoj came to his hut and told him to provide Chillam. He had seen two Kulharis in the hands of Rajpal and Manoj which were blood stained and when he asked they confessed that they had killed Vijay Pal, their enemy and also told him not to tell anyone about that. The appellant Munna Ram @ Baba also stated that he did not disclose that fact to anyone as he had fear that Rajpal would kill him. The Kulharis/axe were also taken by the assailants with them. It is then recorded in the case diary of that date that the police had searched for the accused persons but could not find them. The statement of Vishwa Nath Singh (PW-3) under Section 161 Cr.P.C. was recorded on 03.01.1992 in the case diary, whereas statement of Laakhan Singh was recorded on 09.01.1992 and lastly on 14.01.1992, the statements of Chatrapal, Pradeep Dubey, Rakesh Awasthi and other witnesses of inquest were recorded before completion of the investigation and submission of the charge sheet on 26.01.1992. The facts noted above will be analyzed with the statements of the prosecution witnesses at the appropriate stage of this judgment.

33. It is vehemently argued by Ms. Neelam Giri learned counsel for the appellants Manoj and Rajpal that they had been falsely implicated. The allegations of enmity was only against Rajpal for the reason of mortgaged land, the deed of which was filed as Exhibit Ka-2. Different motives had been assigned to two appellants Rajpal and Manoj and the motive, in any case, are very weak. As per the statement of PW-1, one village boy Mahesh had informed PW-1 that he heard screams of "Bachao Bachao" near the Nursery and on getting alert by the said information they went to the Nursery to search for the deceased. Whereas in his deposition before the Court, PW-1 stated that when he returned to the place of the incident after lodging the report, two persons namely Pradeep and Rakesh Awasthi (PW-2) had intimated him that they had seen his deceased brother alongwith the appellants Manoj and Rajpal who were standing near the Nursery carrying Kulharis (axe) in their hands.

34. The contention is that this submission of PW-1 is an improvement based on the information given by those persons after recovery of the dead body. PW-2, the witness of last seen could not explain as to why prior to the recovery of the dead body, he did not inform the first informant (brother of the deceased) that the deceased was last seen with the assailants. As per own statement of PW-2, he knew the first informant Jeet Singh and deceased Vijay Pal Singh being resident of the same village. The deceased had gone missing on 23.12.1991 and his dead body was recovered from an open place by the first informant on 27.12.1991. PW-1, the first informant had stated that the entire village knew that the deceased had gone missing and that they kept on searching for him for about four days. No missing report however, had been lodged. In the above circumstances, after lodging of the first information report against unknown persons subsequent implication of the appellants Manoj and Rajpal assigning them different motives, is nothing but a result of afterthought that too on deliberations of the witnesses with the police. Moreover, the witness of last seen namely PW-2 is not a reliable witness, in as much as, he stated that he had seen the accused persons standing with the deceased and talking to him while carrying murder weapons in their hands. PW-2 also admitted that the Tempo was crossing the Nursery on the road and it did not stop near the place of last seen. The statement of PW-2 that he had identified accused Manoj and Rajpal with the deceased in the light of Tempo while passing through the road is unbelievable.

35. It is contended that the witness of extra judicial confession broughtforth by the prosecution namely PW-3 Vishwa Nath Singh cannot be trusted, in as much as, the prosecution could not prove that PW-3 had a relationship of trust with the accused persons. Moreover, PW-3 lived in front of the house of the deceased Vijay Pal Singh and there was no reason as to why he would not have disclosed the statements of the accused persons namely Manoj and Rajpal prior to the incident to warn Vijay Pal or his brother. It is vehemently argued that PW-3 is a got up witness in an effort of the prosecution to add one more circumstance in the irregular chain of circumstances. Further, the evidence of PW-4 is a hearsay evidence and is a result of his own imagination, it does not carry any weight as such.

36. It is vehemently argued that the prosecution had tried to connect many loose links in a zeal to complete the chain of circumstances so as to falsely implicate the appellants. The evidence collected by the prosecution, however, could not be proved to unerringly point towards the guilt of the accused persons namely Manoj and Rajpal. The alternative hypothesis of someone else coming on the scene of the occurrence and committing the crime cannot be ruled out in the circumstances brought forth by the prosecution.

37. Sri Kunwar Ajay Singh learned Amicus for the appellant Munna Ram @ Baba while adopting the arguments of the learned counsel for appellants Manoj and Rajpal with regard to the flaws in the chain of circumstances, vehemently argued that there was absolutely no evidence against Munna Ram @ Baba of participation in the crime. The allegations of conspiracy hatched by Munna Ram @ Baba and providing Axe (Kulharis) (projected as Murder weapon) to the accused Manoj and Rajpal are based on the statement of P.W.-

5, Laakhan Singh whose house was in front of the house of the first informant, the brother of the deceased. From the statement of PW-4, Chatrapal (another brother of the deceased) and P.W.-5, it is evident that they both solved the crime on their own by interrogating appellant Munna Ram @ Baba on 09.01.1992. As per own statement of P.W.-5, they threatened appellant Munna Ram @ Baba with dire consequence before making alleged recovery of bicycle and shoes allegedly belonging to the deceased Vijay Pal Singh on his pointing out. Though there is contradiction in the statement of P.W.4 and 5 as regards the manner in which alleged recovery memo of bicycle and shoes was prepared but it is evident from the record that the alleged recovery was made by these witnesses alongwith other villagers and appellant Munna Ram @ Baba was handed over to the Investigating Officer in the police station who put him behind the bar. The implication of appellant Munna Ram @ Baba is not proved by any other incriminating circumstance such as recovery of murder weapon etc. at his instance. The alleged recovery of bicycle and shoes at the instance of Munna Ram @ Baba was not proved by the prosecution by producing the recovered articles in the Court. The recovery memo exhibited as Exhibit Ka-4 had been proved by P.W.-5 who had signed it alongwith other prosecution witnesses namely P.W.4 Chatrapal. The genuineness of this document was not admitted by the defence and in this circumstance, the examination of the Investigating Officer became relevant. The manner in which the appellant Munna Ram @ Baba had been arrested by the Investigating Officer could not be explained by the prosecution for non-examination of the Investigating Officer. All the above documents such as Exhibit Ka-3, Exhibit Ka-4 & Exhibit Ka-5 namely the report submitted by P.W.-4 Chatrapal and P.W.-5 Laakhan Singh and the recovery memo; could not have been relied upon to implicate the appellants, in as much as, genuineness of these documents were not admitted. The proof of these documents is only by the prosecution witness of facts who deposed that they gave those documents/reports to the Investigating Officer. In the event of Non-examination of the Investigating Officer, he could not be confronted on the statements of the witnesses of fact to point out inconsistencies, to cull out truth, with regard to the mode and manner in which alleged recovery was made at the instance of the appellant Munna Ram @ Baba and the contents of the reports. In absence of cogent evidence, conviction of the appellant Munna Ram @ Baba for the offence under Section 302 with the aid of Section 34 and Section 120-B IPC cannot be sustained. The conviction of appellant Munna Ram @ Baba for the offence under Section 201 IPC for destruction of evidence suffers from patent illegality. There is no evidence, much less cogent evidence that the accused Munna Ram @ Baba was involved in the crime of murder and concealment of the dead body at the place of its recovery. It is vehemently argued by the learned counsel for the appellant that the appellant Munna Ram @ Baba had been implicated only on the suspicion of the prosecution witnesses for the reason that his hut was located near the place of recovery of the dead body and the entire prosecution story is concocted.

38. It is lastly argued by the learned counsels for the appellants that there is no recovery of murder weapon; the motive assigned to the accused namely Manoj is very weak and no motive at all could be

assigned to appellant Munna Ram @ Baba. It was a case of circumstantial evidence and hence examination of the Investigating Officer was necessary so as to bring before the Court as to how investigation had proceeded and in what manner evidence was collected by him. The date and place of arrest of the accused persons namely Rajpal and Manoj also becomes relevant in the facts of the present case, which was not brought before the Court. The appellant Munna Ram @ Baba was admittedly nabbed by the prosecution witness themselves and handed over to the police on 09.01.1992. Three different time of giving report by PW-4 Chatrapal (Exhibit Ka-3) to the police, about the evidence of last seen could be found in the statement of three witnesses. PW-1 stated that Chatrapal had reached the place of recovery on 27.12.1991 at about 03.00 PM and at that point of time, the dead body was being sealed to send it for the postmortem. The report Exhibit Ka-3 of the incident was given by PW-4 Chatrapal in the police station after the dead body was sealed whereas the written report was lodged at about 09.00-10.00 AM. PW-4 Chatrapal, to the contrary, stated that he prepared the written the report at about 09.00-09.30 AM and the body was sent for the postmortem at about 10.00-10.30 AM in his presence. He says that he got the information of the incident in Kanpur at about 05.00 AM and when he reached the spot, police was making enquiries. As per the statement of PW-3, the dead body was sealed at about 4.00 AM and he was present near the dead body throughout the night. There is, thus, material contradictions in the testimony of these witnesses who had introduced the witnesses of last seen and conspiracy. This contradiction coupled with other material inconsistencies in the testimony of the prosecution witnesses is proof of the fact that these witnesses were lying in the Court. This is a case of absolutely no evidence at all and three appellants deserve acquittal.

39. In rebuttal, learned A.G.A. vehemently argued that non-examination of the Investigating Officer has no bearing on the case, in as much as, once the genuineness of the documents were not disputed by the defence, the formal proof of the documents prepared during the course of investigation was not necessary and all such documents can be read in evidence in the trial without proof and the signatures of the persons to whom it purports to be signed, in view of the categorical provisions of Section 294 (3) of the Code of Criminal Procedure. The trial court, therefore, cannot be said to have erred in reading the documents admitted in evidence, genuineness of which had been admitted by the defence, against the accused/appellants.

40. On the merits of the case, it is submitted by the learned AGA that the evidence of last seen of the accused persons with the deceased alive is categorical and PW-2, the witness of the last seen had entered in the witness box to prove that the deceased was lastly seen with the accused Munna Ram @ Baba. The first informant, the brother of the deceased had assigned the motive of enmity to the accused Rajpal. Appellant Manoj had also grudges against the deceased which has been proved by the defence by the evidence of PW-1, brother of the deceased. With the statement of PW-3 Vishwa Nath, it was proved by the prosecution that the accused Manoj and Rajpal had conspired to kill the deceased Vijay Pal Singh on account of the grudges carried by them. As regards appellant Munna Ram @ Baba evidence of PW-5,

according to the learned AGA, is sufficient to convict him. It is argued by the learned AGA that since it is a case of circumstantial evidence, it was not possible for the prosecution to collect any direct evidence and the only requirement was to complete the chain of circumstances leading to the guilt of the accused persons.

41. In the instant case, according to the prosecution, the chain of circumstances had begun with the evidence of the last seen and concluded with the evidence of PW-5 who had proved the recovery of bicycle and shoes of the deceased Vijay Pal Singh on the pointing out of appellant Munna Ram @ Baba. The witnesses are natural witnesses who were living in the vicinity of the house of the deceased. Their testimonies cannot be discarded as unreliable. Minor contradictions in the statement of the witnesses are not such which would break the chain or create a dent in the prosecution story.

42. Having heard learned counsel for the parties and perused the record, we may note that this is a case of circumstantial evidence. In a case which rests on circumstantial evidence, the law postulates two fold requirements; Firstly, that every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond all reasonable doubt; Secondly, that all the circumstances must be consistent only with the guilt of the accused and totally inconsistent with his innocence. The principles as summarized by the Apex Court in a recent decision in **Nizam @ another Vs. State of Rajasthan1** taking note of its previous decisions, be noted as under:-

"16. In the light of the above, it is to be seen whether in the facts and circumstances of this case, whether the courts below were right in invoking the "last seen theory." From the evidence discussed above, deceased-Manoj allegedly left in the truck DL-1GA-5943 on 23.01.2001. The body of deceased-Manoj was recovered on 26.01.2001. The prosecution has contended the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act."

9. 9 There are no eye-witnesses to the crime. In a case which rests on circumstantial evidence, the law postulates a two-fold requirement. First, every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt. Second, all the circumstances must be consistent only with the guilt of the accused. The principle has been consistently formulated thus :

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

that of the guilt of the accused and inconsistent with his innocence".

43. The last seen theory i.e. evidence that the deceased was last seen alive in the company of the accused is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. As noted in **Nizam & others (supra)**, the "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. The principle is based on the provisions of Section 106 of the Evidence Act which lay down that when any fact is established within the knowledge of the person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him.

44. However, Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It is well-settled that it is not prudent to base the conviction solely on the "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen. The principle is that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. Thus, in any case, the burden to prove the guilt of the accused is always on the prosecution. If the prosecution has succeeded in proving the fact by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

45. It is noted in **Ganpat Singh Vs. State of Madhya Pradesh2** after taking note of the decisions of the Apex Court that the last seen evidence assumes significance when the lapse of time between the point when the accused and the deceased were seen together and when the deceased is found dead is so minimal as to exclude the possibility of a supervening event involving the death at the hands of another. The law as summarized therein noticing the decision of the Apex Court in **Bodhraj @ Bodha v. State of Jammu and Kashmir**,3 and various other decisions, in paragraph No.10 of the report, is as under:-

"10 Evidence that the accused was last seen in the company of the deceased assumes significance when the lapse of time between the point when the accused and the deceased were seen together and when the deceased is found dead is so minimal as to exclude the possibility of a supervening event involving the death at the hands of another. The settled formulation of law is as follows :

"The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

46. Keeping in mind the above principles, we have to first see as to whether the prosecution has succeeded in establishing by definite evidence that the deceased was seen alive in the company of the accused in such close proximity of time so as to exclude the possibility of a third person entering in the scene of crime in all reasonableness, and, thus, enabling the Court to draw a reasonable inference against the accused to shift onus on the accused to explain the circumstance in accordance with the provisions of Section 106 of the Evidence Act.

47. In this process, analyzing the oral testimony of the witnesses, we find that PW-1 had proved the first information report and the motive of the crime. The first information report was written by him in his own handwriting and after signature it was lodged in the police Station Rasoolabad at about 10.30 AM. As per the version of the first informant (PW-1), the deceased Vijay Pal Singh had gone missing since the evening of 23.12.1991 when he did not return home from his workplace. The version is that during search, PW-1 came to know that the deceased had consumed liquor with some people near Usri Nursery on 23.12.1991 and, thereafter, he was never seen. In the examination-in-chief, PW-1 stated that when he returned to the place of incident after lodging of the first information report, Pradeep and Rakesh Awasthi met him there and told that on 23.12.1991 at about 07.30 to 08.00 PM they had seen the deceased Vijay Pal Singh in the company of Rajpal and Manoj when they were talking and they had also seen sharp edged weapons in their hands, which was like Kulhari.

48. The report of the last seen of the deceased in the company of accused Rajpal and Manoj was allegedly lodged by Chatrapal Singh, another brother of the deceased on 27.12.1991 under the signatures of Pradeep Kumar Dubey and Rakesh Awasthi, the witnesses of last seen. It was stated by PW-2 in his examination-in-chief that the report dated 27.12.1991 shown to him in the Court was dictated by Chatrapal to Pradeep who scribed the same and the said report was signed by him. PW-2 had identified his signatures on the report which was exhibitd as Exhibit Ka-3. In this regard, it may be noted that the signatures of Chatrapal on the said report had not been proved by him in his deposition as PW-4. In cross for Manoj and Rajpal, PW-4 Chatrapal stated that the report which he gave to the Investigating Officer on 27.12.1991 was written by him at about 09.00-09.30 AM and that report was not available on the record. By the statement of PW-2, only his signatures on the document was proved as Exhibit Ka-3.

49. The said report on which PW-2 proved his signature was not shown to PW-4 during his cross examination. There is apparent contradictions in the statements of

PW-2 and PW-4 as to the manner in which the said report was prepared. As the Investigating Officer of the case had not entered in the witness box, the report allegedly given by PW-4 could not be put to him. The prosecution, however, has not been able to prove that the said report on which signature of PW-2 was exhibited as Exhibit Ka-3, was the same application which was given to the Investigating Officer by PW-4, Chatrapal and was entered in the case diary.

50. Apart from this, there are contradictions in the statements of PW-1 and PW-4 about the time when the written report was given by PW-4 Chatrapal to the Investigating Officer. PW-1 stated that the first information report was given by him on 27.12.1991 at about 09.00-10.00 AM in the police station and his brother Chatrapal (PW-4) who was living at Kanpur reached to the place of the incident at about 03.00 PM. At that time, the body was sealed and was being sent for postmortem. PW-1 then stated that the report was given by Chatrapal on his own in the police station after the body was sealed. Whereas PW-4 Chatrapal stated that the report written by him was given in the morning on 27.12.1991 at about 09.00-09.30 AM before the dead body was sealed and sent for postmortem. As per the statement of PW-1 and PW-4, the intimation regarding the incident was given to Chatrapal only on 27.12.1991 and then he came from Kanpur.

51. PW-2, the witness of last seen also stated that he did not inform anyone prior to 27.12.1991; i.e. before the dead body was recovered that he had seen the deceased alive in the company of the accused persons. The reason given by him was that he came to know about the murder of Vijay Pal Singh only on 27.12.1991 when his dead body was found near the Nursery. He alongwith another witness Pradeep then went to the house of the deceased Vijay Pal Singh and from there they went to the place of recovery of the body. PW-2 had denied the suggestion that there was talk in the village of missing of deceased Vijay Pal Singh and stated that he did not know the fact of missing of Vijay Pal Singh till his body was found. This witness is resident of the same village and he deposed to have seen the deceased on 23.12.1991 at about 07.00 PM in the company of accused while traveling in a tempo crossing a road besides the Nursery near the place of recovery of the body.

52. Further, in cross, PW-2 had admitted that the tempo wherein he was traveling from Rasoolabad to the village was crossing the road and that when he had seen the deceased alive with the accused Manoj and Rajpal in the light of tempo, there were Kulharis (Axes) in the hands of accused Rajpal and Manoj; and further that there was one more person with them who could be identified by him if he came before him; and that the deceased Vijay Pal Singh was carrying bicycle while talking to the accused persons.

53. Analysing the statement of P.W.-1, it is evident that he was told by someone that the deceased was seen with some persons on the date of his missing, having liquor near the Nursery where his dead body was found. There is no disclosure as to who told that fact to P.W.-1 the first informant, who gave report of missing of his brother on the fourth days, after recovery of the dead body. P.W.-3 stated that he started search for his brother from 23.12.1991 and kept on searching for three days. Everyone in the village knew about the fact of missing of his brother but before

recovery of the dead body between 23.12.1991 and 27.12.1991 no-one told him that he had seen his brother alive with the accused.

54. Another witness of last seen Pradeep had not entered in the witness box. The statement of the witness of last seen P.W.-2 does not inspire confidence of the Court for two reasons; firstly, that he had disclosed the deceased having been seen in the company of the accused Manoj and Rajpal only after recovery of the dead body on 27.12.1991 when he had reached at the place of recovery though he was resident of the same village. P.W.-1, the first informant was also present on the spot after lodging of the first information report, but no supplementary report was given by him naming the two accused persons on 27.12.1991. The written report allegedly given by P.W.-4 Chatrapal, brother of P.W.-1 had not been proved by him. The Exhibit-3 proved by P.W.-2 cannot be treated as proof of the supplementary report given by Chatrapal as P.W.-2 could not have proved that it was the same report which was given to the Investigating Officer by P.W.-4. The PW-4, to the contrary, stated that the report scribed by him and given to the Investigating Officer was not on record.

55. The second reason for discarding the evidence of last seen of P.W.-2 is the manner in which he described having seen the deceased alive in the company of the appellants Manoj and Rajpal. The statement of P.W.-2 that he had seen three persons talking with the deceased Vijay Pal Singh and two of them were Rajpal and Manoj who were carrying Kulharis (axes) seems unbelievable. It could not be explained as to why the accused persons would carry murder weapon in their hands while talking to the deceased on the road side when they already had plans to kill him. Further the prosecution is completely silent about the third person who was seen by P.W.-2 alongwith two accused Manoj and Rajpal and deceased Vijay Pal Singh. For the additional fact stated by P.W.-2 that he had seen above mentioned four persons standing on the road side while traveling in the tempo, his statement of last seen of the deceased in the company of the accused is not found clinching as it cannot be said that the deceased was exclusively in the company of the accused persons.

56. Further, the lapse of time between the point when the accused and the deceased were seen together with an unknown person and when the deceased was found dead is not so minimal as to exclude the possibility of any supervening event involving the death at the hands of another. The identity of the third man who was seen with the accused persons while they were talking with the deceased had not been fixed by the prosecution.

57. From the statement of P.W.1, the deceased Vijay Pal Singh was seen lastly in the company of some people consuming liquor near the Nursery on the day he had gone missing. Neither the identity of those persons in whose company the deceased was seen consuming liquor nor the person who gave the said information to the first informant P.W.-1 had been established by the prosecution. A statement has come up in the site plan that it was told that the deceased was seen consuming liquor in the hut shown at the eastern side of the Nursery. In the index, as per observation of the Investigating Officer, at the time of preparation of the site plan, at the place marked as (C) at the eastern side, the hut of the Nursery existed wherein Ramesh Kachi Maali was residing. It is the same hut

which has been mentioned as the place of consumption of liquor by the deceased. In the cross-examination of P.W.-2, it has come up that in the Nursery a caretaker in the name of Ramesh Kushwaha was residing as also that one more person Lala Ram Srivastava was also deputed as caretaker of the Nursery at the time of the incident. As per the site plan, the dead body was found at place (A) on the Chak road towards the South, diagonally in the South-West direction, from the place shown as (C) distance of which has been indicated as about one furlong. The place (B) as indicated in the index of the site plan, on the pakka road, has been shown as the place where the deceased was allegedly seen with accused Rajpal and Manoj having Kulhari in their hands by the witnesses. The distance of place (B) and (C) has not been shown in the site plan whereas distance of place (A) and (B) is mentioned at 93 paces. There is nothing on the record which indicates that the occupant of the hut where the deceased was seen having liquor namely Ramesh Kushwaha or Ramesh Kachi Maali (as shown in the site plan) had been interrogated by the Investigating Officer. From the above circumstances also, the possibility of any person other than the accused appellants being the author of the crime cannot be ruled out.

58. It is also not believable that P.W.-2 being the resident of the same village was not aware for about 3 to 4 days that deceased Vijay Pal Singh had gone missing, when P.W.-1 deposed that the entire village knew about the missing of Vijay Pal Singh. Another witness of last seen who was allegedly traveling with P.W.-2 had not been produced in the witness box. Moreover, the testimony of P.W.-2 is found untrustworthy and it also could not be corroborated by the surrounding circumstances. It is a case where the prosecution has not been able to prove the fact of last seen of the deceased alive in the company of the accused in close proximity of time, leaving all possibilities of any supervening event so as to draw a reasonable inference against the accused Rajpal & Manoj to shift onus upon under Section 106 of the Evidence Act. Both the accused persons namely Rajpal and Manoj in their examination under Section 313 Cr.P.C. in reply to the question No.5 relating to the circumstance of last seen had refuted the statement of the witnesses Pradeep and Rakesh Awasthi being "false".

59. Moreover, the 'last seen theory' is only a link in the chain of circumstances though an important link but even if it is established the mere circumstance that the deceased was last seen alive in the company of the accused is an unsafe hypothesis to convict on a charge of murder. In a case like this where the prosecution found it difficult to positively establish that the deceased was last seen with the accused as there was a long gap and possibility of other persons coming in between exists, without any other positive evidence to corroborate by mere concluding that the accused and the deceased were last seen together, it would be hazardous to come to the conclusion of guilt. The corroboration of the circumstance of last seen with other evidence on record so as to form chain will be necessary in such a case.

60. In the instant case, the other circumstances which the prosecution brought in support of its theory of last seen in order to form a chain are:-

(i) The statement of PW-3 Vishwa Nath Singh that he met accused Manoj and Rajpal on 23.12.1991 at about 05.00 PM at the Medh of the field of deceased Vijay Pal

and they themselves told him that Vijay Pal Singh would be killed from their hands in case he met them and would not be spared on that day. In the examination-in-chief, PW-3 stated that prior to the fateful day, Rajpal did not tell anything to him nor they met. He then stated that when Rajpal and Manoj met him they were carrying Kulhari (Axe) in their hands. PW-3 states that after talking to the accused, he went to Malkhanpur and in the evening when he came back, he came to know that Vijay Pal Singh did not return home. The dead body was found near the Nursery at a distance of one furlong concealed in the Payar of Paddy.

In cross, this witness has admitted that his house was located in front of the house of the deceased Vijay Pal Singh and he and deceased belong to the same family. The purpose of visiting Malkhanpur which was a distance of about 03 Km from the village was not disclosed by PW-3 saying that it was a private work which could not be disclosed. On a suggestion PW-3 denied that he did not enter inside the Nursery and, therefore, could not tell as to whether two employees of the Nursery were residing there. He then stated that he reached Malkhanpur within five minutes by bicycle and stayed there for 15-20 minutes and his work was finished by then. When he returned from Malkhanpur, sun was set and that accused Rajpal and Manoj did not meet him at the field of Vijay Pal Singh after he returned from Malkhanpur. In the cross, PW-3 further stated that he got to know, at about 10.00 PM in the night on the same day, i.e. 23.12.1991, that Vijay Pal Singh did not return home from Rasoolabad, but gave an explanation that he could not tell as the brother of the deceased namely Jeet Singh was not met. He further denied the suggestion that search for Vijay Pal was being made in the village and the nearby places. PW-3 further goes on to tell that on the next day, he left at about 06.00 AM for Hardoi to meet his daughter and before he left, he could not talk to Jeet Singh about Vijay Pal Singh. He returned to his village from Hardoi on 27.12.1991 in the evening and when he came back, police was not in the village. He then came to know that the body of Vijay Pal was found concealed in the Payar. After hearing the said news he straightway went to the place where the dead body was discovered and reached there at about 09.00 PM. PW-3 further stated that he stayed besides the dead body for the whole night and the Investigating Officer (Daroga Ji) also reached there. The dead body was sealed and taken away from the place of recovery in the morning at about 04.00 AM. He also went to the police station alongwith the sealed body and after it was sent to Kanpur in the morning, he came back to the village. PW-3 categorically stated that he did not give any statement to the Investigating Officer at the spot where he reached at the night and further stated that he was not interrogated. For the first time, he passed on the relevant information to Jeet Singh, the first informant. This witness has lastly stated that his statement was recorded by the Investigating Officer after 10 to 12 days in the village and he did not tell the officer about him going to Hardoi. He, thus, has stated that he did not tell about the meeting with the accused Rajpal and Manoj in the field of Vijay Pal in the evening of 23.12.1991 or before 27.12.1991.

Analyzing testimony of this witness, first and foremost point noticeable is that this witness has admitted being the member of the same family of the deceased Vijay Pal Singh and that his house was located in front of the house of Vijay Pal Singh though he did not disclosed his relationship with the deceased Vijay Pal

Singh. The accused Manoj and Rajpal were also resident of the same village. For the reason of PW-3 being a relative, member of the family of the deceased, it is unbelievable that the accused Rajpal and Manoj would make any confession before him that too while carrying Kulharis (Axes) in their hands so as to alert him that they would kill Vijay Pal Singh on that very day if he met them. The reason for going to the field of Vijay Pal Singh in the evening at about 05.00 PM given by this witness is that he was going on a bicycle for his private work from Usri to Malkhanpur. There is no explanation as to why this witness would go to the field of Vijay Pal Singh which was located besides the Pakka road on the northern side opposite the Nursery (as shown in the site plan). The distance of Malkhanpur from the village Usri is disclose as 03 km by PW-3, how he had reached there within 5 minutes from bicycle also remains explained. The purpose of visit to Malkhanpur had not been disclosed by PW-3. This witness admittedly did not disclose the factum of meeting the accused persons till the time of the inquest as according to him he met Jeet Singh, the first informant, after coming back from Hardoi on 27.12.1991 when he reached at the place of recovery of the body at about 09.00 PM. The statement of PW-3 that he reached at the place of discovery of the dead body on 27.12.1991 at about 09.00 AM and the body was sealed and sent from the spot at about 04.00 AM where he remained for the whole night is in clear contradiction to the documents on record. The inquest report and the site plan clearly indicate that the inquest commenced on 27.12.1991 at about 11.15 hrs (after the first information was lodged at about 10.30 hrs) and was completed by 12.20 hrs on 27.12.1991 and the body was sent for the postmortem which was conducted on 28.12.1991 at about 01.00 PM. Other witnesses proved that after inquest body was sealed and sent for postmortem. Further this witness had admitted that he did not make any statement to the Investigating Officer about going to Hardoi. The explanation given by this witness for keeping quiet for four days till the dead body was discovered is not convincing. His statement is full of contradictions, inconsistencies and embellishment on material particulars. Even otherwise, he was not in a relationship of trust with the accused persons and being a relative of the deceased living opposite his house, it seems highly improbable that the accused would make this kind of confession to him so as to alert the deceased to save himself from their clutches.

Moreover, it is settled that extra judicial confession is a weak piece of evidence. There must be some very good reason for making the disclosure by the accused to the witnesses for the Court to place reliance on such an evidence. Reference be made to **Pakkirisamy Vs. State of T.N.** 1997 (8) SCC 158; **Sahadevan & another Vs. State of Tamil Nadu** 2012 (6) SCC 403. In the instant case, we do not find any reason to accept the evidence of PW-3 as a reliable and trustworthy one.

(ii). The next link in the chain is the statement of PW-5 who had been introduced as a witness of conspiracy hatched by the appellants Munna Ram @ Baba, Manoj and Rajpal. PW-5 Laakhan Singh, a resident of the same village, admitted that his house was in front of the house of the first informant Jeet Singh who also belong to his community. As per the version of this witness, on 23.12.1991 the fateful day, at about 10.00 AM, while he was going to Rasoolabad, on the way, he

reached at the hut of Munna Ram @ Baba. At that time, 2-3-4 persons were having Charas in the hut of Munna Ram @ Baba and amongst them Manoj and Rajpal were present alongwith one more person whose name was not known to him. PW-5 had also identified the accused persons namely Manoj, Rajpal and Munna Ram @ Baba present in the Court during his deposition. He then narrated that he evesdropped these persons hatching the conspiracy to kill Vijay Pal Singh and Munna Ram @ Baba agreed to provide Kulhari (murder weapon) to commit the murder. PW-5 then stated that he went to Rasoolabad by bicycle and then had gone to Kanpur and after 5-6 days when he returned back to the village on 27.12.1991 in the evening he came to know that Vijay Pal was killed.

On getting information, he went to the house of Vijay Pal but no one other than female family members were present therein and Chatrapal was not met. He also stated that he intimated them raising a suspicion that Munna Ram @ Baba might be having information of the murder of Vijay Pal, he alongwith the family members of deceased Vijay Pal, then, went to the hut of Baba who was not found there. They made a private enquiry and on 09.01.1992, they could catch hold of Munna Ram @ Baba in his hut. They threatened him that he would also be killed and then Munna Ram @ Baba disclosed that the bicycle and shoes of Vijay Pal Singh were concealed in a Payar in the field of Jairam on the southern side of the road. The recovery of bicycle and shoes of Vijay Pal was then made at the instance of Munna Ram @ Baba and PW-5 alongwith Chatrapal (PW-4), Puttan Singh, Vijay Bahadur and other villagers, took Munna Ram @ Baba to the police station after the recovery. A report of the enquiry (Exhibit Ka-4) had also been written by PW-5 Laakhan Singh, at the crossing of Rasoolabad, in his handwriting and submitted the said report in the police station after getting signature and thumb impression of the witnesses. According to him, the recovered articles bicycle and shoes were also deposited in the police station by them and Munna Ram @ Baba was handed over to the police. The memo of recovery of bicycle and shoes was prepared at the police station and read over to him which is Exhibit ka-4.

At this juncture, it is relevant to note that Exhibit Ka-4, the recovery memo of bicycle and shoes of the deceased Vijay Pal Singh was exhibited at the instance of PW-4 who had identified his signature on the said document. The contradiction in the statement of PW-4 & 5 on the recovery memo Exhibit Ka-4 would also be noted at the appropriate place of this judgment.

Noticing further, we may note that PW-5, in cross, had stated that the hut of Munna Ram @ Baba was at a distance of 25 to 30 paces from the Nursery. The location of the hut of Munna Ram @ Baba has not been shown in the site plan. On a suggestion given to PW-5, he had denied that he went to the hut of Munna Ram @ Baba to have Charas but said that he used to go there to have Darshan of Munna Ram @ Baba. For non disclosure of conspiracy before 09.01.1992 an explanation has been given by PW-5 that he did not give much weight to the conversation of Rajpal, Manoj and Munna Ram @ Baba as he thought that they were in the state of intoxication and did not think that they would really commit murder. This witness admittedly returned to the village on 27.12.1991 at about 03.00-04.00 PM after the body of Vijay Pal Singh was discovered but he denied that the body was discovered on 27.12.1991 and stated that he went to the house of the deceased Vijay Pal Singh

in the evening at about 05.00 PM and then about 07.00 PM but neither he could meet Jeet Singh (first informant) nor Chatra Pal (PW-4). He denied having knowledge of the report of the murder having been lodged in the police station and the names of the person against whom the said report was lodged. He then stated that when the report of conspiracy of Munna Ram @ Baba Exhibit Ka-5 was given by him, the Investigating Officer had recorded his statement but he did not know at that time that the police had earlier interrogated Munna Ram @ Baba. On the suggestion as to why he had mentioned the said fact in his report, this witness gave a vague answer.

From the analysis of the statement of this witnesses, the story set up by him is not found convincing for the contradictions in his statement with regard to the time of reaching the village and passing of the information to the family members of the deceased about the conspiracy of three accused. This witness being a resident of a house located in front of the house of the deceased seems to be a got up witness set up by PW-4 Chatrapal Singh, brother of the deceased Vijay Pal Singh. The manner in which enquiry was done by this witness on his own and the statement given by him to the Investigating Officer on 09.01.1992 after the alleged recovery of bicycle and shoes of the deceased at the instance of Munna Ram @ Baba indicated that this witness acted more as a detective taking all credits to solve the crime. He is not found to be an independent witness, an impartial person. PW-5 has very conveniently excluded the presence of the first informant Jeet Singh from the scene to buy time to create evidence about the whole conspiracy chapter against the accused persons.

(iii). The last witness PW-4 brought in the chain of circumstance is Chatrapal Singh, brother of the deceased Vijay Pal Singh. He has stated that he came to know about the death of his brother about 05.00 AM and reached at the place of discovery of the body straightway where the police was making the necessary investigation. An application was given by him, at about 09.00.-09.30 AM in his own handwriting, to the Investigating Officer before the dead body was sealed and sent for postmortem but that report is not on record. He did not remember as to the time when he wrote the report. The body was sent for the postmortem at about 10.00-10.30 AM in his presence and, thereafter, he went to his house. This witness then stated that he stayed in the village for about 15 to 20 days and before 09.01.1992 PW-5 Laakhan Singh did not disclose anything to him about the incident. For the first time on 09.01.1992, he had a talk with Laakhan Singh (PW-5) at about 05.00-06.00 AM in the village. Thereafter, they alongwith other villagers accompanied with the Investigating Officer had reached at the hut of Munna Ram @ Baba within 20 minutes. He then stated that the Investigating Officer had reached at the hut of Munna Ram @ Baba at about 06.30 AM and then they all went to the place wherefrom bicycle and shoes were recovered. The place of recovery was about 150 to 250 meter from the Pakka road at the southern side of the road. On a question put to PW-4, he admitted that the memo of recovery of bicycle and shoes was prepared at the police station but his statement was recorded by the Investigating Officer on 09.01.1992 at the spot. They all went to the place of recovery of bicycle and shoes alongwith the Investigating Officer and the report was written by Laakhan Singh (PW-5) and then signed by him.

Analyzing the testimony of this witness, he is not found to be trustworthy

because of the material contradictions in his statement about the recovery of bicycle and shoes of the deceased from near the place of the incident at the instance of the appellant Munna Ram @ Baba. From the memo of recovery, Exhibit Ka-4 proved by this witness, it is evident that it was noted therein that one bicycle and one pair of shoes were brought to the police station by Laakhan Singh (PW-5) and the memo of the same was prepared at the police station in the presence of PW-4 Chatrapal. Another important feature of his testimony is when he states that Laakhan Singh conveyed the information about conspiracy to him only in the morning of 09.01.1992.

From the statement of this witness and that of Laakhan Singh (PW-5), it is evident that PW-5 opened up only on 09.01.1992 when he gave a report in writing as 'Exhibit Ka-5' after nabbing the third appellant Munna Ram @ Baba from his hut. PW-5 though stated in his deposition that he did not meet Chatrapal (PW-4) on 27.12.1991 at about 07.00 PM when he went to the house of the deceased after discovery of the dead body but he remained silent about the date and time when he had disclosed his information of the incident to Chatrapal (PW-4).

From the analysis of the above evidence, it is proved that the prosecution had concocted a story for implicating Manoj and Rajpal at the instance of Chatrapal (PW-4), the brother of the deceased, who himself was not a resident of the village, after he reached the village on 27.12.1991. The accused persons namely Rajpal and Manoj were introduced in the scene of crime after the discovery of the body when a report allegedly was given by PW-4 Chatrapal naming them as the suspected accused. The alleged report given in the handwriting of Chatrapal (PW-4) had not been proved by him. The report namely Exhibit Ka-3, as is available on the record, had been exhibited by PW-2 Rakesh Awasthi, the witness who could have simply proved his signature on the same. The scribe of the said report who had entered in the witness box as PW-4 did not prove the same, rather stated that the report given by him to the police was not available on the record. No reliance as such can be placed upon the document namely Exhibit Ka-3 so as to treat it as a supplementary report of the crime.

61. From the extract of the case diary, noted above, it could be seen that the first statement of PW-1, the first informant, was recorded on 27.12.1991 at the place of recovery of the body as soon as the police reached at the spot alongwith him, after registration of the first information report. In Section 161 Cr.P.C. statement of PW-1, he had introduced Pradeep Dubey and Rakesh Awasthi as witnesses of last seen of the deceased alive with accused Manoj and Rajpal. He, thus, came to know on 27.12.1991 that Manoj and Rajpal were behind the crime. This witness (PW-1) has very conveniently stated that the Investigating Officer did not record his statement with regard to the incident at any point of time and the statement of his brother Chatrapal was recorded.

62. The above contradictions, inconsistencies in the statements of witnesses show that they were all made up or got up witnesses. Three witnesses namely PW-2 the witness of last seen; PW-3 the witness of extra judicial confession and PW-5 the witness of conspiracy came to know that accused Manoj and Rajpal were behind the crime when the deceased had gone missing on 23.12.1991. They all are either related to the deceased or were his neighbour, but everyone surprisingly,

had left the village on the same day or the next day and, thus, explained why they did not pass on their information to the family members of the deceased/missing person between 23.12.1991 to 27.12.1991 when the search of the deceased was going on. All of them together entered in the scene (though at different times) after discovery of the body on 27.12.1991.

63. From the case diary, it may be noted that on the first date of discovery i.e. on 27.12.1991, the statement of PW-1, the first informant Jeet Singh and Munna Ram @ Baba was recorded by the Investigating Officer, before and after making the spot inspection of the site of the discovery of the body. The place where the deceased Vijay Pal Singh was seen in the company of the accused Manoj and Rajpal is also indicated in the site plan as place (B). The witnesses of last seen Pradeep Dubey and Rakesh Awasthi were present on the spot of discovery as they are witnesses of inquest, but the Investigating Officer despite the information of last seen (an important one) received by him did not record the statement of these two material witnesses for the reasons best known to him. The statement of Vishwa Nath (PW-3) was recorded in the case diary on 03.01.1992 after accused Manoj was arrested by the Investigating Officer as is evident from the Parcha No.III of the case diary dated 03.01.1992. The statements of Lakhan Singh was recorded on 09.01.1992 after the appellant Munna Ram @ Baba was handed over to the police by the prosecution witnesses. The statement of Chatrapal (PW-4) as also Pradeep and Rakesh Awasthi (as both witnesses of last seen and inquest) were recorded on 14.01.1992 in the case diary at Parcha No.IV.

64. There is no recovery of the murder weapon. As per the statement of the witnesses, one Axe used in the murder was provided by the appellant Munna Ram @ Baba but from the statement of the witnesses (PW-2 & PW-3) it seems that both the accused persons were seen having Axe in their hands that means two Kulharis were introduced by the witnesses of last seen. There is no clarity about the second weapon.

65. On the implication of the third appellant Munna Ram @ Baba, there is no evidence of last seen of the deceased alive in his company. Only evidence against appellant Munna Ram @ Baba is the report dated 09.01.1992 submitted by Laakhan Singh (PW-5) which was based on a private enquiry made by the prosecution witnesses.

66. As analysed above, the entire story presented by PW-5 is proved to be a concocted story for his unbelievable version of the events after 27.12.1991 and for the contradictions in the statement of PW-5 and PW-4, PW-5 is proved to be an unreliable/untrustworthy witness. Moreover, the alleged recovery of bicycle and shoes by PW-5 and PW-4 is proved to be planted one as it was not made by the Investigating Officer at the instance of the accused Munna Ram @ Baba.

67. With regard to the recovery memo, Exhibit Ka-4, it was prepared at the police station and not at the spot. A site plan of the place of recovery of these articles is also on the record which contains a signature bearing the date as 26.01.1992. In view of non-examination of the Investigating Officer, it could not be ascertained as to when and where the recovery was made and how the site plan of the place of recovery was prepared by the Investigating Officer on 26.01.1992. The PW-4 though tried to suggest that the

Investigating Officer was accompanying them at the time of recovery but it is evident from the record that the appellant Munna Ram @ Baba was not arrested by the Investigating Officer prior to the recovery and he was handed over to the police by the prosecution witnesses namely PW-4 and PW-5 alongwith the alleged recovered articles namely the bicycle and shoes. The recovery memo namely Exhibit Ka-4 is, thus, liable to be rejected.

68. From the above discussion, it is evident that the prosecution witnesses who were either related to the deceased or his neighbours made lots of enquiries on their own to find out the culprit and in that process many different stories were concocted. The contradictions in the statement of the witnesses arose as they made improvements to prove them right. The prosecution has tried to form the chain by connecting loose links from here and there. Three prosecution witnesses namely PW.2, PW.3 and PW-5 had seen or met the accused persons namely Rajpal and Manoj at different times on the very day when he had gone missing, i.e. 23.12.1991, but all of them had left the village for one or other reason and entered in the scene only on 27.12.1991 after the discovery of the dead body. The explanation offered by these three witnesses for their absence in the village between 23.12.1991 and 27.12.1991 is not convincing. These witness namely PW-2, PW-4 and PW-5 are unreliable and untrustworthy.

69. As far as the motive is concerned, though a mortgage deed was presented in the Court by PW-1 and the signature of his deceased brother on the same was proved as Exhibit Ka-2 but beyond that no other evidence was brought before the Court to prove the dispute of deceased with the accused Rajpal. Only PW-4, another brother of the deceased, in his examination-in-chief, had stated the motive being the mortgage of his field by the deceased Vijay Pal Singh. The 'Exhibit Ka-3' which has been placed on record as the report given by Chatrapal (PW-4) to the Investigating Officer, had not been proved by him, as noted above. The contents of the said report, therefore, cannot be seen.

70. With regard to another accused Manoj, the motive assigned by PW-1 is too weak. Moreover, both the accused had been assigned different motives and there is no evidence on record about meeting of mind of these persons to kill the deceased, except the testimony of PW-3 & PW-5 who have been found to be unreliable witnesses. No motive has been assigned to the third accused Munna Ram @ Baba who has been convicted by the trial court under Section 302 read with Section 34 IPC.

71. All the above circumstances put together raised many questions about the manner in which the investigation was conducted and evidence was collected by the Investigating Officer to submit charge sheet against three accused persons namely Manoj, Rajpal and Munna Ram @ Baba, but it is one of those cases where the Investigating Officer had not entered in the witness box. All the questions, therefore, remain unanswered.

72. The next issue, thus, to be examined is as to whether the non-examination of the Investigating Officer caused prejudice to the accused appellants.

73. In this regard, it may be noted that though the defence had admitted the genuineness of papers of investigation such as Chik FIR, recovery memo, Exhibit Ka-

16, postmortem report Exhibit Ka-18, the inquest report Exhibit Ka-10, the charge sheet Exhibit Ka-19 and Ka-20 as also the site plan Exhibit-8 & 9 but did not admit the papers prepared by the prosecution witnesses and given to the Investigating Officer. Though with the acceptance of the genuineness of the chik report, the written report Exhibit Ka-1 also stood admitted, but other reports such as Exhibit Ka-3, Exhibit Ka-5 and the recovery memo Exhibit ka-4 had not been admitted as genuine documents by the defence. For non-examination of the Investigating Officer, it could not be proved as to how and in what manner these papers were included during the investigation. In absence of the Investigating Officer, the defence has been deprived of the opportunity to cross examine him on the documents entered in the case diary namely the recovery memo Exhibit Ka-4 and the reports Exhibit Ka-3 and Ka-5, allegedly given by PW-4 and PW-5.

74. The question as to how the site plan Exhibit Ka-8 was prepared on 26.01.1992, the date of submission of the charge sheet, remained unanswered. The delay in recording the statement of material witnesses of last seen (namely Pradeep Dubey and Rakesh Awasthi) by the Investigating Officer remained unexplained in his absence. The contradiction in the statement of the prosecution witness PW-4 with regard to giving of the report naming the witnesses of last seen could not be put to the Investigating Officer so as to get his version. The contradiction about the preparation of the recovery memo Exhibit Ka-4 in the statement of PW-4 and 5, the witnesses of the said recovery memo, could not be put to the Investigating Officer. The defence has, thus, been seriously prejudiced in the instant case for the non-examination of the Investigating Officer.

75. We may note that in the matter of non-examination of the Investigating Officer, the legal position is that there can be no universal straight jacket formula that the non-examination of the Investigating Officer per se vitiates the criminal trial. It would depend upon the facts of the particular case as to whether the non-examination of the Investigating Officer had caused prejudice to the accused. It has to be shown by the defence that the accused had been prejudiced and was deprived of the opportunity to bring out contradiction in the statement of the witnesses for the prosecution before the police. It is held in **State of Karnataka Vs. Bhaskar Kushali Kotharkar & others4** that as part of fair trial, the Investigating Officer should be examined in the trial cases, especially in a sessions trial. The reason being that if any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161 Cr. P.C. or there is any omission of certain material particulars, the previous statement of these witnesses could be proved only by examining the investigating officer who must have recorded the statement of these witnesses under Section 161 Cr. P.C.

76. In **Ram Dev & another Vs. State of U.P.5** it was observed that it was desirable for the prosecution to produce the Investigating Officer at the trial notwithstanding the fact that various documents which were to be proved by the Investigating Officer were accepted by the defence as genuine documents and were not disputed.

77. Whether non-examination of the Investigating Officer in any way create any dent in the prosecution case or affect the credibility of the witnesses would depend upon the facts of the case. In any case, it

has to be shown as to what prejudice has been caused to the appellants for such non-examination (reference **Bahadur Naik Vs. State of Bihar6**).

78. Keeping in mind the above discussion in light of the principles noted above we find that in the instant case, the accused appellants have been seriously prejudiced on account of non-examination of the Investigating Officer and this omission has created a deep dent in the prosecution case. The cumulative effect of the prosecution evidence, thus, is that the witnesses of the prosecution have not been found trustworthy; the contradictions in their testimony remained unexplained for non-examination of the Investigating Officer; the chain of circumstances putforth by the prosecution has many loose links which could not be connected to each other. The result is that the complete chain of the circumstances could not be formed by the prosecution to unerringly point towards the guilt of the accused persons excluding every possible hypothesis except one to be proved.

79. The prosecution has failed to establish every link in the chain of circumstance beyond all reasonable doubt to establish the guilt of the accused, leaving reasonable grounds for the conclusion consistent with the innocence of the accused. It could not be shown that in all human probabilities the act must have been done by the accused persons and no on else.

80. Further none of these documents, Exhibit Ka-3, Ka-4 and Ka-5 were put to the accused persons in their examination under Section 313 Cr.P.C. For the site plan, a general question was framed as question No.'19' but the site plan exhibited as Exhibit Ka-8 and Ka-9 were not put up to the accused persons.

81. The trial court had, thus, erred in relying upon these documents to draw inference against the appellants and to accept the submission of prosecution witnesses for conviction of the accused persons.

82. For the above discussion, we find that the trial court namely the IIIrd District & Sessions Judge, Kanpur Dehat has committed a manifest error of law in convicting three accused persons namely Rajpal, Manoj & Munna Ram @ Baba only on an untrustworthy last seen evidence.

83. Accordingly, the judgment and order dated 08.05.1997 passed by the IIIrd Additional District & Sessions Judge, Kanpur Dehat in S.T. No.104 of 1992 and S.T. No. 417 of 1992 arising out of Case Crime No.191 of 1991 under Section 302, 201, 120-B IPC, P.S. Rasoolabad, District Kanpur Dehat, is set aside.

84. The accused-appellants are entitled to be acquitted of all the offences of which they were charged. Their conviction is liable to be set aside.

85. The appeals are hereby **allowed.**

86. The appellant Rajpal and Munna Ram @ Baba are on bail. Their sureties shall stand discharged.

87. The appellant Manoj is in jail. He shall be released forthwith, in case he is not needed in any case.

88. Sri Kunwar Ajay Singh learned Amicus Curiae rendered valuable

assistance to the Court. The Court quantifies Rs.15,000/- to be paid to Sri Kunwar Ajay Singh, Advocate towards fee for the able assistance provided by him in hearing of this Criminal Appeal. The said payment shall be made to Sri Kunwar Ajay Singh Advocate by the Registry of the Court within the shortest possible time.

89. The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary action.

90. The compliance report be submitted to this Court through the Registrar General, High Court, Allahabad.

(2022)04ILR A53
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.04.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE MRS. SAMEER JAIN, J.

Criminal Appeal No. 1171 of 2006

Charan Singh ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Umesh Shankar, Sri Subedar Mishra

Counsel for the Respondent:
A.G.A.

Criminal Law- Code of Criminal Procedure, 1973- Section 318 - Trial of a deaf and dumb person- No bar to proceed against a deaf and dumb accused on a charge of a criminal offence. But, whenever a criminal proceeding is drawn against a deaf and dumb person, the endeavour should be that he understands the proceedings. If the court finds that he understands the proceedings, the trial must proceed in the ordinary way. However, while doing so, courts have to see to it that the trial is fair and the accused gets a chance of putting up such defences as he may have.

The only requirement before the court while trying a deaf and dumb person is to ascertain as to whether he understands the proceedings.

Evidence Law - Indian Evidence Act, 1872- Illustration (e) to section 114 - Code of Criminal Procedure, 1973- Section 318 - There is a legal presumption that judicial and official acts have been regularly performed. In these circumstances once the court had recorded its satisfaction with regard to the ability of the accused to understand and communicate, and there being no application before that court questioning its satisfaction or praying for services of a sign language interpreter for the accused, in our view, an unrebutted legal presumption with regard to the regularity of the judicial act would operate against the accused-appellant. Thus, keeping in mind the legal presumption as also the statement of PW-4 that the appellant is in a position to understand and communicate and is not of weak mind, we are satisfied that the trial did not vitiate for lack of appointment of a sign language interpreter for the accused-appellant.

Where the court records its satisfaction that the accused is able to understand the proceedings against him and the said satisfaction remains unchallenged then the trial cannot be held to be vitiated.

Evidence Law - Indian Evidence Act, 1872 - Non-examination of children and other family members of the deceased- Where the accused is ones own family member, witnesses of that family are reluctant to give evidence. More over, children rarely go against their parents. Therefore, their non-examination, in the facts of the case, is not fatal to the prosecution case.

Non- examination of the family members of the accused will not be fatal for the prosecution as

the family members may be reluctant to depose against the accused.

Criminal Law - Indian Penal Code, 1860 - Section 302- Indian Evidence Act, 1872 Section 106 – Death of wife due to strangulation- Appellant is that he is admittedly the husband of the deceased and there is no denial of the appellant with regard to him residing with his wife at the time and place of the incident. Most importantly, the deceased died due to strangulation - The appellant had escaped from the spot and for several days he was absconding.

The appellant, being the husband of the deceased had failed to discharge the burden of proof explaining the homicidal death of his wife and had absconded after the commission of the crime and therefore an adverse inference may be drawn against him. (Para 22, 23, 27, 28)

Criminal Appeal rejected. (E-3)

Judgements/ Case law relied upon:-

1. Emperor Vs Deaf and Dumb, AIR 1917 Bom. 288

2. Emperor Vs Ulfat Singh, AIR 1947 Alld 301

3. St. Vs Radhamal Sangatmal Sindhi, AIR 1960 Bom. 526

4. In re: Padmanabhan Nair Narayan Nair, AIR 1957 Ker. 9

(Delivered by Hon'ble Manoj Misra, J.)

1. This appeal is against the judgment and order of conviction and sentence dated 12.01.2006 passed by the Additional Sessions Judge (Fast Track Court), Court No. 1, Pilibhit in Sessions Trial No. 695 of 2004 whereby, the appellant has been convicted under section 302 I.P.C. and sentenced to imprisonment for life with fine of Rs. 5,000/- and on default of payment of fine, additional six months imprisonment.

INTRODUCTORY FACTS

2. On a written report (Exb. Ka-1), lodged by Surendra Singh (PW-1), the brother of the deceased, on 28.06.2004, at 17:35 hours, a Chik FIR (Ex. Ka-4) was prepared by PW-5, giving rise to Case Crime No. 54 of 2004, under Section 302 I.P.C., at P.S. Hazara, District Pilibhit. The prosecution case, in brief, is that informant's elder sister Banso Bai (the deceased) was married to the appellant (Charan Singh) twelve years ago; she had five daughters and a son; the appellant used to suspect and taunt the deceased of being unchaste and treated her with cruelty; in the evening of 27.06.2004, the deceased and the accused had a fight; in the night of 27/28.06.2004, deceased's neighbours Darshan Singh (PW-3) and Parsa Singh (PW-4), at about 2.00 am, heard noises; upon which, PW-3 and PW-4 went to the spot to notice that the appellant was strangulating the deceased; that, by the time they could come to the rescue of the victim, she was dead and the appellant escaped. It was claimed that after receipt of the above information from PW-3, PW-1 (informant) went to the house of the deceased to confirm the news and, upon finding her sister dead, the report has been lodged.

3. The inquest was conducted by 19:50 hours on 28.06.2004, which was witnessed by PW-1 (Surendra Singh-informant); Jarnail Singh (not examined); Satnam Singh (not examined); Puran Singh (not examined) and Resham Singh (not examined). The inquest report (Exb. Ka-2) was prepared by PW-6.

4. Autopsy of the body of the deceased was conducted at about 4 pm on 29.06.2004. The autopsy report (Exb. Ka-3) prepared by Dr. K.K. Sharma (PW-2) notices as under:

External examination: Female body of average build and muscularity; face swollen, cynosed, eye-balls prominent (sic) congested. Tongue swollen, bitten by the teeth. Frothy blood coming out of mouth and nostrils. Rigor mortis had passed off from both upper limbs, passing off from lower limbs. Signs of decomposition present. Foul smell coming out of body. Abdomen distended.

Ante-mortem injuries:

(a) Contusion 6 cm x 4 cm on upper part of neck, left side;

(b) Contusion 5 cm x 3 cm on upper part of neck, right side.

On deeper dissections:,

Underlying tissues are ecchymosed; larynx, trachea, bronchial tubes are congested (sic) frothy blood and mucous.

Internal Examination:

(i) Both lungs congested;

(ii) Stomach had 150 ml of fluid; small intestine had fluid and gases; and large intestine had faecal matter and gases.

Cause of death -Asphyxia due to throttling.

Estimated time of death: About one and a half day before.

5. Charge-sheet (Exb. Ka-11) was submitted on 18.08.2006 by S.O. Rajendra Prasad (not examined) but it was proved by PW-6. After taking cognisance on the police report, on committal of the case to the court of session, on 03.03.2005, charge of the offence punishable under Section 302 I.P.C. was framed against the appellant, which was denied and a trial was claimed.

PROSECUTION EVIDENCE

6. During the course of trial, the prosecution examined as many as six witnesses. PW-1 (Surendra Singh) the informant; PW-2 - the Doctor who carried out autopsy; PW-3 (Darshan Singh) and PW-4 (Parsa Singh) - eye-witnesses; PW-5 (Virendra Kumar Srivastava) is the constable clerk, who made G.D. Entry of the FIR (Ex. Ka-5) and prepared the Chik FIR (Ex. Ka-4); and PW-6 (Narendra Singh Tiwatiya) - the first investigating officer (I.O.) who carried out initial stages of the investigation including preparation of the site plan, inquest report, etc but was, later, transferred and replaced by Rajendra Prasad, who was not examined. PW-6, however, proved the charge-sheet submitted by Rajendra Prasad.

7. At this stage, it would be appropriate to notice the testimony of the prosecution witnesses in some detail.

(i) **PW-1 (Surendra Singh).** He stated that the deceased Banso Bai was married to the accused-appellant 13 years ago. Out of the wedlock, she had five daughters and one son; that his brother-in-law (the accused) used to level allegation of unchastity on his sister and also used to treat her cruelly. In respect of the incident, PW-1stated that Darshan Singh (PW-3) came and informed him that in the evening, preceding the night of the incident, the appellant and the deceased had a fight and, at 2 am in the night, on hearing shrieks, PW-3 and PW-4, who were neighbours of the deceased, woke up and witnessed that the accused was pressing the neck of the deceased but, by the time they could save

her, the deceased had died and the accused escaped. PW-1 stated that upon getting the above information, he went to the house of the deceased at village Tatarganj, found body of the deceased lying on a cot; thereafter, PW-1 dictated the report to Jarnail Singh (not examined), who wrote the report, read it over to PW-1, which, PW-1 signed. On this statement, the written report was marked Exb. Ka-1. PW-1 also proved that at the time of inquest proceeding, he was present and had signed the report, which was exhibited as Exb. Ka-2. *{Note: At the time when the statement in chief of PW-1 was recorded, the accused was not represented by a lawyer and, therefore, the court appointed an Amicus Curiae to represent the accused and assist him in cross-examining the witnesses. The Court, accordingly, fixed 14.07.2015 for cross-examination of PW-1. However, the cross-examination of PW-1 was held on 28.07.2005}.*

(i-a) In his **cross-examination,** PW-1 stated that, initially, the relations were good between the accused and the deceased; that when he heard that the accused used to level allegations of unchastity on the deceased, he took no step, thinking that bickering between husband and wife is common. He admitted that his sister had not told him that her husband was treating her cruelly, perhaps, she used to hide all those things. But, through her neighbours, he came to know that she was being harassed by her husband. In respect of the incident, he stated that he came to know about the incident in the morning, between 7.30 and 8.00 am, through PW-3 (Darshan Singh). This information came to him while he was staying with his elder sister at Bazaar Ghat. When PW-1 got information from Darshan Singh, he and his elder sister, namely, Surno Bai went to the house of Banso Bai (the deceased). He stated that it took them one and a half hours to reach the house of the deceased. He stated that deceased's children are being looked after by their 'Tau' (father's elder brother) and that PW-1 is not looking after them. In respect of the incident, PW-1 stated that when he had reached her sister's place in the morning, he did not see any policemen there, though her neighbours were there; after staying there for one and a half hours, PW-1 went to the police station with his other sister to lodge report. PW-1 stated that he saw his sister's body lying on a cot. He stated that near the hut of her deceased sister, at a short distance, there were huts of PW-3 and PW-4. The hut of the deceased and her husband had three shades *(Chhappar)*. Two shades were joint and one was separate. Under the two joint shades there was a kitchen and a *Baithak* (a platform for sitting purposes), partitioned by a *Tatiya* (straw mat). Under the third shade, animals of the accused used to be tied, which was at a distance of five to six paces. In respect of writing the report, PW-1 stated that he met the scribe of the FIR, namely, Jarnail Singh, at a Tea Stall, outside the police station. By the time the report was scribed, it was 4:30 to 5 pm. He stated that he had gone to the police station on a bicycle and it must have taken two and a half to three hours to reach the police station. He stated that when he returned from the police station it was evening and while he was returning on his bicycle, he saw the police proceeding in a Jeep to the village. By the time PW-1 arrived at the village, the police had already reached there. PW-1 stated that the police had prepared documents in his presence; that he and his sister had arrived from the police station by about 7 pm; that the first information report must have been lodged between 4:30 pm to 5 pm.

(i-b) In respect of the condition of his sister's body, PW-1 stated that when he had noticed his sister's body, she was

wearing a Kurti and Salwar and her eyes were shut and her hands were on her chest. He had not noticed any injury on her hands though, there were old injury marks on her leg. He stated that on exposed parts of her body, he had not noticed any injury though, blood was oozing out from her nose and mouth. He also stated that she had glass bangles. PW-1 stated that at the time of inquest there were many persons; that the body of his sister was taken for autopsy in the night, between 1.30 am to 2 am. He denied the suggestion that there was animosity between the accused-appellant and his neighbours Darshan Singh and Parsha Singh in respect of some land dispute. He also denied the suggestion that the deceased and the accused-appellant had good relations. He also denied the suggestion that he is telling a lie.

(ii) **PW-2 (Dr. K.K. Sharma)**. He proved the autopsy report and accepted the possibility of death of the deceased to have occurred at about 2 am on 28.06.2004.

(ii-a) In his **cross-examination**, he admitted that the estimated time of death can vary by nine hours and it is also possible that the injuries found on the body of the deceased could be on account of use of hard and blunt object.

(iii) **PW-3 (Darshan Singh)** - Eye witness. He stated that he knows the accused-appellant as his hut is near the hut of PW-3; that the accused-appellant is deaf and dumb; that there used to be fights between the accused-appellant and the deceased as the accused-appellant used to level allegations of unchastity on her; that in the evening, preceding the night of the incident, the accused and his wife (the deceased) had a fight; that in the night of the incident, while PW-3 was in his own hut, at about 2 am, he heard noises coming from the hut of the accused-appellant; on hearing the noise, PW-3 and his brother Parsa Singh (PW-4) went towards the hut of the accused and saw the accused strangulating his wife. Seeing PW-3 and PW-4, the accused ran away but by the time they reached there, the deceased had died. PW-3 stated that he gave information about the incident to the informant.

(iii-a) In his **cross-examination,** PW-3 stated that the accused is his relative; PW-1 is also his relative; his relationship with the accused is through PW-1; the accused has no agricultural holding though, PW-3 has two acres of land; whereas, his brother Parsa Singh (PW-4) has one and a quarter acre of land; that the deceased, in relation, is PW-3's 'Mausi' (mother's sister); that deceased is a cousin of PW-3's uncle; that the deceased had four daughters and a son and the eldest, amongst the daughters, is 11-12 years old whereas, youngest would be 3-4 months old; that deceased and the appellant had been fighting with each other since last two to three months before the incident; that PW-3 had not given information about their fights to Surendra Singh (PW-1); that Surendra Singh (PW-1) had not visited the deceased in the last 2-3 months, though PW-1's father used to visit, who is 60-70 years old; that in the night of the incident, PW-1's father (Makhan Singh) was not there as he was away; in PW-3's village, there is no electricity; that PW-3's hut is about 10 paces away from that of the accused; that PW-3's brother Parsa Singh's hut is towards east of his hut and the distance between his hut and his brother's hut is about 12 paces; that in the evening, preceding the night of the incident, the accused-appellant had not assaulted the deceased with danda (stick) or slaps; that accused-appellant can neither speak nor listen; PW-2 denied the suggestion that there use to be no fight between Charan Singh (appellant) and Banso Bai (the deceased).

(iii-b) On further cross-examination, PW-3 stated that Charan Singh can communicate with the help of signs, through his fingers, and can also understand what others wish to communicate. He admitted that earlier, relationship between Charan Singh and Banso Bai was cordial and that, out of their relationship, they had six children.

(iii-c) On further cross-examination, PW-3 stated that the night of the incident was a dark night. When he heard noises, he rushed to the spot from his own hut and his brother also arrived there; that deceased's children were there and were crying; that Banso Bai's mother and father were also sleeping there. PW-3 stated that Charan Singh was pressing the neck of Banso Bai and when PW-3 and PW-4 reached the spot and were just about 5-6 paces away, seeing them, accused-appellant ran away. PW-3 stated that after Charan Singh ran away, several others arrived at the spot; that he went to inform the informant (PW-1) at about 6 am on a cycle; that PW-3 reached informant's house by 7 am and after giving information to the informant, PW-3 returned back. PW-3 stated that the police had arrived by 12 (noon). PW-3 stated that he does not remember as to what happened thereafter. PW-3 also clarified that deceased's children were young therefore, they could not save their mother.

(iii-d) PW-3 denied the suggestion that thief/dacoit/robber killed Banso Bai in the night. PW-3 also denied the suggestion that he has a dispute with Charan Singh (the accused-appellant) and therefore he is lying with a view to grab Charan Singh's land. He also denied the suggestion that because Surendra Singh (informant) is his relative, therefore, he is lying.

(iii-e) PW-3 told the Court that when he went to the hut of Banso Bai, he had a torch and in the light of the torch, he had spotted Charan Singh strangulating the victim. He also stated that he had screamed at Charan Singh but, he did not respond. Rather, he ran away. PW-3 stated that the torch which he had, he has not brought. He also could not remember whether he had shown the torch to the I.O. He also stated that the cot where the deceased was lying was outside the shade. He denied the suggestion that he is telling a lie.

(iv) **PW-4 (Parsha Singh)**- another eye-witness. In his statement in chief, he narrates the same story as narrated by PW-3 (Darshan Singh) including that the accused is deaf and dumb. He also stated that the incident was witnessed in the light of a torch.

(iv-a) In his **cross-examination**, he stated that the informant, in relation, is his 'Mama' (maternal uncle) and the deceased is his 'Mausi' (maternal aunt). He also stated that deceased had six children and her son is about 10-11 years old. PW-4 stated that he had disclosed to the I.O. that Banso Bai was of bad character but this was not disclosed to Surendra Singh (PW-1) and Banso Bai's mother and father. He stated that at present Banso Bai's children are being looked after by their grand parents.

(iv-b) On further cross-examination, he admitted that Charan Singh (the accused-appellant) held about two acres of land, which is being ploughed by him. He also stated that, after marriage, Charan Singh and Banso Bai had good relations though, since two months before her death, they used to have fights. PW-4, however, admitted that he never informed Surendra Singh (PW-1) or mother and father of Banso Bai about their fights. PW-4 stated that a day before the incident, the appellant had assaulted Banso Bai with a lathi though it had left no injury mark. PW-

4 stated that he had not informed brother, father and mother of Banso Bai about this incident.

(iv-c) In respect of the incident, he stated that that night was dark; that night, Banso Bai had cried 2-3 times and on hearing her cries, he and his brother (PW-3) went to the spot. Charan Singh's children had also raised alarm but, as they were very young, they could not save their mother. PW-4 stated that outside the shade *(Chhappar)*, there was just one cot where Banso Bai was lying. Rest were sleeping inside the shade. He stated that other cot was at some distance from the cot of Banso Bai. When questioned about distance of the other cot, PW-4 stated that it must have been 20-25 hands away. On further cross-examination, PW-3 stated that in that separate cot Charan Singh's mother and father were sleeping but they did not make any attempt to save the deceased.

(iv-d) On further cross-examination, PW-3 stated that when he had reached the spot, he had seen Charan Singh on top of the cot and pressing the neck of Banso Bai. Banso Bai was screaming but in low volume. When he and his brother (PW-3) arrived, Charan Singh left and ran away. PW-4 further stated, that when they examined Banso Bai from close proximity, she was found dead. He stated that he saw the incident from a distance of 6-7 paces in torch light.

(iv-e) To Court - PW-3 stated that Charan Singh cannot speak clearly but can speak little bit and can communicate by hand gestures. PW-4 also stated that Charan Singh cannot properly hear but has good eye sight and is not insane or of weak mind.

(iv-f) On further cross-examination, PW-4 stated that he had shown to the I.O. the place where the cot was lying and from where he and his brother (Darshan Singh) had challenged Charan Singh and the direction in which he ran away towards the jungle but, if this fact was not mentioned by the Investigating Officer, then he cannot tell the reason. PW-4 stated that after the incident, he had stayed overnight at the spot whereas the police had arrived in the morning at 9 am and had prepared documents and had also got his thumb impression. He stated that the police had not taken thumb impression of Jarnail Singh or anybody else in his presence. PW-4 stated that the police had lifted the body by about night. He denied the suggestion that he had not witnessed the incident and he is telling a lie because of being a relative of Surendra Singh (PW-1).

(v) **PW-5 (Constable Clerk-Virendra Kumar Srivastava).** He proved lodging of the first information report at 17:35 hours on 28.06.2004 of which GD entry no. 20 (Exb. Ka-5) and Chik FIR (Exb. Ka-4) was prepared by him.

(v-a) In his cross-examination, he stated that he is not aware as to how and by what conveyance the informant came to the police station. He stated that Chief Judicial Magistrate had seen the Chik FIR on 02.07.2004. He further stated that at the time of lodging the first information report, the Investigating Officer was there and papers were handed over to him; and that he left immediately. PW-5 stated that the body had not come to the police station. He denied the suggestion that first information report was ante-timed under the influence of the informant.

(vi) **PW-6 (S.I. Narendra Kumar Tivatia)**. He is the investigating officer, who conducted investigation in the matter up to 09.08.2004 whereafter, he was transferred. PW-6 stated that after the FIR was lodged, he took the informant with him on official Jeep to village Tatarganj (the village in which the crime was committed)

and, upon reaching the spot, at the behest of the informant, he inspected the spot, prepared site plan (Exb. Ka-6), conducted and prepared inquest report (Exb. Ka-2) as well as letter for the CMO and other documents in respect of post-mortem etc. and, thereafter, recorded statement of the inquest witnesses and made an effort to search out the accused. He stated that on 29.06.2004, he made an effort to arrest the accused but could not find him in his house. Thereafter, on 30.06.2004, he got copy of the post-mortem report which was incorporated in the case diary. On 01.07.2004, he made efforts to arrest the accused but the accused could not be found. On the same day, he recorded statement of witnesses Parsha Singh and Darshan Singh. Again, on 02.07.2004; 04.07.2004; 07.07.2004; and 10.07.2004, he made effort to arrest the accused-appellant Charan Singh but he could not be found. Finally, on 11.07.2004, he submitted an application in Court, stating Charan Singh has absconded therefore, proceeding under Section 82 and 83 Cr.P.C. be initiated on which, on 14.07.2004 he got information from the Court that the application will be considered on 17.07.2004. On 17.07.2004, he obtained processes, under section 82 Cr.P.C. as also non-bailable warrants. On 21.07.2004, he searched for the accused and took steps under Section 82 Cr.P.C. On 31.07.2004, again, raid was conducted to arrest Charan Singh but he could not be found. On 09.08.2004, he came to know that Charan Singh had left Uttar Pradesh for Uttranchal and is in district Udham Singh Nagar. PW-6 stated that, thereafter, he was transferred and the remaining investigation was conducted by Rajendra Prasad. PW-6 stated that Rajendra Prasad arrested Charan Singh and after recording his statement, submitted charge-sheet. PW-6 proved the writing and signature of the second I.O. on the charge-sheet, which was marked Exhibit Ka-11.

(vi-a) In his **cross-examination,** PW-6 stated that he had not disclosed in the site plan the route which Charan Singh took to escape from the spot. He stated that witnesses Darshan Singh and Parsha Singh did not inform him the direction and the route which the accused take to escape from the spot. He, however, stated that huts of the witnesses and the accused were at close proximity to each other.

(vi-b) He denied the suggestion that Surendra Singh (the informant) was crossed by the police while he was on a cycle, 5-6 kms away from the village. PW-6 stated that when he had gone to prepare the inquest report, deceased's mother-in-law and children were there. Children were young though, he could not recollect their age. PW-6 stated that he had enquired from the mother of the accused but had not recorded her statement. The children had no clue about the incident as they were sleeping. He stated that he had not questioned the children at the time when he was preparing the inquest report. He stated that when he had visited the spot, he had seen only one cot lying there where there was dead body. He stated that the witnesses had not shown any torch to him. He denied the suggestion that he reached the spot at noon. He also denied the suggestion that he found the body of Banso Bai in an open field. He stated that the witness Parsha Singh had not informed about the bad character of Banso Bai though, Parsha Singh had told him that Charan Singh, by gestures, did communicate that his wife is not of good character. On being shown paper no. 11/35, PW-6 stated that this was a letter written by Station Officer Rajendra Prasad to the Chief Medical Officer in

respect of accused being deaf and dumb. He stated that since he had been transferred by then, he did not investigate in that regard. PW-6 stated that from the entry in the case diary, it appears, that the investigating officer, namely, Rajendra Prasad, had interrogated the accused with the help of gestures though, he could not find any report of the Chief Medical Officer on the record. He denied the suggestion that charge-sheet was submitted by conducting a bogus investigation.

8. After the statement of the prosecution witnesses were recorded, on 21.12.2005, the statement of the accused was recorded under Section 313 Cr.P.C. The order-sheet of the court below reflects that the trial court on 21.12.2005 passed following order:-

"21-12-05

आज प्रस्तुत अभियुक्त मय अधिवक्ता उपस्थित। अभियुक्त साफ नही बोल पाता किन्तु बातों को समझ लेता है व तुतलाकर व इशारे से अपनी बात कह लेता है। उसके विद्वान अधिवक्ता व ।क्लb के समक्ष व उनके सहयोग से बयान 313 लिखा गया।

सफाई हेतु अवसर दिया जाना उचित होगा।

न्यायहित मे दिनांक 24.12.05 को सफाई साक्ष्य हेतु पेश हो।"

9. The incriminating circumstances appearing in the prosecution evidence were put to the accused-appellant while recording his statement under Section 313 Cr.P.C. and at the bottom of that statement, following note was put:-

"उक्त पृच्छा मेरी उपस्थिति एवं श्रवणगोचरता मे की गयी, जिसमें अभियुक्त द्वारा किये गयेकथनों की पूर्ण व सही हाल अन्तर्विष्ट है।"

10. After 21.12.2005, on 24.12.2005, a written explanation was also submitted on behalf of the accused, duly thumb marked by him and signed by his lawyer, which reads as follows:-

"न्यायालय श्रीमान् ASJ/FTC I महोदय, पीलीभीत

ST No. 695/04
राज्य बनाम चरन् सिंह
धारा 302 प्च्ब
थाना हजारा

श्रीमान् जी,

लिखित कथन वास्ते सफाई साक्ष्य

1. यह कि प्रार्थी चरन सिंह को उपरयुक्त वाद में झूठा फंसाया गया है।

2. यह कि प्रार्थी की भैंसे व जमीन कृषि भूमि हडप करने की नियत से साक्षी दर्शन सिंह व साक्षी परशा सिंह ने प्रार्थी की पत्नी को मार कर झूठी कहानी बनाकर प्रार्थी को झूठा फंसाया गया है।

3. यह कि प्रार्थी न तो बोल पाता है और न ही कुछ सुन पाता है जिस कारण अपनी बातको पुलिस के सामने कह नही सका और साक्षी परशा सिंह व दर्शन सिंह व अन्य साक्षी झूठी गवाही दे रहे है। और साक्षीगण परशा सिंह दर्शन सिंह ने पुलिस से मिल कर झूठा मुकदमा कायम करा दिया।

4. यह कि प्रार्थी विवाह के उपरान्त अपनी पत्नी के साथ प्रेमपूर्वक सहवास करता रहा जिसके फलस्वरुप प्रार्थी की पत्नी के सन्ताने उत्पन्न हुई। प्रार्थी की पत्नी एक चरित्रवान स्त्री थी।

अतः श्रीमान् जी से प्रार्थना है कि प्रार्थी का लिखित कथन सामिल पत्रावली करने की कृपा की जावे।

दिनांक

प्रार्थी

24.12.05

नि0 अं0 चरन सिंह
चरन सिंह
ह0 अप0
द्वारा रा..... एड0
एम0 ई0 कस0 क्यूरी"

11. The trial court, by the impugned judgment and order dated 12.01.2006, held that from the prosecution evidence it is established that in the night of the incident, the appellant killed his wife by strangulating her and that the appellant being husband of the deceased, living with her, has given no explanation as to in what

other manner the deceased was killed, accordingly, the appellant is liable to be convicted and sentenced, as above. While writing its judgment, in paragraph no.16 and 17 of the judgment, the trial court dealt with the plea of the appellant that, because he was deaf and dumb, he could not put his defence properly. In this context, the trial court held that the accused was not mentally weak and could communicate verbally, in a stuttering manner, as well as by gestures and, therefore, could defend himself. While holding so, it relied on its own observations, the record and the statement of PW-4.

12. We have heard Sri Subedar Mishra for the appellant; Sri J.K. Upadhyay, learned A.G.A., for the State; and have perused the record.

SUBMISSIONS OF THE APPELLANT

13. The submission of the learned counsel for the appellant is that it was proved on record that the appellant is a deaf and dumb person as this position is admitted to the prosecution witnesses of fact, namely, PW-1, PW-3 and PW-4, and a letter was also written by the Investigating Officer to the Chief Medical Officer for medical examination of the accused as he was deaf and dumb. The said letter dated 17.08.2004 is there on record as Paper No. 11/35 and it was put to PW-6 during cross-examination wherein, he admitted that the said letter was sent by the I.O. to the Chief Medical Officer, Pilibhit. The letter dated August 17, 2004 is being extracted below:-

"सेवा में,
थानाझारा – P.B.T.
मुख्य चिकित्साधिकारी
पीलीभीत

विषयः– मु0 अ0 सं0 54/04 धारा 302 IPC बनाम अभि0 चरन सिंह S/O गुलशेर सिंह R/O टाटरगंज थाना हजारा P.B.T. के गूंगे बहरे की जांच कर परिणाम से अवगत कराने विषयक।

महोदय,

निवेदन है कि थाना स्थानीय पर दिनांक 28.06.04 को अभि0 चरन सिंह S/O गुलशेर सिंह R/O टाटरगंज थाना हजारा जि0 पीलीभीत के विरुद्ध मु0 अ0 सं0 54/04 धारा 302 IPC का अभियोग पंजीकृत होकर विवेचना प्रचलित की गयी दौराने विवेचना अभि0 चरन सिंह उक्त का गूंगा, बहरा होना प्रकाश में आया। अभि0 चरन सिंह आज गिरफ्तार किया गया है जो न तो बोल पाता है और न ही सुन सकता है ऐसी दशा में अभि0 चरन सिंह के गूंगे/बहरे की जांच/परीक्षण होना अति आवश्यक है।

अतः अनुरोध है कि अभि0 चरन सिंह उपरोक्त की गूंगे/बहरेपन की जांच कर परिणाम से अवगत कराने की कृपा करें।

आख्या सेवा में प्रेषित हैं।

दिनांक अगस्त 17. 04

ह0 अप0
S.O.
17.8.04
PS हजारा
थानाध्यक्ष
हजारा (पीलीभीत)"

14. By citing the above letter, the learned counsel for the appellant submitted that despite the said request and a clear-cut statement made before the trial court that the accused is deaf and dumb, no medical examination of the accused was conducted and no sign language interpreter was provided to the accused either for getting his statement recorded under Section 313 Cr.P.C. or to enable him to communicate with his lawyer for setting up proper defence, and to enable an effective cross-examination. This, therefore, caused serious prejudice to the appellant, thereby, vitiating the trial. It has been submitted that the whole case turns on the ocular evidence of PW-3 and PW-4. Admittedly, the children who had reached the age of understanding were not produced. The eye-

witnesses stated that the mother and father of the accused were there, but they have not been examined. Noticeably, the body of the deceased carried no injuries except on her neck which is suggestive of the fact that she might have been strangulated with the help of others, who might have held her hand and legs so that she could offer no resistance. He further submits that it is quite possible that if the facility of a sign language interpreter had been provided to the accused, the accused might have explained that on the night of the incident he was not even there at the house and was elsewhere. Thus, not providing an interpreter to the accused has resulted in serious miscarriage of justice.

15. It has further been submitted that the entire prosecution story does not inspire confidence as the prosecution case is that the accused used to accuse the deceased of bad character but, if the accused was deaf and dumb, how would he be able to level those allegations and, if he did level those allegations, how would others come to know of it. Further, the prosecution case that the accused used to suspect and taunt his wife is not substantiated; because, PW-3 and PW-4 have not informed the informant or anybody else in respect of such accusations. He submitted that at the spot only one cot was noticed; if there was just one cot there, where was the accused sleeping because the other cot, according to PW-4, was of father and mother of the accused. This suggests that the accused was not even there at home when the deceased died. It has also been submitted that the investigating officer, who arrested the accused, has not been examined because he could have disclosed as to from where and in what circumstances the accused was arrested. As, admittedly, the accused was not given the benefit of sign language interpreter, which ought to be available to a deaf and dumb person to enable him to render his explanation, the accused was seriously prejudiced as he was not able to disclose the circumstances in which he was arrested and whether he was there at the spot or elsewhere. Equally, at the time of framing of charge, the accused did not have a counsel to represent him because when the witness PW-1 was tendered for cross-examination, the Court discovered that the accused was unrepresented therefore, the Court offered and provided him services of an Amicus Curiae. Under the circumstances, even the recording of statement of the witnesses in accused's presence was meaningless as how will he understand as to what the witnesses were saying. Similarly, if the benefit of a sign language interpreter was not provided to the accused at the time of recording his statement under Section 313 Cr.P.C., how would he be able to understand as to what incriminating circumstances appeared against him. It has been submitted that, it appears, by guess work, the statement of accused has been recorded under Section 313 Cr.P.C. This vitiates the entire trial.

16. On merits, it was argued that the prosecution story does not inspire confidence inasmuch as, admittedly, the village had no electricity, the witnesses are stated to have seen the incident in the light of a torch which was never produced before the Investigating Officer and was never part of the record. Further, the site plan did not disclose the route taken by the accused to escape from the scene. Meaning thereby that the eye-witnesses had not seen the incident and, therefore, it is a case, where, with ill motive, to grab the land of the appellant he has been implicated, which is borne out from the statement of PW-4, where he admits that PW-4 is ploughing the

field of the appellant. Thus, in a nutshell, the submissions of the appellant could be summarised as follows:-

(a) The FIR is highly delayed; the prosecution has suppressed evidence by not examining vital witnesses, namely, mother and father of the accused-appellant as well as her children, who were all sleeping at the place where the deceased was killed. More so, when, according to own case of PW-3 and PW-4, the children were there and crying. Even according to I.O. (PW-6), the children were sleeping there. Yet, their statement was not recorded which means that the investigating agency did not try to verify the allegations;

(b) The ocular evidence does not inspire confidence inasmuch as, admittedly, the incident occurred on a dark night, the body of the deceased showed no marks of resistance, suggesting that she was caught hold by someone and some other person strangulated her. This circumstance renders the ocular account untrustworthy;

(c) That the appellant was deprived of the right of defence as he was not provided services of a sign language interpreter despite the fact that he was deaf and dumb and, that too, to the knowledge of the Court yet, despite application and information to the Court that he was deaf and dumb, the Court did not direct for his medical examination to ascertain whether he was in a position to understand and communicate; and

(d) That the endorsement at the bottom of the statement recorded under Section 313 Cr.P.C. that it was recorded with the help of gestures after being satisfied as to what the accused wanted to communicate, is contrary to the order recorded on the order-sheet that the accused could communicate in low tones and that his statement was recorded with the help of his counsel and the ADGC. All of this would suggest that there was no serious effort to understand the disability of the accused and to record his statement.

SUBMISSIONS ON BEHALF OF THE STATE

17. **Per contra**, the learned A.G.A. submitted that though PW-1, PW-3 and PW-4 stated that the accused was deaf and dumb but, from their testimony it is clear that the accused could communicate in low tones and was not of a weak mind. Moreover, the court recorded accused's statement under Section 313 Cr.P.C. after being satisfied that what the accused wanted to communicate, he had communicated. Hence, there was no miscarriage of justice even if there had been no formal medical examination of the accused to ascertain whether he could hear and communicate. He further submits that even if the facility of sign language interpreter was not provided to the accused that, by itself, would not vitiate the judgment and order of the trial court as there is a legal presumption that all official acts have been performed in accordance with law unless proved otherwise. He submits that since there is an endorsement of the presiding officer of the court that the statement under Section 313 Cr.P.C. was recorded with the help of the advocates after understanding the gestures and the utterances made by the accused in low tones and in a lisping manner, there was substantial compliance of the legal provisions in that regard and, therefore, the trial did not vitiate.

18. On merits, the learned A.G.A. submitted that this is a case where the wife had died in the night on account of strangulation; that the presence of the appellant is proved by ocular account,

burden was heavy on the accused to explain the circumstances in which she had suffered injuries but there appears no explanation in what other manner she suffered the injuries and, in fact, there was not even a denial in respect of his presence there, therefore, the trial court was justified in recording conviction.

ANALYSIS

19. Having noticed the rival submissions, before examining the merit of the prosecution case, we deem it appropriate to first examine the merits of appellant's counsel's submission that the trial vitiated because, firstly, no medical examination of the appellant with regard to his speech and hearing disability was conducted to ascertain whether, without the help of a sign language interpreter, the trial could have proceeded against the accused and, secondly, whether in absence of the facility of a sign language interpreter to the appellant, the appellant was seriously prejudiced in setting up his defence, resulting in complete miscarriage of justice. Before we proceed to test the aforesaid submission, we must first examine whether the appellant is deaf and dumb, if so, to what extent; and whether, in the facts of the case, without medical examination of the accused-appellant in respect of his disability, the trial court could have proceeded on court's own understanding of the issue, if not, whether it vitiates the trial.

20. Before we proceed to ascertain whether the accused-appellant was deaf and dumb and the consequences of him being so, it would be useful to first examine the law governing trial of deaf and dumb accused. Section 318 of the Code of Criminal Procedure, 1973, which is pari materia section 341 of the Criminal Procedure Code, 1898 (old Code), provides as follows:

"S. 318. Procedure where accused does not understand proceedings.- If the accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit"

21. Interpreting section 341 of the old Code, in **Emperor V. Deaf and Dumb, AIR 1917 Bombay 288**, it was observed that though great caution and diligence are necessary in the trial of a deaf and dumb person yet, if it be shown that such person had sufficient intelligence to understand the character of his criminal act, he is liable to punishment. In **Emperor V. Ulfat Singh, AIR 1947 Alld 301,** a single judge Bench of Allahabad High Court, interpreting section 341 of the old Code observed: *"It would appear from the section that the Court has first to find whether the accused can be made to understand the proceedings. If the Court finds that he cannot it may proceed with inquiry or trial, but proceedings have to be forwarded to the High Court with a report of the circumstances of the case for suitable orders by the High Court."* The court went on to observe that there is no provision in the Indian Penal Code under which accused could be exempted from punishment merely because he is deaf and dumb. The court further observed that in such kind of cases, *the Courts have to do their best to see that the trial is a fair trial and the accused gets a chance of putting up such*

defences as he may have. The above view has been noticed and followed by a Division Bench of the Bombay High Court in **State V. Radhamal Sangatmal Sindhi, AIR 1960 Bombay 526,** wherein it was observed that: *"the Court trying such an accused will be directed to see that he has the necessary legal assistance, that the trial proceeds on the basis that the accused has pleaded not guilty to the charge, and that all possible defences open to him in the circumstances of the case are considered."* A Division Bench of Kerala High Court **In re: Padmanabhan Nair Narayan Nair, AIR 1957 Kerala 9,** in respect of holding trial of a deaf and dumb person clarified the law further, by observing that *"it is court's duty to make a proper endeavour to see whether the accused can be made to understand the proceedings. If the Judge finds that the accused can be made to understand the proceedings the trial must proceed in the ordinary way. If the trial proceeds in the ordinary way the court can pass sentence if the accused is found guilty and convicted. However, if it is found that the accused cannot be made to understand the proceedings the court can convict him if the evidence warrants it, but it cannot pass sentence against him. The court must forward the proceedings to the High Court to pass such orders as the High Court thinks fit."*

22. From the decisions noticed above, the law as it stands is that there is no bar to proceed against a deaf and dumb accused on a charge of a criminal offence. But, whenever a criminal proceeding is drawn against a deaf and dumb person, the endeavour should be that he understands the proceedings. If the court finds that he understands the proceedings, the trial must proceed in the ordinary way. However, while doing so, courts have to see to it that the trial is fair and the accused gets a chance of putting up such defences as he may have.

23. In the case at hand, the court below had satisfied itself that the accused could communicate, though in low lisping tone, and could understand the proceeding. This satisfaction is reflected in the order sheet of the trial court as well as the impugned judgment. The finding returned by the trial court in that regard has not been questioned in the grounds of appeal. No doubt, during the course of cross-examination, the I.O. (PW-6) was confronted with an application moved by the second I.O. for medical examination of the accused in respect of his disability, but, during trial, no application for medical examination of the accused in respect thereto has been made, or, at least, brought to our notice, even though the appellant was represented by a counsel. Interestingly, after oral examination, under section 313 CrPC, the appellant submitted a written statement. In that written statement, dated 24.12.2005, he stated that he is deaf and dumb therefore, he could not place his defence properly before the police. This written statement no where stated that he could not understand the evidence led against him during the course of trial or that he needed a sign language interpreter to place his case properly before the court. There is also no prayer in that written statement for his medical examination. Notably, prior to submission of written statement, dated 24.12.2005, the court, after personally examining the accused, on 21.12.2005 had recorded its satisfaction that the accused is in a position to understand and can communicate with the help of gestures and in a low lisping tone. We also notice from record that at the instance of the appellant

all the prosecution witnesses were cross-examined at length, on various aspects, negating the possibility of him not being able to properly instruct his counsel because of his professed disability. Further, there appears no application of the counsel representing the appellant to provide a sign language interpreter to enable the counsel to communicate with the appellant or for the appellant to communicate with the court. Under illustration (e) to section 114 of the Evidence Act, 1872 there is a legal presumption that judicial and official acts have been regularly performed. In these circumstances once the court had recorded its satisfaction with regard to the ability of the accused to understand and communicate, and there being no application before that court questioning its satisfaction or praying for services of a sign language interpreter for the accused, in our view, an unrebutted legal presumption with regard to the regularity of the judicial act would operate against the accused-appellant. Thus, keeping in mind the legal presumption as also the statement of PW-4 that the appellant is in a position to understand and communicate and is not of weak mind, we are satisfied that the trial did not vitiate for lack of appointment of a sign language interpreter for the accused-appellant or for any other like reason. In addition to above, we notice from the record that the appellant has extensively put forth his defence not only by undertaking gruelling cross-examination of the prosecution witnesses but also by making his statement, both oral and written, under section 313 CrPC. Consequently, we reject the defence plea that the appellant was seriously prejudiced in putting forth his defence on account of his disability and non appointment of a sign language interpreter to assist him.

24. Now, we shall examine the merit of the prosecution case. In this regard, the submissions on behalf of the appellant are that it was a night incident, other than torch light no source of light is professed, whereas, the torch has not been shown to the I.O.; the FIR is delayed; family members of the deceased including children, who were there, have not been examined; and all of this, coupled with the delay in lodging the report, would suggest that no body witnessed the incident, the prosecution story is contrived with ill-motives to grab the property of the appellant.

25. In so far as the delay in lodging the FIR is concerned, the explanation offered is that the eye witness went to inform the brother of the deceased who resided elsewhere. After receipt of information, the brother went to deceased's place to confirm the news. When he confirmed the news, he went to lodge the report. The explanation offered is not an eyewash. It appears realistic considering that the informant, the witnesses and the accused are men of ordinary means. Notably, the informant travelled from one place to the other on a bicycle carrying his other sister. No doubt, the eye witnesses could themselves have lodged the report but, ultimately, it is their outlook. Ordinarily, people do not like to interfere in others' family matter. Indisputably, the incident was post mid-night and early morning the eye witness went to inform the brother of the deceased. In these circumstances, though the FIR may be a bit delayed and could have been lodged much earlier but, in the facts of the case, where husband of the deceased is an accused for the murder of the deceased, it does not, by itself, give rise to an adverse inference against the truth of the prosecution case.

26. In so far as absence of light to enable the witnesses to witness the incident is concerned, no doubt, neither the torch used, as a source of light, was shown to the I.O. during investigation, nor was taken into custody, but we must not be oblivious of the fact that the eyewitnesses and the deceased resided in their respective huts in close proximity to each other. Notably, the proximity of the hut of the deceased/accused with those of the eye witnesses have not been disputed rather, it is proved by oral evidence as well as the site plan prepared by the I.O. on the basis of spot inspection. The witnesses came out of their huts on hearing noises and from close proximity they witnessed the accused pressing the neck of the deceased. The deceased died due to strangulation. Further, the incident is of the year 2004, by then, presence of torches in areas where there is no electric supply, as was the village concerned, is a common feature. In these circumstances, the oral deposition in respect of use of torch is not liable to be discarded merely because the I.O. did not question the witnesses with respect to the source of light.

27. In so far as non-examination of children and other family members of the deceased is concerned, suffice it to say that where the accused is ones own family member, witnesses of that family are reluctant to give evidence. More over, children rarely go against their parents. Therefore, their non-examination, in the facts of the case, is not fatal to the prosecution case.

28. Having dealt with the arguments advanced on behalf of the appellant, what clinches the issue against the appellant is that he is admittedly the husband of the deceased and there is no denial of the appellant with regard to him residing with his wife at the time and place of the incident. Most importantly, the deceased died due to strangulation. There is no serious challenge to the incident occurring at the time set out by the prosecution. Even the autopsy surgeon accepts the possibility of death occurring at the time set out by the prosecution. Though, a feeble attempt is there to point out that body was found in the field but that is not substantiated by any evidence. The body was noticed on a cot at a place where the hut of the accused was there, which fact was proved by the oral testimony as well as the site plan prepared by the I.O. after inspecting the spot. Further, from the statement of I.O. it is clear that the appellant had escaped from the spot and for several days he was absconding. In fact, a search had to be made for him and, ultimately, after recourse to coercive processes, appellant's arrest could be secured. All these are highly incriminating circumstances which, by themselves, complete a chain of circumstances pointing towards the guilt of the appellant and in absence of cogent explanation, could form the basis of conviction. Whereas, to explain this chain of incriminating circumstances, nothing has come, either through cross-examination, or by way of explanation under section 313 CrPC, that the appellant resided elsewhere or worked for gain elsewhere and was not present at the scene of crime in the night of the incident. Notably, accused-appellant in the written statement under section 313 CrPC has admitted that the deceased was his wife and they had cordial relationship out of which they had several issues, which, in absence of any specific statement of separation, or claim of residing elsewhere in connection with work, would give an impression that the appellant, as husband, resided with the deceased. Thus,

we do not find a good reason to disbelieve the prosecution case or to discard the prosecution evidence which proves the guilt of the appellant in the murder of his wife beyond reasonable doubt.

29. Consequently, we affirm the judgment and order of the trial court and the appeal is, accordingly, **dismissed.** The appellant is in jail and shall serve out the sentence awarded to him without prejudice to his right to apply for remission.

30. Let the record of the court below along with certified copy of this order be sent to the trial court below for information and compliance.

(2022)04ILR A69
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.03.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Criminal Appeal No. 1689 of 2021

Kamran ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Anil Kumar Pandey

Counsel for the Respondent:
G.A.

Criminal Law- Narcotic Drugs And Psychotropic Substances Act, 1985- Section 8/21(b)- Conviction for a sentence of five years imprisonment and with fine of Rs. 25,000/- Application for confession of the aforesaid offence - Quantum of sentence- Doctrine of proportionality- The judicial trend in the county has been towards striking a balance between the reform and punishment. The protection of society and stamping out a criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool maintain order and peace, should effectively meet challenges confronting the society. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system. In our country, the reformative and corrective approach has been adopted in criminal justice administration and thus so far as the instant case is concern, there is nothing on record to show that the accused-appellant is incapable for being reformative - Conduct and behavior of the appellant shows that he is liable to be reformed and there is no threat to the society from the appellant- Sentence of five years rigorous imprisonment awarded to the appellant is reduced by four years and as such one year sentence as well as the fine of Rs. 25,000/- and in case of default further six months additional rigorous punishment is being upheld.

Settled law that the reformative and corrective approach of criminal justice has been adopted in our country and the same has to be balanced with the proportionality of the punishment imposed, hence the conduct and behaviour of the accused would be a relevant factor in modifying the sentence of the accused. (Para 15, 16, 17)

Criminal Appeal disposed of. (E-3)

Case law/Judgements relied upon:-

1. S.K. Sakkar Vs The St. of W.B, Crl. Appl. No. 1661 of 2010

2. Shanti Lal Vs St. of M.P.,(2007) (2) EFR 702

3. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

4. St. of Punj. Vs Bawa Singh,Crl. Appl. No. 90 of 2015 arising out of SLP (Crl.) No. 5382 of 2014

5. Sham Sunder Vs Puran, (1990) 4 SCC 731

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Anil Kumar Pandey, learned counsel for the appellant, Sri Anirudh Kumar Singh, learned AGA-I for the State and perused the record.

2. The present criminal appeal has been preferred by the appellant against the judgement and order dated 13.08.2021 and punishment order dated 25.08.2021 passed by Special Judge (N.D.P.S. Act), Court No. 10, Barabanki in Special Sessions Trial (Special Criminal Case) No. 28/2014 (State of U.P. vs. Kamran) arising out of Case Crime No. 358/2013 relating to P.S. Zaidpur, District Barabanki, whereby he was convicted with sentence under Section 8/21(b) of N.D.P.S. Act for a period of five years rigorous imprisonment and with fine of Rs. 25,000/- and in case of default of payment of fine further six months additional imprisonment is awarded.

3. As per prosecution story, present appellant including one other co-accused person namely Anwar was arrested on 17.11.2013 and a contraband narcotic drug i.e. 100 gm of morphine was recovered from each of the accused. He submits that infact two FIR's were lodged one is bearing No. 357 of 2013 and the next one is bearing no. 358 of 2013. The aforesaid recovery was shown from both the accused persons by a common recovery memo. Common investigation was done and charge sheet was filed bearing no. 13 of 2013. He submits that trials were separately done and one of the trial, which was proceeded in the matter of Anwar i.e., Sessions Trial No. 27/2014, wherein, Anwar had confessed the guilt and was awarded a punishment of one year rigorous imprisonment and with fine of Rs. 15,000/-. So far as the present appellant is concerned, the trial proceeded in S.S.T. No. 28/2014. During the trial appellant was enlarged on bail. At the level of framing of the charges, the present appellant denied the charges and chose to contest the case and in such an event, trial proceeded in respect with the present appellant.

4. The learned counsel for the appellant contended that infact since 2013 no witness was produced by the prosecution up till 2021 and the appellant was running on each and every date and appeared before the court as and when the case was fixed. He also added that prosecution had failed to produced any witness and as such it is a case where there is no any witness was produced for examination. He also submits that later on, when under the compelling circumstances, he moved an application for confession of the aforesaid offence, the trial proceeded in view of the application of confession so submitted.

5. He submits that on 11.08.2021, statement of present appellant was recorded under Section 313 of the Cr.P.C. and after considering the statement of the present appellant as well the material on record the trial court has passed the judgement dated 13.08.2021 and punishment order was passed on 25.08.2021. By the aforesaid judgement the sentence of 5 years rigorous imprisonment and fine of Rs. 25,000/- was awarded against the appellant.

6. Learned counsel for the appellant has argued that the trial court has failed to appreciate the evidences which was adduced before it. It was also not considered by the trail court that there is non compliance of mandatory provision of Section 50 of N.D.P.S. Act as the appellant

was not produced before the Gazetted Officer or Magistrate for his search. The said occurrence was taken place on 17.11.2013 and after framing of the charges, not a single witness or evidence was produced before the court by prosecution in spite of full co-operation of the appellant. The quantum of sentence has also been fixed harshly. It has also not been considered by the trial court that the appellant had no criminal history and the identically situated co-accused who confessed his guilt was awarded one year sentence in the similar circumstances. Learned counsel for the appellant further argued that provision of Section 52, 55 and 57 of the N.D.P.S. Act was not complied with and the prosecution had failed to prove that the alleged contraband substance was under the safe custody. The place of occurrence was also highly suspicious and the provision provided for search and seizure in Notification No. 1/88 and 1/89 issued by the Central Government was also not been complied with. Further the alleged contraband substance was not sent for chemical examination within 72 hours from the time of occurrence and sampling is not done as per law. He submits that infact there is no any independent eye witness of the alleged recovery to support the prosecution version and there is lack of chain of evidences to prove the link of offence.

7. It was further contended that infact there is no minimum punishment prescribed under Section 8/21 (b) of N.D.P.S. Act though that can be extended up to 10 years of imprisonment. There are several authorities of the Hon'ble Apex Court as well as of this Hon'ble Court that in case of confession of the guilt, the liberal view would be adopted by the Court's. He also argued on the issue of proportionality of the sentence awarded as he has drawn attention towards one of the identical co-accused namely Anwar who had confessed his guilt at the level of framing of charges and therefore awarded a punishment of one year rigorous imprisonment as well as Rs. 15,000/- fine but so far as the present appellant is concerned after running about more than seven years from Court to Court, he chose to confess the guilt and thus after confession of the guilt, the court awarded five years rigorous imprisonment and Rs. 25,000/- fine which is a hard blow and it is not in consonance with the settled principles of reform of the prisoners.

8. Further he added that in fact the Hon'ble Apex Court in case of **S.K. Sakkar vs. The State of West Bengal in Criminal Appeal No. 1661 of 2010** has held that it's manifest from Section 20 (i) of N.D.P.S. Act (as it stood in 1997) that even though a maximum sentence of five years rigorous imprisonment and a fine of Rs. 50,000/- was prescribed but there was no minimum mandatory sentence and as such the legislature had its own wisdom left it to the discretion of a court to award the minimum sentence albeit guided by the well known principles on the proportionality of sentence which is extracted below:

10. We find some merit in the submission noticed above. It may be noted that the appellant committed the crime in the year 1997, i.e., much before the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 came into force. The punishment for contravention in relation to cannabis plant or any other provision of the NDPS Act, in his case, would thus be regulated by the unamended Section 20 of the NDPS Act, as it stood before the amendment of 2001 and which reads as follows:

"20. Punishment for contravention in relation to cannabis plant and cannabis. Whoever, in contravention of any provision of this Act or any rule or order made or condition of license granted thereunder.

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable,

(i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;

(ii) where such contravention relates to cannabis other than ganja, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees." (emphasis supplied)

11. It is manifest from Section 20(i) of NDPS Act (as it stood in 1997), that even though a maximum sentence of five years RI and a fine of upto Rs. 50,000/- was prescribed but there was no minimum mandatory sentence. The Legislature had in its wisdom left it to the judicious discretion of a court to award the minimum sentence albeit guided by the well known principles on the proportionality of sentence. Taking into consideration the peculiar facts and circumstances of this case, it appears to us that the ends of justice would be adequately met if the appellant's sentence is reduced to the extent of the period he has already undergone. We order accordingly.

9. Referring the aforesaid learned counsel has argued that infact there is no minimum punishment prescribed and therefore the proportionality of the sentence is to be looked into by the court concerned as the legislature has in its own wisdom left it to the discretion of a court concerned. He also referred one of the case **Shanti Lal vs. State of M.P., reported in (2007) (2) EFR 702** wherein Hon'ble Apex Court reduced the sentence in lieu of fine of three years to six months. He further added that in fact the arguments on quantum of sentence is to be heard and in fact it should be as per the doctrine of proportionality as per various settled proposition of law.

10. The learned counsel has also placed reliance in the case of **Mohd. Giasuddin Vs. State of AP,** reported in **AIR 1977 SC 1926**, explaining rehabilitary & reformative aspects and while sentencing it has been observed by the Supreme Court, extracted as follows:-

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by re-culturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal

courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

The Hon'ble Supreme Court has basically focused that anti social behaviour cannot be all time countered by civil laws but by being mild through re-culturization, the same can be achieved. Further the punishment to the injured person and the improvement cannot be adhered with causing injury.

11. After the aforesaid contention, learned counsel for the appellant argued on the quantum of sentence and has submitted that the accused appellant has been in jail prior to trial, for six months and after the trial he is in jail since 13.08.2021. He further submitted that accused has been convicted for a sentence of five years rigorous imprisonment and fine of Rs. 25,000/-. He submits that appellant has served a substantial period and as such accused-appellant should be released on undergone or substantial reduction in sentence may be done.

12. Countering the aforesaid learned AGA-I has very vehemently opposed the contention of the appellant's counsel and submits that learned trial court has rightly appreciated the statements of the witnesses and the evidences adduced by the prosecution and has passed the judgment and order. He also added that though there is no maximum punishment provided under Section 8/21-b but the same may be extended upto 10 years. He submitted that this is an offence which is against the society and as such the court may be harsh even applying the reformative theory of punishment.

13. In support of his contention learned counsel appearing for State has placed reliance on the judgment of Hon'ble Apex Court in case of **State of Punjab vs. Bawa Singh in Criminal Appeal No. 90 of 2015 arising out of SLP (Crl.) No. 5382 of 2014,** wherein it is held that liberal view while imposing inadequate sentence would have an impact of more harm to the justice system and the public confidence in the efficacy of law shall be undermined and there must be a serious threats to the society. The relevant part of the aforesaid judgement is extracted as under:-

8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc."

16. A three-Judge Bench of this Court in Ahmed Hussein Vali Mohammed Saiyed vs. State of Gujarat, (2009) 7 SCC 254, observed as follows:

"99. ... The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to (sic break the) law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against the interest of society which needs

to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

100. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the victim of the crime but the society at large while considering the imposition of appropriate [pic]punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong."

17. We again reiterate in this case that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter-productive in the long run and against the interest of the society.

18. Recently, in the cases of State of Madhya Pradesh vs. Bablu, (2014) 9 SCC 281 and State of Madhya Pradesh vs. Surendra Singh, 2014 (12) SCALE 672, after considering and following the earlier decisions, this Court reiterated the settled proposition of law that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. One should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers.

19. Perusal of the impugned order passed by the High Court would show that while reducing the sentence to the period already undergone, the High Court has not considered the law time and again laid down by this Court. Hence the impugned order passed by the High Court is set aside and the matter is remanded back to the High Court to pass a fresh order in the revision petition taking into consideration the law discussed hereinabove after giving an opportunity of hearing to the parties. The appeal is accordingly allowed with the aforesaid direction.

14. He has further placed reliance in case of **Sham Sunder vs Puran,** reported in **(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 as under:-

"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 and the degree of deliberation

shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

15. Considering the contention of the counsel for the parties and after discussing the law laid down by the Hon'ble Apex Court as well as by the other High Courts, it emerges that basic tenant of criminal law is based on social contract theory that a crime is always against the society and not just against the victim. While prosecuting the perpetrators is necessary to prove his guilt. It is to ensure that the ends of justice are met. There are four established theory in the criminal jurisprudence with regard to awarding punishment i.e., Retributive theory, Deterrent theory, Preventive theory and Reformative theory. Reformative theory is based on concept that every person is capable of being reformed and reintegrated into the society. This is internationally the most acceptable theory of punishment in light of the International Human Rights Law. The Hon'ble Apex Court in **Mohd. Giasudding (supra)** has held that the reformative or the restorative theory of punishment states that the aim of the penal system of a state should be reforms of the criminals and not to purely punish them.

16. The judicial trend in the county has been towards striking a balance between the reform and punishment. The protection of society and stamping out a criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool maintain order and peace, should effectively meet challenges confronting the society. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system. In our country, the reformative and corrective approach has been adopted in criminal justice administration and thus so far as the instant case is concern, there is nothing on record to show that the accused-appellant is incapable for being reformative.

17. In the instant matter, the accused-appellant is in jail since 13.08.2021 and prior to that he has served six months of imprisonment and there is no any other criminal antecedent of the appellant. It is also considerable that every convict is entitled for the advantage of reformative and corrective jurisprudence. Further the appellant was on bail during the pendency of the trial and he did not misuse the liberty of bail so granted. He also kept on appearing on each dates fixed by the trial court and never jumped the bail. All these conduct and behavior of the appellant shows that he is liable to be reformed and there is no threat to the society from the appellant.

18. Considering the facts and circumstances of the case and the submission of learned counsel for the parties, the judgement and order dated 13.08.2021 and order dated 25.08.2021 passed by Special Judge (N.D.P.S. Act), Court No. 10, Barabanki in Special Sessions Trial (Special Criminal Case) No. 28/2014 (State of U.P. vs. Kamran) arising out of Case Crime No. 358/2013 relating to P.S. Zaidpur, District Barabanki whereby the accused-appellant was convicted under Section 8/21(b) of N.D.P.S. Act for a sentence of five years imprisonment and with fine of Rs. 25,000/- and in case of default of payment of fine further six months additional rigorous imprisonment is hereby modified and sentence of five years rigorous imprisonment awarded to the

appellant is reduced by four years and as such one year sentence as well as the fine of Rs. 25,000/- and in case of default further six months additional rigorous punishment is being upheld.

19. With the above modification, the appeal is accordingly disposed off, finally.

20. Office is directed to send the certified copy of this judgment along with lower court record to the court concerned for information and necessary action.

(2022)04ILR A76
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Criminal Appeal No. 3930 of 2016

Mohammad School ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri Syed Irfan Ali, Sri Mohd, Naushad, Smt. Beena Mishra, Sri Praveen Kumar Srivastava, Sri Vijay Prakash Chaturvedi, Sri A.K. Rai

Counsel for the Respondents:
A.G.A.

Section 8/20 of NDPS Act

Criminal Law - Code of Criminal Procedure, 1973- Section 3131- The statement of the accused-appellant under Section 313 Cr.P.C. is not a substantive piece of evidence. It can be used for appreciating evidence lead by the prosecution to accept or reject it. The statement of accused-appellant as stated in statement under Section 313 Cr.P.C. will be taken into consideration in appreciating the evidence of prosecution and in arriving at a conclusion regarding the truthfulness and falsity of the prosecution case.

Settled law that statement of the accused recorded u/s 3131 of the CrPc is not substantive evidence but the same can be used to appreciate the evidence of the prosecution and the truthfulness thereof.

Criminal Law - Narcotics Drugs and Psychotropic Substances Act, 1985- Section 50- The Charas was recovered from the bag which was in his right hand not from his personnel search, therefore, the compliance of Section 50 of NDPS Act was not needed.

Where the recovery of the contraband is made from the bag of the accused and not from his person, then Section 50 of the Act will not be attracted.

Criminal Law - Narcotics Drugs and Psychotropic Substances Act, 1985- Indian Evidence Act, 1872- Section 118, Code of Criminal Procedure, 1973- Section 100 (4) – Absence of public witnesses- effect of- The recovery was made from the accused-appellant without prior knowledge by the police personnels that accused-appellant has Charas and recovery was made all of sudden in a lonely place of grove where no public witnesses were present. In above circumstances, non-joining of public witnesses in search will not affect the prosecution case. Police personnels are competent witness to adduce evidence before the learned court below, therefore, there is no substance in the argument of the learned counsel for the accused-appellant that in absence of independent witness no reliance can be placed.

Where the recovery is sudden and from a desolate spot where independent public witnesses may not be available to the prosecution, then merely because only police personnel were examined as witnesses will not

affect the case of the prosecution adversely as police personnel are also competent witnesses.

Criminal Law - Narcotics Drugs and Psychotropic Substances Act, 1985- Section 52-A - Sending of the entire contraband for chemical examination will not render the recovery of contraband and chemical examination report of forensic science laboratory Ex.Ka-11 as inadmissibility.

Section 52-A of the Act merely provides for the disposal of the seized contraband and lays down the procedure for the same. Hence, sending the entire seized contraband to the FSL will not make the recovery doubtful. (Para 17, 19, 20, 23, 24, 30, 36)

Criminal Appeal rejected. (E-3)

Case law/ judgements relied upon:-

1. Mohammad Mustafa Vs St. of U.P. MANU/UP/0220/2014 (cited)

2. Mohan Singh Vs Prem Singh AIR 2002 SC 3582

3. Dehal Singh Vs St. of H.P (2010) 9 SCC 85

4. St. of MP Vs Ramesh (2011) 4 SCC 784

5. Dharanidhar Vs St. of UP (2010) 7 SCC 759

6. St. of Raj. Vs Parmanand and ors (2014) 85 SCC 662

7. St. of Himachal Vs Pawan Kumar with St. of Raj. Vs Bhanwarlal AIR 2005 SC 2265

8. Sama Alana Abdullah Vs St. of Guj. (1996) 1 SCC 427

9. Anil @ Andya Sadashiv Nandoskar Vs St. of Maha. (1996) 2 SCC 589

10. Pradeep Narayan Madkoonkar Vs St. of Maha. (1995) 4 SCC 255

11. Mohan Singh Vs St. of Har. (1995) 3 SCC 192

12. PP Beeran Vs St. of Ker. AIR 2001 SC 2420

13. Devendera Kumar Mishra Vs St. of UP 1998 Crl (J) 2348 (at page 2350 in paragraph 3)

(Delivered by Hon'ble Mohd. Aslam, J.)

1. Heard learned counsel for the accused-appellant, learned A.G.A. for the State and perused the record.

2. The instant appeal has been filed by accused-appellant under Section 374(2) of Cr.P.C. against the impugned judgement of conviction and order of sentence dated 29.4.2013 passed by Additional Sessions Judge (ECP), Siddharth Nagar in Special Case No.9 of 2011 (State Vs. Mohd. School), arising out of Case Crime No.11 of 2011, under Section 8/20 of NDPS Act, Police Station- Shohratgarh, District Siddharth Nagar, by which the accused-appellant was convicted under Section 20(b)(ii)(C) of NDPS Act, 1985 and was sentenced to undergo rigorous imprisonment for a period of 10 years with a fine of Rs.1,00,000/-, in default thereof, to further undergo imprisonment for two years.

3. The brief facts of the prosecution case are that PW-1 S.I. Dinesh Kumar Yadav, In-charge SOG along with his companion police personnels was busy in patrolling duty near Nepal border for taking care of the area and for preventing of smuggling by a Government Specio Jeep No.UP55-G-0030 and on the way he took along with him S.I. Ram Samujh Prabhakar and Ct. Shriram Sharma from the police booth Shohratgarh. As soon as they reached near the north of grove in Village Dhanaura Mustahkam, they saw a person in the light of Jeep coming from Nepal side with a bag and suddenly he started hiding himself in

the grove to avoid the light of vehicle. On suspicion, he was apprehended with the help of his companion personnel. On being asked the reason of hiding, he told that he is having narcotic substance 'Charas' and told his name as Mohammad School. He was informed that it is his legal right to be searched before Magistrate or Gazetted Officer, thereupon, he stated that he may be searched by him and given his consent for being searched after execution of consent letter Ex.Ka-1. The yellow plastic bag which was in his right hand, was searched and from it four packets of beige coloured plastic on which J.O.R. was written and two packets of yellow plastic were recovered. On tearing the packets, Charas was found and on being weighed by the scale kept in vehicle, it was found to be 5 Kg and 150 gm along with plastic packet. In respect of authorisation for keeping Charas, he could not show any authorization letter. Thereafter, he was told that his act is punishable under Section 8/20 of NDPS Act and was taken in police custody on 4.1.2011 at 19:50 p.m. He was arrested and the arrest memo was prepared Ex.Ka-2. After keeping the recovered narcotic substance Charas in the same bag, it was stitched and was sealed and the sample seal was prepared. On enquiry, it was also told by the accused-appellant that the said Charas was given to him by Thapa at Nepal Taulihwa Border. He has also told that a year ago, he was escaped by digging tunnel from Taulihwa Jail from Nepal along with eight more prisoners. Recovery memo of Charas was ascribed by S.I. Ram Samujh Prabhakar (PW-2) on dictation of S.I. Dinesh Kumar Yadav, which was read and explained to accused-appellant and police perssonels. Thereupon, all police personnels put their signatures on recovery memo (Ex.Ka-3) as witness. The information regarding arrest of accused-appellant was given to the family member of the accused-appellant. He was taken to the police station Shohratgarh and was handed over along with contraband and recovery memo to H.C.P. Dharambir Shahi at 20:30 p.m. On 4.1.2011, H.C.P. Dharambir Shahi has ascribed the Check Report (Ex.Ka-9) at 22:30 p.m. at Police Station Shohratgarh and after making necessary entry in GD (Ex.Ka-10) vide report No.48 , the case was registered as Case Crime No.11 of 2011, under Section 8/20 of NDPS Act and the contraband was kept in the Malkhana after making necessary entry in Malkhana Register (Ex.Ka-6).

4. The investigation of the case was undertaken by S.O./S.I. Anoop Kumar Shukla (PW-5). He copied the check report and GD entry in the case diary. He also copied the consent letter signed by accused-appellant and recorded the statement of informant S.I. Dinesh Kumar Yadav and inspected the place of occurrence and prepared site plan Ex.Ka-7 at the pointing out of S.I. Dinesh Kumar Yadav. The entire contraband recovered from the accused-appellant was sent to Forensic Science Laboratory, Lucknow along with sample seal and docket Ex.Ka-4 by Ct. Babban Singh (PW-3) and entry in this respect was made in Case Diary on 16.1.2011 (Ex.Ka-5). Contraband was received on 17.1.2011 at Forensic Science Laboratory, Lucknow at Sl. No. 347. On physical and chemical analysis vide report dated 17.1.2011 Ex.Ka-11, the contraband was found to be Charas. He recorded the statements of accompanying police personnels as witnesses of recovery and after completing the investigation, the charge-sheet (Ex.Ka-8) was submitted against the accused-appellant Mohd. School.

5. The cognizance of offence punishable under Section 8/20 NDPS Act was taken by the then learned Sessions Judge, Siddharth Nagar on 30.3.2011 against the accused-appellant and the copies of police papers were given to the accused-appellant in compliance of Section 207 Cr.P.C. After hearing learned counsel for the parties, charge of the offence punishable under Section 20(b)(ii)(C) of NDPS Act was framed against the accused-appellant to which he has pleaded not guilty and claimed to be tried.

6. In order to prove its case, prosecution has examined informant SI Dinesh Kumar Yadav as PW-1 and S.I. Ram Samujh Prabhakar as PW-2 to prove factum of recovery of contraband, recovery memo Ex.Ka-3, consent letter Ex.Ka-1 and memo of arrest Ex.Ka-2. Prosecution has also examined Ct. Babban Singh as PW-3 to prove carrying of contraband along with sample seal and docket Ex.Ka-4, safe custody and entry of GD Ex.Ka-5. Prosecution has also examined Ct. Ram Agya Prasad as PW-4 to prove the safe custody of the contraband at police station and its entry in Malkhana Register Ex.Ka-6. Prosecution has also examined I.O./S.I. Anil Kumar as PW-5 to prove site plan Ex.Ka-7, charge-sheet Ex.Ka-8 and step taken in investigation. He proved by secondary evidence the check report Ex.Ka-9 and GD entry registering the case Ex.Ka-10. The report of Forensic Science Laboratory Ex.Ka-11 was also tendered by prosecution.

7. The statement of the accused-appellant under Section 313 of Cr.P.C. was recorded by learned court below, wherein he has stated that the witnesses are deposing falsely against him. Regarding deposition of Ram Agya Prasad (PW-4) relating to entry made by him in Malkhana Register, the accused-appellant has stated that false entry was made in the Malkhana Register. With regard to the Investigation, he stated that fake charge-sheet was filed by conducting fictitious investigation against him. It is stated that he was picked up from Sukrauli Bazar by police in presence of public and was kept there for two days and had taken his mobile and cycle. Thereafter, he was sent to police station Siddharth Nagar, where he was kept for four days and thereafter, he was taken to the police station Jogiya where he was kept for 22 days. After that by planting false recovery, he was booked in this case. The accused-appellant has not examined any witness in his defence.

8. After hearing learned counsel for the parties and appreciating the evidence on record, learned court below has held that the testimonies of the prosecution witnesses are liable to be relied on and it is proved beyond reasonable doubt that on 4.1.2011 at 19:50 p.m. in the grove in the north of Village Dhanaura Mustahkam 5 Kg and 150 gm of Nepali Charas was recovered from the accused-appellant for which he has no authorization letter and convicted him for offence punishable under Section 20(b)(ii)(C) of NDPS Act and sentenced him to undergo rigorous imprisonment for 10 years with a fine of Rs.1,00,000/-, in default thereof, to further undergo imprisonment for two years by impugned judgement of conviction and order of sentence. Feeling aggrieved by it, the instant appeal has been preferred by the accused-appellant Mohd. School.

9. It is contended by learned counsel for the accused-appellant that recovery memo does not bear the signature of the witnesses of the recovery. It is further

contended that no independent witness was made by the police party to join the search of the accused-appellant, therefore, the recovery is doubtful. It is further contended that accused-appellant has not signed on the consent letter and his signature on recovery memo does not match with his signature on consent letter. It is further contended that on the recovery memo there is over writing on number 20 of 8/20 NDPS Act as earlier it was written as 8/22 NDPS Act which indicates that recovery memo is fabricated and doubtful. It is further contended that before search procedure the provision of Section 50 of NDPS Act was not followed. It is further contended that the sample seal, by which the contraband was sealed at the time of recovery, was not produced before the court below, therefore, it is not proved that the contraband, which is alleged to have been recovered from the accused-appellant, was produced before the court below and on this ground alone the accused-appellant is entitled for taking the advantage of acquittal. He relied on the law laid-down by ***Hon'ble High Court Allahabad in "Mohammad Mustafa Vs. State of U.P. MANU/UP/0220/2014".*** It is further submitted that the impugned judgement of conviction and order of sentence dated 29.4.2013 passed by learned court below is against law and is liable to be set aside. It is further contended that the sentence awarded to the accused-appellant is too severe and excessive. It is further contended that the accused-appellant has neither committed the alleged offence nor the charges have been proved against him beyond reasonable doubt, and therefore, the court below has committed manifest error and illegality in convicting and sentencing the accused-appellant in the present case. It is further contended that the prosecution has failed to prove its case beyond reasonable doubt. It is further contended that there are so many doubts and suspicion regarding the alleged recovery of the contraband from the accused-appellant, therefore, the benefit of doubt might have been extended in favour of the accused-appellant by the learned court below. It is further contended that police has prepared a forged and fabricated consent letter by putting a forged signature of the accused-appellant because the accused-appellant has not signed the consent letter. It is further contended that from the recovery memo it transpires that nothing was recovered from his personal search except alleged recovery of contraband from the bag which is alleged to have in his right hand. It is further contended that the case against accused-appellant was not proved beyond doubt and the impugned judgement of conviction and order of the sentence passed by learned court below is liable to be set aside and accused-appellant is liable to be acquitted.

10. Learned A.G.A. for the State has opposed the arguments advanced by the learned counsel for accused-appellant and has contended that the recovery of contraband from the possession of the accused-appellant is proved from the statements of S.I. Dinesh Yadav (PW-1) and Ram Samujh Prabhakar (PW-2). It is further contended that from the statement of PW-1 it is proved that the recovery memo was prepared on the spot on his dictation to S.I. Ram Samujh Prabhakar (PW-2) and was witnessed by companion police personnels. It is further contended that the safe custody of keeping the contraband after entering in the Malkhana Register is proved by the statement of Ct. Ram Agya Prasad (PW-4). He had also proved the extract of Malkhana Register Ex.Ka-6. It is further proved from the statement of Ct. Babban Singh (PW-3) that

he had brought the contraband along with docket Ex.Ka-5 to the Forensic Science Laboratory for its chemical analysis. It is further contended that he has also proved the entry of GD dated 16.1.2011, by which the contraband was taken out from the Malkhana and brought to Forensic Science Laboratory. It is also contended that on physical and chemical examination of the contraband was found to be Charas which is a narcotic substance. It is further contended that the accused-appellant was apprehended all of sudden with a bag containing the contraband in his right hand, therefore, there was no necessity for compliance of Section 50 of NDPS Act. It is further contended that the accused-appellant was searched after giving his consent by signing the consent letter stating therein that he does not want to be searched before Magistrate or Gazetted Officer and he has trust upon the informant and wants to be searched by him. It is further contended that after drawing proforma of the consent, the accused-appellant has signed on it, thereafter he was searched. He has further contended that the accused-appellant has deliberately missed "0' in between 'Mo' and 'School' on the consent letter so that he may create false defence. It is further contended that the contraband was recovered from the accused-appellant in the lonely place so no independent witness was available to join the search. It is further contended that the recovery of the contraband is corroborated by the testimony of SI Ram Samujh Prabhakar (PW-2). It is further contended that the contraband was produced by S.I. Dinesh Kumar Yadav (PW-2) in the court and got it exhibited as material exhibit. It is further contended that the safe custody of the contraband in Malkhana of the police is proved by the prosecution as well as sending the contraband to Forensic Science Laboratory is also proved by the prosecution. It is further submitted that learned court below has rightly held the accused-appellant guilty and convicted and sentenced him in accordance with law. It is further contended that the minimum sentence prescribed by law was awarded to the accused-appellant. It is further contended that the judgement of conviction and order of sentence passed by court below suffers from no illegality, therefore, the appeal is liable to be dismissed.

11. I have given thoughtful consideration to the contentions raised by learned counsel for the parties and have gone through the record. After considering the submission of learned counsel for the parties and perusing the lower court record as well as the record of appeal, the following questions are necessary to be determined for deciding this appeal:-

(i) Wheather the 'Charas' which is alleged to have been recovered from the accused-appellant has been falsely planted by the police officer and accompanying police personnels upon the accused-appellant and the signature of the accused-appellant on the consent letter was forged by the police personnels?

(ii) Whether the compliance of Section 50 of NDPS Act is needed and if it is so whether the compliance of Section 50 of NDPS Act has been made?

(iii) Whether the signature of the accused-appellant on the consent letter Ex.Ka-1 is forged?

12. In this case S.I. Dinesh Kumar Yadav (PW-1) in his testimony has stated that on 4.1.2011, he was posted as Incharge of SOG at Siddharth Nagar and was going towords the border of Nepal on patrolling duty for taking care of his area by

Government Spacio Jeep No.UP50-G-0030 along with his companion Ct. Ravindra Mohan Pandey and Ct. Panna Lal for prevention of smuggling and on the way he took along with him S.I. Ram Samujh Prabhakar and Ct. Shriram from police Booth Shohratgarh. When they reached near the north of the grove of Village Dhanaura Mustahkam, in the light of the vehicle they saw a person with a bag in his hand coming from the side of Nepal, who started hiding himself in the grove to avoid the light of the vehicle. On being suspicious, he was apprehended from the grove with the help of his companion police personnels and on being asked his name and address as well as the reason of hiding himself, he disclosed his name as Mohd. School son of Rahmatullah resident of Baldia Chilha Bazar, Police Station- Chiliha, District- Siddharth Nagar and also told that he was having narcotic substance 'Charas' and that is why he was hiding himself from the light. When the police personnels came to know that he is possessing 'Charas'. S.I. Dinesh Yadav informed his right of personal search before the competent Magistrate or Gazetted Officer, thereupon, he desired to be searched by them. Thereafter, the police party searched each other and on being satisfied that no one has any objectionable thing, he drew written consent of Mohd. School and he put his signature on it. After execution of consent letter Ex.Ka-1, he searched the bag which was in his hand and inside the bag four packets of Beige coloured plastic packets and two packets of yellow colour were recovered and being opened 'Charas' was found wrapped in white polythene in each packet and on weighing from scale it was found 5 Kg and 150 gm Charas. Thereafter, accused-appellant Mohd. School was arrested after informing him the grounds of arrest that his act is punishable under Section 8/20 of NDPS Act at 19:50 p.m. Thereafter, recovery memo was prepared by S.I. Ram Samujh Prabhakar on his dictation and the recovery memo was signed by the police party. The copy of the same was given to the accused-appellant and the packets were again kept in the bag and sealed it and prepared sample seal, recovery memo Ex.Ka-3. He further deposed that before arrest the arrest memo Ex.Ka-2 was prepared and he proved the consent letter, recovery memo and arrest memo. He further deposed that the accused-appellant along with contraband and recovery memo was brought to the police stations Shohratgarh and the contraband was handed over to Constable/Clerk who deposited the contraband in police Malkhana after making necessary entry in Malkhana Register and registered the case against accused-appellant and lodged into the lock up. S.I. Dinesh Yadav (PW-1) has deposed and proved the contraband article in the court and got exhibited as material exhibit. The contraband article and the sealed bag related to this case was produced by Ct. Ram Agya Prasad from Malkhana Police Station- Shohratgarh in sealed condition to which the case was registered under Section 8/20 of NDPS Act, Police Station- Shohratgarh, District Siddharth Nagar, was written and having signature in English which is illegible and he stated and identified the handwriting as well as signature of S.I. Ram Samujh. On opening the sealed packet before the court, four packets were found beige coloured plastic and two packets in yellow plastic from the bag. Individually each of the six packets, it was found written as 178 -C-111. The cylindrical rod shaped charas was found wrapped in golden and white plastic foil in each packet. Witness S.I. Dinesh Kumar has deposed that these contraband

articles were recovered from the bag possessing by accused-appellant in his right hand at the time of search. From which one yellow packing in which two packets of Charas was found, one is found in white packing and material containing charas as Material Ex.-1, and other in yellow colour packing containing Charas Material Ex.-2 and yellow packing in which the above two packets were found was exhibited as Material Ex.-3. Likewise, in beige packet in which four packets of Charas wrapped in golden plastic foil charas as Material Ex.4, packet of Charas as Material Ex.-5, beige packet Charas as Material Ex.-6, and black packet charas as Material Ex.-7 were produced in the court and got exhibited. He also deposed that the seal on the bag was found intact at the time of producing it before the court.

13. Witness S.I. Dinesh Kumar Yadav was cross-examined whereby he has admitted that the sample seal by which the bag containing contraband was sealed was not available before the court. He has further stated on oath that prior to this case he has not sent the entire recovered contraband for testing to Forensic Science Laboratory. He has further deposed that he could not remember that there was no public way adjacent to the place of occurrence. It is further deposed by him that each packet of Charas which he has produced in the court was opened from corners at the time of production before the court when the sealed packet was opened. He has further deposed that he does not know that who had opened the packets. He has also stated that the packets of Charas are not in sealed condition. He has denied the suggestion of the counsel for accused-appellant that Charas was not recovered from the accused-appellant Mohd. School. He has also denied the suggestion that Mohd. School has been falsely implicated in this case and no recovery has been made from him. At this point, it is relevant to refer the statement of the accused-appellant recorded under Section 313 of Cr.P.C. the purpose of which is elucidated by Hon'ble Apex Court in the case of ***"Mohan Singh Vs. Prem Singh AIR 2002 SC 3582"*** are as under:-

".....The statement of accused under Section 313 Cr.P.C. is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the persecution. As held in the case of Nishi Kant (supra) by this Court, if the exculpatory part of his statement is found to be false and the evidence led by the prosecution is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 Cr.P.C. cannot be made the sole basis of his conviction."

14. The Hon'ble Supreme Court in the case of ***"Dehal Singh Vs. State of Himachal Pradesh (2010) 9 SCC 85"*** has observed as under:-

".....We do not find any substance in this submission of Mr. Mishra. Statement under section 313 of the code of criminal procedure is taken into consideration to appreciate the truthfullness or otherwise of the case of prosecution and it is not an evidence. Statement of an accused under section 313 of the code of criminal procedure is recorded without administering oath and therefore said

statement cannot be treated as evidence within the meaning of section 3 of the Evidence Act. Appellants have not chosen to examine any other witness to support this plea and in case none was available they were free to examine themselves in terms of section 315 of the Code of Criminal Procedure which, inter-alia provides that a person accused of an offence is a competent witness of the defence and may give evidence on oath in disproof of the charges. There is reason not to treat the statement under section 313 of the code of criminal procedure as evidence as the accused cannot be cross-examined, with reference to those statements. However, when an accused appears as witness in defence to disproof the charge, his version can be tested by his cross-examination. Therefore, in our opinion the plea of the appellant Dinesh Kumar that he had taken lift in the car is not fit to be accepted only on the basis of the statements of the appellants under section 313 of the Code of Criminal Procedure."

15. The Hon'ble Apex Court in the case of ***"State of MP Vs. Ramesh (2011) 4 SCC 784"*** has held as under:-

".....Statement of the accused made under section 313 Cr.P.C. can be taken into consideration to appreciate the truthfulness or otherwise of the prosecution case. However, as such a statement is not recorded after administration of oath and the accused cannot be cross-examined, his statement so recorded under section 313 Cr.P.C. cannot be treated to be evidence within the meaning of section 3 of Indian Evidence Act 1872. Section 315 CRPC enables an accused to give evidence on his own behalf to disprove the charges made against him. However, for such a course, the accused has to offer in writing to give his evidence in defence. Thus, the accused becomes ready to enter into the witness box, to take oath and to be cross-examined on behalf of the prosecution and/or of the accomplice, if it is true required."

16. The Hon'ble Supreme Court in the case of ***"Dharanidhar Vs. State of UP (2010) 7 SCC 759"*** has held as under:-

".....The proper methodology to be adopted by the court while recording the statement of accused under section 313 CRPC is to invite the attention of the accused to the circumstances and substantial evidence in relation to the offence, for which he has been charged and invite his explanation. In other words, it provides an opportunity to an accused state before the Court as to what is the truth and what is his defence, in accordance with law. It was for the accused to avail of that opportunity and if he fails to do so then it is for the court to examine the case of prosecution on its evidence with reference to the statement made by the accused under section 313 CRPC."

17. The statement of the accused-appellant under Section 313 Cr.P.C. was recorded, wherein he has stated that the witnesses have given false testimony against him. Regarding deposition of Ram Agya Prasad (PW-4) with respect to entry made by him in Malkhana Register, he has stated that the false entry was made in the Malkhana Register. With regard to the investigation, he has stated that fake charge-sheet has been prepared by fictitious investigation. He has further stated that he was taken away from Sukrauli Bazar by police of police station Mohana in presence of public and was kept there for two days and his mobile and cycle was taken in police custody. Thereafter, he was sent to

the police station of Siddharth Nagar, where he was kept for four days and was taken to police station Jogiya, where he was kept for 22 days. After that by showing false recovery, he was booked in this case. But in cross-examination nothing was asked from the witnesses S.I. Dinesh Yadav (PW-1) and S.I. Ram Samujh (PW-2) regarding his arrest from the Sukrauli Bazar openly and keeping him in different police station for 22 days, and thereafter, he was booked in this case. From the law laid down by Hon'ble Apex Court as discussed above, it is quite evident that a statement given by the accused-appellant under Section 313 Cr.P.C. can be taken into the consideration for appreciating the evidence of the prosecution with reference to the statement made under Section 313 Cr.P.C. The statement of that accused-appellant made under Section 313 Cr.P.C. can be taken into consideration to appreciate the truthfullness or otherwise of the prosecution case. The statement of the accused-appellant under Section 313 Cr.P.C. is not a substantive piece of evidence. It can be used for appreciating evidence lead by the prosecution to accept or reject it. Witnesses of the recovery, S.I. Dinesh Yadav (PW-1) and S.I. Ram Samujh Prabhakar (PW-2) were cross- examined by learned counsel for the accused-appellant in the lower court in reference to the statement given by accused under Section 313 of Cr.P.C., which lead assurance that the recovery of the Charas as alleged by them is truthful and reliable and inspires confidence.

18. In this regard, it is also pertinent to mention that S.I. Ram Samujh (PW-2) in his statement before the court has stated that on 4.1.2011, he was posted at Police Station- Shohratgarh. He has further stated that on that day he was present near the Police Booth Shohratgarh at about 07:00 p.m. in connection with law and order duty along with Ct. Shriram Sharma Ram. Meanwhile, S.I. Dinesh Yadav SOG incharge arrived there in company with Ct. Panna Lal Yadav, Ct. Ravindra Mohan Pandey with Government Jeep and all of them proceeded for taking care of his area and for prevention of smuggling and as soon as they reached near the north grove of the village Mustahkam, in light of the Jeep, a person was found coming from Nepal side with a bag in hand, he started hiding himself to avoid the light of Jeep. On being suspicion, he was stopped by companion police personnels in the grove and on being asked the name and address and also the reason of hiding himself, he became stunned. Again on being asked for reason of hiding by applying tactics, he told his name as Mohd. School son of late Rahmatullah resident of Chilha and told that he is in possession of narcotics. He was told that he has right to be searched before competent Magistrate or Gazetted Officer, if you so desire they will be called or he will be taken before them for search. He has stressed upon them that they may search him. After obtaining the consent of Mohd. School on consent letter, he has stated that he was caught by them and even if it is searched before the Magistrate or Gazetted Officer, Charas will come out before them also. Thereafter, consent and memo were prepared and got it signed by accused-appellant. After which police party searched each other, then no suspicious object was found with anyone. After that Mohd. School was searched and a bag was found in his right hand inside it two plastic packets one yellow colour and one beige plastic packets were recovered and inside the yellow colour plastic packet two small packets of Charas wrapped in white and yellow plastic foil and four packets were

found in beige plastic. Inside the packet, Charas in shape of cylindrical rod was found wrapped in plastic polythene. The charas was weighed by scale which was kept in Jeep and its weight was found 5 Kg. and 150 gm of Charas. The accused-appellant was asked to show the authorisation for possession or carrying Charas but he could not show it and started apologizing for his mistake again and again. Charas was taken in custody at about 19:50 p.m. and recovered Charas was put in the same bag and was sealed and sample seal was prepared. Thereafter, accused-appellant was asked about the source of the charas received, it was told that narcotic substance Charas was given by a Thapa at the Tawliwa border in Nepal the name is not known. On enquiry he told that one year ago he fled by digging tunnel from of Tawliwa in Nepal and along with him eight other prisoners were also escaped. He has further stated that S.I. Ram Samujh (PW-2) scribed the recovery memo Ex.Ka-3 on dictation of S.I. Dinesh Kumar and has read over to informant and accompanying police personnels and thereafter S.I. Dinesh Kumar informant signed it and police personnels also signed on recovery memo as witnesses and the copy of it was given to accused-appellant Mohd. School. He has further deposed that S.I. Dinesh Kumar Yadav had taken to police station the recovered contraband along with accused-appellant and recovery memo and got the case registered at Police Station-Shohratgarh. It was further deposed that the recovery memo, consent memo in compliance of Section 50 NDPS Act and the memo of arrest of the accused-appellant was prepared in light of torch and headlight of the Jeep. In cross-examination, he has stated that SOG incharge S.I. Dinesh Kumar though met him in Shohratgarh Town at 07:00 p.m. He has further corroborated that the place of occurrence is 6 kilometer from Shohratgarh police booth. He has further corroborated that they reached at the place of occurrence at 07:40 p.m. and had seen the accused-appellant hiding from headlight of Jeep at the same time. He has further corroborated that it took two hours in completing the entire proceeding at the place of occurrence. He has further stated that the Charas was sealed and sample seal was prepared at the place of occurrence. He has further corroborated that the Charas was sealed in that bag from which it was recovered. He has denied the suggestion of counsel for the accused-appellant that he had apprehended the accused-appellant from his house. He has also denied the suggestion of counsel for the accused-appellant that Mohd. School was doing business of firecrackers by preparing it manually and because of not greasing the hand of SOG incharge he was falsely implicated.

19. As discussed earlier that the counsel for accused-appellant has not asked any question regarding apprehending the accused-appellant from Sukrauli bazar in broad day in public view and later he was kept for 22 days in illegal police custody and later on he was challenged by planting false recovery. Therefore, in above circumstances the statement of accused-appellant as stated in statement under Section 313 Cr.P.C. will be taken into consideration in appreciating the evidence of prosecution and in arriving at a conclusion regarding the truthfulness and falsity of the prosecution case. Nothing came in their cross-examination which indicates that false recovery was planted on accused-appellant. In above circumstances, it is proved that the depositions of the witness S.I. Dinesh Kumar (PW-1) and S.I. Ram Samujh (PW-2) is unimpeachable and

liable to be relied. From their consistent statements, it is proved beyond doubt that on 4.1.2010 a bag was recovered from accused-appellant in which two packets were recovered out of one packet two packets and out of another packet four packets of contraband were recovered.

20. From above unimpeached testimonies of S.I. Dinesh Kumar (PW-1) and S.I. Ram Samujh (PW-2), it is proved beyond reasonable doubt that accused-appellant was apprehended at 07:40 p.m. on 4.1.2021 in the lonely place from grove. There is no evidence on record, which proves that they have any previous knowledge regarding possession and carrying of contraband by the accused-appellant. From the evidence on record, it also transpires that the accused-appellant stopped on suspicion all of sudden and he told that he has Charas in his bag in his right hand, therefore, no public witness can be procured which is quite natural. Therefore, non-joining the public witnesses in search is not in any way adversely affect the prosecution case. It is further proved by the evidence on record that the Charas was recovered from the bag which was in his right hand not from his personnel search, therefore, the compliance of Section 50 of NDPS Act was not needed although it is proved beyond reasonable doubt from an unimpeached testimonies of S.I. Dinesh Kumar (PW-1) and S.I. Ram Samujh Prabhakar (PW-2) that he was informed about his legal right to be searched before competent Magistrate or Gazetted Officer but accused-appellant has stated that Charas will be recovered before Gazetted Officer or Magistrate and it will make no difference and has authorised S.I. Dinesh Kumar to search him and signed on consent letter Ex.Ka-1 which is proved to be ascribed by S.I. Ram Samujh Prabhakar (PW-2) and thereafter search was made. The signature of Mohd. School and recovery memo and consent letter were proved by above witnesses. So far as absence of zero in between मो and School on consent form and presence of zero (0) in between मो and School on recovery memo is concerned, it appears that it was deliberately done by accused-appellant to create the defence. He has not moved any application for comparing his signature on consent form with the recovery memo or by giving specimen signature to handwriting expert, but that was not done. From above, it appears that it was deliberately done by accused-appellant to create the defence. Therefore, in above circumstances, it is proved beyond reasonable doubt that accused-appellant Mohd. School has executed the consent form and deliberately omitted '0' from मो. Therefore, it cannot be said that some other person has signed the consent form and I find the argument of counsel for accused-appellant is devoid of merit.

21. The Hon'ble Apex Court in the case of ***"State of Rajasthan Vs. Parmanand and others (2014) 85 SCC 662"*** has held as under:-

"....Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, section 50 NDPS act will have application. In this case respondent no.1 Parmanand's bag was searched. From the bag opium was recovered. His personal search was also carried out. Personal search of respondent no.2 Surajmal was also conducted. Therefore, in light of the judgement of this

Court mentioned in the preceding paragraph, section 50 of NDPS act will have application."

22. The Hon'ble Supreme Court in the case of ***"State of Himachal Vs. Pawan Kumar with State of Rajasthan Vs. Bhanwarlal AIR 2005 SC 2265"*** has observed as under:-

"....A bag, briefcase or any such article or container etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a Thaila, a Jhola, a Gathri, a holdall, a carton etc. of varying size, dimensional or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on shoulder or Back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in section 50 of the Act. "

23. In case in hand, the contraband was recovered from the bag carrying by the accused-appellant in his right hand, therefore, the compliance of Section 50 of NDPS Act was not needed although it was complied as precaution.

24. So far as the argument of learned counsel for accused-appellant regarding non-joining of public witnesses in the search is concerned, it is proved from evidence on record that the recovery was made from the accused-appellant without prior knowledge by the police personnels that accused-appellant has Charas and recovery was made all of sudden in a lonely place of grove where no public witnesses were present. In above circumstances, non-joining of public witnesses in search will not affect the prosecution case.

25. The exposition of law regarding the evidence of police personnels, the Division Bench of Hon'ble Apex Court in case of ***Sama Alana Abdullah Vs. State of Gujarat (1996) 1 SCC 427*** has held as under:-

".....Only P.I.B.B. Dwivedi and P.S.I. Gohil have stated that the map was found from the house from a tin trunk kept on a cupboard. Therefore, in the absence of any independent evidence the High Court ought not to have held that the appellant was in conscious possession of the said map particularly when at the time of the raid he was not present in the house. In support of the submissions that the evidence of P.I. Dwivedi and P.S.I. Gohil should not be regarded as sufficient it was also submitted that they had taken two persons of Bhuj as Panchas to witness the raid instead of taking independent witnesses from the locality i.e. Village Nana Dinara and does it becomes apparent that they were selected Panch witnesses and therefore to that extent the investigation was not fair and impartial. Even on close scrutiny of the evidence of P.I. Dwivedi and P.S.I. Gohil, we see no reason to disbelieve this explanation. It cannot, therefore, be said that the investigation was not fair and therefore independent Corroboration was

necessary. Again their evidence cannot be rejected only on the ground that they are police witnesses and were members of the raiding party. Their evidence receives corroboration from the Punchnama. It may be stated that the other panch witness could not be examined by the prosecution because he had expired before his evidence could be recorded."

26. A Division Bench of Hon'ble Supreme Court in case of ***"Anil @ Andya Sadashiv Nandoskar Vs. State of Maharashtra (1996) 2 SCC 589"*** has held as under:-

".....Indeed all the 5 prosecution witnesses who have been examined in support of search and seizure were members of the raiding party. They are all police officials. There is, however, no rule of law that the evidence of police officials has to be discarded or that it suffers from some inherent infirmity. Prudence, however, requires that the evidence of the police officials, who are interested in the outcome of the result of the case, needs to be carefully scrutinised and independently appreciated. The police officials do not suffer from any disability to give evidence and the mere fact that they are police officials does not by itself give rise to any doubt about their Creditworthiness."

27. It inspires confidence and learned counsel for the accused-appellant has not been able to point out any serious infirmity in their evidence. The Division Bench of Hon'ble Supreme Court in the case of ***"Pradeep Narayan Madkoonkar Vs. State of Maharashtra (1995) 4 SCC 255"*** has held as under:-

"..... The evidence of the officials (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigating or the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation, requires greater care to appreciate their testimony."

28. The Division Bench of Hon'ble Supreme Court in the case of ***"Mohan Singh Vs. State of Haryana (1995) 3 SCC 192"*** has held as under:-

"..... In these facts and circumstances when the police officials deliberately avoided to join any public witness or railway officials though available at the time when the appellant was apprehended the evidence of Heera Lal who is nothing but a chance witness and the evidence of police officials PW6 and PW7 has to be closely scrutinised with certain amount of care and caution."

29. The three judges bench of the Hon'ble Supreme Court in case of ***"PP Beeran Vs. State of Kerala AIR 2001 SC 2420"*** has held as under:

"....The case alleged against him shows that he was found in possession of 23.5 grams of opium at the time when he was intercepted and searched by PW2, sub-inspector of police. We have noticed that two witnesses were called by PW2 at the time of search out of whom one was examined as PW1 and the other was not examined. But even the one examined (PW1) did not support the prosecution and hence he was treated as hostile. Though an argument was addressed by Mr. R.

Venkataramani, learned senior counsel for the appellant that the evidence of PW2, sub-inspector of police remained uncorroborated, and therefore, that should not be made the sole basis for conviction, it is too late in the day for us to reject the testimony of PW2 on that ground alone. Even otherwise, it cannot be said that evidence of PW2 remains uncorroborated because the fact that opium was recovered from his person and also Exhibit P2 which is an endorsement containing the signature of the appellant could be treated as circumstances corroborating the testimony of PW2."

30. The police personnels are competent witness to adduce evidence before the learned court below, therefore, there is no substance in the argument of the learned counsel for the accused-appellant that in absence of independent witness no reliance can be placed. Other police personnels who are the persons by whom and by whose presence the recovery of Charas and on Charas a yellow packet Material Ex.-2 was marked and Charas was found in white packet Material Ex.-3 was marked on Charas found in yellow packet.

31. The witness Anoop Kumar Shukla (PW-5) has stated on oath that the investigation of this case was undertaken by him on 5.1.2011. He copied the check report and GD registering the case in CD. He also recorded the statement of S.I. Dinesh Kumar and prepared site plan Ex.Ka-7 on pointing out of S.I. Dinesh Kumar. He also deposed that entire recovered contraband was sent to Forensic Science Laboratory for chemical examination.

32. Ct. Baban Singh (PW-3) deposed that he was posted on 16.1.2011 at Police Station- Shohratgarh and on that day he left Shohratgarh for going to Forensic Science Laboratory at 18:45 p.m. by getting docket made with specimen seal and sealed bag of Crime No.11 of 2011, under Section 8/22 of NDPS Act pertaining to accused-appellant Mohd. School and handed over the same to Forensic Science Laboratory, Lucknow on 17.1.2011 along with specimen seal at Receipt No.347. He further deposed that he took the contraband in sealed condition and handed over to Forensic Science Laboratory in safe custody along with specimen seal in intact sealed condition. He had also proved docket Ex.Ka-4. He further desposed that he has taken the contraband in sealed condition from the Malkhana Moharir and proceeded to FSL, Lucknow and entry in this regard was made in GD Report No.36 on 16.1.2011. He also proved the photo copy of entry of GD Report No.36 dated 16.1.2011 Ex.Ka-5. In cross-examination, he has stated that the contraband was handed over to him by incharge Malkhana. He has further stated that he received the contraband in sealed condition and sealed was found intact. He further admitted the suggestion of learned counsel for the accused-appellant that on specimen seal Mohd. School was written. He further stated that the contraband with sample seal was handed over to FSL for its analysis. Nothing came in his cross-examination which makes his statement unreliable. In above circumstances, his statement can be safely relied on and from it, it is proved that he has obtained the contraband from Malkhana of Police Station- Shohratgarh along with specimen seal in intact condition and had handed over it to FSL along with specimen seal in safe custody.

33. Ct. Ram Agya Prasad was also examined as PW-4 to prove the safe

custody of the contraband in police Malkhana and he has stated that he came with Malkana Register of Police Station Shohratgarh of the year 2011 wherein at Serial No.1 the details of the contraband along with Crime No.11 of 2011 under NDPS Act (State Vs. Mohd. School) is entered. He further deposed that entry of this register begins from the year 2010 and contained the entry up to 7.6.2011 and Goshwara was appended at the end of each month. He further deposed that the entery was signed by Head Muharir and officer-in-charge of the station Shri Anoop Kumar Shukla along seal. He has proved the entry and the signature of S.I. Anoop Kumar Shukla and has filed the photo copy of relevant entry pertaining to this case as Ex.Ka-6. In cross-examination he has admitted that he is working at Police Station Shohratgarh from 8.9.2011, therefore, he could not tell as to who has made entry in the register. No other question was put in cross-examination. From the deposition of Ram Agya Prasad (PW-4), it is proved that the Malkhana Register was produced from proper custody and it was also proved from the statement of Ct. Babban Singh (PW-3) that he received the case property to be conveyed to FSL which was kept in safe custody at Police Station Shohratgarh. From the statement of PW-3 and PW-4, safe custody of the contraband is proved beyond reasonable doubt. It is pertinent to mention here that S.I. Anoop Kumar Shukla (PW-5) was also examined, but he was not cross-examined to contradict PW-3 regarding entry and safe custody of the contraband. It is proved from the statement of PW-3 that S.I. Anoop Kumar Shukla (PW-5) was the Station House Officer of Police Station Shohratgarh, therefore, the statement of Ram Agya Prasad (PW-3) is liable to be relied on, and therefore, it is proved that the case property was kept in Police Station in safe custody. It is also proved from the statement of Ct. Babban Singh (PW-3) that the contraband was carried to FSL for chemical analysis in safe custody and thereafter was kept in Police Station in safe custody and later was produced before the court from the Police Station in safe custody.

34. It is submitted by learned counsel for the accused-appellant that no sample was taken from the contraband and entire contraband was sent to FSL for its chemical analysis, therefore, on this count for violation of provision of Section 52-A of NDPS Act, the forensic science report is in accordance with the evidence. It is further submitted that due to a reason, it is not proved that the contraband alleged to be recovered from the accused was Charas, therefore, offence under Section 8/22 of NDPS Act is not proved against the accused-appellant.

35. A co-ordinate Bench of this Court in the case of ***"Devendera Kumar Mishra Vs. State of UP"*** reported in ***1998 Crl (J) 2348 (at page 2350 in paragraph 3)*** has observed as under:-

".....The learned Counsel for the applicant then switched gear to another submission of there being no compliance with the requirements of section 52-A of the Act. The submission of the learned counsel too is sans any substance. Section 52-A of the Act postulates disposal of seized Narcotic Drugs and Psychotropic Substances and lays down the procedure therefor. Non-compliance, if any, of section 52-A of the Act, would not render the search and seizure illegal, nor will it degenerate the recovery of contraband into one being inadmissible in evidence...."

36. Therefore, sending of the entire contraband for chemical examination will not render the recovery of contraband and chemical examination report of forensic science laboratory Ex.Ka-11 as inadmissibility. From analysis and appreciation of evidence led by prosecution, it is proved beyond reasonable doubt that the contraband recovered from the accused-appellant was found to be Charas and for possessing of which he has no authorisation letter.

37. So far as the argument of learned counsel for accused-appellant regarding non-production of specimen seal of the contraband in the court is concerned, it is proved beyond reasonable doubt that the recovered contraband was sent to FSL for chemical examination and it was opened after comparing with specimen seal and was after taking sample for chemical examination and was resealed by FSL authorities and there is a presumption that public authorities will discharge their duties according to law. There is no evidence on record which establishes that the accused has complained to higher authorities regarding illegal planting of the contraband by PW-1 and PW-2.

38. In above circumstances, I find no substance in the argument of learned counsel for the accused-appellant that the law laid down by High Court of Allahabad in Mohammad Mustafa (supra) is applicable in this case being distinguishable from the fact and circumstances of this case. Therefore, it is proved beyond reasonable doubt that the accused-appellant has signed the consent letter Ex.Ka-1 and deliberately omitted '0' after "Mo", which is written in Hindi to mislead the prosecution and the court as well. From the evidence on record, it is established that the contraband Charas 5 kg and 150 gm was recovered from accused-appellant. It is also proved beyond reasonable doubt that the search was made without prior information as surprise in secluded place grove in the late evening, therefore, non-joinder of the such by independent witness will not affect the prosecution case. Point of determination (i) to (iii) are decided accordingly. Therefore, it is held that learned court below has rightly held the accused-appellant guilty for offence punishable under Section 20(b)(ii)(C) of NDPS Act. The court has awarded the minimum punishment that is rigourous imprisonment for 10 years with a fine of Rs.1,00,000/-, therefore, it cannot be said that the sentence awarded by the learned court below was severe. This appeal is liable to be dismissed and, accordingly, the appeal is ***dismissed.*** Consequently, the impugned judgement of conviction and order of sentence dated 29.4.2013 passed by court below is hereby confirmed.

(2022)04ILR A92
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.04.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Appeal No. 5712 of 2008

Sunita & Ors. ...Appellants

Versus

State of U.P. ...Respondent

Counsel for the Appellants:
Sri Pankaj Kumar Tyagi, Sri Abhishek Kumar Srivastava, Sri Ajay Singh, Sri Amar Nath Mishra, Sri Indra Bhan Yadav, Sri R.S. Kushwaha, Smt. Archana Tyagi, Ms. Sushma Devi, Sri V.K. Rai, Sri V.K. Shukla, Sri V.S. Shukla

Counsel for the Respondent:

A.G.A.

Evidence Law - Indian Evidence Act, 1872- Section 24- Extra-judicial confession made by the accused Sunita before near relations was without undue influence, coercion or pressure. It was voluntary, no suggestion was made in the cross-examination that such extra-judicial confession are tempted or non-voluntary. Thus, the said extra-judicial confession is reliable and admissible evidence being trustworthy and accepted as a whole. There is no enmity of Sunita against Raju & Amit Chopra.

Where the extra- judicial confession made by the accused is voluntary and without any undue influence, inducement or coercion, the same can be relied and accepted by the court.

Evidence Law - Indian Evidence Act, 1872- Section 8- Conduct- From the cogent & trustworthy evidence, it is proved that accused Sunita, wife of the deceased, who was present in the room, at the time of incident, did not interfere or made struggle with the other accused to save the life of her husband. She had not made any noise or even hue and cry/scream; she was not only silent spectator of the incident but also offered assistance in commission of the crime. Thus, the inaction shown by the accused Sunita indicates that she has mala fides and knew everything about murder of her husband.

The conduct of the accused, who was the wife of the deceased, at the time of commission of the offence would be a relevant fact for being considered by the court.

Evidence Law - Indian Evidence Act, 1872- Section 106- Burden of proof where the facts are especially in knowledge of the accused- From the evidence, it is proved that at the time of incident, accused Sunita was in the room with her husband, so Sunita is the best witness for the murder of her husband. Section 106 of the Evidence Act lays down that *"when any fact is established within the knowledge of any person, the burden of proving that fact is upon him."* Thus, how the husband of Sunita had been murdered is especially within her knowledge that who has killed him and she has not made any noise to save the life of her husband. Accused Sunita failed to discharge the burden of proving these facts. This fact also goes against Sunita and indicates that she knows the actual assailant, which has been disclosed by her in her extra-judicial confession.

Settled law that the burden of proof lies upon the person where the facts are especially in knowledge of that person and failure to discharge the said burden with a credible explanation is bound to draw an adverse inference against the accused. (Para 43, 46, 48)

Criminal Appeal rejected. (E-3)

Judgements/ Case law relied upon:-

1. St. of U.P Vs M.K. Anthony (1985) 1 SCC 505

2. Satish & ors Vs St. of Har. (2018) 2 SCC Cr. 652

3. St. of H.P Vs Raj Kumar (2018) SCC Cr. 452

4. Ishwari Lal Vs St. of Chattis. 2020 (1) SCC Cr. 13

5. Sahoo Vs St. of U.P., 1966 AIR 40, 1965 SCR (3) 86

6. Pyara Singh Vs St. of Punj. (1978) 1 SCR 661

7. Palvinder Kaur Vs St. of Punj. AIR 1952 SC 354

8. Marvadi Kishore Paramanand Vs St. of Guj. (1994) 4 SCC 549

9. Leela Ram Vs St. of Har. (1999) 9 SCC 525

(Delivered by Hon'ble Om Prakash Tripathi, J.)

1. Heard Ms. Sushma Devi, learned amicus curiae, counsel for appellant nos. 1 & 2, Sri Abhishek Kumar Srivastava, learned counsel for appellant no. 3, Sri A.N. Mulla, learned AGA for the State and perused the record.

2. This criminal appeal has been preferred against the judgment and order dated 21.08.2008 passed by the Special/Additional Sessions Judge, Court No.4, Saharanpur in Sessions Trial No. 294 of 2004, arising out of Case Crime No. 206 of 2004 (State Vs. Sunita & others), Police Station Kotwali Nagar, District Saharanpur convicting and sentencing the appellants to undergo life imprisonment under Section 302/34 of India Penal Code (for short "IPC') with a fine of Rs.10,000/- each, in default thereof, to undergo three months additional imprisonment.

3. The prosecution case in brief is that complainant, Om Prakash lodged the first information report on 18.04.2004 at Police Station Kotwali Nagar, District Saharanpur with the allegation that on 18.04.2004, at 07:15 am, wife of Charan Jeet @ Babbu told the informant that last night, at 11:30 pm, four persons who came from Delhi, were very well known to her husband, administered him intoxicating material, on account of which, he became unconscious. On the next morning, she found her husband dead. She also said that two days ago, two men had come to inquire about her husband. On the basis of written report, Ex.Ka.1, police registered FIR being Case Crime No. 206 of 2004, under Section 302 IPC against four unknown persons. During investigation, Investigating Officer prepared site plan and recorded the statements of the witnesses. After completion of investigation, Investigating Officer submitted a charge sheet, Ex.Ka.17, in the Court of Chief Judicial Magistrate, Saharanpur under Section 302 IPC. Cognizance of offence was taken by the Magistrate concerned. Thereafter, case was committed to the Court of Sessions for trial.

4. The case was transferred to the Court of Special/Additional Sessions Judge, Court No.4, Saharanpur and charge was framed against the appellants under Section 302/34 IPC on 09.08.2004. Accused-appellants pleaded not guilty and claimed to be tried.

5. In order to prove the charge framed against the appellants, prosecution has examined (PW-1) Om Prakash, (PW-2) Raj Rani, (PW-3) Sudhir Pal, (PW-4) Raj Singh, (PW-5) Dr. R.K. Agrawal, (PW-6) Sandeep, (PW-7) Bina Devi, (PW-8) Mukesh Rawal, (P.W.-9) Iqbalujama Khan. Prosecution has proved written report Ex.ka.1, Panchayatnama Ex.ka.2, letter loss Ex.ka.3, Photo loss Ex.ka.4, letter CMO Ex.ka.5, letter R.I. Ex.ka.6, recovery memo table leg Ex.ka.7, recovery memo wrapper of medicine Ex.ka.8, recovery memo by which legs and hands of the deceased were tied Ex.ka.9, blood stained and simple earth Ex.ka.10, recovery memo of clothes of deceased Ex.ka.11, recovery memo of blood wiped clothes Ex.ka.12, Chick FIR Ex.ka.13, GD Ex.ka.14, post-mortem report Ex.ka.15, spot map Ex.ka.16, charge sheet Ex.ka.17, report FSL Ex.ka.18 as documentary evidence.

6. P.W.1 complainant Om Prakash stated that deceased was his cousin. On 18.04.2004, at about 07:00am, Sunita came to his house and stated that on 17.04.2004, at about 11:30 pm, four persons came from Delhi and administered her husband intoxicating material. Sunita went to

another room. They all assaulted Charanjeet on his head by leg of table due to which he has sustained injuries on his head as a result of which he died. Charanjeet has two children, who are mentally disabled.

7. Charanjeet was doing job of Conductor in Delhi. He had been living in Delhi since six years. On the day of the incident, he came along with his wife and children from Delhi. Sunita is lady of bad character. Six years ago, at the house of Sunita at Sharanpur, Charanjeet caught Sunita red handed with one person. Parents of Sunita came, made apology, after accepting the said apology, Charanjeet pardoned his wife. At the house of Charanjeet, Ashok Kumar, his wife Bina and their children lived as tenant. Sunita told the name of Amit Chopra, Raju and Dinesh, who were neighbours at her paternal home in Delhi. Sunita told that all the four children, who born from the wedlock of her and Charanjeet, were handicapped. Two are alive and two died. Sunita told that she had made illicit relations with three accused, so that, the coming generation would be hale and hearty.

8. P.W.2 Rajrani has stated that the deceased was his nephew. Her sister's name was Prakash Rani, who died. Charanjeet @ Babbu was only son of her sister Prakash Rani. Earlier, Charanjeet lived in Numaish Camp at Saharanpur, after that, he lived at his in-laws' house in Delhi along with his wife and children and doing job of conductor. Her sister Prakash Rani was living with P.W.2 Rajrani and at the time of incident also, her sister was with her in Ludhiyana. Charajeet @ Babbu died about two years and nine months ago. When she knew about the murder of Charanjeet, then she came along with her sister Praksh Rani at Saharanpur from Ludhiana. On third day of the incident, P.W.2 and her sister sat at her room. All relatives have gone. Her sister Prakash Rani was very sad and was lamenting due to murder of his son. Sunita fell on the legs of Prakash Rani, apologizing that "she had developed illicit relationship with Amit Chopra (friend of his brother). Charanjeet began to suspect on her and used to be angry with her and forbades her to meet Amit Chopra. Due to this, Sunita became annoyed, she and Amit Chopra made a plan in Delhi to remove Charanjeet from their way. Amit, Raju, Dinesh came from Delhi, on 17.04.2004, at about 09-10 pm and came at the house of Charanjeet. She administered intoxicating pills in the *sikanji* of Charanjeet and he became unconscious. Thereafter Amit, Raju, Dinesh and she killed Charanjeet jointly." This statement was given by Sunita before PW2 and her sister and also stated that if she is not pardoned then she will commit suicide with children.

09. P.W. 2 has stated in her cross-examination that she has problem of hearing and vision. Her sister Prakash Rani died one and a half year ago. She had been living with her since three years. Om Prakash is son of her sister-in-law *(nand)*. She has stated that Charanjeet died on 17th April but she does not remember the year of his death. She has stated that she has no knowledge of her hearing and vision problem. Charanjeet had been living in Delhi since 3-3½ years before the incident. He comes to Saharanpur occasionally. She got the information of murder of Charanjeet from Om Prakash by telephone. Om Prakash told her that three persons came from Delhi and murdered Charanjeet. Sunita apologized on 20th April, 2004, at that time, P.W.2 and her sister were present

there. Her sister was weeping. On the day of the incident, she came from Ludhiana.

10. She stated that she came from Ludhiana to Saharanpur at about 02:00-02:30 pm on 18.04.2004. After the incident, she went back to Ludhiana. Her sister Prakash Rani sold his house. She heard that at the house of Charanjeet, some persons came at about 09-10 pm. Sunita had apologized to her mother-in-law.

11. P.W.3 S.I. Sudhir Pal has stated that on 18.04.2004, at about 10:00 am, he has prepared inquest report, letter CMO, letter R.I., photograph of dead body, recovery memo of one wooden table, wrapper of medicines. Recovery memo of clothes by which legs and hands of the deceased was tied with white patti on his head, one pink dupatta by which his legs were tied. Recovery of blood stained earth & plain earth, blood stained clothes, green trouser of the deceased, brown undergarment etc. were sealed.

12. P.W.4 Constable Raj Singh deposed that on 18.04.2004, he has written chick FIR, Ex.Ka.13 and GD, Ex.Ka.14. Witness has proved FIR and G.D.

13. The postmortem examination, Ex.ka.15, was conducted on the dead body of the deceased, Charan Jeet @ Babbu by Dr. R.K. Agarwal on 18.04.2004 at 03:00 pm. The cause of death was shock and haemorrhage as a result of ante-mortem injuries at about half day before the time of postmortem. Post-mortem report was proved as Ex.ka.15 by P.W.5.

14. P.W.6 Sandeep deposed that he lives in the same locality where Charanjeet @ Babbu died. Charanjit had gone to Delhi. On 17/18.04.2004 at around 11:00 pm, he had forbidden three persons from ringing the bell of his house, in front of Police Inspector, he did not even recognize the three persons. He also denied having witnessed the culprits. He is hostile witness.

15. P.W.7 Bina Devi deposed that when the murder took place, she was the tenant in that house and Sunita told about the murder; the people who came on the night of the incident did not saw them. On questioning by the police, she has told that three people had come, whom the landlord had disclosed as her relatives, who had come from Delhi. At 07:00 am, Sunita told her that four men had killed her husband and all made him unconscious. She also denied having witnessed the culprits. She is hostile witness.

16. P.W.8 Mukesh Rawal deposed that Sunita is his sister, she was married to Charanjit Singh, who worked as a conductor in a private bus in Delhi. Amit Chopra lived in a rented house near the house of the deceased and this witness. Sunita has an illicit relationship with Amit Chopra. This witness has forbade Amit Chopra to meet Sunita. When he told the deceased Charanjit about Sunita's illicit relationship, he came to Saharanpur with Sunita and his children.

17. PW9 Investigating Officer Iqbalujama Khan along with SI Sudhir Pal and other police personnel has visited the spot on 18.04.2004. Wooden table, nitrogen, medicine cover and clothes to which the head, legs and hands of deceased Charanjit were tied, blood stained clothes and other clothes were recovered and prepared recovery memo. During investigation, he came to know that Sunita is a woman of bad character. He tried to

take statement of the wife of the deceased, but he was unsuccessful. On 19.04.2004, statement of Witnesses, namely, Sandeep Soni, Smt. Bina, Lal Bahadur, SI Sudir Pal were recorded. On the same day, statements of the deceased's mother and aunt (mausi) were also recorded. With the help of Sunita and Sandeep, accused Amit, Raju and Dinesh were arrested from Saharanpur bus stand and their statements were also recorded. Charge sheet, Ex.ka.17, Report of the Vidhi Vigyan Prayogshala, Ex.ka.18, broken wooden table, Ex.ka.1, Dupatta, Clothes etc., Ex.ka2, Ex.ka.13 were proved by the witness.

18. Statement of accused under Section 313 Cr.P.C was recorded, accused Sunita has denied her illicit relations with anyone and also stated that her husband Charanjeet @ Babbu had come to Saharanpur for taking rented money. She denied the incident dated 17.04.2004 and also denied having given any intoxicating tablet to her husband. She has stated that she had not told Om Prakash about the incident. Lastly, she stated that the prosecution witnesses are deposing falsely only because of property dispute. Statement of the accused Raju under Section 313 Cr.P.C. was recorded, he denied the incident dated 17/18.04.2004 and he also denied the illicit relations of Sunita with anyone. Statement of the accused, Amit Chopra under Section 313 Cr.P.C. was recorded. He has denied having knowledge about Sunita and her family and he also denied the illicit relations with her and denied the incident dated 17.04.2004. He has stated that Investigation Officer has arrested him from his house and he also stated that the prosecution witnesses are totally false.

19. Accused had examined DW-1 (Aruna) in his defence. She stated that her sister Sunita had no illicit relation with accused and some unknown persons came on 17/18.04.2004 and murdered Charanjeet @ Babbu.

20. Learned counsel for the appellants has submitted that they have been falsely implicated in this case and has also contended that the case is based on circumstantial evidence. There is no eye witness of the incident. There is no evidence of illicit relationship of Sunita, Amit Chopra and Raju. There is no motive established by the prosecution for causing this serious offence. Evidence given by the witnesses are not reliable and accused are innocent and liable to be acquitted.

21. These arguments were opposed by learned AGA and submitted that accused Sunita had given natural and unambiguous extra-judicial confession before near relatives, which is trustworthy. Chain of circumstantial evidence is complete and case against the present appellants is proved beyond reasonable doubt.

22. So far as the FIR of the case is concerned, incident took place in the fateful night on 17/18.04.2004. FIR was lodged by Om Prakash, who is cousin of the deceased. On 18.04.2004, at about 08:45 am, under Section 302 IPC Crime No. 119 of 2004, P.S. Kotwali Nagar, District Saharanpur. The incident took place in the intervening night of 17/18.04.2004 from 11:30 pm till morning. The place of incident is 2km far from the police station. It is alleged in the FIR that at about 07:15 am, wife of the deceased Sunita told him that at about 11:30 pm, four persons came from Delhi; all were very well known to her husband; they administered her intoxicating material. Sunita found her husband Charanjeet @ Babbu dead in the morning. Murder had been committed by those persons. This

written report was prepared by the complainant Om Prakash and given to the police station within two hours. He had not mentioned the name of the assailants. He had reported only on the basis of what was told by Sunita (wife of deceased). Written report was proved by PW1 as Ex.Ka.1 and Chick FIR has been proved by PW4 (Constable Raj Singh), Ex.ka.13 and Kayami GD Rapat No.17, Ex.ka.14, there is nothing in the cross-examination of PW4, which shows that FIR is ante-time. It is apparent that FIR has been lodged promptly without any consultation.

23. The main question for determination is that what was the motive for the incident by the accused, why they killed the deceased Charanjeet @ Babboo. P.W.1 has stated that Sunita and Charanjeet had two children, both are mentally retarted and physically handicapped. Charanjeet was doing the job of conductor for the last six years in Delhi. Charanjeet and Sunita along with their children came in the evening on the date of the incident. Sunita is a woman of loose character. About 6-6 ½ years ago, deceased caught Sunita in his home with a male in an objectionable condition. The members of parental side of Sunita and her father came and tendered apology. Charanjeet accepted the apology and pardoned his wife. Ashok Kumar along with his wife Bina and their children lived as tenant in the house of the deceased. Sandeep is neighbour. Sunita told the name of Amit Chopra, Raju and Dinesh, who were neighbours at her paternal home in Delhi. Sunita told that all the four children, who born from her wedlock with Charanjeet, were handicapped. Two are alive and two had died. Sunita told that she had developed illicit relations with three accused, so that, the coming generation would be hale and hearty. There is nothing contrary in the cross-examination of the witness PW1.

24. P.W.2 (Raj Rani) is the maternal aunt, aged about 75 years, she also deposed that deceased was the only son of her sister Prakash Rani. Prakash Rani used to live with her in Ludhiana. She was in Ludhiana with her at the time of incident. Sunita made extra-judicial confession before her that "she had illicit relationship with Amit Chopra. Charanjeet began to suspect her and used to be angry and forbade her to meet Amit Chopra. Because of this, she made a plan in Delhi with Amit Chopra to end Charanjeet. She mixed intoxicating pills in juice (*sikanji*) and served to Charanjeet. Thereafter, with the help of Amit, Raju and Dinesh, all the four have committed the murder of Charanjeet." Nothing adverse came in the cross-examination of the witness.

25. PW.8 Mukesh Rawal, adopted brother of the accused Sunita, had stated that there was illicit relationship between Amit Chopra and Sunita, then, he forbade Amit Chopra from meeting Sunita. Charanjeet also came to know this fact, so he went to Saharanpur along with her wife Sunita and children. Sunita was detained in jail with her children. About four years ago, Sunita met him in court and repented that she had committed a mistake and she with the help of Amit Chopra, Raju and Dinesh killed Charanjeet, kindly help her. He has not seen Raju and Dinesh ever. Amit Chopra had also told the name of co-accused Raju and Dinesh.

26. Although this fact was denied by the accused in statement under Section 313 Cr.P.C. but on the basis of corroborated and credible evidence, it is proved that accused Sunita and Amit Chopra had illicit

relationship. It is also proved that Sunita gave birth to four disabled children from the wedlock of Charanjeet. Two died and two are alive. They are in jail with Sunita.

27. Prior to the incident, deceased came to know that Sunita had illicit relationship with Amit Chopra and Raju due to this, they came from Delhi to Saharanpur, where, the deceased was brutally murdered. The motive for causing murder was begetting of healthy offspring. That's why, the accused Sunita, Amit Chopra and Raju planned to get rid of from deceased Charanjeet. Thus, the prosecution had succeeded to establish the motive for the present crime against Sunita, Amit Chopra and Raju.

28. P.W.-5 Dr. R.K. Agrawal had performed the post-mortem report of the deceased on 18.04.2004, at about 03:00 pm. The report is as under :

29. Accused was about 33 years old, healthy body, eyes and mouth were closed. Rigormortis was present in both the hands and legs after the death. Following injuries were found on the body of the deceased :

(i) torn wound on right side of head of size 5cm x 1cm x muscle deep.

(ii) torn wound at the centre of the forehead of size 7cm x 1cm located deep bone injury.

iii) torn wound on left of head 6cm x 1cm x muscle deep.

iv) torn wound on left of head 4cm x 1cm x muscle deep.

v) torn wound on left-back side of head of size 10cm x 1.5cm x bone deep x broken bone under the injury.

vi) torn wound on top of the head size of 7cm x 1cm x muscle deep.

vii) torn wound on left of head of size 8cm x 1cm x muscle deep.

viii) torn wound on top of the head of size of 6cm x 1.5cm x bone deep and broken bone of injury.

ix) torn wound on right side of head of size 6cm x 1cm x muscle deep.

x) torn wound on right side of head of size 2cm x ½ cm muscle deep.

xi) torn wound on right side of head of size 4cm x 1cm x muscle deep.

30. The cause of death is due to ante-mortem injuries, excessive bleeding and shock half day earlier caused by blunt object as piece of wood.

31. Deceased had 11 injuries on the head. The bones of the head had been injured from many points and there was no other injury except head. Injuries only on the head, vital part of the body shows only intention to kill Charanjeet.

32. The main question before us is that whether accused Sunita, Amit Chopra and Raju had killed Charanjeet on 17/18.04.2004 in the night. This case is based on extra-judicial confession made by the accused Sunita and circumstantial evidence. She had made extra-judicial confession before PW2 (maternal aunt), aged about 75 years and PW-1 Om Prakash, who is cousin of the deceased and in presence of her mother-in-law Prakash Rani, who died later on. PW-8 Mukesh Rawal adopted son of his father. On the point of extra-judicial confession, following rulings are mentioned as under:

33. **State of Uttar Pradesh Vs. M.K. Anthony (1985) 1 SCC 505**, it has been held that :

"an extra-judicial confession was made by the accused to his friend. The court found that the statement was made by the accused was unambiguous and unmistakably conveyed that the accused was perpetrator of the crime. Testimony of friend was true, reliable and trustworthy. Confession of accused on such extra-judicial confession was proper and no corroboration was necessary which importance should not be given to minor discrepancies and technical error. Generally, extra-judicial confession is made before an unbiased person, not the enemy of the accused and that person has not such motive to speak false statement. It should be voluntarily unambiguous and clear. No fact has been concealed with regard to the incident."

34. **Satish and others vs. State of Haryana (2018) 2 SCC Cr. 652,** it has been held that :

"Extra-judicial confession is a week piece of evidence, normally by itself, it can be corroborative only. It should be proved like other evidence. It is not necessary that witness should speak the same about as told by the accused."

35. **State of Himachal Pradesh vs. Raj Kumar (2018) SCC Cr. 452,** it has been held that :

"circumstantial evidence of prosecution establishing circumstances by cogent and convincing evidence. Circumstances cumulatively taken, form accompanied, general pointing out that murder was committed by accused and none else, burden under Section 106 Evidence Act not discharged by the accused. Accused should explain incriminating circumstances against him."

36. **Ishwari Lal vs. State of Chattisgarh 2020 (1) SCC Cr. 13**, it has been held that :

"extra-judicial confession is a weak piece of evidence but at the same time, if the same is corroborated by other evidence on record such confession can be taken into consideration to prove the guilt of the accused."

37. **Sahoo vs. State of U.P., 1966 AIR 40, 1965 SCR (3) 86,** it has been held that :

"an extra-judicial confession may be an expression of conflict of emotion, a conscious effort to stifle the pricked conscience; an argument to find excuse or justification for his act; or a penitent or remorseful act of exaggeration of his part in the crime." Before evidence in this behalf is accepted, it must be established by cogent evidence what were the exact words used by the accused. The Court proceeded to state that even if so much was established, prudence and justice demand that such evidence cannot be made the sole ground of conviction. It may be used only as a corroborative piece of evidence. The High Court did not interfere with the conviction observing that the evidence of extra-judicial confession is corroborated by circumstantial evidence.

Pyara Singh Vs. State of Punjab (1978) 1 SCR 661,

Apex Court observed that the law does not require that evidence of an extra-judicial confession should in all cases be corroborated. It thus appears that extra-judicial confession appears to have been treated as a weak piece of evidence but there is no rule of law nor rule of prudence that it cannot be acted upon unless corroborated. If the evidence about extra-

judicial confession comes from the mouth of witness/witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction. In such a situation to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra-judicial confession is reliable, trustworthy and beyond reproach the same can be relied upon and a conviction can be founded thereon.

Palvinder Kaur Vs. State of Punjab AIR 1952 SC 354,

"if extra-judicial confession was not acceptable in part, it has to be rejected completely. It could be held to be discredited for some purpose, and yet accepted as evidence for other purpose."

38. In the present case, extra-judicial confession was made by accused Sunita, first time on the day following the incident i.e. 18.04.2004 at 07:00 am, before PW-1 complainant (cousin of the deceased) who was residing nearby. Extra-judicial confession is as under :

"first of all intoxicating pills were administered to Charanjeet, then she went in another room, Sunita told that they inflicted head injury to Charanjeet by leg of the table and he died due to the injury received."

39. In the cross-examination, no question has been asked about the said extra-judicial confession, but it was suggested that it is wrong to say that Sunita accused had not stated such fact. FIR was lodged against four unknown persons but it will not affect the prosecution case.

40. PW.-2 Raj Rani was 75 years old and in relation she is aunt (mausi). Sunita made extra-judicial confession before her after third day from the incident as under:

"Her sister Prakash Rani was very sad and was weeping due to death of his son. Sunita fell on the legs of Prakash Rani and apologizing that she had developed illicit relationship with Amit Chopra (friend of his brother). Charanjeet began to suspect on her and angry with her and forbades her to meet with Amit Chopra. Due to this, she became annoyed, she and Amit Chopra made a plan in Delhi to remove Charanjeet from their way. Amit, Raju, Dinesh came from Delhi, on 17.04.2004, at about 09-10 pm and came at the house of Charanjeet. She administered intoxicating pills in the sikanji of Charanjeet, thereafter Amit, Raju, Dinesh and she killed Charanjeet jointly."

This statement was given by Sunita before PW2 and her sister and also stated that if she had not pardoned her then she will suicide with children.

41. Mother of the deceased Prakash Rani died later on. P.W. 2 Raj Rani is about 75 years old. She is impartial and has no enmity with the accused, she has no motive to give a false statement. P.W. 1 has also no motive to give false statement. The said statement of the accused is clear and

unambiguous and unmistakably conveyed that accused Sunita and other appellants are the only perpetrator of the crime. Testimony of aunt PW2 and cousin PW1 is true, reliable and trustworthy. Both the witnesses PW1 and PW2 corroborated the extra-judicial confession made by Sunita. The extra-judicial confession was made by Sunita before PW1 on the first day of the incident and third day of the incident before PW2.

42. Such extra-judicial confession was also made before the Investigating Officer by Sunita which was also heard by Raj Rani and Prakash Rani. This will not affect the prosecution case as extra-judicial confession made by Sunita was given before PW2 and later on before police which was also heard by the PW2. Such extra-judicial confession is also made by the accused Sunita before PW8 Mukesh Rawal, who is adopted son of Indrasen. He is brother of the accused Sunita. This witness was neither charge-sheeted nor permitted by court to be examined and he has stated that when he went to meet Sunita in jail/Court three and a half years ago and she had made above confession is not relevant because it is not clear that when the extra-judicial confession has been made before PW8 and why he has not disclosed this fact to the Investigating Officer.

43. Thus, it is evident that above extra-judicial confession made by the accused Sunita before near relations was without undue influence, coercion or pressure. It was voluntary, no suggestion was made in the cross-examination that such extra-judicial confession are tempted or non-voluntary. Thus, the said extra-judicial confession is reliable and admissible evidence being trustworthy and accepted as a whole. There is no enmity of Sunita against Raju & Amit Chopra.

44. Spot map of the case has been proved, Ex.Ka.16, which is not challenged by the defence. This shows that on the point A dead body of Charanjeet was lying near double bed and sofa and this shows that it was the living room of Sunita. It is also admitted fact that one tenant Sandeep (PW-6) was also residing in the same house. This shows that the deceased, Sunita, Amit Chopra and Raju were present in the same room where the dead body of the deceased was lying and no other living room is shown in the spot map or suggested by the defence that Sunita was sleeping in another adjoining room. After the incident, Sunita had not made any hue and cry or scream for protection of her husband. She was silent throughout the night. PW-6, neighbour of the same premises has also stated that Sunita had not told about the murder of Charanjeet in the intervening night of 17/18.04.2004. She had also not told about the incident to the tenant Bina Devi PW.7. Accused Sunita told about the incident to P.W.1 Om Prakash at 07:15 am and in the meantime, she was silent about the incident.

45. It is true that every person has distinct reactions during/after incident. Some make interference in the incident, some become silent spectator and some flee from the spot to save her life. On the point of reaction, following rulings are necessary to be mentioned here:

Marvadi Kishore Paramanand Vs. State of Gujarat (1994) 4 SCC 549,

"Different persons react differently in different situations and circumstances. No hard and fast rule of universal application with regard to the reaction of a person in a given circumstance can be laid down. Most often when a person happens to see or come across a gruesome and cruel act being

perpetrated within his sight then there is a possibility that he may lose his equilibrium and balance of mind and therefore he may remain as a silent spectator till he is able to reconcile himself and then react in his own way. There may be a person who may react by shouting for help while others may even choose to quietly slip away from the place of occurrence giving an impression as if they have seen nothing with a view to avoid their involvement, in any way, with the occurrence. Yet, there may be persons who may be so daring, hazardous and chivalrous enough to come forward unhesitantly and jump in the fray at the peril of their own life with a zeal to scare away the assailants and save the victim from further assailants."

Leela Ram Vs. State of Haryana (1999) 9 SCC 525,

"Reaction of eye witness, different witnesses react differently. There cannot be any set pattern of or a rule of human reaction on the basis of non-confirmity where with a piece of evidence may be discarded."

46. From the cogent & trustworthy evidence, it is proved that accused Sunita, wife of the deceased, who was present in the room, at the time of incident, did not interfere or made struggle with the other accused to save the life of her husband. She had not made any noise or even hue and cry/scream; she was not only silent spectator of the incident but also offered assistance in commission of the crime. Thus, the inaction shown by the accused Sunita indicates that she has mala fides and knew everything about murder of her husband.

47. Ex.ka.8, is recovery memo of wrapper of medicine nitrogen 10mg from the place of occurrence. It was administered in juice (*sikanji*) to the deceased by Sunita, due to which, he became unconscious. This was necessary for the accused, because in conscious position, they were not in a position to kill the deceased silently. How the empty wrapper of the said medicine was found from the place of occurrence is not explained by the accused in the statement under Section 313 Cr.P.C. No suggestion was made in cross-examination that this wrapper was planted. Due to this, deceased was not in position to defend himself, unable to make any hue & cry. It is the case of prosecution that injury on the head of the deceased was inflicted through leg of the table. Recovery memo of wooden table was proved as Ex.ka.7. The wooden leg of the table was recovered from the spot. From the evidence, it is apparent that the wooden leg of the table has not been sent for chemical examination to FSL and on the leg of the table, presence of blood is not proved. This will not damage the prosecution case. Sunita herself stated that Charanjeet was inflicted injury on his head with the leg of the table. There was no injury on the body of the accused Sunita, this shows that she had not made any intervention to save the life of her husband, who was murdered by the accused.

48. From the evidence, it is proved that at the time of incident, accused Sunita was in the room with her husband, so Sunita is the best witness for the murder of her husband. Section 106 of the Evidence Act lays down that *"when any fact is established within the knowledge of any person, the burden of proving that fact is upon him."* Thus, how the husband of Sunita had been murdered is especially within her knowledge that who has killed him and she has not made any noise to save the life of her husband. Accused Sunita

failed to discharge the burden of proving these facts. This fact also goes against Sunita and indicates that she knows the actual assailant, which has been disclosed by her in her extra-judicial confession.

49. From the perusal of inquest report, Ex.ka.2, it reveals that dead body of the deceased Charanjeet was lying near the bed. Both legs were tied up with *chunni*, both hands were tied up with rosy *chunni* from the back side. There was bandage of white clothes on the head of the deceased. There were clothes full of blood near the dead body. There were sandal in both the legs. Zip of pant was found open. There were injuries on the forehead and back side of the head. From the post-mortem report, there was no other injury except head of the deceased. This shows that injuries has been inflicted on the vital part of the deceased in helpless condition, when hands and legs of the deceased were tied up by the *Chunni*. This *Chunni* relates to Sunita and this fact was not denied by her. The bandage of white clothes on the head of the deceased shows that stranger will not put such sort of bandage on the head of the deceased. Clothes full of blood found near the dead body also shows that there was profused oozing of blood from the injuries of the deceased. Such act cannot be expected from a stranger/outside killer. The stranger killer will never keep the clothes tied on the head of the deceased and will never wipe the blood spilled on the floor. The said topography only indicates that accused had clear-cut intention to kill the deceased and none else. From the perusal of FSL report, Ex.ka.18, viscera report, no chemical poison was found in the stomach of the deceased. Sandal was found on the feet of the deceased. This shows that the incident took place before bedtime. No person will wear sandal on his feet while sleeping. This also shows that the murder was committed before sleeping.

50. Defence taken by the accused Sunita in her statement under Section 313 Cr.P.C. is that informant Om Prakash lodged this report that she may not demand her share in the house. She also stated that due to dispute of property, informant has given false evidence. But the accused Sunita had not submitted any documentary evidence with regard to dispute between Om Prakash and Sunita. Deceased is the son of maternal uncle of Om Prakash. From the evidence of PW2, it reveals that Prakash Rani mother of the deceased has sold the house of her husband that is father of the deceased. It also reveals that Om Prakash had helped Prakash Rani in selling that house. It is admitted fact that Charanjeet and Sunita came to Saharanpur to collect the rent of his house from Delhi. This shows that the defence taken by the accused Sunita is not believable or probable. Informant/PW1 has no enmity to implicate accused falsely. The next defence taken by Sunita is that PW8 Mukesh Rawal wants to usurp the property of her father in Delhi. From the evidence, it is apparent that Mukesh Rawal is adopted son of Indrasen. Indrasen has no son, so he had adopted Mukesh Rawal, the son of his sister. After death of Indrasen, property of Indrasen was inherited by Mukesh Rawal and in that house Sunita and deceased also lived during their service.

51. PW8, who alleges himself as brother of Sunita also came to see her in Court Saharanpur. D.W.1 Aruna, sister of Sunita also stated that Mukesh has taken possession of the house of her father, but it is not clear that what sort of enmity Mukesh Rawal had with Sunita. It was not established by the defence, so this defence

taken by Sunita is not probable. Accused Raju has taken the plea that he has been falsely implicated in the case and he has been arrested at his house.

52. It is also submitted that PW8 has stated that police has arrested the accused from Delhi after two days. Accused Amit Chopra had taken the defence that he has been falsely implicated. *Jija* of Sunita came with the police and arrested him at his home. Brother of Sunita lives in his mohalla. Contrary to this, PW9, Investigating Officer of the case has deposed that at the pointing of Sunita and Sandeep, he arrested Amit, Raju and Dinesh from roadways bus stand Saharanpur nearby Neelam Hotel. It is also submitted that place of arrest of the accused is suspicious, but this will not affect the prosecution case. Place of arrest is not so material. Main question is the role of the accused in committing the crime.

53. It is also submitted that prior to the incident, two persons also came at the house of the deceased who want to know about Charanjeet. Investigating Officer has not traced those two persons. This fact will not damage the case of prosecution.

54. PW6 Sandeep is the neighbour of Sunita. He is a hostile witness. He has not seen any person in the intervening night of 18.04.2004 at 11:30 pm and he also denied that accused were arrested before him. He has not supported the case of prosecution. But his evidence is not in a position to support the defence.

55. P.W.7 Bina Devi is tenant in the house of the deceased and she has stated that it is true that the information of murder was given by Sunita to her about 3-3½ years ago. She has not seen the persons who came in the night. But in the cross-examination, she has stated that she has given statement to the Investigating Officer that three males had come, whom Aunty (Sunita) was stating to be her relative from Delhi. She has also given statement to the Investigating Officer that at 07:00 am, landlady Smt. Sunita came in her room and told that four criminals came in the night, they made her unconscious and committed murder of her husband. Although, this witness is hostile witness but in the cross-examination, the said evidence is also relevant and supports the case of prosecution.

56. On the basis of above discussion, we are of the view that chain of evidence is complete in this case. Extra-judicial confession made by the accused Sunita is corroborated by the other circumstantial evidence. The only hypothesis is that accused Amit Chopra, Raju and Sunita has committed gruesome murder of Charanjeet with planning and cool mind. Thus, prosecution has proved beyond reasonable doubt that accused Sunita, Amit Chopra and Raju has committed the murder of Charanjeet in intervening night of 17/18.04.2004.

57. In our opinion, the guilt of appellants has been established by the prosecution beyond reasonable doubt and their acquittal would result in grave miscarriage of justice. There is no manifest error or illegality in the finding of the trial court.

58. In the result, the judgment and order of the trial court dated 21.08.2008 passed by the Special/Additional Sessions Judge, Court No.4, Saharanpur in Sessions Trial No. 294 of 2004, arising out of Case Crime No. 206 of 2004 (State Vs. Sunita &

others), Police Station Kotwali Nagar, District Saharanpur convicting and sentencing the appellants to undergo life imprisonment under Section 302/34 of India Penal Code with a fine of Rs.10,000/- each, in default thereof, to undergo three months additional imprisonment, is hereby confirmed.

59. During appeal, appellants Sunita, Amit Chopra and Raju had remained in judicial custody. They are directed to serve out the remaining period of sentence.

60. The appeal under Section 302/34 is devoid of merits and accordingly **dismissed.**

(2022)04ILR A106
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.04.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 5803 of 2007

Birnami & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri R.C. Kandpal, Sri Krishna Gopal, Sri Krishna Kant Shukla, Sri Lalit Kumar Mishra, Sri P.R. Maurya, Sri Pradeep Kumar Mishra, Sri S.M. Khan, Sri C.K. Jha, Sri Vinay Saran

Counsel for the Respondent:
A.G.A.

Evidence Law - Indian Evidence Act, 1872- Section 3- The site plan does not disclose PW-1's presence but shows him to be emerging from the dwelling unit- PW-2 is not reliable; firstly, because he has a separate residence and is a chance witness, secondly, his location is not disclosed in the site plan and, thirdly, he has faulted on directions. Rather, it appears to us, PW-2 arrived at the spot, as a neighbour and brother of the deceased, after he heard the gunshot.

Where it is shown from the own evidence of the prosecution that the witnesses of fact are chance witnesses who had arrived after the commission of the offence and their testimonies stand contradicted by other material, then no reliance can be placed upon the testimony of such witnesses.

Criminal Law - Code of Criminal Procedure, 1973- Section 154- FIR being ante-timed- the FIR is being lodged at 00.30 hrs in a typed format by claiming that it was got typed by about mid night - the inquest was conducted after day break at 10.30 hrs. even though the body was at the chowki- lodging of a typed report at 00.30 hours creates a strong suspicion with regard to the FIR being ante-timed-GD Entry/ Chik maker not examined- the Diwan who, allegedly, accompanied the informant to the police station to lodge the FIR has not been examined. This coupled with the delay in conducting the inquest lends credence to the defence suggestion that the FIR was lodged in the morning after getting it typed. Once this is the position, the prosecution case gets shrouded in suspicion throwing multiple possibilities including a strong probability of the incident being a hit and run kind of an incident, witnessed by none, and the prosecution story developing on guess-work based on strong suspicion with implication of those with whom the deceased had enmity. Probability of such guess-work becomes stronger also from the circumstance that as against a solitary gunshot injury three persons have been roped in, out of which, two have not been assigned any major role except that they came with weapons and escaped with the assailant.

When the prosecution fails to give any credible explanation for the suspicious circumstances attending the lodging of the FIR and the same is found to be ante-timed and ante- dated, then the story of the prosecution cannot be relied. (Para 26, 28, 29, 30)

Criminal Appeal allowed. (E-3)

(Delivered by Hon'ble Manoj Misra, J.)

1. This appeal is preferred against the judgment and order dated 24.08.2007/25.08.2007 passed by Sessions Judge, Rampur in Sessions Trial No. 496 of 2005 convicting the appellant no.2 (Tej Pal) under Section 302 I.P.C. and appellant no.1 (Birnami) under Section 302 read with Section 34 I.P.C., and sentencing them to imprisonment for life and fine of Rs. 10,000/- each with a default sentence of one year R.I.

INTRODUCTORY FACTS

2. On a typed written report (Exb. Ka-1) submitted by PW-1 (son of the deceased - Sitaram) at 00.30 hours, on 07.07.2005, Case Crime No. 227 of 2005 was registered at P.S. Milak, District Rampur of which Chik FIR (Exb. Ka-15) was prepared. The allegation in the FIR is that on 06.07.2005, at about 9 pm, when PW-1's father (the deceased) was sitting on a cot, smoking a Beedi, the accused-appellants along with one unknown person came and, before the deceased could react, appellant no.2 (Tej Pal) fired a shot at the deceased. Upon which, PW-1, his brother- Sompal (not examined) and his uncle Indraman (PW-2), who were present there, and many others who arrived on hearing gunshot, made an attempt to apprehend the accused but they ran away, brandishing their weapons. It was alleged that the informant recognised the two named accused in the light of lantern and torch but could not recognise the third person. It was also alleged that the deceased was taken on a cart for medical attention but by the time they could cross the river the deceased expired therefore, he was brought to Police Chowki Param.

3. Inquest was completed on 07.07. 2005 by about 10.30 hrs at Police Chowki Param whilst the body of the deceased was on a Dunlop cart (a bullock cart with tyres). The inquest report (Exb. Ka-3) was prepared by S.C. Tyagi (PW-4). The inquest report notices that the body was wrapped in a bed spread / mattress and was lying in a supine position on that Dunlop cart.

4. Autopsy was conducted by Doctor M.A. Ali (PW-3) on 07.07.2005 at about 4.30 pm. **Autopsy report** (Exb. Ka-2), in respect of body condition and injuries, recites:-

(i) **External Examination:-**

Rigor mortis passed off in neck but present in both upper and lower extremities. No sign of decomposition.

(ii) **Ante-mortem injuries:**

Firearm wound measuring 5.5 cm x 4 cm x 16 cm situated over right side of upper part of abdomen, 12.5 cm below right nipple. Margins abraded and blackening present (wound of entry). The tract of wound directed inwards and upwards. No wound of exit found.

(iii) **Internal Examination:-**

(a) Seventh and Eighth ribs, on right side broken;

(b) Underlying pleura on right side lacerated;

(c) Right lung lacerated. 10 pellets recovered from right lung. Two litres of clotted blood present in right pleural cavity. Six pellets and one cock recovered from right pleural cavity. Left

lung -NAD and Pale. Pericardium- NAD and pale.

(d) Heart - NAD and empty.

(e) Cavity- about 1 litre of clotted blood present in abdominal cavity.

(f) Stomach: NAD, 150 ml of semi-digested food matter present.

(g) Small intestine - NAD - digested food matter and gases present.

(h) Large intestine - NAD, faecal matter and gases are present.

(i) Liver - lacerated, 12 pellets recovered from liver.

(j) In all 28 pellets recovered from the body

(iv) **Cause of death**: Haemorrhage and shock due to ante-mortem firearm injury.

(v) **The estimated time of death** - About one day before.

5. After completion of the investigation, two persons, namely, the appellants, were charge-sheeted by PW-4 vide charge-sheet dated 22.07.2005 (Exb. Ka-14) on which cognisance was taken on 11.08.2005 and the case was committed to the Court of Session where, vide order dated 02.01.2006, the appellants were charged for offence punishable under Section 302 read with Section 34 I.P.C. The accused-appellants pleaded not guilty and claimed to be tried.

PROSECUTION EVIDENCE

6. During the course of trial, the prosecution examined four witnesses, their testimony, in brief, is noticed below:-

(i) **PW-1 - Surendra** (informant - son of the deceased). He stated that on 06.07.2005, at about 9 pm, while the deceased was smoking Beedi at the *Baithak* (sitting place) in front of his house and PW-1 was returning to the house, after serving water to the deceased, the accused - Birnami and Tej Pal, along with an unknown person, came and, before the deceased could realise, Tej Pal (appellant no.2) fired a shot at the deceased. All of this was witnessed by Sompal (younger brother of PW-1) and Indraman (PW-3 - brother of the deceased) and they made an effort to nab the accused but they ran away brandishing their weapons. PW-1 stated that he and the witnesses saw and recognised the accused in the light of lantern and torch though, they could not recognise the third unknown person. PW-1 stated that thereafter the injured was taken on a Dunlop cart for medical attention but, by the time they could cross the river Naurah, he expired. Therefore, they took the body on that Dunlop Cart to the police chowki Param. PW-1 stated that after parking the Dunlop cart there, he went to police station Milak where, on getting the report typed, he lodged the report after signing the same. The typed report was exhibited as Exb. Ka-1. PW-1 stated that accused were inimical to the deceased because government tap was installed in the premises of the deceased.

(ia) **In his cross-examination**, PW-1 stated that his house and PW-2's house are separate from each other. The deceased and PW-1 stayed in one house. The '*Baithak*' where the deceased was sitting at the time of occurrence is on the outer side, below a shade *(chhappar)*, open from three sides and towards north of the house. The distance between that '*Baithak*' and the house is 8-10 paces. When PW-1 was about 5 paces away from the deceased, he heard gun shot, before that he could sense someone coming and when he turned, simultaneously, gun shot was heard and he saw three persons holding pistols in their hands. PW-1 stated that the shot was fired

in his presence; and that shot was fired from a distance of about 1 feet and, immediately thereafter, the accused ran away. PW-1 stated that they chased the accused for 2-4 paces but returned to attend to the deceased who was lying injured. PW-1 stated that upto the Chowki he was accompanied by his brother (Sompal), his mother and PW-2 but other villagers, due to fear, did not accompany them though they had arrived at the spot. They reached Chowki at 10.30 pm where they informed Diwan about the incident but the report was not written. They stayed there for half an hour, whereafter, PW-1 went to P.S. Milak along with Diwan. They reached there by quarter to twelve. By that time the Bazaar was closed. At the police station, PW-1 met Daroga (I.O.) and informed him about the incident. Daroga told PW-1 to get the report in writing. Next to the police station, at the Tehsil, he found a man who got the written report typed. Prior to that, he had never seen that typist. That at that time there was just one typist available. The typist did not type his name in the report. The typed report was given at the police station at about 00.30 hrs. He denied the suggestion that the report was typed in the morning after sunrise and thereafter was given at the police station. He stated that the I.O. did not ask him as to from where he got the report typed. At this stage, the witness was confronted with his statement under Section 161 Cr.P.C. where he had not stated that the report was got typed at the Tehsil.

(ib) **In respect of position** of the deceased when the shot was fired, PW-1 stated that the shot had hit the deceased while he was sitting on the cot; the shot was fired from the right side. Blood had dropped on the cot.

(ic) **In respect of conveyance used to lodge report,** PW-1 stated that from Chowki Param, he went on a cycle with Diwan and returned back to the chowki on the same cycle; and that night they did not return back to the village.

(id) **In respect of the time he served food to the deceased-** PW-1 stated that that night he had served food to the deceased about 15 minutes before 9 pm. The deceased had consumed Roti and Sabji (vegetable) and after that meal he had gone to serve water to the deceased.

(ie) **In respect of animosity**- PW-1 stated that though there was animosity between the accused and his family but there was no pending litigation.

(if) **In respect of source of light,** PW-1 stated that he had a torch; and a lantern was hanging from the *Chhappar*. He had disclosed to the I.O. the spot where the lantern was hanging from the *Chhappar* but the I.O. had not taken the lantern into custody. He stated that he had also shown his torch to the I.O. but the torch was not taken into custody by the I.O. He denied the suggestion that he had not seen the incident in the light of torch/lantern as they were not there. He also denied the suggestion that he had not shown the torch and the lantern to the I.O.

(ig) **In respect of the third accused,** PW-1 stated that he did not know him. PW-1 also could not describe him by his height and body structure. He stated that all the three accused came together and were standing together at one place when they fired at the deceased. He denied the suggestion that it was dark therefore, he could not recognise the third person. He also denied the suggestion that it was dark at the place of occurrence. He also denied the suggestion that it was dark and he could not recognise any person. He denied the suggestion that the accused were not involved but have been falsely implicated on account of enmity. He further denied the

suggestion that the accused-appellants neither brandished their weapons nor extended threats.

(ii) **PW-2 - Indarman** (younger brother of the deceased and uncle of PW-1). He stated that while he was standing on the rasta, in front of his house, he saw the accused-appellants and one another coming out of their house and going towards the house of the deceased. Seeing them together, PW-2 also went towards the house of the deceased when he saw accused (Tej Pal-appellant no.2) firing a shot at the deceased. Thereafter, PW-2, PW-1, PW-1's brother (Sompal) and PW-1's mother challenged the accused and tried to catch them but the accused ran away brandishing their weapons and extending threats. PW-2 stated that, at that time, there was a lantern hanging from the *Chhappar* and he had a torch in his hand and in the light thereof, he saw the incident and could recognise the accused. He stated that after the incident, they took the deceased on a Dunlop cart for medical attention at Milak but the deceased died on way and, therefore, they took the body to Param Chowki. From Chowki, PW-1 went to the police station to lodge the report.

(iia) **In his cross-examination**, PW-2 stated that his house and the house of the deceased are separate with separate entrance. He stated that soon before the incident, the deceased has had his food. At the time of the incident, PW-2's wife and children were inside the house. He stated that, during investigation, he had informed the I.O. that he was standing on the rasta at the time of the incident but when confronted with the omission in that regard, he stated that if that was not written, he cannot tell the reason for the same. He denied the suggestion that he is lying that he was standing on the rasta at the time of the incident and therefore he had not made disclosure of this fact to the I.O. He admitted that he had not informed the I.O. that there was lantern hanging from *Chhappar* and that he had a torch in his hand. He, however, denied the suggestion that he did not make disclosure of the lantern hanging from Chappar and about the torch in his hand because they were not there. Immediately, thereafter, he stated that he had informed the I.O. about the lantern and the torch. When PW-2 was confronted with the omission in his statement in that regard, he stated that if that was not mentioned in his statement under Section 161 Cr.P.C., he cannot give its reason.

(iib) **On further cross-examination**, he stated that at about 9 pm, on the day of the incident, he had come out to urinate, then he spotted the accused roaming and by the time he could finish urinating, he heard gun shot. As soon as gun shot was fired by accused-appellant (Tej Pal), he arrived at the spot where he saw deceased's both sons and wife and other than them there was no one else there. PW-2 stated that after being hit by the gun shot, the deceased fell there. Thereafter, the deceased was taken on a Dunlop cart. He stated that the distance between Param Chowki and the spot is 3-4 kilometer. He stated that he had accompanied the cart up to police chowki Param. Thereafter, as the body of his brother was kept at the Chowki, he remained at the Chowki, whereas, PW-1 went to police station Milak to lodge the report. He stated that from the spot to Chowki Param, it took them about 45 minutes. He stated that from Milak, police personnel had arrived in the night between 12.00- 1.00 pm and they were there at the Chowki till day break. Thereafter, they brought the body to the police station by about noon. He stated that when PW-1 had gone from Chowki Param to Police Station Milak, a constable had accompanied him.

(iic) On being queried as to whether the accused had covered their faces, he stated that their faces were not covered. He stated that since before the incident there were disputes between the deceased and accused-appellants (Tej Pal and Birnami); and that a month before the present incident, there was a fight though no one had received any serious injury; that incident had occurred at 8-9 am in the morning but that incident was not reported and no information of that incident was given to the I.O. In respect of the present incident, his statement was recorded next day of the incident. He stated that he had also informed the police personnel of the police chowki about the incident but when they were informed, the I.O. was not present. He stated that he was not asked by the I.O. to handover the batteries (should be read as torch) therefore, he had not shown the batteries to the I.O.

(iid) **In respect of the direction in which the deceased was sitting at the time of the incident,** he stated that the deceased at the time of the incident was sitting on a cot smoking a Beedi; deceased's face was towards East and deceased's house was towards West; whereas, the *Chhappar* was overhead. PW-2 stated that deceased was shot from the *Galliyara* (lane) located towards East of that *Chhappar*. When he was questioned as to whether he is aware about directions, PW-2 stated that he is aware of the directions. He denied the suggestion that there is no *Galliyara* towards the East of the *Chhappar* of the deceased. He stated that *Chhappar* of the deceased joins his house towards North. He stated that in between his and deceased's house there is Kothri and near the *Chhappar*, apart from his house, there is no other house. He denied the suggestion that he did not witness the incident and as the incident involved the murder of his brother, he has told lies.

(iii) **PW-3- Dr. M.A. Ali.** He proved the autopsy report which was marked as Exhibit Ka-2. He stated that death of the deceased could have occurred in between 9 pm to 11 pm on 06.07.2005.

(iiia) **In his cross-examination,** he stated that the position from where the shot was fired at the deceased must have been lower than the position at which the deceased was when he was hit by the shot. He stated that if shot is fired from a distance less than 2 feet blackening would be noticed though it depends upon the nature of the gun powder in the bullet as also the clothes worn by the deceased. He stated that scorching and tattooing would be noticed if the shot is fired from a distance between 1 to 2 feet but it all depends upon the nature of the firearm.

(iiib) In respect of his estimation with regard to the time of death, he stated that there could be a variation of plus-minus 4 to 6 hours.

(iiic) In respect of presence of semi-digested food material in the stomach of the deceased, he stated that this suggests that the deceased might have had his meal 4-6 hours before. He stated that if the deceased had died about 10 pm, he might have had his meal at around 4.30 pm and if he had died at about 4.30 pm then he might have had his meal between 10-10.30 am.

(iv) **PW-4-S.I. S.C. Tyagi (Investigating Officer)**. He stated that on the date of lodging the first information report he was posted at P.S. Milak as Sub-Inspector and he took over the investigation of the case under the direction of the Station House Officer. After taking over the investigation of the case, he recorded the statement of Chatrapal Singh, who had prepared the Chik FIR and the GD Entry of

the receipt of the written report; thereafter, he recorded the statement of the informant. Vide GD Report No. 2, he left for police chowki Param along with other police personnel where he saw the body of the deceased. The body of the deceased was inspected but as it was late night, the inquest was deferred to morning and was, accordingly, conducted in the morning. He proved the inquest report. He stated that after the inquest, the body was sealed and papers in respect of autopsy were prepared. At the time of sealing the body, pieces of bed-sheets and mattress were taken whereafter, he proceeded to the spot. At the spot, the site plan was prepared on the instructions of PW-2. The site plan was exhibited as Exb. Ka-10. PW-4 stated that he took blood stained pieces of the cot where the deceased was sitting and prepared a memorandum thereof, which was marked Exhibit Ka-11. He stated that in that cot there was bed sheet and mattress which were blood stained and he took their pieces of which seizure memo (Exb.Ka-12) was prepared. He also proved lifting of blood stained and plain earth from the spot of which seizure memo prepared was exhibited as Exb. Ka-13. He stated that the accused - Birnami was arrested on 09.07.2005; whereas, the accused-Tej Pal was arrested in PW-4's absence on 16.07.2005. He stated that after he recorded the statement of the eye-witnesses including Sompal (other son of the deceased) and Premwati (wife of the deceased), charge-sheet was prepared and submitted, which was exhibited as Exb. Ka-14. He stated that the articles seized were sent for forensic examination. He stated that at the time of inquest, the deceased was wearing a Kurta, Aangocha and an underwear which were sealed and sent for forensic examination. He produced plain earth/blood stained earth, clothes etc. which were made material exhibits. He proved the signature of Chhatrapal - constable, who prepared the Chik FIR, and stated that Chhatrapal could not be produced as a witness because he is on VIP duty and there is no possibility of him being available. On PW-4 recognizing the signature of Chahtrapal, the Chik FIR and the GD entry of the report were exhibited as Exb. Ka-15 and Exb. Ka-16, respectively.

(iva) **In his cross-examination,** he stated that the FIR was registered in his presence. At the time of registration of the first information report, 2-3 persons had come for lodging the first information report. He, however, could not tell the conveyance used by the informant to reach the police station. He stated that the FIR was scribed at the police station. Immediately thereafter, he stated that it was already written. He stated that from village Koop (place of occurrence) if one comes to the police station, Param Chowki falls in between. PW-4 stated that the informant had informed that the body of the deceased was lying at Param Chowki. He stated that he left the police station at 12.30 am (0030 hours) to reach Param Chowki; the informant had accompanied them; and police personnel had gone on a Jeep. He stated that the statement of Chik maker and the informant was recorded at the police station. He stated that the distance between Param Chowki and the police station would be 8-10 kms. PW-4 took about an hour to reach Param Chowki as the road was very bad. On reaching Chowki, the body of the deceased was seen and PW-4 stayed overnight at the Chowki where family members of the deceased were also present. Amongst villagers, Kripal and others were also there; that there must have 10-15 people there. He stated that though PW-2 was present at the Chowki but his statement

was not recorded then, and no step in furtherance of investigation was taken there. He stated that no separate order was passed for him to investigate the case, in fact the SHO (Amrit Lal) was also present at the time of lodging the FIR and the order in respect of investigation of the case by PW-4 was written in the Chik FIR itself.

(ivb) In respect of the investigation being assigned to him, PW-4 stated that the investigation was assigned to him because the incident occurred within his Halka (circle). He stated that he does not remain at the Chowki during night but is either on round or at the Thana. He stated that, that entire night the body remained on Dunlop Cart and the proceedings commenced in the morning between 8 and 9 am. He stated that sun rise must have occurred between 6.00 and 6.15 am. He stated that at the time of inspection of the body, the body was on a mattress and a bed-sheet, which were soaked with blood, but there was no blood on the dunlop cart. He could not tell as to what mode of transport was used for carrying the body from the Chowki to Sadar Hospital. He stated that uncle of the informant, namely, PW-2, took him from police chowki to village Koop i.e. the place of occurrence.

(ivc) **In respect of the description of the spot** i.e. the place of occurrence, PW-4 stated that a cot was seen at the *Baithak*. The *Baithak* was covered by Chappar. He could not tell whether mattress/ bedcover was there on the cot but the cot had blood stains. He could not tell the exact portion of the cot in which blood stain was present but stated that there was blood also on the floor in a dimension of 2-3 inches as was on the cot. He stated that the informant did not have a separate room but the entire family used to reside at one place in the house.

(ivd) In respect of various other steps during investigation, he stated that eye-witnesses of the incident were informant (PW-1), his brother Sompal, his uncle (PW-2) and informant's mother and no other. He stated that the statement of deceased's wife was recorded on 22.07.2005 because earlier, when he visited the spot, she was not found. He denied the suggestion that on the day of the incident, wife of the deceased was not present. He stated that he had prepared the site plan on the instruction of (PW-2). He stated that on 09.07.2005, he had arrested Brijmani from his house. He denied the suggestion that he completed the investigation while sitting in his office. He reiterated that he recorded the statement of the informant in the night of the incident itself at the police station but the time of its recording was not entered in the general diary. He stated that at the time of recording statement of the informant, PW-2 was not present.

(ive) In respect of typed report of the written report (FIR), PW-4 stated that when the informant had come to lodge the report he had a written report with him which was seen by him. PW-4 stated that copy of the report and the copy of the Chik was provided to him. He stated that he does not know from where the informant got the report typed. He also stated that he does not know whether the typed report was given at police station Milak in the morning. He stated that he did not record the statement of the person who typed the first information report and he cannot tell the reason for the same. He stated that he did not ask the informant as to from where he could get the written report typed in the night. He also did not ask any question as to the name of the typist.

(iv f) **In respect of the time when he left the police station for investigation,** he stated that after

completing the formalities, he left at 1.30 hours for Chowki Param.

(iv g) **In respect of the time when he reached village-Koop** (the place of occurrence), he stated that he reached there at 10.30 hrs in the morning but before that he had reached Param Chowki. He stated when he had reached village-Koop then PW-2 was with him.

(iv h) **In respect of describing the surroundings of the spot -** He stated that the house of the informant (PW-1), PW-1's brother (Sompal) and PW-1's wife (Premwati) was common; whereas, the house of PW-2 is separate and PW-2 resides separately. He stated that though the two houses are separate but there is no boundary in between. He stated that in the house of the deceased, there are 2 or 3 rooms facing North. All three rooms are *Pakka*. At the time of occurrence, informant (PW-1) and the deceased used to stay in the same house but in different rooms. He stated that in the site plan the house of the accused is across the road. He stated that towards north of the house of the deceased there is Chappar and there is a gap between the *Chhappar* and the house (where the deceased and other members of his family resided). PW-4 stated that in the site plan he had not shown the three rooms separately but has shown the location of the entire house. On being shown the site plan prepared by him, he stated that in the site plan he has shown the direction from where the informant (PW-1) and PW-1's mother (Premwati) and PW-1's brother (Sompal) had come out of their house to the spot. He stated that the place where the incident occurred (Point 'A') is about 7-8 paces from the house of the informant.

(Iv i) **In respect of the presence of lantern and torch,** when PW-4 was questioned, he stated that at point 'A' where the cot was laid on which the deceased was present at the time of the incident there was no lantern shown in the map and that no such lantern was recovered. The informant (PW-1) and his uncle (PW-2) had also not given their torches to the custody of the police. The informant had also not disclosed the presence of lantern at the spot. He admitted that at Point 'A' he had not shown presence of blood. He stated that neither PW-1 nor PW-2 in their statement recorded under Section 161 Cr.P.C. had disclosed to him the distance from where the deceased was shot at. That he had not noticed any bullet at the spot nor he could notice any pellet marks. He also stated that the two eye-witnesses had also not disclosed to him as to how they could recognise the assailants. He stated that at the spot he did not notice any empty cartridge. He denied the suggestion that investigation was completed sitting at one place. He stated that he had collected pieces of the cot from the spot but he had not mentioned the length of those pieces and he had also not mentioned in the case diary as to how many pieces were sent to the forensic laboratory. He denied the suggestion that the recovered articles were not properly kept and entered in the records before being sent for forensic examination. He stated that recovered articles were sent for forensic examination after submission of charge-sheet. He denied the suggestion that the forensic report is bogus.

7. The incriminating circumstances appearing in the prosecution evidence were put to the accused-appellants. They denied the incriminating circumstances and claimed that they have been falsely implicated on account of land dispute.

8. The trial court found that the FIR was promptly lodged, the ocular account of PW-1 and PW-2 was reliable and consistent

with the medical evidence, accordingly, convicted the appellant no.2-Tej Pal under Section 302 I.P.C. and appellant no.1 Birnami under Section 302 read with Section 34 I.P.C.

9. We have heard Sri Vinay Saran, learned senior counsel, assisted by Sri Pradeep Kumar Mishra, for the appellants and Sri H.M.B. Sinha, learned A.G.A., for the State and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANT

10. Learned counsel for the appellants submitted that the incident is of late night; existence of electricity light is neither alleged nor proved; incident is stated to have been witnessed in the light of lantern and torch whereas, neither lantern nor torch was shown to the I.O. and their existence was not confirmed during investigation therefore, in the darkness of night no one could identify the assailant; whereas, the FIR was lodged by guess-work, implicating three suspects against one injury; that the FIR was ante-timed; and that the trial court failed to properly test the prosecution evidence, particularly, when a close scrutiny was required as the ocular account was coming through interested witnesses.

11. It was contended that the place of incident, as per the site plan, was adjoining *Aam Rasta* (public lane). Admittedly, the deceased was seated underneath a *Chhappar* which was open from three sides including lane/ road-side, therefore, anybody from the road could have fired a shot at the deceased from close range and run away. It is thus a case of hit and run, giving no opportunity to the witnesses to identify the assailants. Moreover, the incident occurred without altercation or dialogue. It was a split second affair. When the testimony of PW-1 is carefully scrutinised, it would appear that he rushed out from his room on hearing gun shot and, therefore, possibility of his witnessing the actual firing is not there. Notably, the site plan discloses arrows/ directions from where the witnesses arrived and not the spot from where they witnessed the incident.

12. There is a strong suspicion with regard to the FIR being ante-timed as it is not at all probable that at 12 midnight a typist would be available to type the report. This suspicion has not been dispelled by examination of the scribe / typist of the written report or the constable who prepared the Chik FIR/ GD Entry in respect of its receipt. Rather, the suspicion gets amplified by non-disclosure of the identity of that typist despite questioning. It is therefore a case where the report was lodged on guess-work and suspicion in the morning by ante-timing the same. This is corroborated by the inordinate delay in conducting the inquest. All of this raise a strong suspicion with regard to the truthfulness of the prosecution case entitling the accused to the benefit of doubt.

13. It was next argued that in so far as PW-2 is concerned, he appears to be a chance witness whose presence at the spot, at the time of the incident, appears doubtful because1-33 the reason that he discloses for his presence is that he had been out to urinate. This reason is not disclosed by him in his statement recorded under section 161 CrPC. Other than that his presence is not natural because he has a separate house. Moreover, the site plan, which is prepared at his instance, does not disclose his location from where he witnessed the

incident. Further, the disclosure by him with regard to the direction in which the deceased was sitting i.e. with his face towards east, is at variance with the spot position including the site plan because, if the deceased was facing east then had the shot been fired from lane, which is towards north, as shown in the site plan, the deceased would have been hit on the left side, whereas the shot had hit the deceased on the right side.

14. In so far as PW-1 is concerned, it appears, he rushed out of the house on hearing the gun shot. Further, PW-1 is not reliable because, according to him, he had served dinner to the deceased just 15 minutes before the incident; whereas, semi-digested food was noticed in deceased's stomach, which, according to the doctor, might have been eaten about 4 hours before. This also suggests that the incident might have occurred late night and not as suggested by the prosecution.

15. Further, it is a case where there is no corroboration to the ocular account from recovery of the murder weapon or from any independent witness, hence, conviction of the appellants, under the circumstances, would not be safe and, therefore, it is a fit case where the benefit of doubt be extended to the appellants.

16. Lastly, there existed no strong motive for the crime. If there was any, there appeared no motive for three persons to join hand. Even the two named persons belong to different families though they both reside near the house of the deceased across the road.

SUBMISSIONS ON BEHALF OF THE STATE

17. Per contra, the learned A.G.A. stated that PW-1 was a co-resident with the deceased and PW-2 resided next door, thus, their presence at the spot is natural. Their ocular account is consistent with medical evidence and the first information report was promptly lodged in the night itself; that source of light has been disclosed in the FIR as well as in the testimony. Therefore, merely because the investigating officer was not vigilant in effecting recovery of lantern and torches, non production of lantern/ torch would not prove fatal to the prosecution case.

18. Absence of a strong motive for the crime would not be material as the case is based on ocular account which is consistent with medical evidence. Importantly, the place and time of occurrence has not been challenged by putting suggestions to the eye-witnesses therefore, once it is established that the incident occurred in close proximity to the dwelling unit of the witnesses, their presence becomes natural on the spot and their testimony cannot be discarded merely because they are not independent witnesses.

19. No presumption can be drawn that a typed report cannot be prepared late in the night. Similarly, if the inquest was deferred till day break, an inference cannot be drawn that the FIR was not in existence by then because in villages where there is no facility of electric light, inquest usually awaits day break. Thus, there is no logical reason to assume that the first information report is ante-timed.

20. Presence of semi-digested food in the stomach of the deceased does not render the ocular account of PW-1 in respect of the incident doubtful because his presence in the house at the time of the

incident has not been challenged. The learned AGA thus prayed that the appeal be dismissed.

ANALYSIS

21. Having considered the entire prosecution evidence and the rival submissions, we are of the view that the prosecution has been able to prove beyond doubt the following:

(i) **The place of incident** i.e. where the deceased was shot at. The place of occurrence is the *Baithak* of deceased's house, just in front of the house of the deceased, adjoining public lane, covered by a *Chhappar* (a shade), which is open from three sides including the lane side, and is 7-8 paces north of the dwelling units of deceased's house. Notably, there is no suggestion to the eyewitnesses to dispute the spot. Further, there is no serious challenge to the deceased sitting on a cot, placed on that *Baithak*, at the time he was shot. This is also confirmed by collection and production of blood stained pieces of cot etc found on that '*Baithak*'.

(ii) **The time of the incident.** Though, presence of semi-digested food matter in the stomach of the deceased has been highlighted by learned counsel for the appellants to develop an argument that if food had been served 15 minutes before the incident, as is the testimony of PW-1, there would be undigested food and not semi-digested food in the stomach therefore, it appears, the incident was of late night but, interestingly, there is no suggestion to the eye-witnesses PW-1 and PW-2 that the incident occurred at some other place or at some other time.

22. As the prosecution has been able to fix the place of occurrence, we shall now closely scrutinise the spot described in the site plan (Ex. Ka-10) prepared by I.O. after inspection of the spot on the guidance of PW-2, the alleged eye witness of the incident. The site plan (Ex. Ka-10), indicates that the entire area of the deceased's house is in three parts. First being the main dwelling unit, which is towards South. Second is the *Baithak* - Point A (the place of occurrence), underneath a *Chhappar* (a shade), which is located north - east of the dwelling unit, at a distance of 8 paces from the dwelling unit; and the third, namely, Point B is open space located in front, towards north, of the dwelling unit and towards west of the *Baithak*. Notably, this is the open area in respect of which, as per item no.2 in the index of the site plan, there is a dispute. The place of occurrence i.e. '*Baithak*', which has been marked by alphabet "A', adjoins the *Aam Rasta* (public lane) located north to it. Across that public lane, further north, there are separate houses of Parmi (father of appellant no.2) and Chunni (father of appellant no.1). What is important is that the houses of accused-appellants are across the road in front of the residential area of the deceased. The house of PW-2 (Indraman) is located east to the house of the deceased.

23. According to PW-3 (autopsy surgeon who conducted autopsy and prepared the autopsy report Ex. Ka-2), the bullet travelled in a direction lower to upper, that is, the shot was fired at the deceased from a level lower to that at which the deceased was positioned. As per prosecution evidence the deceased was sitting on a cot placed at the '*Baithak*'. Ordinarily, '*Baithak*' is higher than the adjoining ground level. The site plan reflects that the '*Baithak*' in question adjoins *Aam Rasta* (public lane). The

arrows in the site plan (Ex. Ka-10), indicate the direction from where the accused arrived and escaped. These arrows suggest that neither the accused entered the residential area of the deceased nor stepped on to that *Baithak*. Rather, they fired from the margin of the public lane, adjoining the *Baithak*, and escaped. Putting all these circumstances together, in our view, it appears to be a case where the shot was fired at the deceased from the adjoining public lane and the assailants escaped using that lane. The incident is, therefore, a hit and run kind of an incident. More so, because it is not the prosecution case that there was an altercation or exhortation preceding the shot.

24. In these circumstances, what we have to examine is whether PW-1 and PW-2 had the opportunity to witness the incident in the darkness of night or it is a case where they came out on hearing gunshot and by the time they could come out, the assailant had vanished; whereafter, on strong suspicion, or guess-work, a named FIR was lodged. Notably, PW-1 is the son of the deceased and he resides in the same house. But, the dwelling unit of that house is separate from the *Baithak* where the deceased was seated at the time when the shot was fired at him. Admittedly, in the house there were deceased's wife and the other son who carried the deceased to the police chowki yet, they have not been examined. PW-1 (the informant), the other son of the deceased, to show his presence at the spot for the purposes of witnessing the incident, claims that 15 minutes before the incident, PW-1 had served *Roti - Sabji* (food) to his father (the deceased) and to serve him water thereafter, he had come out and when, after serving water, he was returning to the dwelling unit, he could sense some one coming and by the time he turned, shot was fired. In that small span of time, he noticed as to who fired the shot and who were the others present. Interestingly, he claims to have noticed two persons, namely, the two appellants with whom, according to PW-1, there was some dispute in respect of the land. He, however, could not recognise the third person and could not describe his physical attributes despite being questioned on that aspect. At this stage, to test the above story, the statement of PW-3 (the autopsy surgeon) need be noticed. According to PW-3, he noticed semi-digested food in the stomach of the deceased which, in his opinion, would suggest that the deceased had his meals 4 to 6 hours before. This throws two possibilities, that is, either the occurrence was late in the night or, the story narrated that the deceased had meals 15 minutes before the incident is contrived as a ploy to justify PW-1's presence at the spot in the nick of time. Both possibilities would have to be ruled out even if we assume that medical evidence cannot, with precision, determine the time when the meal was taken inasmuch as much would depend on the digestive power of the person and the nature of the food consumed. But as these possibilities have arisen, to rule out all doubts, we would have to carefully scrutinise and test the prosecution evidence. A careful scrutiny of the prosecution evidence is otherwise also required because it flows from witnesses who are closely related to the deceased and the deceased admittedly had a dispute with the two named accused and, in the past, they have had a fight.

25. As a first step in our endeavour to test the prosecution evidence, we shall notice the site plan (Ex. Ka-10). When we notice the site plan (Ex. Ka-10), item No. 3 of its index, would suggest that the

informant and the witnesses had arrived together from the dwelling unit to witness the incident. Notably, the dwelling unit comprises of three rooms and is 8 paces away from the spot where the deceased was shot at. Admittedly, the incident is of night and the prosecution has not taken up a case that there was electric light in the area. To prove the source of light, the burden was on the prosecution. To discharge that burden, the prosecution story was that there were torches and a burning lantern hanging from the *Chhappar* under which the deceased was sitting. Neither the lantern was shown to the investigating officer nor the place where the lantern was hanging was shown to the I.O. The site plan does not disclose the spot where the lantern was hanging. Even the torches were not presented before the I.O. and, admittedly, there was no custody or seizure memo of either the torch or the lantern. These circumstances may not be sufficient to discard the testimony of the eye witnesses of the incident as they may be on account of lapses in investigation but they are of consequence to the extent that the ocular account in respect of the presence of those objects i.e. lantern and torch does not get support from any material collected during investigation. Consequently, the ocular account would have to be tested independently.

26. Before testing the testimony of PW-1, as a second step, we shall test the testimony of PW-2 i.e. the brother of the deceased. In so far as PW-2 is concerned, he has a separate house and, notably, the site plan, though is prepared at his instance yet, it does not disclose as to from where PW-2 witnessed the incident. Further, PW-2 appears to be a chance witness, who was out of his house to urinate when he got the opportunity to witness the incident. Importantly, when PW-2 was questioned as regards the direction in which the deceased was sitting when he was shot at, PW-2 stated that the deceased was facing East at the time when he was shot. Had it been so, the shot fired from northern side of the deceased (as is according to the site plan) would have hit the deceased on the left side whereas the post-mortem report suggests that the deceased suffered injury on the right side. In our view, PW-2 is not reliable; firstly, because he has a separate residence and is a chance witness, secondly, his location is not disclosed in the site plan and, thirdly, he has faulted on directions. Rather, it appears to us, PW-2 arrived at the spot, as a neighbour and brother of the deceased, after he heard the gunshot.

27. Now, we arrive at the testimony of PW-1 to find out whether it is reliable and trustworthy. Before we proceed to test the testimony of PW-1, we may observe that there are no cut and dried formulae to test the reliability and credibility of a witness. The reliability of a witness not only depends on his consistency but also on surrounding facts and circumstances of the case. As a first step, the court must test whether the presence of the witness at the spot at the crucial time is natural or is by chance. If it is natural, then whether he had the opportunity to witness the incident. If the presence is by chance, then there ought to be an acceptable explanation for his presence there. Ordinarily, when there is a prompt reporting of an incident based on an ocular account of a witness, that ocular account is considered truthful because he gets lesser opportunity to embellish the account by guess work or ill motives. Therefore, to make the prosecution story look truthful, at times there is an effort to ante-time the FIR. We shall therefore proceed to test the ocular account rendered by PW-1 not only on its own merit but also

by examining the possibility of the FIR being ante-timed.

28. As regards the presence of PW-1, we notice that the incident occurred in the night at the *Baithak* of the house of the deceased with whom PW-1 resided. Considering that by night hours, after finishing day's chores, one would return to the comfort of his house, the probability of PW-1 being present in the house at the time of the incident is quite high. Under the circumstances, the presence of PW-1 in the house at the time of the incident is natural. Moreover, no suggestion has been given to PW-1 that he was elsewhere at the time of the incident. But that, by itself, is not sufficient for us to accept that PW-1 had witnessed the incident. Notably, the site plan prepared by the I.O. would suggest that the dwelling unit of the house of the deceased had three rooms. Admittedly, the deceased had two sons and a wife residing with him. The dwelling unit comprising of three rooms was separate from '*Baithak*' (where the deceased was seated on a cot at the time when he was shot), which was about 8 paces away from the dwelling unit. Notably, this '*Baithak*' adjoins the *Aam Rasta* (public lane). Instant case, is a case of single gun shot which, from the site plan, appears to have been fired from the public lane and which fact is corroborated by medical evidence as the direction of the shot was from lower to higher level, as already discussed above. Notably, there was no altercation or exhortation preceding the incident and there was no scuffle before or after the incident. No doubt, PW-1 stated in the FIR that the accused had brandished their weapons to threaten the witnesses while escaping but has not disclosed about their utterances. Further, during cross-examination on 21.11.2008, he stated that PW-1 could chase them to a distance of only 2 to 4 paces thereafter he returned to his father (the injured, who died later). It was thus a hit and run kind of an incident and therefore, what needs to be examined is whether in that short time span PW-1, in the darkness of the night, had the opportunity to identify the assailants or whether it is a case where the assailant fired and ran away and on hearing the gunshot, the inmates of the house rushed out from their dwelling units. Notably, in the site plan the presence of PW-1 is not specifically shown. Rather, direction is given from where the witnesses emerged to arrive at the spot. The site plan no doubt is not prepared at the instance of PW-1 therefore, it cannot be used to contradict him but what is important is that it does not disclose PW-1's presence but shows him to be emerging from the dwelling unit. Importantly, even PW-1 does not say that he was sitting with his father at the *Baithak*. Rather, to show his presence, he sets up a story that his father had eaten his meals 15 minutes before the incident and, therefore, to serve him water PW-1 had come out and, after serving water, when he was returning to the dwelling unit he could sense some one coming and as soon as he turned, he saw three persons including the appellants and Tejpal firing a shot at his father whereafter they ran away. The story of serving meal 15 minutes before the incident is not supported by medical evidence as semi-digested food was found and, according to PW-3, the autopsy doctor, meal might have been taken 4 to 6 hours before. Though this piece of circumstance might not be sufficient to outright discard the account as being not truthful, but it does throws some doubt on it. More so, when the source of light i.e. presence of lantern hanging from the *Chhappar* has not been confirmed during investigation and torches were also not shown to the I.O. But

assuming that that could be a lapse on the part of the I.O., we do not propose to use it to discard the prosecution evidence. However, what clinches the issue for us is an important circumstance, which is, whether the first information report was lodged at the time alleged by the prosecution.

29. According to the prosecution, the FIR was lodged by PW-1 at 00.30 hours. According to PW-1, when the deceased was shot, the deceased was taken on a Dunlop Cart for medical attention but by the time they could cross the river, the deceased expired. Therefore, they took the body of the deceased on that cart to the police chowki Param. They reached the chowki by about 10.30 pm. At the chowki, PW-1 stayed for half an hour and thereafter, PW-1 went with Diwanji (a constable) posted there, on a bicycle, to the police station to lodge the FIR. They reached the police station at quarter to 12 (midnight). PW-1 found Daroga (I.O.) there. At that time, the entire bazaar had shut and when he disclosed the incident to the I.O., the I.O. told him to submit a written report. Near the police station, at the Tehsil, he found a man who typed the report, which was handed over by PW-1 to the police. The defence challenges this part of the evidence as completely unacceptable and, consequently, questioned PW-1 about the typist. PW-1 replied by stating that he does not know that man and earlier also he had never seen that man. He stated that he had informed the I.O. that he had got the report typed at the Tehsil but the I.O. had not written in the report that the first information report was got typed before being lodged. Notably, suggestion was given to PW-1 that he got the report typed in the morning and that the report was lodged in the morning. PW-1 denied the suggestion. The learned counsel for the appellants submitted that this a strange case where the I.O. insisted for a written report at midnight and did not bother to check as to from where the informant got it typed. Importantly, the name of the typist is also not disclosed to enable the defence to verify as to who typed it at midnight. It is argued that the inquest was conducted at 10.30 hrs, late in the morning, even though the body was at the Chowki where artificial light is expected. Thus, it is a clear cut case where the FIR was lodged in the morning and was ante-timed.

30. In our view, the circumstances noticed above do raise a strong suspicion with regard to the FIR being ante-timed. This suspicion could have been dispelled had the prosecution examined the constable who made GD Entry of the receipt of the written report and had prepared the Chik report. It could also have been dispelled if the name of that typist had been disclosed either in the typed report or in the testimony. Notably, from the testimony of PW-4, it appears, the GD Entry /Chik maker was alive but he was not produced under the excuse that he was attending to VIP duty. Further, the Diwan who, allegedly, accompanied the informant to the police station to lodge the FIR has not been examined. In that backdrop, the defence put several questions to the I.O. (PW-4) to demonstrate that the FIR was not lodged at the time when it is purported to have been lodged. In fact, during cross-examination, PW-4 (I.O.), in an answer to one such question, stated that he is not aware whether the report was got typed and delivered at the police station in the morning, which is in stark contrast to what he had stated earlier that the report was registered in his presence. In fact, PW-4, at one stage of his cross-examination (i.e.

dated 20.03.2007), stated that when PW-1 had come to lodge the report, at that time, he had a written report with him. If that was so, what was the occasion for PW-4 to be evasive to the specific suggestion that the FIR was got typed and submitted in the morning. Importantly, PW-1 stated that it was the I.O. who requested him to bring a written report. From the above discussion it appears that the prosecution was searching for answers to disclose the reason for there being a typed report at that odd hour of the night. In ordinary circumstances, this issue would not have been material but it assumes importance in this case because the FIR is being lodged at 00.30 hrs in a typed format by claiming that it was got typed by about mid night. In this kind of a situation, submitting a typed report at 00.30 hrs is an unusual circumstance which needed explanation, particularly, when the admitted case is that the entire Bazaar had closed down by that time. This circumstance is also unusual for the reason that there is no prohibition in law in accepting an oral information to lodge a first information report. In that background, the explanation offered by PW-1 as to why he got the FIR typed appears to have no basis. This explanation is there, only to explain a strange circumstance of getting the report typed around mid-night when otherwise there was no need to submit a typed report or even a written report. When we notice this strange circumstance in conjunction with another circumstance, which is, that the inquest was conducted after day break at 10.30 hrs. even though the body was at the chowki, we get a strong feeling that the FIR had not come into existence in the night. Rather, it was got typed and lodged in the morning after day break, as is the defence suggestion, and, only thereafter, the inquest was conducted. Ordinarily, in night occurrences, an inquest might be deferred to morning hours, particularly, where the source of light is not available or the place where the inquest is to be conducted is far off from police establishment. But, here, the body was at the Chowki where light sources, in ordinary course, are expected. Moreover, it is not the specific case of the prosecution that there was no source of light at the police chowki. Further, no police witness from that police chowki has been examined to clear our doubts as to why the inquest could not be conducted in the night hours or in the early hours of the morning, earlier than 10.30 hrs. In this background, lodging of a typed report at 00.30 hours creates a strong suspicion with regard to the FIR being ante-timed. This coupled with the delay in conducting the inquest lends credence to the defence suggestion that the FIR was lodged in the morning after getting it typed. Once this is the position, the prosecution case gets shrouded in suspicion throwing multiple possibilities including a strong probability of the incident being a hit and run kind of an incident, witnessed by none, and the prosecution story developing on guess-work based on strong suspicion with implication of those with whom the deceased had enmity. Probability of such guess-work becomes stronger also from the circumstance that as against a solitary gunshot injury three persons have been roped in, out of which, two have not been assigned any major role except that they came with weapons and escaped with the assailant.

31. The upshot of the discussion above is that there is a cloak of doubt shrouding the prosecution case and, therefore, the prosecution has failed to prove its case against the appellants beyond reasonable doubt. Consequently, the appellants are entitled to the benefit of

doubt. As a result, the appeal is **allowed**. The judgment and order of the trial court is set aside. The appellants are acquitted of the charges for which they have been tried. The appellant no.1 (Birnami) is on bail, he need not surrender subject to compliance of section 437-A Cr.P.C. to the satisfaction of the court below. The appellant no.2 (Tej Pal) is reportedly in jail. He shall be set at liberty forthwith subject to compliance of the provisions of section 437-A Cr.P.C. to the satisfaction of the court below.

32. Let the certified copy of the judgment and the record of the court below be sent to the trial court for information and compliance.

(2022)04ILR A123
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.03.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Criminal Appeal No. 6711 of 2011

Criminal Appeal No. 6975 of 2011

Yespal Singh Yadav ...Appellant (In Jail)
Versus
The State of U.P. ...Respondent

Counsel for the Appellant:
Sri Mahavir Verma, Sri Nitin Agarwal, Sri Rajesh Kumar Singh, Sri Santosh Kumar Rai, Sri Satya Dheer Singh Jadaun, Sri Utkarsh Singh

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

(अ) फौजदारी कानून - भारतीय दंड प्रक्रिया संहिता ,१९७३ - धारा ३७४(२) - दोष सिद्ध के खिलाफ - स्वापक ओषधि और मनः प्रभावी पदार्थ अधिनियम, १९८५ - धारा 20 (ख) (ii) (ई) - जहाँ उल्लंघन, वाणिज्यिक मात्रा से संबंधित हो वहाँ कठोर कारावास, जिसकी अवधि दस वर्ष से कम नहीं होगी, किन्तु बीस वर्ष तक की हो सकती है और जुर्माने से भी, जो एक लाख रुपये से कम नहीं होगा, किन्तु जो दो लाख रुपये तक का हो सकेगा और लेखबद्ध कारणों के साथ दो लाख रुपये से अधिक का जुर्माना अधिरोपित भी किया जा सकता है। (पैरा - १४)

अपीलार्थी दोषसिद्धि के आदेश को चुनौती नहीं देना चाहता - मात्र दण्डादेश के कारावास की अवधि व अर्थदण्ड की मात्रा को चुनौती -वाणिज्यिक मात्रा से 99 गुनी चरस बरामद हुई - दोनों अपीलार्थी द्वारा समान अपराध कारित करना - दोनों अपीलार्थी समान दंडादेश के अधिकारी - दोनों अपीलार्थीयों द्वारा 13 वर्ष का कारावास पूर्ण किया जाना - उम्र को भी ध्यान रखना - अपराध से पूर्व कोई और अपराध का इतिहास न होना - कारावास में रहते हुए कोई प्रतिकूल टिप्पणी का भी न होना । (पैरा - २,१५, १९)

(ब) स्वापक ओषधि और मनः प्रभावी पदार्थ अधिनियम, १९८५ - धारा 32 ख - न्यूनतम दंड से उच्चतर दंड अधिरोपित करने के लिए विचार में लिए जाने वाली बातें - सजा देने के पहलुओं को हल्के में नही लेना चाहिए, क्योंकि आपराधिक न्याय व्यवस्था का यह भाग समाज पर निर्णायक प्रभाव डालता है - अपराधों के लिए सजा का तीन परीक्षण - अपराध परीक्षण, आपराधिक परीक्षण और तुलनात्मक अनुपातिकता परीक्षण के मापदण्ड पर परीक्षण किया जाना ।(पैरा - ११ ,१२)

निर्णय : दोनों अपीलार्थीयों के विरुद्ध दोषसिद्धि के आदेशों को मान्य करते हुए संबंधित दंडादेश में पारित कारावास की अवधि, उनके द्वारा आज तक व्यतीत कारावास की अवधि में परिवर्तित किया जाता है । अर्थ दंड की मात्रा को न्यूनतम करते हुए दोनों अपीलार्थी पर अलग अलग एक-एक लाख रुपये का अर्थदण्ड निर्धारित किया जाता है, जिसकी अदायगी न करने पर दोनों अपीलार्थी को अलग अलग एक-एक वर्ष का अतिरिक्त कारावास भुगतना पड़ेगा। (पैरा - २०)

आपराधिक अपील आंशिक रूप से स्वीकार्य। (E-7)

<u>उद्धृत मामलों की सूची</u> :-

1. रफीक कुरैशी प्रति नारकोटिक्स कंट्रोल ब्यूरो ईस्टर्न जोनल यूनिट : (2019) 6 एस सी सी 492

2. मध्य प्रदेश राज्य प्रति उधम व अन्य : (2019) 10 एस सी सी 300

3. अभियुक्त 'X' प्रति महाराष्ट्र राज्य : (2019) 7 एस सी सी 1

4. गुरुदेव सिंह प्रति पंजाब राज्य : (2021) 6 एस सी सी 386

5. कल्लू व अन्य प्रति उत्तर प्रदेश राज्य : क्रिमिनल अपील संख्या 741/1983

6. मध्यप्रदेश शासन बनाम ऊधम और अन्य : (2019) 10 एस सी सी 300

7. मध्य प्रदेश शासन प्रति सुरेश : (2019) 14 एस सी सी 151

8. आलिस्टर ऑन्थानी परेरा प्रति महाराष्ट्र शासन : (2012) 2 एस सी सी 648

9. मध्य प्रदेश शासन प्रति घनश्याम सिंह : (2013) 8 एस सी सी 13

10. रवजी प्रति राजस्थान शासन : (1996) 2 एस सी सी 175

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. दाण्डिक अपील संख्या 6711/2011 दोषसिद्ध अभियुक्त यशपाल यादव व दाण्डिक अपील संख्या 6975/2011 दोषसिद्ध अभियुक्त संजय कुमार विश्वकर्मा द्वारा भारतीय दण्ड संहिता की धारा 374 (दोष सिद्धि से अपील) की उपधारा (2) के अंतर्गत दाखिल की गई है, जिसके द्वारा अपर जिला व सत्र न्यायाधीश कक्ष संख्या-20, कानपुर नगर, द्वारा सत्र परीक्षण संख्या 432/09, में पारित निर्णय व आदेश दिनांक 19.10.2011 व 21.10.2011 को आक्षेपित किया गया है, जिसके द्वारा दोनों अपीलार्थीयों को आरोपित अपराध अन्तर्गत धारा 20 (ख) (ii) (ई), स्वापक ओषधि और मनः प्रभावी पदार्थ अधिनियम, 1985, (संक्षेप में "अधिनियम 1985') में दोष सिद्ध किया गया व अपीलार्थी यशपाल सिंह यादव को 15 वर्ष का सश्रम कारावास व 3 लाख रुपये के अर्थ दण्ड से दण्डित किया गया व अर्थदण्ड की अदायगी न किये जाने की दशा में 2 वर्ष का अतिरिक्त कारावास भुगतने का आदेश भी दिया गया व अपीलार्थी संजय कुमार विश्वकर्मा को 18 वर्ष का सश्रम कारावास व 4 लाख रुपये के अर्थदण्ड से दण्डित किया गया व अर्थदण्ड की अदायगी न करने की दशा में 3 वर्ष का अतिरिक्त कारावास भुगतने का आदेश भी दिया गया।

<u>अपीलार्थी का पक्ष</u>

2. अपीलार्थी यशपाल सिंह यादव की ओर से विद्वान अधिवक्ता श्री उत्कर्ष सिंह (अपीलार्थी के अधिवक्ता श्री राजेश कुमार सिंह द्वारा निर्देशित) ने प्रारम्भ में ही कथन किया कि अपीलार्थी दोषसिद्धि के आदेश को चुनौती नहीं देना चाहता है तथा वो मात्र दण्डादेश के कारावास की अवधि व अर्थदण्ड की मात्रा को ही चुनौती देना चाहता है।

3. विद्वान अधिवक्ता ने जेल अधीक्षक, कानपुर नगर द्वारा, अपीलार्थी के कारावास की अवधि संबधी प्रमाणपत्र, जो पूरक शपथपत्र के द्वारा इस अपील की पत्रावली पर प्रस्तुत किया गया है पर इस न्यायालय का ध्यान आकर्षित करवाया कि प्रमाणपत्र की तिथि (21.01.2022) तक अपीलार्थी द्वारा 15 वर्ष के कारावास दण्ड में से 12 वर्ष 11 माह व 29 दिवस व्यतीत कर चुका है। अर्थात करीब-करीब 13 वर्ष कारावास में व्यतीत कर चुका है अतः दण्ड के प्रतिस्थापित सिद्धान्तों के तहत 15 वर्ष के कारावास के दण्ड को अब तक कारावास में व्यतीत 13 वर्ष के दण्ड में परिवर्तित कर दिया जाये व अर्थदण्ड की मात्रा जो रु0 3 लाख निर्धारित की है उसको कम करके न्यूनतम कर दिया जाये, तो न्याय के उद्देश्यों की प्राप्ति के लिए उचित रहेगा।

4. विद्वान अधिवक्ता ने दण्ड के सिद्धान्त के सम्बन्ध में उच्चतम न्यायालय द्वारा **रफीक कुरैशी प्रति नारकोटिक्स कंट्रोल ब्यूरो ईस्टर्न जोनल यूनिट : (2019) 6 एस सी सी 492, मध्य प्रदेश राज्य प्रति उधम व अन्य : (2019) 10 एस सी सी 300, अभियुक्त 'X' प्रति महाराष्ट्र राज्य (2019) 7 एस सी सी 1, गुरुदेव सिंह प्रति पंजाब राज्य: (2021) 6 एस सी सी 386** के मामलों में पारित निर्णयों व इस न्यायालय द्वारा **कल्लू व अन्य प्रति उत्तर प्रदेश राज्य (क्रिमिनल अपील संख्या 741/1983, निर्णय दिनांक 10.07.2020)** के मामले में पारित निर्णय को प्रस्तुत किया।

5. विद्वान अधिवक्ता ने उपरोक्त निर्णयों का हवाला देते हुए कथन किया कि किसी अपराधी को दण्ड देते समय तीन कारकों का परीक्षण करना होता है वो हैं- अपराध परीक्षण, आपराधिक परीक्षण व तुलनात्मक आनुपातिकता परीक्षण, जिसका वर्तमान प्रकरण में सत्र न्यायालय द्वारा विचार नहीं किया गया। इसके अतिरिक्त अधिनियम 1985 की धारा 32 ख (न्यूनतम दंड से उच्चतर दंड अधिरोपित करने के लिए विचार में लिए जाने वाली बातें) के अंतर्गत उच्चतर दंड अधिरोपित करने के कारकों का वर्णन करते हुए विद्वान अधिवक्ता ने कथन किया कि वर्तमान प्रकरण में 3 अभियुक्त (अपीलार्थी को मिलाकर) को एक महिन्द्रा पिकअप वैन के साथ अवरोधित किया गया था व जांच के दौरान पिकअप वैन की फर्श में बनाये गये गुप्त स्थान जो गाड़ी के फर्श के नीचे था, वहाँ से चरस के एक-एक किलोग्राम के 100 बण्डल बरामद हुए थे, जिसकी मात्रा वाणिज्यिक मात्रा से 99 गुना अधिक थी। परन्तु धारा 32 ख में उल्लेखित कारक (क) लगायत (च) में से कोई भी कारक उपस्थित नहीं था, अतः सत्र न्यायालय के पास न्यूनतम दंड से उच्चतर दंड अधिरोपित करने का कोई न्यायसंगत कारण नहीं था तथा सत्र न्यायालय द्वारा दिया गया कारण कि पिकअप वैन से एक गुप्त स्थान से भारी मात्रा में चरस का मिलना व अभियुक्तगण की अपराध में संलिप्त होना, अपराध को और भी गंभीर बनाता है, अपीलार्थी को दिया गया दंडादेश को न्यायसंगत नहीं बनाता है। अपीलार्थी को 15 वर्ष का दण्ड, प्रकरण के तथ्य व परिस्थितियों में अधिक उच्चतर है तथा अपीलार्थी जिसने अबतक13 वर्ष का कारावास व्यतीत कर लिया है प्रकरण की परिस्थितियों में उक्त अपराध का उचित दण्ड माना जा सकता है। विद्वान अधिवक्ता ने यह भी कथन किया कि अपीलार्थी वर्तमान में 37 वर्ष का है अर्थात् अपराध कारित करते समय उसकी उम्र मात्र 24 वर्ष थी तथा दण्ड के सुधारवादी सिद्धान्तों को भी ध्यान में रखते हुए, अपीलार्थी के दण्ड को अबतक कारावास में व्यतीत अवधि में परिवर्तित करा जा सकता है तथा अर्थ दण्ड की मात्रा को भी यथोचित कम किया जा सकता है।

6. अपीलार्थी संजय कुमार विश्वकर्मा का पक्ष रखते हुए उसके विद्वान अधिवक्ता श्री राजनरायण ने यह कथन किया कि वो भी मात्र दंडादेश पर बहस करना चाहते है। उन्होने निवेदन किया कि अपीलार्थी संजय कुमार विश्वकर्मा को 18 वर्ष के कारावास व 4 लाख रुपये के अर्थदण्ड को आदेश देने का एक मात्र कारण है कि वो अपराध में उपयोग की गई पिकअप वैन का मालिक था। अतः उसका अपराध और भी गम्भीर प्रकृति का हो जाता है। यह कारण धारा 32 ख में उल्लेखित कारक व अन्य कोई न्याय संगत कारक पर आधारित नहीं है तथा कारावास की अवधि व अर्थदण्ड की मात्रा तय करने में सत्र न्यायालय ने मनमाना रवैया अपनाया है। विद्वान अधिवक्ता के अनुसार इस अपीलार्थी ने भी अपीलार्थी यशपाल सिंह यादव के समान ही 13 वर्ष का कारावास व्यतीत कर लिया है अतः उसको भी उक्त कारावास में व्यतीत अवधि व अर्थदण्ड की मात्रा को कम से कम कर, न्यायहित में आदेश पारित करने का निवेदन किया।

<u>राज्य का पक्ष</u>

7. राज्य की ओर से श्री मुन्ना लाल, अतिरिक्त शासकिय अधिवक्ता ने पक्ष रखा। उन्होने कथन किया कि, वर्तमान प्रकरण में 100 किलोग्राम चरस एक पिकअप वैन में बनाये गये एक गुप्त स्थान से प्राप्त किया गया था। चरस की वाणिज्यिक मात्रा 1 किलोग्राम है अतः बरामद हुई चरस की मात्रा उक्त वाणिज्यिक मात्रा से 99 गुनी है। दोनों अपीलार्थी को पिकअप वैन से गिरफ्तार किया गया। अतः उनको इस तथ्य की जानकारी थी कि पिकअप वैन में इतनी अधिक मात्रा में चरस छुपाई गई है। विद्वान अधिवक्ता ने रफीक कुरेशी (पूर्व में उल्लेखित) मामले में निर्णय का हवाला देते हुए कथन किया कि 'अधिनियम 1985' की धारा 32 ख में उल्लेखित कारक के अतिरिक्त जिन्हे न्यायालय ठीक समझें उन कारक को विचार में ले सकता है, अतः बरामद की गई चरस की अत्यधिक मात्रा (100 किलोग्राम) भी एक विचारणीय कारक हो सकता है। अतः सत्र न्यायालय ने बरामद की गई चरस की मात्रा को ध्यान में रखते हुए अपीलार्थी यशपाल सिंह यादव को 15 वर्ष का कारावास का दण्ड व तीन लाख रु0 का अर्थदण्ड का आदेश पारित करने में तथा अपीलार्थी संजय कुमार विश्वकर्मा को पिकअप वैन के मालिक होने के नाते उसके विरुद्ध अपराध की अधिक गंभीरता को ध्यान में रखते हुए 18 वर्ष का कारावास

व चार लाख रु0 का अर्थदण्ड का दंडादेश पारित करने में भी कोई विधिक त्रुटि नहीं करी है।

8. मैंने अपीलार्थियों व राज्य के विद्वान अधिवक्ताओं को ध्यानपूर्वक सुना व पत्रावली का सम्यक परिशीलन किया।

<u>दण्ड के सिद्धान्त</u>

9. भारतीय विधायी ने दंडादेश के सम्बंध में कोई नीति निर्धारित नहीं करी है, परंतु **मालीमथ समिति (2003) व माधव मेनन समिति (2008)** ने दंडादेश नीति निर्धारित करने की आवश्यकता पर जोर दिया व नीति बनाने के लिए सिफारिश भी की है।

10. दंडादेश के सिद्धांत या दंडादेश की नीति क्या हो, उच्चतम न्यायालय इस विषय पर चिंतित रहा है और समय-समय पर अपने विभिन्न विधिक उद्धरण के द्वारा इस विषय पर स्पष्टता लाने का प्रयास भी करता रहा है तथा जिला न्यायालय व उच्च न्यायालय द्वारा दंडादेश पारित करते समय लापरवाही होने से रोकने के लिये सचेत भी करता रहा है।

11. उच्चतम न्यायालय की तीन सदस्यीय पीठ द्वारा पारित निर्णय **मध्यप्रदेश शासन बनाम ऊधम और अन्य : (2019) 10 एस सी सी 300** के माध्यम से पुनः दंडादेश के सिद्धांत पर प्रकाश डाला गया है और अभिनिर्धारित किया गया :-

"8. आरंभ में, यह ध्यान रखना उचित है कि वर्तमान प्रत्यार्थीगण-अभियुक्तगणों की अपीलों को आंशिक रूप से स्वीकृत करने और आक्षेपित आदेश को पारित के लिए उच्च न्यायालय का तर्क सम्मत विचार केवल दंडादेश तक ही सीमित है। उच्च न्यायालय अपने आदेश में कहता है कि अपराध की प्रकृति, यह तथ्य कि प्रत्यार्थीगण का प्रथम अपराध है और उसके द्वारा पहले से व्यतीत सजा की अवधि को देखते हुए आक्षेपित आदेश पारित किया गया।

9. इस स्तर पर, इस न्यायालय के अभियुक्त ('X') बनाम महाराष्ट्र राज्य (2009) 7 एस. सी. सी. 1, जिसमें हम में से दो सदस्य पीठ के भाग थे, की टिप्पणी भारत में सजा के संबंध में प्रांसंगिक है-

"49. आपराधिक प्रतिबंधो का उचित आबंटन, जो कि ज्यादातर न्यायिक शाखा द्वारा दिया जाता है। {निकोला पैडफील्ड, रॉड मॉर्गन और माइक मैगुइयर "न्यायालय से बाहर, दृष्टि से बाहर" आपराधिक प्रतिबंधों और कोई न्यायिक निर्णय नही", ओक्सफोर्ड, अपराध शास्त्र की पुस्तिका (5 वां, संस्करण)}। विचारण के अंत में होने वाली यह प्रक्रिया अभी भी आपराधिक न्याय प्रणाली की प्रभावकारिता पर बड़ा प्रभाव डालती है। ***यह स्थापित है कि सजा एक सामाजिक-विधिक प्रक्रिया है जिसमें एक न्यायाधीश तथ्यात्मक, परिस्थितयों और ओचित्य पर विचार करते हुए अभियुक्त के लिए उचित दण्ड तलाशता है। इस तथ्य के प्रकाश में यह आवश्यक हो जाता है कि विधायिका ने न्यायाधीशों को सजा देने के लिए जो विवेकाधिकार प्रदान किया, उसका उपयोग एक सैद्धांतिक रुप से किया जाये।*** *हमें यह मूल्यांकन करने की जरूरत है कि सजा देने में एक सख्त निर्धारित दण्ड की सोच मान्य नही हो सकती है, कि न्यायाधीश को पर्याप्त स्वविवेक की भी आवश्यकता होती है।*

50. इस प्रकरण का परीक्षण करने से पूर्व, हमें सजा देने की प्रक्रिया में तार्किकता के प्रभाव के प्रश्न को संबोधित करने की आवश्यकता है। विचारण न्यायालय की तार्किकता, कारित किये गये अपराध की सजा के लिए सामान्य स्तर और तथ्यों व परिस्थितियों के बीच की कड़ी के जैसे कार्य करती है। विचारण न्यायालय सजा देने के लिए तर्कों को देने के लिए बाध्य है,क्योंकि प्रथमतः ***नैसर्गिक न्याय का मूलभूत सिद्धांत है कि न्यायकर्ता को निर्णय तक पहुंचने के कारण अवश्य प्रदान करने चाहिए, और द्वितीय कारण अधिक महत्वपूर्ण हो जाता है, क्योंकि अभियुक्त की स्वतंत्रता उपरोक्त वर्णित तर्क के अधीन होती है।*** *इसके आगे, अपीलीय न्यायालय के समक्ष, सजा की मात्रा को चुनौती देने पर आदेश की यथार्थता का आकलन करने के लिए बेहतर रुप से सक्षम हो जायेगा, यदि विचारण न्यायालय ने उसे कारणों सहित न्यायोचित ठहराया है ....." (जोर दिया गया)*

10. X X X

11. हमारी यह राय है कि अवर न्यायालय द्वारा अपर्याप्त या गलत सजा दिये जाने के कारण इस न्यायालय के समक्ष बड़ी संख्या में प्रकरण दायर किये जा रहे हैं। कतिपय प्रकरणों में दंडादेश देने में लापरवाही बरतने के विरुद्ध हमने बार बार चेतावनी दी है। इसमें कोई दो राय नही है कि सजा देने के पहलुओं को हल्के में नही लेना चाहिए, क्योंकि आपराधिक न्याय व्यवस्था का यह भाग समाज पर निर्णायक प्रभाव डालता है। इसके प्रकाश में हमारी राय है कि हमें इसको और स्पष्टता प्रदान करने की जरूरत है।

12. अपराधों के लिए सजा को तीन परीक्षण अर्थात अपराध परीक्षण, आपराधिक परीक्षण और तुलनात्मक अनुपातिकता परीक्षण के मापदण्ड पर परीक्षण किया जाना है। अपराध परीक्षण के कारकों में जैसे अपराध की योजना की सीमा, अपराध में इस्तेमाल हथियार का चुनाव, अपराध का तरीका, अपवहन का तरीका (यदि कोई हो), अभियुक्त की भूमिका, अपराधी की असामाजिकता या घिनौना चरित्र, पीडित की दशा सम्मलित रहते है। *आपराधिक परीक्षण में कारकों का मूल्यांकन जैसे अपराधी की आयु, अपराधी का लिंग, अपराधी की आर्थिक स्थिति या सामाजिक पृष्ठभूमि, अपराध के लिए प्रेरणा, प्रतिरक्षा की उपलब्धता, मानसिक स्थिति, मृतक के समूह में से किसी के द्वारा उत्प्रेरण, विचारण में पर्याप्त रूप से प्रतिनिधित्व, न्यायाधीश द्वारा अपीलीय प्रक्रिया में असहमति, पछतावा, सुधार की संभावना, पूर्ववर्ती आपराधिक अभिलेख (लंबित प्रकरणों को न लेकर) तथा कोई अन्य सुसंगत कारण (यह एक विस्तृत सूची नहीं है) के आधार पर होना चाहिए।*

13. इसके अतिरिक्त हमें यह ध्यान दे सकते है कि अपराध परीक्षण के अंतर्गत गंभीरता को सुनिश्चित किये जाने की आवश्यकता है। अपराध की गंभीरता को (i) पीड़ित की शारीरिक सम्पूर्णता; (ii) भौतिक समर्थन या सुख-सुविधा की हानि; (iii) मानभंग की सीमा; और (iv) निजता के उल्लघंन के द्वारा निर्धारित की जा सकती है।

"(उपरोक्त https://main.sci.gov.in/ Supremecourt vernacular/ 2013/ 10532_2013_3_1501_ 17728 Judgement_22_Oct_ 2019_ HIN. pdf से अधोभारण (download) किया गया है, जिसमें यह 'खंडन' लिखा गया है किः- "क्षेत्रीय भाषा में अनुवादित निर्णय से आशय केवल पक्षकारों को उनकी अपनी भाषा में समझने के लिये है एवं इसका प्रयोग किसी अन्य उद्देश्य के लिये नहीं किया जा सकेगा। सभी व्यवहारिक एवं कार्यालयीन उद्देश्य के लिये निर्णय का अंग्रेजी संस्करण ही प्रमाणित होगा और निष्पादन तथा क्रियान्वयन के उद्देश्य के लिये प्रभावी माना जायेगा।" *अधोभरण के उपरान्त इस न्यायालय ने स्वयं के स्तर से अनुवाद में कुछ संशोधन भी किये हैं)*

12. उच्चतम न्यायालय के एक और निर्णय जो **मध्य प्रदेश शासन प्रति सुरेश : (2019) 14 एस सी सी 151** के मामले में पारित किया है का उल्लेख करना समीचीन होगा। इस निर्णय में उच्चतम न्यायालय के ही पूर्व में दिये गये **आलिस्टर ऑन्थानी परेरा प्रति महाराष्ट्र शासन (2012) 2 एस सी सी 648, मध्य प्रदेश शासन प्रति घनश्याम सिंह (2013) 8 एस सी सी 13 और रवजी प्रति राजस्थान शासन (1996) 2 एस सी सी 175** के मामलों में पारित निर्णयों का उल्लेख करते हुए यह प्रतिपादित किया दोष सिद्ध अपराध में दोषी को उचित व पर्याप्त दंड देना न्यायालय के कर्तव्य का भाग रहा है। किसी मामले में पारित दंडादेश अपराध की गंभीरता के साथ साथ प्रासंगिक तथ्य व परिस्थितियों के अनुरुप भी होना चाहिए। निस्सन्देह गंभीरता बढ़ाने व घटाने वाले कारको के मध्य नाजुक संतुलन भी बनाये रखना होगा। इसी के साथ किसी मामले में दंडादेश के प्रश्न पर ध्यान करते समय विधि के समाज की सुरक्षा के प्रति स्वीकृत उद्देश्य और न्याय के लिए समाज की आवाज के प्रति भी उत्तरदायी होना होगा। अन्तिम विश्लेषण में अपराध एवं दंड का अनुपात बनाये रखना होगा और इसी क्रम में आगे अपराधी, पीड़ित व व्यापक समाज के अधिकारों का संतुलन भी बनाये रखना होगा।

13. दंड निर्धारण की प्रक्रिया में अपराधी के पक्ष की ओर से कोई कारक चाहे वो लघुकारी परिस्थिति हो या गंभीरता कम करने वाले बताया जाये परन्तु वो निर्णायक नहीं होगा और इसी क्रम में समय का व्यतीत हो जाना स्वयं में मजबूत कारण नहीं हो सकता है। उपयुक्त मामले में इन कारकों की भी अन्य कारकों के संग कुछ महत्ता हो सकती है। इन सब कारकों की उपस्थिति होते हुए भी अन्य कारक

जैसे अपराध की प्रकृति व उसका समाज पर होने वाला असर को अनदेखा नहीं किया जा सकता है।

14. 'अधिनियम 1985' की धारा 20 (कैनेबिस के पौधे और कैनेबिस के संबंध में उल्लंघन के लिए दंड) की उपधारा ख (ii) (ई) के अनुसार जहाँ उल्लंघन, वाणिज्यिक मात्रा से संबंधित हो वहाँ कठोर कारावास, जिसकी अवधि दस वर्ष से कम नहीं होगी, किन्तु बीस वर्ष तक की हो सकती है और जुर्माने से भी, जो एक लाख रुपये से कम नहीं होगा, किन्तु जो दो लाख रुपये तक का हो सकेगा और लेखबद्ध कारणों के साथ दो लाख रुपये से अधिक का जुर्माना अधिरोपित भी किया जा सकता है। संदर्भ के लिए धारा 20 निम्न उल्लेखित की जा रही है।

*"20. **कैनेबिस के पौधे और कैनेबिस के संबंध में उल्लंघन के लिए दंड**-जो कोई, इस अधिनियम के किसी उपबंध या इसके अधीन बनाए गए किसी नियम या निकाले गए किसी आदेश या दी गई अनुज्ञप्ति की शर्त के उल्लंघन में, -*

(क) किसी कैनेबिस के पौधे की खेती करेगा; या

(ख) कैनेबिस का उत्पादन, विनिर्माण, कब्जा, विक्रय, क्रय, परिवहन अन्तरराज्यिक आयात, अन्तरराज्यिक निर्यात या उपयोग करेगा;

(i) जहां उल्लंघन खंड (क) के संबंध में है वहां, कठोर कारावास से, जिसकी अवधि दस वर्ष तक की हो सकेगी और जुर्माने से भी, जो एक लाख रुपए तक का हो सकेगा, दंडनीय होगा; और

(ii) जहां उल्लंघन खंड (ख) के संबंध में है, -

(अ) और अल्पमात्रा से संबंधित है, वहां कठोर कारावास से, जिसकी अवधि (एक वर्ष) तक की हो सकेगी, या जुर्माने से, जो दस हजार रुपए तक का हो सकेगा, अथवा दोनों से,

(आ) और जहां वाणिज्यिक मात्रा से कम किंतु अल्प मात्रा से अधिक मात्रा से संबंधित है, वहां कठोर कारावास से, जिसकी अवधि दस वर्ष तक की हो सकेगी, और जुर्माने से, जो एक लाख रुपए तक का हो सकेगा,

(इ) और जहां वाणिज्यिक मात्रा से संबंधित है, वहां, कठोर कारावास से, जिसकी अवधि दस वर्ष से कम की नहीं होगी किंतु बीस वर्ष तक की हो सकेगी, और जुर्माने से भी, जो एक लाख रुपए से कम का नहीं होगा किंतु जो दो लाख रुपए तक का हो सकेगा,

दंडनीय होगा:

परंतु न्यायालय, ऐसे कारणों से, जो निर्णय में लेखबद्ध किए जाएंगे, दो लाख रुपए से अधिक का जुर्माना अधिरोपित कर सकेगा।"

15. उपरोक्त से यह विदित है कि वर्तमान प्रकरण में जहाँ वाणिज्यिक मात्रा से 99 गुनी चरस बरामद हुई है, वहाँ दंडादेश कठोर कारावास जिसकी अवधि दस वर्ष से कम नहीं हो सकती परन्तु बीस वर्ष तक हो सकती है तथा लेखबद्ध कारण से अर्थदण्ड दो लाख रुपये से अधिक भी हो सकता है। परन्तु एक लाख रुपये से कम किसी भी दशा में नहीं हो सकता है।

16. 'अधिनियम 1985' की धारा 32 ख (क लगायत च) के अनुसार न्यूनतम दंड से उच्चतर दंड आरोपित करने के लिए विचार करने के कुछ कारक वर्णित किये गये है परन्तु उन कारकों के अतिरिक्त न्यायालय अन्य उचित कारकों पर भी विचार कर सकता है। जैसा कि उच्चतम न्यायालय के रफीक कुरैशी (पूर्व में उल्लेखित) के मामले में निर्णय में निर्धारित किया गया है। संदर्भ के लिये धारा 32 ख निम्न उल्लेखित की जा रही है।

*"32**ख. न्यूनतम दंड से उच्चतर दंड अधिरोपित करने के लिए विचार में लिए जाने वाली बातें**-जहां इस अधिनियम के अधीन किए गए किसी अपराध के लिए कारावास की कोई न्यूनतम अवधि या जुर्माने की रकम विहित है, वहां न्यायालय, कारावास की न्यूनतम अवधि या जुर्माने की रकम से उच्चतर कोई दंड अधिरोपित करने के लिए ऐसी बातों के अतिरिक्त जिन्हें वह ठीक समझे, निम्नलिखित बातों को विचार में ले सकेगा, अर्थात्: -*

(क) अपराधी द्वारा हिंसा या आयुध का उपयोग या उसके उपयोग की धमकी;

(ख) यह तथ्य कि अपराधी लोक पद धारण करता है और उसने अपराध करने में उस पद का लाभ उठाया है;

(ग) यह तथ्य कि अपराध द्वारा अवयस्क प्रभावित होते हैं या उस अपराध के किए जाने के लिए अवयस्कों का उपयोग किया जाता है;

(घ) यह तथ्य कि अपराध किसी शिक्षा संस्था या सामाजिक सेवा संकाय में या ऐसी संस्था या संकाय के ठीक निकट या ऐसे अन्य स्थान में, जिसमें विद्यालय के बालक और छात्र शिक्षा, क्रीड़ा और सामाजिक क्रियाकलापों के लिए आते-जाते हैं, किया जाता है;

(ङ) यह तथ्य कि अपराधी संगठित अंतरराष्ट्रीय या किसी ऐसे अन्य अपराधी समूह का है जो अपराध करने में लगा हुआ है ; और

(च) यह तथ्य कि अपराधी अपराध करके सुकर बनाए गए अन्य अवैध क्रियाकलापों में लगा हुआ है।"

17. उपरोक्त उल्लेखित विधिक विश्लेषण की पृष्ठभूमि में यह निर्धारित करना है कि आक्षेपित दंडादेश में पारित कारावास की अवधि व अर्थदंड की मात्रा को वर्तमान प्रकरण के तथ्य जैसे घटना का 13 वर्ष पूर्व में कारित होना, दोनों अपीलार्थियों द्वारा 13 वर्ष का कारावास व्यतीत कर लेना, अपीलार्थी यशपाल की वर्तमान उम्र करीब 37 वर्ष व अपीलार्थी संजय की वर्तमान उम्र 52 वर्ष का होना तथा यह भी ध्यान में रखना होगा की वर्तमान प्रकरण में पिकअप वैन में एक गुप्त स्थान से 100 किलोग्राम चरस (वाणिज्यक मात्रा से 99 गुनी) बरामद की गई थी तथा यह अपराध एक समाजिक अपराध है तथा ऐसी स्वापक औषधियों और मनः प्रभावी पदार्थों के अवैध व्यापार का समपहरण करने के कड़े उपबन्ध करने के लिए ही 'अधिनियम 1985' अधिनियमित किया गया है। वर्तमान प्रकरण में दोनों अपीलार्थी ने समान अपराध कारित किया है अतः दोनों को समान दंडादेश से दण्डित करना चाहिये था। अपीलार्थी संजय को मात्र इस कारण से कि वो पिक अप वैन का मालिक है, अपीलार्थी यशपाल से अधिक कारावास की अवधि व अधिक अर्थदंड की मात्रा का आदेश पारित करने का कोई यथोचित कारण नहीं माना जा सकता।

18. वर्तमान प्रकरण में अपीलार्थियों को दोषसिद्धि के उपरान्त दस वर्ष से बीस वर्ष का कारावास व अर्थदंड एक लाख रुपये तक तथा विशेष कारण से 2 लाख रुप से अधिक भी हो सकता है परन्तु किसी भी दशा में एक लाख रुपये से कम नहीं हो सकता है। अपीलार्थियों को अर्थदण्ड रु0 तीन लाख व रु0 चार लाख निर्धारित करने का कोई विशेष आधार, आक्षेपित आदेश में नहीं दिया गया है।

19. दोनों अपीलार्थी अब तक 13 वर्ष का कारावास व्यतीत कर चुके हैं। जैसा पूर्व में उल्लेखित किया गया की दोनों अपीलार्थी समान दंडादेश के अधिकारी है। अतः दोनों अपीलार्थीयों द्वारा अबतक 13 वर्ष का कारावास पूर्ण किया जा चुका है तथा दोनों अपीलार्थियों की उम्र को भी ध्यान में रखते हुए एवं इस अपराध से पूर्व कोई और अपराध का इतिहास न होने व कारावास में रहते हुए कोई प्रतिकूल टिप्पणी का भी न होना, ऐसे उचित कारण है, जो दंड के सुधारवादी सिद्धान्त व पूर्ण में वर्णित दण्डादेश के सिद्धान्तो के अनुसार व न्यायहित के उद्देश्य की प्राप्ति के लिए दोनों अपील निम्न आदेश के साथ निस्तारित की जाती है।

आदेश:-

20. अपीलार्थी यशपाल सिंह यादव व अपीलार्थी संजय कुमार विश्वकर्मा के विरुद्ध उपरोक्त वर्णित दोषसिद्धि के आदेशों को मान्य करते हुए उपरोक्त वर्णित संबंधित दंडादेश में पारित कारावास की अवधि, उनके द्वारा आज तक व्यतीत कारावास की अवधि में परिवर्तित किया जाता है तथा संबंधित अर्थ दंड की मात्रा को न्यूनतम करते हुए दोनों अपीलार्थी पर अलग अलग एक-एक लाख रुपये का अर्थदण्ड निर्धारित किया जाता है, जिसकी अदायगी न करने पर दोनों अपीलार्थी को अलग अलग एक-एक वर्ष का अतिरिक्त कारावास भुगतना पड़ेगा।

21. उपरोक्त वर्णित दोनों अपील उपरोक्त आदेशानुसार आंशिक रुप से स्वीकार की जाती है।

(2022)04ILR A129
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.04.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 1629 of 2020

Pankaj Third Bail Appl. ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Shuk Deo Singh, Paritosh Shukla, Ramakar Shukla

Counsel for the Opposite Parties:
G.A., Shiv Shankar Singh

A. Constitution of India, 1950 - Article 21 - Under-trials cannot indefinitely be detained pending trial. (Para 24)

If the trial is being delayed unnecessarily and for such delay there is no fault on the part of the accused, rather, it is on the part of the prosecution and the period of incarceration of such accused is long, his/her bail application may be considered subject to his previous criminal records. (Para 25)

Bail Application Allowed. (E-10)

List of Cases cited:-

1. U.O.I. Vs K.A. Najeeb AIR 2021 Supreme Court 712

2. Paras Ram Vishnoi Vs The Director, Central Bureau of Investigation Criminal Appeal No. 693 of 2021

3. Gokarakonda Naga Saibaba Vs St. of Mah. (2018) 12 SCC 505

4. Saudan Singh Vs The St. of U.P. Criminal Appeal No. 308 of 2022 (@ SLP (Crl.) No. 4633 of 2021)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ramakar Shukla, learned counsel for the applicant, learned Additional Government Advocate for the State and Ms. Shobha Rajpoot, Advocate holding brief of Sri Shiv Shankar Singh, learned counsel for opposite party no.2 i.e. the complainant/informant.

2. Learned Additional Government Advocate has filed counter affidavit, today in the Court, the same is taken on record.

3. Learned counsel for the applicant has filed supplementary affidavit, today in the Court, the same is taken on record. Sri Shukla has also filed certified copy of the F.I.R. and the order-sheet of learned trial court showing the status of trial on various dates, the same are also taken on record.

4. This is the third bail application. The first bail application has been rejected on 26.02.2015 by Hon'ble Surendra Vikram Singh Rathore, J. (since retired). The second bail application has been rejected on 20.09.2017 by Hon'ble Ravindra Nath Mishra-II, J. (since retired).

5. The first bail application of the present applicant was rejected on merits and the second bail application of the applicant was rejected on the ground that no knew facts have been pointed out to consider the second bail application, therefore, such bail application has been rejected.

6. Sri Ramakar Shukla, learned counsel for the applicant has submitted that he is cautious about the fact that while arguing third bail application, he may not raise any ground which could have been taken at the time of arguing the first bail application or the second bail application. Therefore, he is not arguing on merits of the present case. He has submitted that he shall argue the present bail application on the ground that about seven years and eight months period have passed, to be more precise with effect from 17.08.2014 the present applicant is in jail, and there is no possibility to conclude the trial in near future so considering the dictum of Apex Court in catena of cases his period of incarceration may be considered to release him on bail. Further, since the complainant and the prosecutrix have already been

examined, therefore, if the present applicant is released on bail there would be no apprehension on his part to influence the star witnesses i.e. the complainant/ informant and the prosecutrix.

7. Only for the purpose to apprise the fact in brief Sri Shukla has submitted that the present applicant is languishing in jail since 17.08.2014 in Case Crime No.417 of 2014, under Section 376 & 323 I.P.C. r/w Section 3/4 of Protection of Children from Sexual Offences Act (in short POCSO), Police Station-Chanda, District-Sultanpur. He has further submitted that as per the prosecution story so narrated in the First Information Report (in short F.I.R.), the prosecutrix was said to be a minor girl, aged about 12 years at the time of incident in question, and her radiological age was 16 years. She had levelled allegations against the present applicant in the statements recorded under Sections 161 Cr.P.C. and 164 Cr.P.C. As per medical examination report, no injury was found on her body and due to some quarrel took place in the year 2012, in the month of August, 2014 when the cattle of the applicant entered into the field of the complainant, the false F.I.R. has been lodged and he has been falsely implicated.

8. Sri Shukla has drawn attention of this Court towards Section 309 Cr.P.C. with its 1st proviso, which reads as under:-

"309. Power to postpone or adjourn proceedings. *[(1) In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.*

Provided that when the inquiry or trial relates to an offence under Section 376, [Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860), the inquiry or trial shall] be completed within a period of two months from the date of filing of the charge-sheet.]"

9. Sri Shukla has submitted that in the present case, the trial relates to Section 376 I.P.C. and Section 3/4 of POCSO Act, therefore, the trial must be completed within a period of two months from the date of filing the charge-sheet. However, the charge-sheet has been filed on 06.10.2014 and the learned court has taken cognizance on 20.10.2014, as shown in the charge-sheet filed along with the counter affidavit as Annexure No.CA-5 but there is no good progress in the process of trial. Therefore, the same aspect may be considered as disobedience of mandatory and statutory provisions enshrined under the proviso of Section 309 Cr.P.C.

10. Sri Shukla has drawn attention of the certified copy of the F.I.R. and the order-sheet of the trial court from 21.09.2019 till 16.03.2022 and perusal thereof reveals that the prosecution witnesses are not co-operating with the trial proceedings. As a matter of fact, with effect from 21.09.2019, more than two dozen dates have been fixed for examination of the prosecution witnesses but those witnesses have not appeared. The court has taken coercive steps issuing warrant but to no avail. Orders dated 21.01.2021, 17.02.2021 and 01.04.2021 reveals that the Doctor and the Investigating Officer were summoned and the warrants were issued against them but no one has appeared. Further, vide orders dated 04.09.2021,

28.09.2021 again the Doctor and the Investigating Officer, PW-3 and PW-6 were summoned but to no avail. The last date of the aforesaid order-sheet reveals that on 16.03.2022 the case was fixed for 30.03.2022 for examination of the aforesaid prosecution witnesses.

11. Sri Shukla has further drawn attention of this Court towards Annexure No.SA-1 of the supplementary affidavit dated 13.04.2022 to show that PW-1, (complainant/ informant), was examined on 19.02.2016 and he was cross-examined on 23.06.2016. PW-2 (prosecutrix), was examined on 20.10.2016 and her cross-examination was done on 30.05.2017 and finally concluded on 24.07.2017.

12. In view of the above, Sri Shukla has submitted that PW-1 (complainant/ informant), and PW-2 (prosecutrix) were finally examined by 24.07.2017. Thereafter, couple of dates have been fixed till 16.03.2022 but no other prosecution witnesses have been examined despite the learned trial court issued warrants.

13. As per Sri Shukla, for all practical purposes the prosecution witnesses are not co-operating with the trial proceedings and the trial proceedings are unnecessarily held up for no fault on the part of the present applicant.

14. Sri Shukla has also drawn attention of this Court towards order dated 30.03.2022 passed by this Court in Criminal Misc. Bail Application No.6869 of 2019 (Anokhi Lal (Second Bail) vs. State of U.P.) whereby this Court considered the dictum of Apex Court in re: ***Union of India vs. K.A. Najeeb AIR 2021 Supreme Court 712 and Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation*** passed in ***Criminal Appeal No.693 of 2021 (Arising out of SLP (Crl.) 3610 of 2020*** granted bail to such accused Anokhi Lal while allowing his second bail application on the ground that there was no good progress in the trial and there was a long incarceration of that accused, therefore, he was entitled for bail. Para-16 of the case K.A.Najeeb (supra) is being reproduced here-in-below:-

"This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail."

15. The Apex Court in the case of ***Paras Ram Vishnoi*** *(supra)* has observed as under:-

"On consideration of the matter, we are of the view that pending the trial we cannot keep a person in custody for an indefinite period of time and taking into

consideration the period of custody and that the other accused are yet to lead defence evidence while the appellant has already stated he does not propose to lead any evidence, we are inclined to grant bail to the appellant on terms and conditions to the satisfaction of the trial court."

16. Sri Shukla has further drawn attention of this Court towards the dictum of Apex Court rendered in re: ***Gokarakonda Naga Saibaba vs. State of Maharashtra*** reported in ***(2018) 12 SCC 505*** wherein the Apex Court has observed that if the material and fact witnesses have been examined, the bail of the accused persons may be considered.

17. Sri Shukla has placed reliance upon the recent judgment of Apex Court dated 25.02.2022 in re: ***Saudan Singh vs. The State of Uttar Pradesh*** passed in ***Criminal Appeal No.308 of 2022 (@ SLP (Crl.) No.4633 of 2021)***, wherein the Apex Court has held that period of long detention of the accused may be considered even if the issue is pending consideration before the Appellate Court.

18. Therefore, to sum up his arguments Sri Shukla has vehemently submitted that about seven years and eight months period have passed since the present applicant is in jail, the informant/ complainant (PW-1) and the prosecutrix (PW-2) have already been examined in the year 2017 and since then the prosecution witnesses are not co-operating with the trial proceedings, therefore, the trial could not be concluded. On the side of the present applicant, the proper co-operation is being given to the trial court as no unnecessary adjournment has been sought from his side but it is on account of unwarranted attitude and approach of the prosecution not to co-operate in the trial properly the trial is still pending. The present applicant has got no previous criminal history, therefore, he may be enlarged on bail. If the present applicant is enlarged on bail, it has been submitted by Sri Shukla that he shall co-operate with the trial proceedings and shall abide by all terms and conditions of bail order.

19. Learned counsel for the applicant has undertaken on behalf of the present applicant that the applicant shall not misuse the liberty of bail, if so granted by this Court and shall abide by all terms and conditions of the bail order and shall cooperate with the trial proceedings.

20. Learned Additional Government Advocate as well as learned counsel for the complainant/ informant have vehemently opposed the prayer for bail of the present applicant by submitting that since two bail applications of the present applicant have already been rejected, therefore, this bail application may not be entertained.

21. However, on being confronted on the point, on the basis of material available on record, that the prosecution witnesses are not co-operating with the trial proceedings, resultant thereof, the trial could not be concluded, both the learned counsel for the opposite parties have submitted that since this is matter of record, therefore, they have nothing to say.

22. Heard learned counsel for the parties and perused the material available on record.

23. At the very outset, there is displeasure in my mind towards approach of the trial court for the reason that the star witnesses i.e. PW-1 (informant/ complainant) and PW-2 (prosecutrix) have

already been examined finally by 24.07.2017 but since then no positive efforts have been taken to conclude the trial despite the clear cut statutory and mandatory provisions enshrined under Section 309 Cr.P.C. which provides that the trial in the cases of 376 I.P.C. etc. shall be completed within a period of two months from the date of filing of the charge-sheet. In the present case, what is to say about the period of two months, more than four years and three months period have passed after examination of both the star witnesses and despite noticing the fact that other prosecution witnesses are not co-operating, no appropriate coercive steps have been taken by the learned trial court for which they are properly armed with. If the prosecution witnesses were not properly co-operating in the trial proceedings, the learned trial court must take coercive steps strictly in accordance with law so that the trial could be concluded at the earliest. In the present case, Covid-19 Pandemic may not be the reason of delay in proceeding the trial inasmuch as both the star witnesses have been examined finally on 24.07.2017 and Covid-19 sparked in the country in the month of March and April, 2020.

24. Since there is no report that there is any unnecessary delay on the part of the present applicant/ defence, rather, the order-sheet reveals that no adjournment has been sought from his side before the learned trial court and it is deliberate delay on the part of the prosecution, resultant thereof, the trial is unnecessary held up, therefore, the benefit thereof should be extended to the present applicant in terms of his right enshrined under Article 21 of the Constitution of India as the fundamental rights enshrined under Article 21 is available to the accused/ detenu also. It is also trite that under-trials cannot indefinitely be detained pending trial.

25. In view of the various dictum of Apex Court to the effect that if the trial is being delayed unnecessarily and for such delay there is no fault on the part of the accused, rather, it is on the part of the prosecution and the period of incarceration of such accused is long, his/ her bail application may be considered. The facts and circumstances of the present case qualifies such test. Besides, the fact that the present applicant is not having any previous criminal history, may also be considered to release him on bail.

26. Therefore, in view of the above and without entering into merits of the issue, I find it a fit case for grant of bail.

27. Let the applicant-Pankaj, be released on bail in the aforesaid case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fail to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(v) The applicant shall not leave the country without prior permission of the Court.

28. Before parting with, it is expected that the trial shall be concluded with expedition in terms of Section 309 Cr.P.C. Further, the learned trial court may take all coercive measures as per law if either of the parties do not co-operate in the trial properly.

(2022)04ILR A135
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.03.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 6869 of 2019

Anokhi Lal Second Bail ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Dinesh Chandra Tewari, Arun Sinha

Counsel for the Opposite Party:
G.A.

A. Bail - Second Bail - The grounds subsequent to the rejection of the first bail application has come up which was considered by the court as fresh ground for considering second bail application. (Para 25)

Bail Application Allowed. (E-10)

List of Cases cited:-

1. U.O.I. Vs. K.A. Najeeb AIR 2021 Supreme Court 712 *(followed)*

2. Paras Ram Vishnoi Vs. The Director, Central Bureau of Investigation Criminal Appeal No. 693 of 2021 *(followed)*

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Arun Sinha, learned counsel for the applicant and Sri Balkeshwar Srivastava, learned Additional Government Advocate for the State.

2. This is the second bail application as the first bail application bearing Bail Case No.7160 of 2018 (Anokhi Lal vs. State of U.P.) has been rejected by Hon'ble Anant Kumar, J. (since retired) on 23.04.2019.

3. While rejecting the first bail application, the Hon'ble Court was pleased to observe as under:-

"However, at this stage, learned counsel for the applicant states that a direction may be given to the trial court for expeditious disposal of the trial. Accordingly, trial court is directed to expedite the trial and make an endeavour

to conclude the trial, within a period of five months."

4. Sri Sinha has submitted that despite the specific direction of this Court vide order dated 23.04.2019 to conclude the trial within a period of five months, about three years period have passed but the examination of PW-2 has not been concluded inasmuch as such prosecution witness is a fact witness, who is not co-operating with the trial proceedings.

5. Sri Sinha has filed certified copy of orders of trial court for the last one year, the same are taken on record. Those certified copies shall be kept properly with this paper-book.

6. Sri Sinha has submitted that the present applicant is languishing in jail since 15.04.2018 in Case Crime No.36 of 2018, under Sections 498-A & 304-B I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station-Khargupur, District-Gonda. He has further submitted that in the impugned First Information Report (in short F.I.R.), the entire family of the in-laws of the victim has been implicated. The present applicant is not a direct family member of the in-laws of the victim as he is a cousin brother of husband of the victim and such fact has been shown in the pleadings as well as in the family register which has been annexed in the bail application.

7. Sri Sinha has further submitted that in the dying declaration, the allegation has been levelled against the mother-in-law (Smt. Munni Devi) and the present applicant. However, as per statement of the family members of the victim the main allegation has been levelled against the mother-in-law (Smt. Munni Devi).

8. As per the prosecution story, the victim had been brought to the hospital by her husband (Vinay Kumar Awasthi), and the victim died in the hospital. As per the family members of the victim, all the family members including the husband of the victim were involved.

9. Attention has been drawn by learned counsel for the applicant towards Annexure No.5 of the bail application, which is a bail order of mother-in-law (Smt. Munni Devi) dated 05.07.2019 passed by this Court in Bail Case No.2035 of 2019 (Smt. Munni Devi vs. State of U.P.) whereby this Court granted bail to the mother-in-law (Smt. Munni Devi).

10. Further attention has been drawn by learned counsel for the applicant towards Annexure No.6 of the bail application, which is a bail order of the husband of the victim dated 20.02.2019 passed by this Court in Bail Case No.6236 of 2018 (Vinay Kumar Awasthi vs. State of U.P.).

11. Sri Sinha has submitted that if the allegations of the family members of the victim are considered on its face value, then all the family members were involved but the mother-in-law (Smt. Munni Devi) and the husband (Vinay Kumar Awasthi) have been granted bail. Further, if dying declaration is considered on its face value, then despite having similar allegations the mother-in-law (Smt. Munni Devi) has been granted bail. Besides in various statements of family members of the victim the main culprit was the mother-in-law (Smt. Munni Devi).

12. Sri Sinha has submitted that however all the aforesaid arguments were available at the time of rejection of first

bail application of the present applicant but since the mother-in-law (Smt. Munni Devi) has been granted bail subsequent to the rejection of the bail application of the present applicant, therefore, this may be considered as fresh ground.

13. Sri Sinha has further drawn attention of this Court towards supplementary affidavit filed on 12.07.2021 showing Annexure No.SA-3, which is a statement of PW-2 dated 04.04.2019 to show that despite the specific direction being issued by this Court on 23.04.2019 to conclude the trial within a period of five months, there is no progress in the trial. On last date of hearing of the present bail application on 24.03.2022 Sri Sinha prayed sometime to show the current status of trial, therefore, he was granted time. Today, he has provided the certified copy of the orders of the trial court for the last one year to show the progress of trial.

14. As per the certified copies of orders of the trial court, PW-2 is absent since 03.04.2021 and on 03.04.2021 a bailable warrant of Rs.10,000/- has been issued against him for his appearance. The latest order dated 23.03.2022 provides that for evidence/ examination of PW-2 the next date has been fixed for 07.04.2022. The perusal thereof clearly reveals that the examination of PW-2 could not be completed since April, 2019.

15. Sri Sinha has shown the charge-sheet which indicates that there are 19 prosecution witnesses. Presently, the examination of PW-2 has not been completed.

16. Therefore, Sri Sinha, learned counsel for the applicant has submitted that despite the specific direction of this Court vide order dated 23.04.2019 to conclude the trial within a period of five months, there is no possibility to conclude the trial in near future inasmuch as out of 19 prosecution witnesses even examination of PW-2 has not been concluded. Therefore, this ground may be considered as a fresh ground to consider the second bail application. Besides, after rejection of first bail application of the present applicant on 23.04.2019 the main accused (Smt. Munni Devi) i.e. mother-in-law of the victim has been granted bail on 05.07.2019, therefore, this may also be considered as a fresh ground.

17. Sri Sinha has placed reliance upon the dictum of Hon'ble Apex Court rendered in re: ***Union of India vs. K.A. Najeeb*** reported in ***AIR 2021 Supreme Court 712.*** Para 16 of the judgment is being reproduced herein below:-

"This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a

significant period of time, Courts would ordinarily be obligated to enlarge them on bail."

18. The Apex Court in the case of ***Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation*** passed in ***Criminal Appeal No. 693 of 2021 (Arising out of SLP (Crl) 3610 of 2020)*** has observed as under :

"On consideration of the matter, we are of the view that pending the trial we cannot keep a person in custody for an indefinite period of time and taking into consideration the period of custody and that the other accused are yet to lead defence evidence while the appellant has already stated he does not propose to lead any evidence, we are inclined to grant bail to the appellant on terms and conditions to the satisfaction of the trial court."

19. In the aforesaid cases the Hon'ble Apex Court has held that if there is no possibility to conclude the trial in near future and the accused applicant is in jail for a substantial long period then a period of incarceration may be considered as a fresh ground.

20. Sri Sinha has submitted that since the charge-sheet has already been filed in this case and the present applicant is co-operating with the trial proceedings and if there is any lapse in not concluding the examination of PW-2 it is no fault on the part of the present applicant but on the part of the prosecution, therefore, he may be released on bail.

21. Learned counsel for the applicant has undertaken on behalf of the present applicant that the applicant shall not misuse the liberty of bail, if so granted by this Court and shall abide by all terms and conditions of the bail order and shall cooperate with the trial proceedings.

22. On the other hand, learned Additional Government Advocate has opposed the prayer for bail by submitting that since the specific allegations has been levelled against the present applicant by the victim herself, therefore, his bail application may be rejected.

23. However, on being confronted on the fact that on the basis of statement of family members of the victim as well as of the victim the allegations have been levelled against the mother-in-law (Smt. Munni Devi) who has been granted bail and the family members of the victim have also levelled allegations against the husband, who has also been granted bail, the learned Additional Government Advocate has submitted that those orders being a matter of record, therefore, he has nothing to say.

24. Having considered the fact that despite the specific direction being issued by this Court vide order dated 23.04.2019 to conclude the trial within a period of five months but about three years period have passed and the progress of trial is the same as it was in the month of April, 2019 when the first bail application was rejected. As a matter of fact, there is no progress of trial as such. The PW-2 is not co-operating with the trial and has absconded for quite sometime. The period of incarceration of the present applicant in jail since 15.04.2018 is also worth considering at this stage when there is no possibility to conclude the trial in near future inasmuch as out of 19 PWs the examination of PW-2 is going on. Besides, all the family members of the victim including the victim herself have levelled specific allegation of

torture etc. to the mother-in-law (Smt. Munni Devi), who has been granted bail subsequent to the rejection of the first bail application of the present applicant. Hence, these grounds may be considered as fresh ground to consider the second bail application.

25. Therefore, in the given circumstances and considering the dictum of Hon'ble Apex Court in re: ***K.A. Najeeb*** *(supra)* and ***Paras Ram Vishnoi*** *(supra)*, the aforesaid grounds are considered as fresh to consider the second bail application, therefore, without expressing any opinion on merits of the case, the instant second bail application of the present applicant is allowed.

26. Let applicant -Anokhi Lal, be released on bail in aforesaid case crime number on his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned subject to following conditions:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fail to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(v) The applicant shall not leave the country without prior permission of the Court.

27. Before parting with it is expected that the trial shall be concluded with expedition. Further, the learned trial court may take all coercive measures as per law if either of the parties do not co-operate in the trial properly. The learned trial court shall fix short dates to ensure that trial is concluded at the earliest.

(2022)04ILR A139
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.03.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 11785 of 2019

Rameshwar Pandey Third Bail ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Anil Kumar Tripathi

Counsel for the Opposite Party:
G.A.

A. Bail - Third Bail - The Court on observing that the applicant was almost seven years in jail and examination of all except formal witnesses is pending and there is no likelihood of conclusion of trial in near future due to non co-operation of witnesses, the bail was granted. (Para 15)

Bail Application Allowed. (E-10)

List of Cases cited:-

1. Gokarakonda Naga Saibaba Vs St. of Mah. (2018) 12 SCC 505 *(followed)*

2. Anokhi Lal Vs State of U.P. Criminal Misc. Bail Application No. 6869 of 2019

3. U.O.I. Vs K.A. Najeeb AIR 2021 Supreme Court 712 *(followed)*

4. Paras Ram VishnoiVs The Director, Central Bureau of Investigation Criminal Appeal No. 693 of 2021 *(followed)*

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Anil Kumar Tripathi, learned counsel for the applicant and learned A.G.A. for the State.

2. This case was listed on 15.3.2022 and on that date this Court has passed the following order :

"Heard Sri Anil K. Tripathi, learned counsel for the applicant and learned AGA.

Sri Anil K. Tripathi has filed a questionnaire dated 12.2.2020 in the present case to apprise the Court that no prosecution witness has been examined, however, charges have been framed on 13.11.2018, the same is taken on record.

This is the third bail application. First and second bail applications have been rejected by Hon'ble Prashant Kumar, J. on 22.2.2017 and 17.5.2018 vide Criminal Misc. Bail Applications No.7312 of 2015 and 7137 of 2017 respectively.

On being confronted on the point as to what is the fresh ground to consider the third bail application, Sri Anil K. Tripathi has submitted that the present applicant is in jail since 27.5.2015 in Case Crime No.840 of 2015, under Sections 302, 504 & 506 IPC, Police Station Ikauna, District Shrawasti and there is no possibility to conclude the trial in near future, therefore, considering the fundamental right of the applicant enshrined under Article 21 of the Constitution of India, he may be released on bail.

I have noted that vide order dated 17.5.2018, the Hon'ble Court has directed the Chief Judicial Magistrate, Bahraich to commit the case to the Court of Session immediately within a period of one month. It appears that after the aforesaid order, the case has been committed to the Court of Session, who has framed the charges on 13.11.2018.

List this case on 31.03.2022 to enable the District and Sessions Judge, Bahraich to provide the status report of the trial. Such status report should be exhaustive indicating therein about the relevant dates of the trial.

The Registry of this Court shall intimate this order to the District and Sessions Judge, Bahraich within three working days for compliance of the direction.

On the next date, after considering the status of the trial, the present bail application may be disposed of finally and learned counsel for the applicant as well as learned AGA shall

prepare the case on the point as to whether inordinate delay in concluding the trial may be considered as one of the fresh grounds to consider the bail application if two bail applications have already been rejected."

3. In compliance of the aforesaid order the District Judge, Bahraich has provided a detailed and exhaustive status report dated 28.3.2022 relating to the trial proceedings.

4. The learned counsel for the applicant has fairly submitted that he is aware about the fact that he cannot take any ground in third bail application which was available with him at the time of first bail application or second bail application. Therefore, he has restrained himself to raise factual arguments and grounds of the bail except that the present applicant is in jail since 27.5.2015 in Case Crime No. 840 of 2015 u/s 302, 504, 506 IPC, P.S. Ikauna, District Shrawasti. He has further submitted that the present applicant has been falsely implicated as he has not committed any offence as alleged by the prosecution in the F.I.R.

5. Sri Tripathi has submitted that he has also received instructions in respect of status of the trial and as per his information after the committal of the trial to the sessions on 7.8.2018 the fact witnesses remained absent till 28.10.2021 and the bailable and non-bailable warrants were issued against them. He has further submitted that after the issuance of bailable warrants and Non-Bailable Warrants on several dates the fact witnesses namely, Bablu Pandey Raj Kumari and Kanhaiya Lal Pandey appeared before the learned trial court. Besides, one more witness Dharam Raj also appeared before the learned trial court.

6. So as to verify the aforesaid submission of Sri Tripathi, I perused the status report dated 28.3.2022 which clearly reveals that all the fact witnesses i.e. P.W. 1 Bablu Pandey, P.W. 2 Raj Kumari and P.W. 3 Dharam Raj have been finally examined. Further, the chief-examination of another prosecution witness no. 4 Kanhaiya Lal Pandey has been completed and his part cross-examination has also been completed. Further, the prosecution has shown its willingness not to examine witness Umesh Kumar Pandey and Yugal Sharan Pandey. It has been further indicated that the examination of some more prosecution witnesses is yet to take place, thereafter the formal witnesses e.g. Doctor who has done postmortem examination, chick writer of the F.I.R. and investigating officer are to be examined. After their examination the defence witnesses would be examined and the trial would be finally concluded adopting legal requirements.

7. Sri Tripathi has submitted that since all fact witnesses have been examined and there is no possibility that the trial would be concluded in near future, therefore. the period of incarceration of present applicant i.e. w.e.f. 27.5.2015, about seven years may be considered to grant bail.

8. Sri Tripathi has also drawn attention of this Court towards para 23 of the bail application wherein he has categorically indicated that the present applicant is having no criminal history and such fact has not been disputed in the

counter affidavit. Therefore, the fact that the present applicant is not a past criminal may be considered while granting him bail. In support of his aforesaid submission the reliance has been placed in para 4 of the dictum of Hon'ble Apex Court in re: ***Gokarakonda Naga Saibaba v. State of Maharashtra, (2018) 12 SCC 505,*** has held in para-4 as under:-

"4. Having given our thoughtful consideration to the submissions advanced at the hands of the learned counsel for the rival parties, specially the undisputed position that the petitioner has never been accused of having misused the concession of bail, we are of the view, that the submission made by the learned counsel for the respondent is extremely unfair. Since all the material witnesses have been examined and cross-examined, the release of the petitioner on bail ought not to have been opposed, especially keeping in mind the medical condition of the petitioner."

(emphasis supplied)

9. Besides, the reliance has also been placed on a recent decision of this Court in re; ***Anokhi Lal vs. State of U.P. passed in Criminal Misc. Bail Application No. 6869 of 2019*** wherein almost aforesaid facts and circumstances were considered while granting bail in second bail application. In the aforesaid order the dictum of Apex Court in re: ***Union of India vs. K.A. Najeeb, AIR 2021 Supreme Court 712 and in re: Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation passed in Criminal Appeal No. 693 of 2021 (Arising out of SLP (Crl) 3610 of 2020)*** have been followed.

10. Sri Tripathi has placed reliance on the judgment of Hon'ble Apex Court in re: ***Union of India vs. K.A. Najeeb reported in AIR 2021 Supreme Court 712***. Para 16 of the judgment is being reproduced herein below:-

"This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail."

11. Sri Tripathi has further placed reliance on the dictum of Hon'ble Apex Court in re: ***Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation passed in Criminal Appeal No. 693 of 2021 (Arising out of SLP (Crl) 3610 of 2020)*** wherein the Hon'ble Court has observed as under :

"On consideration of the matter, we are of the view that pending the trial we cannot keep a person in custody for an indefinite period of time and taking into consideration the period of custody and that the other accused are yet to lead

defence evidence while the appellant has already stated he does not propose to lead any evidence, we are inclined to grant bail to the appellant on terms and conditions to the satisfaction of the trial court."

12. Sri Tripathi has also submitted that there is no fault on the part of the present applicant in not concluding the trial at the earliest and the specific fault is attributable to the fact witness and other witnesses who remained absent till 28.10.2021 w.e.f. 7.8.2018 when the case was committed to the sessions, therefore, while considering bail application of the present applicant this fact may also be considered. However, Sri Tripathi has given undertaking on behalf of applicant that the applicant shall not misuse the liberty of bail and shall cooperate with the trial proceedings and shall abide by all terms and conditions of bail, if granted.

13. Learned A.G.A. opposed the prayer for bail by submitting that since two bail applications of the present applicant have been rejected by this Court, therefore, present third bail application may not be allowed as no new ground has been shown to this Hon'ble Court to consider his bail.

14. However, on being confronted on the point that present applicant is in jail for almost seven years and the fact witnesses and other prosecution witnesses were not cooperating with the trial proceedings, resultant thereof the trial could not be concluded despite being committed on 7.8.2018 and the status report was provided by the District Judge does not indicate any fault on the part of the applicant, learned AGA has submitted that since the aforesaid situation being a matter of record, therefore, he has nothing to say.

15. Without entering into the merits of the case and considering the period of incarceration of the present applicant w.e.f. 27.5.2015, almost seven years and there are total 15 prosecution witnesses out of them all fact witnesses have been examined and examination of other witnesses is almost complete except the examination of formal witnesses and there is no likelihood of conclusion of trial in near future and the non-cooperation of the fact witnesses / prosecution witnesses is apparent on the status report of the trial dated 28.3.2022, therefore, the aforesaid grounds may be considered as a fresh ground to grant bail to the present applicant while deciding his third bail application. Besides, the dictums of Apex Court in re : ***Gokarakonda Naga Saibaba v. State of Maharashtra, (supra), Union of India vs. K.A. Najeeb (supra) and Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation (supra)*** are being considered as those judgments, to me, are supporting the submission of learned counsel for the applicant.

16. Accordingly, the third bail application of the applicant is ***allowed.***

17. Let the applicant Rameshwar Pandey, involved in aforesaid case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as

abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(v) The applicant shall not leave the country without permission of the Court concerned.

18. Before parting with it is expected that the trial shall be concluded with expedition. Further, the learned trial court may take all coercive measures as per law if either of the parties do not co-operate in the trial properly. The learned trial court shall fix short dates to ensure that trial is concluded at the earliest.

(2022)04ILR A144

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 05.01.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Bail Application No. 13747 of 2021

Gaurav @ Gaura ...Applicant (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Applicant:

Zia Naz Zaidi, Sri Atul Kumar, Sri Dharmendra Pratap Singh, Sri Praveen Singh, Sri Brijesh Sahai (Senior Adv.)

Counsel for the Opposite Party:

G.A.

A. Bail - The Court after considering the nature of accusations, the nature of evidence in support, the severity of punishment which conviction will entail, the character of the accused-applicant, circumstances which are peculiar to the accused, reasonable apprehension of securing the presence of the accused at the trial, the reasonable apprehension of the witnesses being tampered with, the larger interest of the public/State and other circumstances, but without expressing any opinion on the merits of the case, granted bail to the applicant. (Para 24)

Bail Application Allowed. (E-10)

List of Cases cited:-

1. Pawan kumar Pandey Vs St. of U.P. 2007 (1) JIC 680 (Allahabad)

2. Sanjay Chandra Vs Central Bureau of Investigation AIR 2012 SC 830

3. Mayakala Dharamaraja Vs St.of Telangana (2020) 2 SCC 743

4. Lachman Dass Vs Resham Chand Kaler AIR 2018 SC 599

5. CBI Vs Vijay Sai Reddy (2013) 7 SCC 452

6. Kanwar Singh Meena Vs St. of Raj. AIR 2013 SC 296

7. Kamlapati Trivedi Vs St. of W.B. 1979 AIR (SC) 777

8. U.O.I. Vs Shiv Shankar Keshari (2007) 7 SCC 798

9. Dataram Singh Vs St. of U.P. & anr. (2018) 3 SCC 22 *(followed)*

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Mr. Brijesh Sahai, learned Senior Advocate assisted by Mr. Zia Naz Zaidi, learned counsel for the applicant, Mr. Ajeet Kumar Singh, learned Additional Advocate General assisted by Mr. Vibhav Anand Singh, learned A.G.A. for the State and perused the record.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant seeking enlargement on bail in Case Crime No. 0583 of 2020, under Section 8/21 N.D.P.S. Act, 1985 at Police Station Khatauli, District Muzaffar Nagar.

3. Rejoinder affidavit filed today is taken on record.

4. In compliance of the order dated 9.11.2021, S.S.P., Muzaffar Nagar, namely, Mr. Abhishek Yadav has filed an affidavit wherein it has been stated that the order dated 4.10.2021 was not communicated by the office of Government Advocate as well as the deponent was not aware of the said order and as such he could not file his affidavit.

5. In the compliance affidavit, it has been stated that there are 49 criminal cases registered against the applicant. As per DCRB report, out of 49 cases 48 cases have been registered at P.S. Khatauli, District Muzaffar Nagar and one case i.e., Case Crime No. 420 of 2011 under Section 60 Excise Act r/w Section 272, 273 I.P.C. was registered at P.S. Mansoorpur, District Muzaffar Nagar. It is further stated in paragraph No. 7 of the said affidavit that due to typographical error Police Station of Case Crime No. 420 of 2011 has been typed as Mansoorpur in place of Khatauli. The report provided by DCRB has been annexed as Annexure No. 2 to the compliance affidavit.

6. The explanation referred in the affidavit is found plausible and accepted. The personal presence of S.S.P. Muzaffar Nagar is hereby dispensed with.

7. Now coming to the merits of the case.

8. Learned counsel for the applicant has submitted that the applicant has been falsely implicated in the present case. The applicant has been arrested by the police and from his possession 102.66 gram Alprazolam is said to have been recovered. He has further submitted that nothing has been recovered from the possession of the applicant and the alleged recovery is false and fabricated. It is further submitted that there is no chemical analysis report to prove that the recovered contraband is actually the Alprazolam powder or something else. Learned counsel for the applicant submits that at the time of arrest, mandatory provisions of Section 50 of NDPS Act have not been complied with. Lastly, it is also been submitted by learned counsel for the applicant that he has been implicated in several criminal cases by the police for the reason that the father of the applicant has made several complaints against the police officials of District Muzaffar Nagar.

9. It has been vehemently argued by Mr. Brijesh Sahay, learned Senior Counsel for the applicant that the animus of the police towards the applicant is evident from the fact that the recovery of 102.66 gram Alprazolam has been deliberately shown from the possession of the applicant to make it fall in the category of commercial quantity. The recovery of more than 100 gram Alprazolam falls in the category of commercial quantity. The recovery is a sham.

10. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required. The applicant is languishing in jail since 29.12.2020. He undertakes that he will not misuse the liberty, if granted, therefore, he may be released on bail.

11. On the other hand, learned Additional Advocate General opposed the application on the ground that applicant has criminal history of 48 cases and most of them have been lodged before filing of the said complaint against the police officials. He further submits that criminal antecedent of the accused is to be seen while granting the bail. Their relevance cannot be totally ignored.

12. Per contra, learned counsel for the applicant submits that applicant has already been acquitted in five criminal cases whereas the prosecution in 17 has already came to an end. It is also submitted that the applicant has already been granted bail by this Court as well as by the lower Court in 21 criminal cases after considering the merits of the case. It is further submitted by learned counsel for the applicant that criminal history attributed to the accused applicant is due to the application dated 26.4.2002 which has been filed by the father of the applicant against the police officials. It has also been admitted in the compliance report filed by the S.S.P. that the then Senior Superintendent of Police, Muzaffar Nagar directed the Circle Officer, Khatauli to inquire into the aforesaid matter and submit a report. It has also been fairly admitted by the learned counsel Additional Advocate General that an investigation into the allegations levelled by father of applicant was also taken up by the C.B.C.I.D. against the police officials.

13. In support of his contention learned counsel for the applicant also placed reliance on the case of ***Pawan Kumar Pandey Versus State of U.P. reported in [2007 (1) JIC 680 (Allahabad)]*** where the accused was allegedly involved in the commission of murder punishable u/s 302 I.P.C., it has been held by the Court that if the accused is otherwise entitled to bail, the same should not be refused simply on the ground of criminal antecedent. It is also argued that the accused in the said case was wanted in 56 criminal cases. Further more the said criminal history of the applicant has already been explained in the supplementary affidavit filed on 23.8.2021.

14. The matter of foisting of frivolous cases against the applicant has already been dealt with by this Court in order dated 9.11.2021. The same is not being reiterated to avoid repetition.

15. The object of grant of bail to an accused of an offence is neither punitive nor preventive in nature. The true object behind granting of bail is to secure appearance of accused during trial. The courts owe more than verbal respect to the

principle that punishment begins after convictions and that every man is deemed to be innocent until duly tried and found guilty. From the earlier times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as mark of disapproval of former conduct whether the accused has been convicted for it or not.

16. It has been opined by the Apex Court in ***AIR 2012 SC 830 Sanjay Chandra vs. Central Bureau of Investigation*** that if bail to an accused under Section 437 or 439 Cr.P.C. is refused by the Court and he is detained in jail for an indefinite period of time and his trial is likely to take considerable time, the same would be violative of his fundamental right as to 'Personal liberty' guaranteed by Article 21 of the Constitution of India. It has also been opined that seriousness of the offence should not be treated as the only ground for refusal of bail.

17. At the stage of consideration of bail it cannot be decided whether offer given to the applicant and his consent obtained was voluntary. These are the questions of fact which can be determined only during trial and not at the present stage. In case of prima facie non-compliance of mandatory provision of Section 50 the accused is entitled to be released on bail within the meaning of Section 37 of N.D.P.S. Act.

18. Interpreting the provisions of bail contained u/s 437 & 439 Cr.P.C., the Supreme Court has laid down following considerations for grant or refusal of bail to an accused in a non-bailable offence:-

(i) Prima facie satisfaction of the court in support of the accusations.

(ii) Nature of accusation.

(ii) Evidence in support of accusations.

(iv) Gravity of the offence.

(v) Punishment provided for the offence.

(vi) Danger of the accused absconding or fleeing if released on bail.

(vii) Character/criminal history of the accused.

(viii) Behavior of the accused.

(ix) Means, position and standing of the accused in the Society.

(x) Likelihood of the offence being repeated.

(xi) Reasonable apprehension of the witnesses being tampered with.

(xii) Danger, of course, of justice being thwarted by grant of bail.

(xiii) Balance between the rights of the accused and the larger interest of the Society/State.

(xiv) Any other factor relevant and peculiar to the accused.

(xv) While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, but if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused.

(See: ***Mayakala Dharamaraja vs. State of Telangana, (2020) 2 SCC 743 and Lachman Dass vs. Resham Chand Kaler, AIR 2018 SC 599.)***

19. While disposing of bail applications u/s 437/439 Cr.P.C., courts

should assign reasons while allowing or refusing an application for bail. But detailed reasons touching the merit of the matter should not be given which may prejudice the accused. What is necessary is that the order should not suffer from non-application of mind. At this stage a detailed examination of evidence and elaborate documentation of the merit of the case is not required to be undertaken. Though the court can make some reference to materials but it cannot make a detailed and in-depth analysis of the materials and record findings on their acceptability or otherwise which is essentially a matter of trial. (See: ***CBI vs V. Vijay Sai Reddy, (2013) 7 SCC 452and Kanwar Singh Meena vs. State of Rajasthan, AIR 2013 SC 296.)***

20. According to ***Halsbury's Laws of England - "*** the effect of granting bail is not to set the defendant (accused) free, but to release him from custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place."

21. According to ***Law Commission's 268th report (2017),*** "Bail' essentially means the judicial interim release of a person suspected of a crime held in custody, on entering into a recognizance, with or without sureties, that the suspect would appear to answer the charges at a later date; and includes grant of bail to a person accused of an offence by any competent authority under law.

22. In ***Kamlapati Trivedi vs. State of West Bengal, 1979 AIR (SC) 777***, the Supreme Court of India observed that bail is devised as a technique for effecting a synthesis of two basic concepts of human values, namely the right of the accused to enjoy his personal freedom and the public interest; subject to which, the release is conditioned on the surety to produce the accused person in Court to stand trial.

23. The Apex Court in the Case of ***Union of India vs. Shiv Shankar Keshari, (2007) 7 SCC 798*** has held that the court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

24. Considering the facts of the case and keeping in mind, the ratio of the Apex Court's judgment in the case of ***Union of India vs. Shiv Shankar Keshari (spura)***, larger mandate of Article 21 of the constitution of India, the nature of accusations, the nature of evidence in support thereof, the severity of punishment which conviction will entail, the character of the accused-applicant, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interest of the public/ State and other circumstances, but without expressing any opinion on the merits, I am of the view that it is a fit case for grant of bail.

25. Keeping in view the nature of the offence, evidence on record regarding complicity of the accused, larger mandate of the Article 21 of the Constitution of

India and the dictum of Apex Court in the case of ***Dataram Singh Vs. State of U.P. and another reported in (2018) 3 SCC 22*** and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

26. Let the applicant- ***Gaurav @ Gaura***, who is involved in aforementioned case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions (Further, before issuing the release order, the sureties be verified):-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the date fixed for evidence when the witnesses are present in Court. In case of default of this condition, it shall be open for the Trial Court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the Trial Court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the Trial Court may proceed against him under Section 229-A IPC.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C., may be issued and if applicant fails to appear before the Court on the date fixed in such proclamation, then, the Trial Court shall initiate proceedings against him, in accordance with law, under Section 174-A IPC.

(iv) The applicant shall remain present, in person, before the Trial Court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C. If in the opinion of the Trial Court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the Trial Court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

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

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

(2022)04ILR A149
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.03.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 195 of 2022

Sneha Kumari @ Gungun ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Prashant Rai

Counsel for the Opposite Parties:
A.G.A., Sri Pradeep Kumar Rai, Sri Deependra Kumar

A. Criminal Law - Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 12 - The Court after considering the nature of evidence, the period of detention already undergone, the likelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of

tampering with the evidence and considering that the prosecution has not produced any single witness against the revisionist who actually seen the incident, the fact that the case rests on circumstantial evidence and in view of the larger mandate of the Article 21 of the Indian Constitution, granted bail to the revsiionist. (Para 20)

Revision Allowed. (E-10)
List of Cases cited:-

1. Balakrishna Tukaram Angre Vs The St. of Mah. Criminal Appeal No. 1704 of 2017

2. Takht Singh Vs St. of M.P. 2001 (10) SCC 463 *(followed)*

3. Shiv kumar @ Sadhu Vs St. of U.P. 2010 (68) ACC 616 (LB) *(followed)*

4. Dataram Singh Vs St. of U.P. & anr. (2018) 3 SCC 22 *(followed)*

5. Kamal Vs St. of Har. 2004 (13) SCC 526 *(followed)*

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This revision is directed against the judgment and order dated 19.11.2021 passed by learned Special Judge (POCSO Act)/ Additional Sessions Judge, Ghaziabad, dismissing Criminal Appeal No. 101 of 2021 (Sneha Kumari @ Gungun versus State of U.P.), filed under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the Act') and affirming an order of Juvenile Justice Board, Ghaziabad dated 12.01.2021 refusing bail plea to the revisionist in Case Crime No. 67 of 2020, under Section 302 IPC, Police Station Link Road, District Ghaziabad.

2. Heard Shri Prashant Rai, the learned counsel for the revisionist, learned A.G.A. for the State and Shri Pradeep Kumar Rai, the learned counsel for opposite party no.2 and perused the record.

3. Learned counsel for the revisionist submits that it is a case of circumstantial evidence. There is no independent eye witness of the alleged incident. The name of the revisionist surfaced in the statement of eye witness, namely, Smt. Naina Devi, who also in her statement had stated that she is not assured but there is some relations between the revisionist and co-accused, Jitendra, and they must have killed the deceased, who is the mother of the revisionist. The informant is the father of the revisionist who was in the State of Bihar at the time of incident and on the basis of statement of witness, Naina Devi, the F.I.R. was lodged against the revisionist and the co-accused, Jitendra.

4. Leaned counsel for the revisionist further submits that according to the postmortem report of the deceased cause of death is due to compression of neck by ligature.

5. Learned counsel for the revisionist further submits that no eye witness took the name of the revisionist that she was involved in the present crime. The alleged recovery of rope made by the police is not from the possession of the revisionist.

6. Learned counsel for the revisionist further submits that it is a case based on circumstantial evidence. The revisionist has been roped in by the police on the basis of statements of Smt. Naina Devi, Satyanarain and Urmila Devi, who have also not seen the incident. The recovery memo is totally false. It is also argued that there is no incriminating evidence available on record about the revisionist's involvement in the commission of alleged offence.

7. Learned counsel for the applicant has relied upon the decision of the Hon'ble Supreme Court in the case of **Balakrishna Tukaram Angre Vs. The State of Maharashtra in Criminal Appeal No. 1704 of 2017.** In the said decision, the Hon'ble Supreme Court was pleased to observe that case of the prosecution rests on circumstantial evidence and the accused has been in custody for fifteen months.

8. Learned counsel for the revisionist further submits that the present case is a case of the circumstantial evidence. It is well settled law that where there is no direct evidence against the accused and the prosecution rests its case on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. In other words, there must be chain of evidence so complete as not to leave any reasonable ground for 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. All the links in the chain of circumstances must be complete and should be proved through cogent evidence. In the present case there is no continuing chain of evidence.

9. Learned counsel for the revisionist further submits that the revisionist is juvenile and there is no apprehension of reasoned ground for believing that the release of the revisionist is likely to bring her in association with any known criminals or expose her to mental, physical or psychological danger or her release would defeat the ends of justice. He further submits that except this the revisionist has no previous criminal history. The maternal uncle (Mama) of the revisionist is giving his undertaking that after release of the revisionist on bail, he will keep her under his custody and look after her properly. Further, the revisionist undertakes that she will not tamper the evidence and she will always cooperate the trial proceedings. There was no report regarding any previous antecedents of family or background of the revisionist. There is no chance of revisionist's re-indulgence to bring her into association with known criminals.

10. Learned counsel for the revisionist further submits that it is not in dispute that the revisionist is a juvenile as she already been declared juvenile by Juvenile Justice Board, Ghaziabad vide order dated 05.11.2020. The revisionist was a juvenile aged 15 years, 11 months and 02 days on the date of occurrence. She was, thus, clearly below 16 years of age. She is in detention since 14.02.2020 in connection with the present crime and has completed a substantial period of sentence out of the maximum three years institutional incarceration permissible for a juvenile, under Section 18(1)(g) of the Act.

11. Learned counsel for the revisionist further submits that thereafter the revisionist applied for bail before the Juvenile Justice Board, Ghaziabad, upon which a report from the District Probation Officer was called for. The bail application was rejected vide order dated 12.01.2021, being aggrieved, the revisionist preferred an appeal under Section 101 of the Act, which was also dismissed vide order dated 19.11.2021. Hence the present criminal revision has been filed before this Hon'ble Court mainly on the following amongst other grounds:

(i) That the revisionist is innocent and has been falsely implicated in the

present case due to rivalry/village partibandi.

(ii) That the revisionist is juvenile and there is no apprehension of reasoned ground for believing that the release of the revisionist is likely to bring him in association with any known criminals or expose him to mental, physical or psychological danger or his release would defeat the ends of justice.

(iii) That the revisionist has no criminal history except the present case.

(iv) That the law has been laid down by this Court as well as the Apex Court that the seriousness of the offence is no ground to reject the bail of the juvenile and only three contingencies have been provided to be considered at the time of consideration of the bail application and those are if the release is likely to bring him into association with any known criminal or would expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

(v) That the father of the revisionist is giving his undertaking that after release of the revisionist on bail, he will keep him under his custody and look after him properly.

(vi) That the revisionist undertakes that he will not tamper the evidence and he will always cooperate the trial proceedings.

(vii) That both the courts below have committed gross illegality by rejecting the revisionist's bail prayer after declaring him juvenile.

(viii) That both the courts below have given wrong findings without any material available on record.

(ix) That there was no report regarding any previous criminal antecedents of the family or background of the revisionist.

(x) That there is no chance of revisionist's re-indulgence to bring him into association with known criminals.

(xi) That the impugned orders passed by the courts below are totally arbitrary, illegal and bad in law.

(xii) That the findings given by the courts below are based on conjectures and surmises.

12. Several other submissions in order to demonstrate the falsity of the allegations made against the revisionist have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the revisionist that she is ready to cooperate with the process of law and shall faithfully make herself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon her. It has also been pointed out that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

13. Learned counsel for the revisionist has pointed out that the revisionist has by now done a substantial period of institutional incarceration. The maximum period for which a juvenile can be incarcerated in whatever form of detention, is three years, going by the provisions of Section 18(1)(g) of the Act. In support of his contention, learned counsel for the revisionist has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

14. Learned counsel for the revisionist has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463,** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

15. Learned A.G.A. as well as Shri Pradeep Kumar Rai, the learned counsel for opposite party no.2 have opposed the revisionist's case with the submission that the release of the revisionist on bail would bring her into association of some known criminals, besides, exposing her to moral, physical and psychological danger. It is submitted that her release would defeat the ends of justice, considering that she is involved in a heinous offence.

16. This Court has carefully considered the rival submissions of the parties and perused the impugned orders. The juvenile is clearly below 16 years of age and does not fall into that special category of a juvenile between the age of 16 and 18 years whose case may be viewed differently, in case, they are found to be of a mature mind and persons well understanding the consequences of their actions. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

"(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

17.Provided that such person shall not be so released if there appears reasonable grounds for believing that the

release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

17. A perusal of the said provision show that bail for a juvenile, particularly, one who is under the age of 16 years, is a matter of course and it is only in the event that his/her case falls under one or the other disentitling categories mentioned in the proviso to sub-Section (1) of Section 12 of the Act that bail may be refused. The merits of the case against a juvenile acquire some relevance under the last clause of the proviso to sub-section (1) of Section 12 that speaks about the ends of justice being defeated. The other two disentitling categories are quite independent and have to be evaluated with reference to the circumstances of the juvenile. Those circumstances are to be gathered from the Social Investigation Report, the police report and in whatever other manner relevant facts enter the record.

18. What is of prime importance in this case is that the juvenile, who is a young girl, less than the age of 16 years, has no criminal history. There is nothing said against the juvenile, appearing from the Social Investigation Report that may show her to be a *desperado* or misfit in the society. The two courts below have held the juvenile disentitled to bail on account of her case falling under each of the three exceptions enumerated in the proviso to sub section (1) of Section 12, for which no reason has been indicated. That finding, in both the orders impugned, is based on an *ipse dixit*, in one case of the judge and in the other of the Board. Even if it be assumed that the offence was committed in the manner alleged, it would be rather strained logic to hold that release of the juvenile on bail would lead to the ends of justice being defeated.

19. This Court in the case of **Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB)** was pleased to observe that the gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile.

20. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with

the evidence and considering that the prosecution has not produced any single witness against the revisionist who actually seen the incident, and the fact that the case rests on circumstantial evidence, and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22** and the view taken by the Apex Court in the cases of **Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra) and Shiv Kumar alias Sadhu Vs. State of U.P. (supra).**, this Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail.

21. In the result, this revision **succeeds** and is **allowed**. The impugned judgment and orders dated 12.01.2021 and 19.11.2021, are hereby **set aside** and **reversed**. The bail application of the revisionist stands **allowed.**

22. Let the revisionist, **Sneha Kumari @ Gungun,** through her natural guardian/ maternal uncle (Mama), Rajesh Kumar, be released on bail in Case Crime No. 67 of 2020, under Section 302 IPC, Police Station Link Road, District Ghaziabad, upon her maternal uncle furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Ghaziabad subject to the following conditions:

(i) That the natural guardian/ maternal uncle (Mama), Rajesh Kumar will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the maternal uncle will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and her maternal uncle (Mama), Rajesh Kumar will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first Wednesday of May, 2022 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Ghaziabad, on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

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

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

23. However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

(2022)04ILR A156
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.04.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Criminal Revision No. 670 of 2016

Smt. Kahkashan & Ors. ...Revisionists
Versus
Umesh Kumar Gupta @ Abbas Husain Kahkashan ...Opposite Party

Counsel for the Revisionists:
Mohiduddin Khan, Mohammad Aslam Khan

Counsel for the Opposite Party:
Lokendra Kumar Gupta, Ravendra Pratap Singh Cha

A. Criminal Law - Criminal Procedure Code, 1973 - Section 125 - The Court after careful analyzing the evidence on record observed that concubinage can be presumed from mobile phone and compact disc submitted as an evidence. This establishes familiarity to the extent of intimacy of the respondent with the revisionist and her family members. Therefore, the Court directed that the children of the revisionist are entitled to maintenance from respondent till their respective marriages and marriage expenses will also be borne by the respondent. (Para 37 & 38)

Revision Disposed of. (E-10)

List of Cases cited:-

1. Sarla Mudgal Vs U.O.I. (1995) 3 SCC 635

2. Lily Thomas Vs U.O.I. (2000) 6 SCC 224

3. Sumitra Devi Vs Bhumikan Chaudhary AIR 1985 Supreme Court 765

4. Chaturbhuj Vs Sita Bai (2008) 2 SCC 316

5. Chanmuniya Vs Virendra kumar Singh Kushwaha (2011) 1 SCC 141 *(followed)*

6. Vimala Vs Veera Swamy 1991 (2) SCC 375

7. Dwarika Prasad Satpathy Vs Vidyut Prava Dixit (1999) 7 SCC 675 *(followed)*

8. Yamuna Bai Anant Rao Aadhav Vs Anant Rao Shivram Adav 1988 (1) SCC 530

9. Savita Ben Soma Bhai Bhatiya Vs State of Gujarat (2005) 3 SCC 636

10. Badshah Vs Urmila Badshah Godse (2014) 1 SCC 188

11. Ramesh Chandra Ram Pratapji Daga Vs Rameshwari Ramesh Chandra Daga (2005) 2 SCC 33

12. Captain Ramesh Chand Kaushal Vs Veena Kaushal (1978) 4 SCC 70

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

1. Heard Sri Mohd. Arif Khan, learned Senior Counsel assisted by Sri Mohiuddin Khan, learned counsel for the Revisionists and Sri Lokendra Kumar Gupta, learned counsel for the respondent.

2. Kahkashan, the Revisionist No. 1 alongwith her three minor daughters filed an application under Section 125 of the Cr.P.C. on 3 August 2009 claiming maintenance from the respondent of Rs.20,000 per month for herself and 10,000 per month each for her three daughters i.e. a total of Rs.50,000 per month. The facts as mentioned by her were that the Applicant had married the Respondent Umesh Kumar Gupta @ Abbas Hussain "Khun Khun' on 24 October 2002 as per Muslim rites and rituals at the residence of the Applicant. The Nikahnamma had been filed as an annexure to the application. After such

wedding the applicant started living in the Respondent's home and three daughters, namely, Neha aged about seven years,Kiran aged about five years, and baby Hina aged about two months, were born out of the wedlock. Initially the Respondent took good care of the applicant and her children but later on started neglecting them as three daughters were born to her one after another and he wanted a son. The youngest daughter baby Hina was born on 15 May 2009 and the Respondent left the Applicant 20 May 2009. Because of financial difficulty faced by the Applicant she had to withdraw her daughters from City Montessori School and get them admitted in a cheaper school. She was facing great hardship as she did not have any skill and no income of her own, whereas the Respondent was a very well-known businessman having a factory for manufacturing of batteries by the name of Kaali Power and he earned about Rs.4 lakhs per month. As such the Respondent was having sufficient *means* to look after his wife and children i.e. the applicants.

3. The Respondent filed an objection to such Application Paper No. Kha-9, where he denied having converted to Islam and marrying the Applicant. It was stated that a forged Nikahnama had been produced in court by the Applicant and her father. Since there was no wedding performed, there was no question of the Applicant going and living in his home or three daughters being born out of the wedlock. The Applicant had herself stated that the wedding took place on 24 October 2002. However the eldest daughter was seven years old at the time of filing of the application under Section 125 Cr.P.C. in August, 2009, which was not possible. It was alleged that the Respondent had no concern at all with the children of the Applicant. The Respondent was a staunch Hindu by birth. He had got married some eighteen years ago and his wife was still alive and he had two children from the said wedlock and they were living a happy family life. The Application had been filed by the Applicant as a result of a conspiracy between her and her father, Mohd. Raees Hussain. Forged documentary evidence like receipts of school fees had been produced. The names of all three daughters were of Hindu origin whereas the applicant herself stated that she was Muslim and the Respondent had converted to Islam and performed Nikaah with her. The Applicant was a scheming lady of loose character who had been caught by the police for immoral flesh trade. The news regarding the same was also published in the newspapers on 24 March 2001 much before the alleged marriage on 24.10.2002 and Case Crime Number 18 of 2001 under section 3 (1) 5/7 of Immoral Traffic (Prevention) Act, 1986 had been registered and Charge sheet had been filed against her and other accused in the competent court. A certified copy of the FIR and also the news item published in the newspapers were filed along with the objections by the Respondent. The Respondent was never named Abbas Hussain, Khun Khun and he had never converted to Islam. The Applicant and her father were used to extorting money from people, On the basis of threats to lodge false cases against them. The Applicant had also mentioned wrong residential address of the Respondent only to prevent the Respondent from coming to know of the filing of the application for maintenance and responding to the same appropriately and on time. The Application was filed with deliberate concealment and misrepresentation of facts and ought to be dismissed on this ground alone.

4. The Applicant filed her reply, Paper Number 15, and also documentary

evidence. Most of the documentary evidence that were filed were photocopies. One Compact Disc and One Mobile Phone, and several photographs were however also filed as originals.

5. In the documentary evidence filed by the Respondent were certified copies of the Chargesheet and FIR filed in the case under a Immoral Traffic (Prevention) Act, 1986. A certified copy of a Sale Deed of a property bought by the Applicant subsequently showing herself as daughter of Raees Hussain was also filed.

6. After taking evidence of the Applicant and the Respondent the learned Trial Court proceeded to consider the matter on merits. The Trial Court noted that the very first issue that needed to be determined was whether there was any actual marriage performed between the parties. The Applicant had stated that such marriage had taken place on 24 October 2002 as per Muslim rites and rituals. Although Nikaahnama had been filed in original by her as evidence, the same had not been proved as per Section 75 of the Evidence Act. As per the Applicant, the Respondent at the time of marriage, had converted to Islam and had adopted the name of Abbas Hussain Khun Khun. The Applicant got herself examined as PW-01. In her Examination in Chief the Applicant stated that they had a love marriage and that before such marriage the Respondent had already married one lady by the name of Ragini Gupta and from her two daughters had been born to him. Ragini Gupta had also filed FIR against the Respondent and sent him to jail for having married the Applicant.

7. In her cross-examination the Applicant had admitted that her Nikaah had been performed with Abbas Hussain "Khun Khun", but the Respondent continued to be a Hindu and the Nikaahnama was not in the name of Umesh Gupta. She also admitted in her Cross-Examination that she had not gone to the house of the Respondent to live with him as his wife and she continued to live with her parents. The Applicant had not filed any documentary evidence for example, Identity Card or any proof of residential address to show that she started living with Umesh Gupta who after conversion to Islam came to be known as Abbas Hussain "Khun Khun". The learned trial court noted several contradictions between what was stated on affidavit in the support of the Application filed under Section 125 Cr.P.C. by the Applicant and in her Examination in Chief and Cross-Examination conducted in Court. In support of the allegation of the Applicant that Respondent had been sent to jail on a complaint being made by Ragini Gupta his first wife, the Applicant had filed a photo copy of a newspaper item only without submitting any proof of the same. The Respondent on the other hand stated that the Applicant had been accused of flesh trade and news regarding her arrest by the police on 24 March 2001 was published in the Newspapers. Newspaper cutting in this regard was also filed. Certified copy of the FIR in the Case Crime Number 18 of 2001 under section 3 (1), 5/7, of the Immoral Traffic (Prevention) Act and the certified Chargesheet filed therein were also brought on record. The competent court had taken cognizance of such offence and the trial was still pending before the CJM.The contentions raised by the Respondent No.1 was denied vaguely by the Applicant.

8. The learned Trial Court thereafter also recorded his findings from the documentary evidence produced by both

the parties and discussed three things that are necessary for a claim under Section 125 of the Cr.P.C. to succeed. Firstly, the claimant has to prove that the respondent had married her. Secondly, she had to prove that she had no independent source of income to maintain herself. Thirdly, she had to prove that the respondent had enough income to give maintenance to the Claimant.

9. The learned Trial Court found from evidence on record that initially the claimant had stated in her application that she got married as per Muslim Rites and Rituals to Umesh Gupta who had converted to Islam and changed his name to Abbas Hussain Khun Khun. She also claimed that she went to the matrimonial home and started living with the respondent as his wife. However in her cross-examination she had admitted that she had not left her paternal home and continued to live with her parents and two brothers although in a different house. The Nikahnama being a private document, had also not been proved as required under Section 75 of the Indian Evidence Act.

10. The Learned Trial Court observed on the basis of Sections 101, 102 & 103 of the Evidence Act, which he quoted in the order impugned, that whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist and when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Also, that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proof of that fact shall lie on any particular person. In this case the Burden of Proof lay upon that person who would fail if no evidence at all were given on either side.

11. Learned Trial Court thereafter referred to the only facts that could be proved by the claimant during the course of hearing. Firstly, that the respondent was familiar and friendly towards the claimant, her parents and daughters, and secondly, that he also used to converse with her parents on phone even during the pendency of the claim under Section 125 Cr.P.C. It could not be proved by her that the respondent had converted to Islam and changed his name to Abbas Hussain Khun Khun. She could also not prove that she had started living with him as his wife in the matrimonial home and that the three children were born out of the wedlock. She also could not prove that she was recognized by the Society at large as the wife of Umesh Gupta. She also could not prove that she had no knowledge of the respondent being already a married person with two children before her alleged marriage with him.

12. The Respondent had stated that the Nikahnama produced before the Court did not bear his name as Umesh Gupta but had noted the name of one Abbas Hussain "Khun Khun' whereas he continued to use the name of Umesh Gupta and had remained a Hindu. The Applicant had filed photocopies of few fee receipts issued by City Montessori School and also Birth Certificate issued by the Nagar Nigam but such photocopies were of no consequence. The Applicant had also filed photocopies of documents relating to New St John's Inter College where Kumari Neha Gupta and Kiran Gupta were allegedly studying. In such papers the trial court noticed interpolations in the surnames and the

name Abbas Hussain was easily visible which had been scored out and "Khun Khun Gupta" was written in a different handwriting. In the column meant for noting the name of the father of the child initially "Khun Khun" was mentioned but later on struckoff. Such documentary evidence being only photocopies was also not admissible as evidence. The Applicant in her cross-examination had stated that photographs of the Respondent and the Applicant had been filed to show that they were married. However, the learned trial court observed that only because a man and a woman were shown in a close proximity in the photographs, would not prove that they were married. The photograph showing the Respondent with Appellants' daughter in his arms would also not determine that the Respondent was the actual father of such a child. Only because the Respondent was standing with a girl child in his arms, the Nikaah with Applicant could not be proved. The Applicant had referred to a CD (Compact Disc) being filed as evidence which allegedly recorded a conversation between the respondent and the Applicant to prove that they were living together. The trial court observed that only because a man and woman were living together would not prove beyond doubt that they were living as husband and wife. It only established a *live-in* relationship. For the presumption of marriage to arise it was necessary that the man and woman should be recognised as a couple by the society at large. The applicant had not produced any evidence to show that in the eyes of the general public the Applicant and the Respondent were treated to be husband and wife. As such, neither the Applicant's case of having married the Respondent, nor the case set up later on of a *live-in* relationship between the parties could be proved by the Applicant. Also, admittedly the first wife of the Respondent was alive and if the Respondent was living in adultery then he would be guilty under Section 494 IPC, but he would not be liable to give maintenance to the Applicant.

13. The learned trial court has observed that even if the Respondent had been arrested for Bigamy, it would not prove the Respondent's Nikaah with the Applicant as per Islamic law. Even if any Nikahnama was actually signed by both the parties, such marriage would be void, as the Respondent never converted to Islam, and continued to remain a Hindu. He had married one lady by the name of Ragini Gupta in 1992 and the said marriage was still subsisting. If any physical relations had been established by the Respondent with the Applicant, it would not raise the presumption of a valid marriage but would rather be a *live-in* relationship. Having a *live-in* relationship with another woman or living in adultery, would not make the Respondent liable to pay maintenance to such other woman or her children.

14. The learned Trial Court thereafter discussed Muslim law specifically Surah No. 2.221 of the Quran which said that if a Muslim of Shia belief marries a person who is an idol worshipper or a fire worshipper such marriage would be void. Although the claimant had not stated in her application initially that she was a believer in Shia Sect during her cross-examination it had come out that she was a Shia. The Learned Trial Court thereafter referred to judgement of the Supreme Court given in **Sarla Mudgal Versus Union of India reported in (1995) 3 SCC 635**; wherein it was held that Hindu Marriage Act only recognized one marriage and during the subsistence of first marriage and during the lifetime of the first wife, if a

Hindu married a second time, such marriage would be void and that person would be liable to be prosecuted under Section 494 IPC. Such law would be applicable also in cases where a Hindu converts to Islam and marries a second time. It also meant that if a person continues to be a Hindu and marries a Muslim then also he would be liable to be prosecuted under Section 494 IPC. If such a person converts to Islam and marries a second time then also he shall be liable for conviction under Section 494 IPC and the second marriage would be void. The Learned Trial Court also referred to the judgement rendered by the Supreme Court in the case of **Lily Thomas Versus Union of India reported in (2000) 6 SCC 224**, holding that the Hindu Marriage Act does not recognize more than one marriage and if a person marries a second time during the lifetime of his first wife then such marriage would be void under Section 11 of the Hindu Marriage Act. The learned trial Trial Court having found that the claimant was unable to prove a valid marriage with the opposite party, has rejected the claim of the Revisionist.

15. Sri Mohd. Arif Khan, Learned Senior Advocate for the Revisionists has argued that the trial court had granted an order of interim maintenance dated 03.08.2009 giving Rs. 200/- per month to the Revisionist no.1 and, Rs.100/- per month each to the two minor daughters, yet not even a single penny was paid by the Respondent. A distress warrant was also issued on 12.10.2011. The Respondent had denied the marriage and fatherhood, despite ample documents being submitted before the learned trial court showing that the respondent had married the revisionist no. 1 after conversion to Islam and during the subsistence of his first marriage with one Ragini Gupta. Learned counsel for the revisionists has referred to the documents on record summoned from the lower court i.e. papers no. C37/7, C37/8, C37/2, C38/2 and A16/3. He has also referred to a CD and mobile phone submitted before the learned trial court, which was not appreciated at all by the learned trial court. It has also been argued that an application for a DNA test of the daughters was also moved, but it was kept pending and the case disposed of by the learned trial court. Referring to certain judgments of the Supreme Court and it was argued that a hyper technical view was taken by the learned Trial Court whereas it is settled law by the Supreme Court that even if the children are illegitimate, they are still entitled to maintenance and that even if a marriage is not proved, *live-in* relationship itself, if recognized by the society at large, would entitle the revisionist no.1 for an order granting maintenance.

16. Sri Lokendra Kumar Gupta, learned counsel appearing for the respondent has pointed out from the pleadings on record, in the Application under Section 125 of the Cr.P.C. that the revisionist No.1 had claimed marriage with the respondent according to muslim rites and rituals, but the Nikaahnama was never proved. The Nikaahnama was itself doubtful as the name of Abbas Hussain has been written in Hindi and thereafter, in a different handwriting altogether the word "Khun Khun" in English has been added. Four witnesses were alleged to have attended the Nikaah, but none of these witnesses were produced.

17. It has been submitted by Sri Lokendra Kumar Gupta that all other documents that were filed, for example, Birth Certificates and copies of Scholar

Register, etc., were filed as photocopies and not in their original, because in the original Birth Certificate, the Revisionist no.1 has been shown as W/o Khun Khun Gupta and not W/o Umesh Kumar Gupta. In the High School certificate that has been produced in its original during the course of the arguments by the learned counsel for the revisionists, there is a mention of the child being the daughter of Khun Khun Gupta and not Umesh Kumar Gupta. The revisionist could not prove before the learned trial court that she was living with the respondent as husband and wife in a *live-in* relationship which was recognized by the society. She could also not prove that Umesh Kumar Gupta was the person she had married i.e. Abbas Hussain was the same as Khun Khun Gupta who was the same as Umesh Kumar Gupta, the respondent to this Revision.

18. Sri Lokendra Kumar Gupta, learned counsel for the respondent says that there is no application on record allegedly moved by the Revisionist for getting DNA test conducted of her three daughters. He has vehemently argued that there was a conscious attempt at concealment of evidence, as the original certificates were in the possession of the Revisionist no.1, which were not produced intentionally before the learned trial court as the original certificates showed that Kahakashan was the wife of Khun Khun Gupta and Hina Gupta, Kiran Gupta and Neha Gupta were the daughters of Khun Khun Gupta and not the Umesh Kumar Gupta. The Revisionist also could not prove that Khun Khun Gupta was the same person as Umesh Gupta and she ever shared the same matrimonial home with the respondent.

19. On a specific query being made by this Court as to whether, the learned trial court could not see that the Revisionist no.1 may have been kept as a concubine, the Learned counsel for the respondent has pointed out that the trial court had only to see whether the applicant had proved her pleadings as mentioned in the application under Section 125 of the Cr.P.C. It was the applicant's duty to prove the CD and the Mobile Phone that were produced as evidence, and to connect and prove that evidence during her statement recorded by the learned trial court. The Revisionist No.1 had stated about marriage with the respondent which she could not prove. She had not pleaded concubinage. She had also not proved that Umesh Kumar Gupta was living with her for a long period and they had been living openly in such a relationship and had been recognized as a married couply by the Society at large. He has pointed out that the case laws that has been cited by the learned counsel for the Revisionist all relate to persons who were living together for a long time and were recognised by the society/public at large as husband and wife. He has pointed out that the sale deed was executed by the revisionist no.1 and she had bought property as daughter of Rahees Hussain and not as wife of Umesh Kumar Gupta.

20. Sri Lokendra Kumar Gupta, learned counsel for the respondent no.2 has read out from the plaint and from the Examination-in-chief and cross-examination of the applicant that she failed to prove that her marriage with Umesh Gupta took place on 24.10.2012 and for getting married to the applicant the respondent had converted to Islam and changed his name to Abbas Husain. She had also failed to prove that she was ever living with the applicant in his home or was recognized as his wife by the public. According to the counsel for the respondent

no.2, the applicant was involved in flesh trade and was arrested alongwith her father and seven other persons in 2001, and a Charge Sheet has been filed before the Competent court against the applicant and her father as also seven other accused for immoral trafficking.

21. It has also been argued by the learned counsel for the respondent that neither the Nikaahnama was proved nor was any other documentary evidence which was filed alongwith Application by the applicant. It is evident from the order passed by the learned trial court that except for the Nikahnama, all other documents that were filed were only photocopies which are inadmissible in evidence. Nikahnama being a private document, was not proved as per Chapter V of the Indian Evidence Act

22. It has also been argued that the applicant is quite well off and had bought property and a certified copy of the sale deed was also filed before the learned trial court showing herself to be the daughter of Rahees Hussain and not as wife of Umesh Kumar Gupta or Abbas Husain the *alias* which was allegedly adopted by the respondent to get married to the applicant.

23. Sri Mohd. Arif Khan, learned Senior Counsel after going through the record relating to the lower court has very fairly submitted that there is no application on record for the DNA test of the children and he has been wrongly instructed in the matter. He however, says that the CD and the Mobile Phone are also on record which remained in a sealed cover and those should have been seen by the learned trial court before coming to a conclusion that there was no relationship between the revisionist no.1 and the respondents. He has also pointed out that the charge of bigamy and of Umesh Kumar Gupta being sent to jail on the complaint of his first wife, Ragini Gupta, has not been denied anywhere by Sri Umesh Kumar Gupta in his written statement or in his statement before the learned trial court. Therefore, it could not be said that the respondent had not been sent to jail on the complaint of his first wife with regard to bigamy being lodged at Police Station Thakurganj. He has referred to photocopies of newspaper cuttings filed as evidence.

24. Sri Lokendra Gupta has denied the evidentiary value of photocopies of newspaper cuttings submitted before the learned trial court. He says that there was no complaint ever lodged against his client by any person, let alone his first wife, regarding bigamy and that he was never arrested. There is no evidence on record that Umesh Kumar Gupta had ever been sent to jail or was granted or released on bail by the competent court.

25. After having heard the learned Counsel for the parties and having perused the order impugned, this Court considers it appropriate to consider the case law referred to by Learned counsel for the revisionists. In ***Sumitra Devi versus Bhumikan Chaudhry AIR 1985 Supreme Court 765,*** the Supreme Court was considering an appeal against an order passed by the High Court rejecting the revision of the appellant against an order passed by the District Judge. The Revisional Court had reversed the grant of maintenance under section 125 Cr.P.C. given to the appellant by the Judicial Magistrate. It was the case of the appellant that she had been married to the Respondent in 1971 and out of the wedlock, a child had been born. The

respondent was already a married man, which fact was not known. Relations between the parties soured and the appellant had no option left, but to ask for maintenance for herself and also for her child. The respondent did not dispute their marriage as a fact, though he pleaded that such marriage was void, being a result of concealment and fraud, and also for non-performance of religious rites necessary for a valid Hindu marriage. He also pleaded that the child was not his, as the appellant was already pregnant for about three months before the marriage with the respondent.

The Supreme Court observed that it was impressed by the fact that the respondent had not seriously disputed the fact of marriage but had taken the stand that such marriage was void. It also observed that the Sessions Judge and the High Court adopted a hypertechnical approach while considering the question of marriage which was not denied by the respondent himself. The Sessions Judge as well as the High Court did not consider the fact that for about a decade the parties had lived together. Public records including Voters List, described them as husband and wife, and competent witnesses of the village of the wife as also of the husband had supported the factum of marriage. Witnesses had also spoken about the reputation of the appellant being known in the locality as wife of the respondent. No doubt performance of certain religious ceremonies/rites were essential for traditional Hindu wedding but in the case of the appellant whether or not such rites were performed had also not been determined by the Sessions Judge and the High Court. The matter was remanded to the Learned magistrate for a fresh enquiry regarding evidence of both sides already on record and also both sides being given an opportunity to lead further evidence in support of the respective stands.

The Supreme Court observed in paragraph 4 that *"under section 125 of the CRPC even an illegitimate minor child is entitled to maintenance. Even if the fact of marriage is discarded, the minor child having been found to be illegitimate daughter of the respondent would still be entitled to maintenance." The Supreme Court observed in paragraph 5 that in such matters "the role of the court is not that of a silent spectator or of a passive agency - - - particularly - - - when maintenance of a neglected wife or a minor child is in issue, the court must take genuine interest to find out the truth of the matter - - ."*

26. In ***Chaturbhuj versus Sita Bai (2008) 2 SCC 316***, the Supreme Court was considering the Appellant's case that the deserted wife had personal income which was sufficient to maintain herself under section 125Cr.P.C. The trial court had directed payment of Rs.1,500/- per month to the respondent as maintenance. Revision filed against such order was rejected. The Appellant filed an application under Section 482 Cr.P.C. which was also dismissed by the High Court, noticing that conclusions had been arrived at by the trial court on the basis of appreciation of evidence. It was argued by the learned counsel for the Appellant that he was a retired Assistant Director of Agriculture and he had bought a house and land in the name of the respondent. The land had been sold off by the respondent and she had also let out the house on rent and was residing with one of their sons. The Hon'ble Supreme Court considered the language of section 125 Cr.P.C. and observed that the object of maintenance proceedings is not to punish a person for his past neglect but to

prevent vagrancy by compelling those who can provide support to those who are unable to support themselves, and who have a moral claim to such support. The phrase *"unable to maintain herself"* would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children. The objective is to prevent vagrancy and destitution. It provides a speedy remedy for supply of food, clothing and shelter to the deserted wife and children if any. Under the law the burden is in the first place upon the wife to show that the *means* of her husband are sufficient. Secondly the Applicant has to show that she was unable to maintain herself. These two conditions are in addition to the requirement that the husband must have neglected or refused to maintain his wife. Only because the wife was earning some income was not sufficient to rule out the application of Section 125 Cr.P.C. It has to be established that with the amount she earned, the respondent wife was able to maintain herself in the way she was used to in the house of her husband. In *Bhagwan Dutt versus Kamla Devi 1975 (2) SCC 386* the Supreme Court had observed that the wife should be in a position to maintain a standard of living which is neither luxurious nor penurious, but what is consistent with the status of the family. The expression *"unable to maintain herself"* does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.

27. In *Chanmuniya* ***versus Virendra Kumar Singh Kushwaha (2011) 1 SCC141,*** Supreme Court was considering a matter where the appellant had been married as per Kushwaha community customs by *Katha* and *Sindoor* to her brother-in-law after her husband"s death in 1996. They started living together as husband and wife but after sometime the first respondent stopped looking after her and refused to discharge his marital obligations. As a result she initiated proceedings under Section 125 Cr.P.C. for maintenance. This proceeding remained pending. She also filed a Suit for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. The trial court decreed the suit for restitution in 2004. The first respondent preferred an appeal under Section 28 of the Hindu Marriage Act saying that there was no evidence that the appellant after being widowed had remarried the first respondent. The High Court in its judgement reversed the order of the trial court on the ground that the essentials of a valid Hindu marriage as required under Section 7 of the Hindu Marriage Act had not been performed. The appellant"s Review was also dismissed in 2009. The Appellant thereafter filed appeal before the Supreme Court. The Supreme Court observed in Para 7, thus :-

"One of the major issues which cropped up was whether or not presumption of marriage arises when parties lived together for a long time, thus giving rise to a claim for maintenance under Section 125 Cr.P.C. In other words the question was, what is meant by "wife' under section 125 CRPC, specially having regard to explanation under clause (b) of Section. Thus the question that arises is whether a man and woman living together for a long time, even without a valid marriage, would raise, as in the present case, a presumption of a valid marriage entitling such woman to maintenance."

28. The Supreme Court relied upon English case law on the subject and the observations made by the House of Lords that the question of validity of a marriage

cannot be tried like any other issue of fact, independent of presumption. The Court had held that law will presume in favour of marriage and such presumption could only be reverted by strong and satisfactory evidence. The House of Lords had observed that *"cohabitation, with required repute, as husband-and-wife proved that parties between themselves had mutually contracted the matrimonial relation. A relationship which may be adulterous at the beginning may become matrimonial by consent. This may be evidenced by habit and repute."* Quoting the decisions of the House of Lords the Supreme Court observed that since the appellant and first respondent were related and lived in the same house and by social custom were treated as husband and wife by their community, there was a very strong presumption in favour of marriage. *"The presumption of marriage is much stronger than a presumption in regard to other facts. Where a man and woman are proved to have lived together as man and wife, the law will presume, unless contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage." Referring to Indian case law also the Supreme Court observed that "continuous cohabitation of man and woman as husband and wife may lead validly to a presumption of marriage which is rebuttable on evidence to the contrary being led. A heavy burden lies on him who seeks to deprive the relationship of legal origin."*

29. The Supreme Court referring to its earlier judgement in ***Vimala versus Veera Swamy,1991 (2) SCC 375,*** that Section 125 of the CRPC is meant to achieve a social purpose and the object is to prevent vagrancy and destitution.

It observed in paragraph 3 that *".... the term "wife' in Section 125 of the Code includes a woman who has been divorced by her husband or who has obtained a divorce from her husband and has not remarried. A woman not having the legal status of a wife is thus brought within the inclusive definition of the term "wife' Consistent with the objective."*

The Supreme Court observed in paragraph 24 :-

"...24. Thus in those cases where a man who lived with a woman for a long time and even though they may not have undergone legal necessities of a valid marriage, should be made liable to pay the woman maintenance if he deserted her. The man should not be allowed to benefit from the legal loopholes where enjoying the advantages of a de facto marriage, without undertaking the duties and obligations. . Any other interpretation would lead the woman to vagrancy and destitution, which the provision of maintenance in section 125 is meant to prevent.."

30. The Supreme Court also observed that in a subsequent decision in ***Dwarka Prasad Satpathy versus Vidyut Prava Dixit (1999) 7 SCC 675;*** the Supreme Court had held that *"the standard of proof of marriage in a section 125 proceeding is not as strict as is required in a trial for an offence under Section 494 IPC."* The Court explained the reason for the aforesaid finding by holding that an order passed in an application under Section 125 does not really determine the rights and obligations of the parties, as the Section is enacted with a view to provide a summary remedy to the neglected wives to obtain maintenance. The Supreme Court held that *"maintenance cannot be denied where there was some evidence on which conclusion of living together could be reached."*

31. The two Judge Bench in *Chanmuniya* (Supra), however observed a

contrary note struck by a two Judge Bench of the Supreme Court in ***Yamuna Bai Anant Rao Aadhav versus Anant Rao Shivram Adhav 1988 (1) SCC 530,*** where it was held that an attempt to exclude altogether the personal law of the parties in proceedings under section 125 is improper. The Division Bench had held that the expression *"wife'* in Section 125 of the Code should be interpreted to mean only a legally wedded wife. Similarly in ***Savita Ben Soma Bhai Bhatiya versus State of Gujarat (2005) 3 SCC 636***, the Supreme Court had observed that however desirable it may be to take note of plight of an unfortunate woman, who unwittingly enters into wedlock with a married man, there is no scope to include a woman not lawfully married within the expression of *"wife'*. The Bench had held that this inadequacy in law can be amended only by the legislature. While coming to the aforesaid finding the judges had placed reliance upon the decision in *Yamuna Bai's* case.

The Supreme Court after noting the two judgements of *Yamuna Bai* and *Savita Ben* (supra), in *Chan Munia's* case observed that there was a divergence of judicial opinion on the interpretation of the word *"wife'* in Section 125 of the Code and referred the matter to the Chief Justice of India to refer the following questions to be decided by a Larger Bench:

"(i) Whether the living together of a man and woman as husband and wife for a considerable period of time would raise the presumption of a valid marriage between them and whether such a presumption would entitle the woman to maintenance under section 125 Cr.P.C.? (ii) Whether strict proof of marriage is essential for the claim of maintenance under section 125 CRPC having Regard to the provisions of Domestic Violence Act 2005? (iii) Whether a marriage performed according to customary rites and ceremonies, without strictly fulfilling the requisites of Section 7(1) of the Hindu Marriage Act 1955, Or any other personal law would entitle the woman to maintenance under Section 125 Cr.P.C.?"

32. The Division Bench in *Chan Munia's* case however expressed a prima facie opinion on the basis of various sections of Protection of Women From Domestic Violence Act 2005, that assigns a very broad and expansive definition to the term *"domestic abuse'* to include within its purview even economic abuse i.e. deprivation of financial and economic resources. It observed that Under Section 20 of the Act of 2005 the Magistrate may direct the respondent to pay monitory relief to the aggrieved person who may be a harassed woman for expenses incurred and losses suffered by her, which may include, but is not limited to, maintenance under Section 125 Cr.P.C. In addition to this, some compensation may also be granted to the aggrieved person. Such relief can be sought in any legal proceedings before a Civil Court, a Family Court, or a Criminal Court, and the Act gives a very wide interpretation to the term *"domestic relationship'*, to take it outside the confines of a marital relationship, and even includes *live-in* relationships in the nature of marriage within the definition of domestic relationship under section 2(f) of the Act. Therefore women in *live-in* relationships are also entitled to all the reliefs given in the Domestic Violence Act. It observed in paragraph 39 thus:

"39. We are thus of the opinion that if the above mentioned monitory relief and compensation can be awarded in cases of live-in relationships under the Act of

2005, they should also be allowed in the proceedings under Section 125 Cr.P.C. It seems to us that the same was confirmed by Section 26 of the said Act of 2005."

33. In ***Badshah versus Urmila Badshah Godse (2014) 1 SCC 188***, the Supreme Court was considering the claim of maintenance by the second wife having been upheld by the High Court. The appellant had married the respondent No. 1 during the subsistence of the first marriage. Appellant had performed marriage with the respondent as per Hindu rites and rituals, in a temple, and lived for some time with the respondent. Respondent No.2 was born out of the wedlock. Later on one lady Shobha came to the house of the petitioner and claimed herself to be his wife. Respondent No.1 confronted with such a situation filed an Application claiming maintenance under Section 125 Cr.P.C. The appellant contested the petition by filing his written statement wherein he denied having ever married the Respondent and claimed that he was not the father of the Respondent No.2 either. According to the Appellant, he was married to Shobha a long time ago and he had two children out of the wedlock and Respondent No.1 was not and could not be his wife during the subsistence of his first marriage and she had filed a false petition claiming a marital relationship with him. The Judicial Magistrate Ist class, allowed the application. The learned Additional Session Judge dismissed the Revision. The High Court affirmed the orders passed by the lower courts. The Appellant approached the Supreme Court thereafter. Counsel for the Appellant referred to the judgement of the Supreme Court in *Yamunabai Anant Rao Adhav Versus Anant Rao Shivram Adhav;* and *Savita Ben Somabhai Bhatiya versus State of Gujarat*, where the Supreme Court had observed that the expression *"wife'* in Section 125 Cr.P.C. cannot be stretched beyond the legislative intent and would mean only a *"legally wedded wife"*. The appellant submitted that since the petitioner had proved that he was already married to Shobha and the said marriage was subsisting on the date of marriage with Respondent No.1, such second marriage, if any, was void and the Respondent No.1 was not his legally wedded wife and, therefore, had no right to move an application under Section 125 Cr.P.C. The Supreme Court dealt with the judgements rendered in *Dwarka Prasad Satpathy* (supra) and *Chanmuniya* versus *Virendra Kumar Singh Kushwaha* (supra), and observed that no doubt the Division Bench had referred the matter to a Larger Bench framing three questions formulated by it, but it noticed that the facts in the case were different from those in *Chanmuniya*. The Supreme Court in *Badshah versus Urmila Badshah Godse* was dealing with the situation where marriage between the parties had been proved. However the appellant was denying his responsibility to pay maintenance on the ground that the second marriage during the subsistence of the first marriage was void. The Supreme Court observed that he could not be allowed to take benefit of his own wrong. The Court observed in paragraph 13.1 that *"firstly in Chanmuniya case, the parties had been living together for a long time and on that basis question arose as to whether there would be a presumption of marriage between the two giving rise toa claim of maintenance under Section 125 Cr.P.C. by interpreting the term "Wife' widely."* The Supreme Court had observed in *Chanmuniya* (supra) that even if there was no valid marriage, the man and woman had been living together for a long time and such a woman would be entitled to maintenance. In the case of Badshah

(supra), however, the Respondent No.1 had been able to prove by cogent and strong evidence that the petitioner and the Respondent No.1 had been married to each other. Secondly, when the marriage between the Respondent No.1 and the petitioner was solemnised, the petitioner had kept the Respondent No.1 in the dark about his first marriage. A false representation was made that he was single and competent to enter into wedlock. The petitioner could not be allowed to take advantage of his own wrong and turn around and say that the respondents are not entitled to maintenance under Section 125 Cr.P.C. and say that the Respondent No.1 is not the legally wedded wife of the petitioner. The Supreme Court therefore observed that at least for the purpose of Section 125 Cr.P.C. the Respondent No.1 would be treated as the wife of the petitioner going by the spirit of the two judgements rendered in *Dwarika Prasad Satpathy* (Supra) and *Chanmuniya* (Supra). The Supreme Court held that the judgements in Adhav (supra) and *Savita Ben*(supra) would apply only in those circumstances where a woman married a man with full knowledge of the first subsisting marriage. In such cases, she should know that the second marriage with such a person is impermissible and, therefore, she has to suffer the consequences thereof. The said judgement would not apply to those cases where a man marries a second time by keeping that lady in dark about the first surviving marriage. The Supreme Court also observed that in such cases purposive interpretation needs to be given to the provisions of Section 125 Cr.P.C. While dealing with the application of a destitute wife or hapless children or parents under 125 Cr.P.C., the Court is dealing with marginalised sections of the society. *"The purpose is to achieve social justice which is the Constitutional vision enshrined in the Preamble of the Constitution of India. - - - - - it becomes the bounden duty of the Court to advance the cause of social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and the society... Of late, and in this very direction, it is emphasised that the Courts have to adopt different approaches in social justice adjudication which is also known as social context adjudication as mere adversarial approach may not be very appropriate. - - - in such a situation the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. The provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, a shift in the approach from adversarial litigation to social context adjudication is the need of the hour..."*.

34. It further observed that in ***Ramesh Chandra Ram Pratapji Daga versus Rameshwari Ramesh Chandra Daga (2005) 2 SCC 33,*** the right of the other woman in a similar situation was upheld. Here the Court had accepted that Hindu marriages have continued to be bigamous despite the enactment of the Hindu Marriage Act, 1955. The Court had commented that though such marriages are illegal as per the provisions of the Act, they are not immoral and hence financially dependent woman cannot be denied maintenance on this ground. The Court invoked the doctrine that where alternative constructions are possible the Court must give effect to that which will be responsible

for the smooth working of the system for which the Statute has been enacted rather than one which will put a roadblock in its way. *"If the choice is between two interpretations, then one which would fail to achieve the manifest purpose of the Legislation should be avoided. We should avoid a construction which would reduce the Legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is accepted it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125 Cr.P.C., such a woman would be treated as the legally wedded wife".*

The court referred to the judgement rendered by it in ***Captain Ramesh Chand Kaushal versus Veena Kaushal (1978) 4 SCC 70,*** where it was observed: - *"...,the brooding presence of the constitutional empathy for the weaker sections like women and children must inform the interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause - the cause of the derelicts."*

35. Now this Court has to see whether the argument made by the learned counsel for the Revisionist on basis of judgements cited by him entitles the Revisionists to maintenance.

36. This Court has also gone through the the record of the Lower Court which was summoned earlier. Paper No.16/2 is a copy of photo copy of the Scholar Register/Admission Certificate of Neha Gupta and Kiran Gupta. The name of the child Neha has been followed by scoring out of two words and the writing of the word "Gupta" thereafter. Similarly, the father"s name and occupation also shows scoring out of several words and writing of "Khun Khun Gupta" instead. Paper No.16/3 is a photo copy of the Birth Certificate issued by Lucknow Nagar Nigam wherein the name of the child has been shown as Heena Gupta and the name of the mother has been shown as Smt. Kehkashaan w/o Shri Umesh Kumar Gupta but the words "Khun Khun" have been added later on in a different Handwriting. Paper No.16/4 is a photocopy of a news item published in the newspaper. Paper No. 16/7 are two photographs of the respondent holding a girl child in his arms on the terrace of a house. Exhibit No.C-37/2 is a Compact Disc/CD which has been taped to the record. Exhibit No.C-37/3 is a copy of a complaint made to the Chief Minister and the S.S.P., Lucknow on 24.06.2008 by the Revisionist. Paper No. C-37/7 is a photograph of the respondent standing with the Revisionist No. 1 by his side. Exhibit No.C - 37/8 is a photograph of the respondent. Exhibit No.38/7 is a mobile phone set in a yellow envelope sealed with a Cello Tape, which the learned counsel for the Revisionist says was not opened by the learned Trial Court to find out the truth of the Revisionist's claim regarding it containing conversations between the Revisionist and the respondent.

37. This Court has found from the evidence on record, which has been considered in great detail by the learned Trial Court, that:-

(a) There was no proof of marriage by Muslim rites and rituals of the Revisionist no.1 with the Respondent. She

may have married one Abbas Hussain Khun Khun but she could not prove that the Respondent, Umesh Kumar Gupta was also known as Abbas Hussain Khun Khun.

(b) The Revisionist could not prove even a *live-in* relationship in a separate matrimonial home, and of the revisionist being recognized as wife of Umesh Gupta by the public at large.

(c) There was no proof of the first marriage having been concealed by the Respondent before alleged marriage to the Revisionist No.1.

(d) The photographs submitted in original and the CD and mobile phone set submitted by the Revisionist No.1 could however prove familiarity to the extent of intimacy of the Respondent with the Revisionist No.1 and with her family members.

(e) Hence, concubinage can be presumed from careful examination of the mobile phone set and Compact Disc submitted.

38. In such a case the children, i.e. the Revisionist No.2, 3 and 4 are entitled to maintenance of Rs. 10,000/- per month each from the Respondent from the date of this judgment till their respective marriages. The Respondent shall also be responsible to bear all their wedding expenses.

39. The Criminal Revision is ***disposed of*** with such modification of the judgment and order impugned.

(2022)04ILR A171
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.

THE HON'BLE VIKRAM D CHAUHAN, J.

Criminal Misc. Writ Petition No. 296 of 2022

Prashant Tiwari @ Jammu ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Narendra Deo Shukla, Sri Pankaj Kumar Tiwari

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Constitution of India, 1950 - Article 226 - U.P. Act No. VIII of 1971-Section 3(1)-maintainability of – petitioner subjected to a show cause notice issued u/s 3(1) of the Act, 1971-general nature of allegations have been stated in the alleged notice-factual foundation in general terms have been laid down by the authority concerned in the impugned order-the correctness of the those allegations are not subject-matter of enquiry before the court at this stage-petitioner has an opportunity to file an explanation before the authority concerned-Even if an order has been passed u/s 3(1) of the Act, the person concerned has a right of appeal u/s 6 of the Act, 1971.(Para 1 to 26)

B. U.P. Act No. VIII of 1971 - Section 3(1) - authorizes the District Magistrate to issue a notice in writing informing of the general nature of the material allegations against the petitioner in respect of clauses (a),(b),(c) of Section 3(1) of the Act,1971 and to provide a reasonable opportunity to the petitioner for tendering an explanation and thereafter on being satisfied pass an order u/s 3(3) of the Act including an externment order.(Para 8 to 10)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Bhim Sain Tyagi Vs St. of U.P. & ors. (1999) 39 ACC 321 FB

2. Special Director Vs Mohd. Ghulam Ghouse, (2004) 3 SCC 440

3. Pandharinath Shridhar Rangnekar Vs Commr. of Police(1973) 1 SCC 372

(Delivered by Hon'ble Vikram D Chauhan, J.)

1. The present writ petition is filed by the petitioner challenging the show cause notice dated 3rd July 2020 said to be issued by the respondent no. 2 - District Magistrate, Jaunpur.

2. Heard learned counsel for the petitioner and learned AGA on behalf of the State.

3. It is submitted by the learned counsel for the petitioner that the petitioner has been subjected to a show notice issued under Section 3(1) of the Uttar Pradesh Control of Goondas Act, 1970 (U.P. Act No. VIII of 1971). The impugned show cause notice is illegal as the general material allegation under Section 3(1) of the U.P. Act No. VIII of 1971 has not been stated in the impuned show cause notice. Learned counsel for the petitioner has further relied upon the Full Bench judgment of this Court in **Bhim Sain Tyagi Vs. State of U.P. and others,** reported in **1999 (39) ACC 321 (FB)** and submits that the writ petition against the show cause notice is maintainable as has been held by the Full Bench of this court and as such the impugned notice is liable to be quashed.

4. The learned AGA for the State has raised objection with regard to the maintainability of the present writ petition and has stated that in the writ petition the prayer is made for challenging the show cause notice whereas petitioner can always submit a reply to the show cause notice before the concerned authority and as such, the writ petition is premature and is liable to be dismissed.

5. The writ petition involves challenge to the alleged show cause notice dated 3rd July, 2020 said to have been issued by the District Magistrate, Jaunpur. As per the argument of the learned counsel for the petitioner, the aforesaid notice being Annexure 1 to the writ petition, is a show cause notice issued under Section 3(1) of the U.P. Act No. VIII of 1971. A perusal of the impugned notice would demonstrate that except mentioning of the criminal cases pending against the petitioner, the general material allegations in respect of the petitioner has not been stated in the impugned notice and on the strength of the aforesaid, learned counsel for the petitioner submits that the notice is bad in law and as such is liable to be quashed.

6. It is to be seen that the alleged notice dated 3rd July, 2020 is annexed as Annexure No. 1 to the writ petition at page 17. A perusal of the aforesaid document would demonstrate that the document is a requisition issued by the Superintendent of Police, Jaunpur and is addressed to the District Magistrate, Jaunpur wherein the details as to why the proceedings under Section 3(1) of the U.P. Act No. VIII of 1971 be issued against the petitioner is stated, with a further request to the District Magistrate, Jaunpur to initiate proceedings under Section 3(1) of the U.P. Act No. VIII of 1971.

7. On the aforesaid requisition by the Superintendent of Police there is an endorsement by the District Magistrate, Jaunpur directing for registering the aforesaid case and transferring the aforesaid matter before the Additional

District Magistrate, Finance and Revenue for disposal.

8. In the present case, the dispute pertains to Section 3 of the U.P. Act No. VIII of 1971 and for convenience, the same is reproduced herein-below :-

"3. Externment, etc. of Goondas. - (1) Where it appears to the District Magistrate :

(a) that any person is a goonda; and

(b) (i) that his movements or acts in the district or any part thereof are causing, or are calculated to cause alarm, danger or harm to persons or property; or

(ii) that there are reasonable grounds for believing that he is engaged or about to engage, in the district or any part thereof, in the commission of an offence referred to in sub-clauses (i) to (iii) of clause (b) of Section 2, or in the abetment of any such offence; and

(c) That witnesses not willing to come forward to give evidence against him by reason of apprehension on their part as regards the safety of their person or property.

The District Magistrate shall by notice in writing, inform him of the general nature of the materials allegations against him in respect of clauses (a), (b) and (c) and give him a reason-able opportunity of tendering an explanation regarding them.

(2) The person against whom an order under this Section is proposed to be made shall have the right to consult and be defended by a Counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires, and also of examining any other witness that he may wish to produce in support of his explanation, unless for reasons to be recorded in writing the District Magistrate is of opinion that the request is made for the purpose of vexation or delay.

(3) Thereupon the District Magistrate on being satisfied that the conditions specified in clauses (a), (b) and (c) of sub-section (1) exist may by order in writing -

(a) direct him to remove himself outside the area within the limits of his local jurisdiction or such area and any district or districts or any part thereof, contiguous thereto, by such route, if any, and within such time as may be specified in the order and to desist from entering the said area and such contiguous district or districts or part thereof, as the case may be, from which he was directed to remove himself until the expiry of such period not exceeding six months as may be specified in the said order;

(b) (i) require such person to notify his movements, or to report himself, or to do both, in such manner at such time and to such authority or person as may be specified in the order;

(ii) prohibit or restrict possession or use by him or any such article as may be specified in the order;

(iii) direct him otherwise to conduct himself in such manner as may be specified in the order.

until the expiration of such period, not exceeding six months as may be specified in the order."

9. A bare perusal of Section 3 (1) of the U.P. Act No. VIII of 1971 would demonstrate that the aforesaid authorises the District Magistrate to issue a notice in writing informing of the general nature of the material allegations against the petitioner in respect of clauses (a), (b), (c) and Section 3(1) of U.P. Act No. VIII of 1971 and to provide a reasonable opportunity to the petitioner for tendering

an explanation and thereafter on being satisfied pass an order under Section 3(3) of the U.P. Act No. VIII of 1971 including an externment order.

10. Under Section 15 of the U.P. Act No. VIII of 1971, the State Government has been authorised to make Rules for the purpose of carrying out the provisions of the Act. In pursuance thereof, the State Government has notified Uttar Pradesh Control of Goondas Rules, 1970. Under Rule 3(1) it is provided that the action under Section 3(1) will not ordinarily be taken by the District Magistrate except on the information in writing received from the Superintendent of Police of the District or Magistrate in-charge of the sub-division or on information in writing received from two respectable citizens of the locality in which the person to be proceeded against is ordinarily resident or is active. In this respect, the Rule 3(1) is quoted hereinbelow :

"3. (1) Action under sub-section (1) of Section 3 will not ordinarily be taken by the District Magistrate except on information in writing received from the Superintendent of Police of the District or Magistrate in-charge of a sub-division or on information in writing received from two respectable citizens of the locality in which the person to be proceeded against is ordinarily resident or is active. It will not be necessary for the District Magistrate to disclose the identity of the informants and particulars from which such identity can be ascertained to the person proceeded against but only the general nature of the material allegations shall be intimated to such person."

11. Rule 4 of the Uttar Pradesh Control of Goondas Rules, 1970 further provides that the notice to be issued under Section 3(1) shall be, as far as, may be in conformity with the Form I provided along with the said Rules. It is to be seen that a specific Form has been provided in the Rules for initiating proceedings/show cause notice under the U.P. Act No. VIII of 1971. The FORM I prescribed under the Rules is extracted herein-below :

"SCHEDULE

FORM I

Notice under Section 3 of the Uttar Pradesh Control of Goondas Act, 1970

(See Rule 4)

Whereas it appears to me on basis of information laid before me that-

(a) Sri.....son of Sri.....ordinarily residing in.....is as "goonda", that is to say, he either himself *or* as a member or leader of gang, habitually commits, *or* attempts to commit, *or* abets the commission of offences punishable under *Chapter XVI*, Chapter XVII or *Chapter XXII of the Indian Penal Code* has been convicted under the Suppression of Immoral Traffic in Women and Girls Act, 1956/* has been convicted not less than thrice under the U.P. Excise Act, 1910/* is generally reputed to be a person who is desperate and dangerous to the community; and that

(b) his movements or acts in.....are causing or are calculated to cause alarm, danger or harm to persons or property/* there are reasonable grounds for believing that he is engaged or about to engage in the district or any part thereof, in the commission of any offence punishable *under Chapter XVI/* Chapter XVII/* or Chapter XXII of the Indian Penal Code, *or under the Suppression of Immoral Traffic in Women and Girls Act, 1956* or under

the U.P. Excise Act, 1910,* or in the abetment of any such offence, and that

(c) witnesses are not willing to come forward to give evidence against him by reasons of apprehension on their part as regards the safety of their person or property ;

And whereas the material allegations against him in respect of the aforesaid clauses (a)/(b)/(c) are of the following general nature :

1. .....
2. .....
3. .....

The said Sri.....is hereby called upon to appear before me on (date) at (time) in my Court-room and if he so desires, to tender an explanation in writing regarding the said material allegations showing cause why an order under sub-section (3) of Section 3 of the Uttar Pradesh Control of Goondas Act, 1970, may not be made against him, also intimating me whether he desires to examine himself of any other witness (if so, their names and address) in support of his explanation.

The said Sri.....is hereby informed that if he fails to appear in aforesaid or if no explanation or intimation is received with the time specified it will be presumed that Sri.....has no desire to tender any explanation/examine any witness in regard to the said allegations and I will proceed to pass the proposed order.

Seal of Court
District Magistrate/
Additional District Magistrate."

12. A perusal of the aforesaid would demonstrate that under Section 3(1) it is the District Magistrate who is authorised to issue the show cause notice under the U.P. Act No. VIII of 1971 and the District Magistrate is obliged under Rules to issue notice in FORM I giving details of the general nature of material allegations against the person to be proceeded with.

13. In the present case, a perusal of the alleged impugned show cause notice, at page 17 of the writ petition, would go to show that the aforesaid is information/requisition received from the Superintendent of Police, Jaunpur by the District Magistrate, Jaunpur, for proceeding under Section 3 of the U.P. Act No. VIII of 1971 and on the aforesaid information so received, the District Magistrate has directed registration of the same and has further transferred the matter to the Additional District Magistrate, Finance and Revenue, for disposal. The aforesaid document, at page 17 of the writ petition, is neither in FORM I as prescribed under the Rules for issuance of the show cause notice nor the same can be said to be a show cause notice as it is only an information that has been received from the Superintendent of Police, Jaunpur to the office of the District Magistrate, Jaunpur for initiation of proceedings. Under the U.P. Act No. VIII of 1971 the aforesaid document at page 17 of the writ petition is relatable to Rule 3(1) of the Uttar Pradesh Control of Goondas Rules, 1970 and cannot be said to be a notice under Section 3(1) of U.P. Act No. VIII of 1971.

14. Once the show cause notice itself is not before this Court, it would not be proper for this Court to exercise the writ jurisdiction as the basic principle for quashing any order under writ jurisdiction is that the aforesaid order ought to have been placed before the Court and that no order under writ jurisdiction can be passed without such document being brought on record by the petitioner.

15. In so far as the issuance of show cause notice under Section 3(1) of the U.P. Act No. VIII of 1971 is concerned, the notice can be issued when the conditions prescribed under Section 3(1) of the aforesaid Act are fulfilled and on the basis of the aforesaid, a notice in writing has been issued to the person concerned informing him of the general nature of material allegations against him and a reasonable opportunity of tendering an explanation regarding the same is provided. It is to be noted that the show cause notice so issued by the District Magistrate under the Act is for the purpose of calling an explanation in order to ascertain whether the proceedings under Section 3 of U.P. Act No. VIII of 1971 may be proceeded with against the person concerned or not.

16. It is to be seen that against a show cause notice, the writ petition may be premature as the show cause does not give rise to any cause of action as no adverse order which affects the right of the party is in operation and unless the same is issued to the person concerned, the litigant have no right to challenge the show cause notice. It is also the settled law that the writ petition would lie when some right of the party is infringed. Further, where the show cause notice alleged to have been issued without jurisdiction of the authority, to do so, the writ petition would lie.

17. The Apex Court in **Special Director v. Mohd. Ghulam Ghouse, (2004) 3 SCC 440** has deprecated the practice of entertaining writ petition against the show cause notice and in paragraph 5 has held

"This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."

18. It is also to be noted that the Full Bench decision in the case of **Bhim Sain Tyagi (supra)** has held that a show cause notice which fails to indicate the 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 to issue fresh notice in accordance with law. In this reference, attention is drawn to paragraph no. 17 of the aforesaid judgment and the same is quoted hereinbelow:-

"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."

19. In the present case, it has to be seen whether the alleged show cause notice, as impugned in the present writ petition, is within the four corners of Section 3(1) of the U.P. Act No. VIII of 1971 or the general nature of material allegations are missing in the alleged notice.

20. The alleged notice dated 3rd July, 2020 specifically states that the petitioner is a Goonda and there is a terror; fear in the mind of the ordinary citizens; the petitioner is having connection with other persons having criminal antecedents; is involved in abatement of the crime and there is an atmosphere where no ordinary citizens is ready to be witness against the petitioner. Further, the Superintendent of Police, Jaunpur has also reported seven cases of crime or offence pending against the petitioner and on the basis of the aforesaid, the Superintendent of Police, Jaunpur has recommended for action under the U.P. Act No. VIII of 1971 against the petitioner.

21. The meaning of the words "general nature of material allegations" has not been provided in the Act and the same has to be considered in light of the object of the Act. A plain reading of the above referred provision of law would indicate that what is required to be informed in writing is only the general nature of the material allegations in order to give the person proposed to be externed a reasonable opportunity of tendering an explanation regarding the allegations. When it is said that the material allegations against the person be communicated to him generally or in a manner as to give an idea of the general nature of material allegations, it necessarily means that the material allegations with all their details regarding the date, place and specific facts of the incident must not be disclosed and only as much indication of these allegations

be made in general terms as is sufficient to give notice to the proposed extemee about what he has to face and explain in the enquiry. Such information must contain in general terms the main allegations made against the proposed externee and not all the details of the allegations. In all these proceedings, the notice to be issued under section 3(1) should contain as much of material allegations stated in general terms as would be necessary for constituting a sufficient notice contemplated under the Act. If the show-cause notice were to furnish to the proposed externee concrete data like specific dates of incidents or the names of persons involved in those incidents, it would be easy enough to fix the identity of those who out of fear of injury to their person or property are unwilling to depose in public. If such details are to be given, it would defeat the very purpose of an extemment proceeding.

22. The Hon'ble Apex Court in **Pandharinath Shridhar Rangnekar Vs. Commr. of Police, (1973) 1 SCC 372** in para 9 has observed as under:-

9.These provisions show that the reasons which necessitate or justify the passing of an externment order arise out of extraordinary circumstances. An order of externment can be passed under clause (a) or (b) of Section 56, and only if, the authority concerned is satisfied that witnesses are unwilling to come forward to give evidence in public against the proposed externee by reason of apprehension on their part as regards the safety of their person or property. A full and complete disclosure of particulars such as is requisite in an open prosecution will frustrate the very purpose of an externment proceeding. If the show-cause notice were to furnish to the proposed externee concrete data like specific dates of incidents or the names of persons involved in those incidents, it would be easy enough to fix the identity of those who out of fear of injury to their person or property are unwilling to depose in public. There is a brand of lawless element in society which is impossible to bring to book by established methods of judicial trial because in such trials there can be no conviction without legal evidence. And legal evidence is impossible to obtain, because out of fear of reprisals witnesses are unwilling to depose in public. That explains why Section 59 of the Act imposes but a limited obligation on the authorities to inform the proposed externee "of the general nature of the material allegations against him". That obligation fixes the limits of the co-relative right of the proposed externee. He is entitled, before an order of externment is passed under Section 56, to know the material allegations against him and the general nature of those allegations. He is not entitled to be informed of specific particulars relating to the material allegations."

23. In the present case, the general nature of allegations have been stated in the alleged notice dated 3rd July, 2020 and the factual foundation in general terms have been laid down by the authority concerned in the impugned order. The correctness or sanctity of the aforesaid allegations are not subject matter of enquiry before this Court at this stage. Once the general nature of material allegations is provided by the concerned authority in the impugned order, it would not be open for this Court to examine the correctness of the general allegations on merit in the writ jurisdiction specifically when the authority concerned is seized of the matter and the petitioner has an opportunity to file an explanation

before the authority concerned. Even if an order has been passed under Section 3 (1) of the U.P. Act No. VIII of 1971, the person concerned has a right of appeal under Section 6 of the aforesaid Act.

24. In view of the aforesaid, since the nature of the general allegations are provided in the impugned order. This Court under extraordinary jurisdiction decline to interfere with the impugned order at this stage and liberty is granted to the petitioner to approach the authority concerned for appropriate redressal.

25. It is made clear that we have not addressed the issues raised by the petitioner on the merit of the allegation in the impugned order dated 3rd July, 2020 and it shall be open for the authority concerned to independently apply its mind to the facts and circumstances and material available and come to a logical conclusion in accordance with law.

26. Accordingly, the writ petition lacks merit and is dismissed with liberty to the petitioner to approach the authority concerned in accordance with law.

(2022)04ILR A179
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal No. 374 of 2019

M/s Himalaya Sahkari Awas Samiti Ltd., Ghaziabad ...Appellant
Versus
U.P. Awas Vikas Parishad Lucknow & Anr. ...Respondents

Counsel for the Appellant:
Sri Vishnu Singh, Sri Anil Kumar Rai, Sri Greesh Kumar Malviya

Counsel for the Respondents:
Sri Chandra Shekhar Singh, Sri Anand Kumar

Civil Law - U.P. Co-operative Society Act, 1965- whether demanding interest at the rate of 18% and penal interest at the rate of 21% is bad - Held - rate of interest would be 8% (Para 17)

Two acres plot was given to the appellant - appellant had to make payment by way of installments - appellant deposited the amount for five years but could not pay installments - respondents claimed 18% rate of interest and 21% as penalty interest for unpaid amount - In the allotment order it was not fixed what additional interest would be liable to be paid by the society if the the amount of installment was not deposited within stipulated period of time - society already deposited a sum which is more than 50% of the cost of land - Held - appellant - plaintiffs would be obliged pay the remaining amount with 8% rate of interest.

Allowed. (E-5)

List of Cases cited:

1. Swasthya Enclave Sahkari Awas Samiti Ltd. & anr.Vs D.M. Ghaziabad & Others WRIT - C No. - 13223 of 2002

2. UP Avas Evam Vikas Parishad Vs. Swasthya Enclave Sahkari Awas Samiti Ltd. & ors. Civil Appeal No.9088 of 2015

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Vishnu Singh, learned counsel for appellant and Sri Chandra Shekhar Singh, learned counsel for respondent.

2. This appeal under Section 96 of Code of Civil Procedure, 1908 has arisen from judgment and decree dated 16.2.2019 passed by Additional Civil Judge (Senior Division), Court No.6, Ghaziabad dismissing the suit being original Suit No.679 of 2014 of the plaintiff. The parties are referred as plaintiff/appellant-respondent/ defendant.

3. The brief facts as they are culled out from the record and for deciding the sole issue raised for on consideration namely whether demanding interest at the rate of 18% and panel interest at the rate of 21% is bad and the dismissal of suit challenging this demand is bad in view of decision of this High Court in Writ Petition No.15950 of 2002 decided on 10.8.20211 and SLP decided by the Apex Court in Civil Appeal No.9088 of 2015 (UP Avas Evam Vikas Parishad Vs. Swasthya Enclave Sahkari Awas Samiti Ltd. and other) decided on 16.12.2016 are that the appellant is the cooperative society registered under U.P. Co-operative Society Act, 1965 (hereinafter refereed to as "Act, 1965"). The suit was instituted on the ground that two acres plot was given to the appellant being Plot No.05 GH, 4 Vasundhara Ghaziabad on 19.11.1998 for a sum of Rs.2,67,06,537/- . The appellant had to make payment by way of installments. In the year 2000, the respondent decreased the area of the land making it to 1.25 acres and that the price of the said area is Rs.1,72,56,624/-. The plaintiff took the possession of the said land on 21.6.2021 and the lease deed was also executed.

4. The main grievance in the plaint was that the appellant deposited the amount for five years but could not pay installments. The respondents claimed 18% rate of interest and 21% as penalty interest for unpaid amount which was challenged as being unreasonable and against principles on which such interest could be demanded. The appellant showed readiness to pay 14% simple interest as according to them the said rate of interest which was approved by Hon'ble Supreme Court in a similar matter where facts were identical. A reference requires to be made to a later judgment of this Court passed on 12.5.2015 in Writ C No.13223 of 2002 (Swasthya Enclave Sahkari Awas Samiti Ltd. and Another Vs. D.M. Ghaziabad & Others) wherein a stand was taken by the respondent that grant of 14% rate of interest by the Supreme Court should be granted. The court refused the same as the said order of the Apex Court was not to be treated as precedent. The respondent was asked to convey whether they still wanted to place reliance on their statement of relying on the said judgment which was refused.

5. It is submitted by learned counsel that the case of Assistant HNG Commissioner, Ghaziabad and others Vs. Shri Krishna Sahkari Awas Samiti Ltd. has fixed the rate of interest to 14%. This fact was brought to the notice of learned Judge but the said finding is negatived.

6. The issue about demand of interest as demanded by defendant framed was answered against the plaintiff and suit was dismissed.

7. Learned counsel for the plaintiff has heavily relied on the decision in First Appeal From Order No. 662 of 2004, judgment dated 16.3.2004 wherein in similar facts, 8% interest has been considered to be just and proper where 8% rate of interest granted has attained finality.

8. Learned counsel for the appellant has relied on the judgment of Supreme

Court in SLP (CC) No. 2376 of 2012 decided on 13.3.2012 arising from FAFO No.662 of 2004 and contended that similar treatment be accorded to the plaintiff - appellant herein but not granting the same is bad in eye of law. This Court requested the respondent to mediate or re-conciliate but the proposal was rejected.

9. It is further submitted by counsel for appellant that the Court below has illegally reached to the conclusion that the judgment and order dated 13.3.2012 passed by Apex Court in SLP (CC) No. 2376 of 2012 between Assistant H.N.G. Commissioner, Ghaziabad and others Vs. Shri Krishna Sahkari Awas Samiti Limited is not binding precedent and the ratio of the said judgment cannot be applied in the facts and circumstances of the present case and dismissed the suit.

10. It is submitted by counsel for the appellant that the Court below has failed to consider the ratio of judgment dated 13.3.2012 passed by Hon'ble Apex Court in SLP (CC) No. 2376 of 2012 between Assistant H.N.G. Commissioner, Ghaziabad and others Vs. Shri Krishna Sahkari Awas Samiti Limited, while dismissing the suit of the plaintiff. It is further submitted that the Court below has also illegally reached the conclusion that the plaintiff - appellant has not approached the Court with clean hands. The said conclusion of the Court below is illegal and against the pleadings of the plaintiff as well as the material evidence adduced by the plaintiff available on record, hence the findings recorded by the Court below are vitiated by law and deserves to be set aside. It is submitted by learned counsel for the appellant that the plaintiff - appellant was required to pay said amount in 8 quarterly installments w.e.f. 01.10.1998. It is totally wrong to assert that in case of installment, the society was supposed to pay 8 installments of Rs.41,83,900/- each. The allotment letter dated 19.11.1998 specifically provides that above mentioned amount either by cash / cheque or draft would be deposited in the Allahabad Bank, Branch Vasundhara, Ghaziabad. In case the amount of installment was not deposited within stipulated period of time then from the date of deposit of first installment, what additional interest would be liable to be paid by the society was not fixed. It is further submitted that an amended allotment letter dated 2.11.2000, the defendant Awas Vikas Parishad has reduced the area of the plot in question from 2 acres to 1.25 acres and the cost of the land has also been reduced to the tune of Rs.1,72,56,624/- only but strange enough the repayment scheduled as provided in the initial allotment letter dated 19.11.1998 was neither changed nor amended in pursuance of the amended allotment letter dated 2.11.2000 whereby the area and the cost of the land allotted to the appellant - plaintiff has been reduced and there is no new re-schedule plan issued by the defendant - respondent for assuring the payment of the land in dispute. The society has already deposited a sum of Rs.98,74,877/- upto 8.6.2001 which is more than 50% of the cost of land. The possession of the aforesaid allotted land was handed over to the appellant society on 21.6.2001.

11. It is submitted by learned counsel for the respondent that enhanced liability fastened is just and proper. The rate of 18% interest and 21% panal interest on plaintiff has already been enhanced and the plaintiff was obliged to pay the amount with interest . The judgment of Supreme Court passed in SLP (CC) No.2376 of 2012 (Assistant H.N.G. Commissioner, Ghaziabad and

others Vs. Shri Krishna Sahkari Awas Samiti Ltd.) cannot apply to the facts of this case.

12. For the reasons mentioned herein below, we cannot concur with the judgment of the Court below and it is bad on facts and law.The amount of interest recoverable, at any one time cannot exceed the principal as per judgment in Dhondu v. Narayan, (1863) 1 Bom HC 47. Law of Damdupat says that a creditor is not entitled at any one time to recover interest exceeding the amount of principal. It doesn't say that a creditor shall not in any case be entitled to interest exceeding the principal.

13. The suit could not have been dismissed. The reasonings and finding on most of eleven issues are not only the perverse but there is no discussion whether there was any contract to the contrary by and between the parties for demanding 18% interest and the panel interest would be 21%.

14. The learned Judge has failed to appreciate the fact that the Apex Court has decided the appeal holding that rate of interest would be 14% was in pursuance of order passed in First Appeal From Order No.662 of 2004 whereas this High Court in Writ Petition No.13223 of 2002 a copy of which is produced by way of additional evidence under Order XXXXI Rule 27 of the Cr.P.C.. The said judgment relies on the Division Bench judgment passed on 10.8.2011 in Writ Petition No.15950 of 2002. The Division Bench headed by Hon'ble Mr. Justice Krishna Murari (he was then) was in the said decision granted 8% rate of interest. If we apply it, can the submission of counsel for the respondents is accepted that the decision of Apex Court be relied. The subsequent decision holds the rate of interest as per repo rate would be 8% as the earlier judgment passed in Writ Petition No.15950 of 2002, on similar facts has attained finality as nothing has been brought to our notice as to in the said matters where the respondents are involved and the interest at the rate of 18% on delayed payment and 21% panal interest has been quashed and the interest is fixed at 8%. This Court as in the year 2016 again decided that the correct rate of interest would be 8% as decided in Writ Petition No. 15950 of 2002 but in our case we would be obliged to follow the same, we were taking a liberal view and hold that the appellants would be liable to pay 14% rate of interest, on the unpaid amount (which has been objected by the learned counsel for respondents), till the amount is paid on the basis that the appellants had prayed that they may be permitted to pay balance amount at the rate of 14% as per decision of Apex Court not accepting this has obliged us to decide the matter on merits and rely on the Division Bench judgment passed in Writ C No.13223 of 2002 on 12.5.2015 which reads as under :

" Heard Sri G.K. Singh, learned senior counsel, assisted by Sri G.K. Malviya, appearing for the petitioners, learned Standing Counsel appearing for the State respondent no.1 & 2 and Sri Shri Kant, appearing for the respondent no.3.

By this writ petition, petitioner has challenged the recovery proceedings initiated at the instance of respondent no.3, whereby a sum of Rs.2,58,87,731/- including 21% interest on delayed payment to the concerned respondent has been claimed.

Learned counsel for the parties do not dispute the fact that the dispute involved herein stands adjudicated by a Division Bench vide judgment dated

10.8.2011 passed in Writ Petition No.15950 of 2002. The said writ petition was dismissed by making following observations:-

"16. Besides this, it is to be noted that since this court has stayed the impugned order dated 27.3.2002 passed by respondent vide interim order dated 23.4.2002, therefore, in event of recovery sought to be made from the petitioner as intended by the impugned order dated 27.3.2002 or otherwise on the basis of fresh decision in pursuance of our this order, in that situation, we are of the further opinion that on the amount sought to be recovered only 8% simple interest per annum shall be charged from the petitioner during the period of pendency of instant writ petition and/or till the fresh decision is taken as directed by this court, such interest, in our opinion would meet the ends of justice and also balance the equity between the parties."

In view of the above, this writ petition also stands disposed of in the same terms.

In the end, it was submitted by Sri Shri Kant, learned counsel for respondent no.3, that against the aforesaid judgment, a special leave petition was preferred, wherein interest payable was made 14% instead of 8%, vide judgment dated 13.3.2012, a copy of which has been placed before us, where from we find that Apex Court has held that this order shall not be treated as precedent in another identical matter. Moreover, perusal of the judgment dated 13.3.2012 goes to show that this is on the consent of the parties before the Apex Court and since parties have not consented before us, for disposal of matter upon similar terms, we are not inclined to pass said order. "

15. The earlier judgment will enure for the benefit of the appellant herein and we direct that 8% rate of interest would be the interest. We direct the same to be paid within 12 weeks from today. The appeal is partly allowed . The respondent is directed to first calculate the amount already paid by the appellants herein towards the principal amount and then calculate interest at the rate of 14% and assign the statement to the appellants herein within four weeks from today. The appellants will have eight weeks thereafter to deposit the amount, failing which the respondents would be at liberty to take legal proceedings as permitted under law as it is seen that the appellants have misused the liberty given time and again.

16. We really obliged that the respondents did not accept our proposal to settle the matter and accept 14% rate of interest. While going through the record, we are covered by the later judgment passed on 10.8.2021 in Writ Petition No.15950 of 2002 which hold the fact that the plaintiff has requested that they may be permitted to pay 14% rate of interest is on the decision of Apex Court which according to the respondent is not applicable. The dismissal of the suit is absolutely without any basis. There was no contract for 18% rate of interest. The Committee has also not given any reasons why they are charging this high rate of interest for this commercial transaction. The suit could not have been dismissed as the demand itself is without any reasons against the mandate of law of Damdupat and even against the principles of Indian Contract Act.

17. We, therefore, are obliged to allow the appeal and hold that the rate of interest would be 8% as per the judgment granted in Writ C No.13223 of 2002 dated 12.5.2015.

18. We set aside the order of the Court below and decree the suit holding that the demand is bad in eye of law. The appellant -plaintiffs would be obliged pay the remaining amount with 8% rate of interest. Record and proceeding be sent back to the Tribunal forthwith. Fresh modified decree be passed.

19. We are thankful to learned counsel for the parties for assisting the Court very ably whereas we are pained to mention that the respondent in one matter pressed into service the order of the Apex Court directing 14% whereas in this matter they contended that it was in peculiar facts of the case there are two matters where the precedent was granting 8% interest.

(2022)04ILR A184
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2022

BEFORE

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

Second Appeal No. 612 of 2013

Deepak Bose ...Appellant
Versus
Shrabonee Bose ...Respondent

Counsel for the Appellant:
Sri Chandan Sharma, Sri Anand Kumar Srivastava, Sushmita Mukherjee

Counsel for the Respondent:
Sri Ajay Kumar Srivastava, Sri Virendra Kumar

Hindu Marriage Act,1955 – Section 13 1(ib)- Divorce - Desertion - Mental Cruelty - Whether desertion without a reasonable cause and without the consent of the party aggrieved during the wedlock amount to cruelty u/s 13 of the Hindu Marriage Act ? - ***Held*** **- long desertion and separation of a spouse constitute mental cruelty within the meaning of Section 131 (ib) of the Hindu Marriage Act - Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair - marriage becomes a fiction though supported by a legal tie - In such like situations, it may lead to mental cruelty (Para 31, 32, 33)**

Hindu Marriage Act, 1955 – Section 13 - Divorce - irretrievable breakdown of marriage - Grant of divorce on the ground of 'irretrievable breakdown of marriage' i.e. where the repair of broken marriage becomes impossible - ***Held*** **- Hindu Marriage Act does not provide for irretrievable breakdown of marriage as a ground for divorce - High Court or any other court has no power to grant a decree of divorce u/s 13 of the Hindu Marriage Act on the ground of irretrievable breakdown of marriage - That power can only be exercised by the Supreme Court under Article 142 of the Constitution (Para 38, 40, 42)**

Appellant (husband) and Respondent (wife) married on 11.07.2001- Wife did not serve the appellant's (husband) old, ailing mother & exerted pressure upon the husband to forsake his mother - respondent wife suddenly left her matrimonial home on 22.11.2007 - *Held* - separation between parties has been fourteen long years after the respondent left the matrimonial home - long separation of fourteen years between parties would lead to an inference of mental cruelty within the meaning of Section 131 (ib) of the Hindu Marriage Act, 1955 - relationship between parties is extinct - it is a dead marriage - divorce petition allowed - marriage between the appellant and the respondent dissolved forthwith.

Allowed. (E-5)

List of Cases cited:-

1. Savitri Pandey Vs Prem Chandra Pandey, (2002) 2 SC 73

2. K.N. Nagarajappa & ors. Vs H. Narsimha Reddy, AIR 2021 SC 4259

3. Samar Ghosh Vs Jaya Ghosh, (2007) 4 SCC 511

4. Shashi Bala Vs Rajendrapal Singh, 2020 (2) AWC 149

5. Puneet Kumar Trivedi Vs Smt. Nikita Pathak, First Appeal No.76 of 2014, dt 29.04.2020

6. Shailendra Kumar Singh Vs Reeta Singh & anr., 2019 SCCOnline All 5316

7. Munish Kakkar Vs Nidhi Kakkar, (2020) 14 SCC 657

8. Pooja Suri Vs Bijoy Suri, 2016 SCC OnLine All 300

9. n Reeta Vs Ankit Kumar, AIR 2021 All 225

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

1. The husband, who has failed before the two Courts below to secure a decree of divorce, has appealed under Section 100 of the Code of Civil Procedure, 1908, asking those decrees to be overturned and a decree of divorce granted.

2. The fact giving rise to this appeal are these:

3. Deepak Bose, the appellant here, instituted a petition for divorce against Smt. Shrabonee Bose, the sole respondent, before the Civil Judge (Senior Division), Ghaziabad, seeking a decree for divorce under Section 13 of the Hindu Marriage Act, 1955. The petition was registered as Marriage Petition No.1098 of 2010. It was pleaded in the petition, *inter alia*, that Deepak Bose and Shrabonee Bose were married according to Hindu rites on 11.07.2001. In course of time, two sons were born to the parties. Deepak Bose, who shall hereinafter be referred to as "the appellant', says that he discharged his duties as a husband faithfully. It is asserted by the appellant that at the time of marriage, it was represented that Shrabonee Bose, who shall hereinafter be called "the respondent', was of the same age as that of the appellant. It was also represented to the appellant that the respondent was unmarried, though, in fact, she is a divorcee. The appellant came to know of the fact that the respondent was a divorcee six years after the parties' marriage in the year 2001.

4. It was pleaded that the respondent is three years' older to the appellant. Upon further inquiry, it came to the appellant's knowledge that the respondent was first married in the year 1990, and she and the man she had earlier married, divorced in the year 1996. It was asserted that in the aforesaid manner, the appellant and his family members were defrauded by falsehood into marrying the respondent. The respondent was also castigated as a woman of questionable character, inasmuch as after the appellant would go to sleep, she would be busy on her phone until late in the night and exchange e-mails and SMSs. It is said that when the appellant asked the respondent to desist from this kind of interaction, she refused and remained firm on her stand. It is pleaded that the respondent wants to stay away from the appellant. The respondent did not serve the appellant's old, ailing and dependent mother in any way. The respondent is said to have exerted pressure upon the appellant to forsake his mother and in that endeavour of hers, she had the support of her family.

5. It is the appellant's further case that despite persuasion by him that the respondent ought to take care of his

mother, she stuck course. After the appellant would go away to work, the respondent never served meals to his mother on time or gave her medicines. Any persuasion would lead the respondent to fight the appellant. It is the appellant's case that the daily bickerings mounted so much of anxiety that it resulted in him suffering from diabetes. It is the appellant's further case that it was heightened pain for him when the respondent and her family asked him to resign his job and move over to Jamshedpur forsaking his old mother. The appellant is employed with a company, that manufactures computers, on a good position. He draws a handsome salary. He takes care of his mother and cannot forsake her. It is pleaded that any attempt by the appellant to persuade the respondent to be amiable towards him and his mother would lead her to fight the appellant, to the extent of assaulting him. The respondent's behaviour is claimed to be casting an ill-effect upon the parties' sons.

6. It is the appellant's further case that in the backdrop of all that has been indicated, the respondent suddenly left her matrimonial home on 22.11.2007, along with her father and brother, quietly and without informing the appellant. The appellant went over to the respondent, asking her to come back along with her children a number of times, but to no avail. The appellant, upon visiting his in-laws, was insulted and turned away. The appellant had also addressed letters to the respondent, which have led to no positive answer. It is also pleaded that on 22.11.2007 the respondent fought the appellant on the foot of unreasonable demands and refused to continue in matrimony, that is before she left the appellant along with her father and brother. It is on these facts that the appellant asked for a decree of divorce petitioning the Court under Section 13 of the Hindu Marriage Act.

7. The respondent put in a written statement and denied the appellant's allegations. She has pleaded that parties' marriage was solemnized according to Hindu rites, with the appellant being lavished with gifts etc. The parties have two sons, who were then aged six years and five years . The respondent dutifully discharged her obligations as a wife, but the appellant was an aggressive man. In the evenings, he would return home drunk and beat up the respondent. It is also pleaded that the parties' marriage was solemnized according to the socially acceptable form of an arranged marriage, where the respondent had clearly disclosed her age and the *factum* of her previous marriage to the appellant. It is elaborated that the respondent had informed the appellant about her previous marriage in all detail as also her age. It is only after the appellant had agreed that the family members spoke about settling the matrimonial alliance. It is also pleaded that the appellant is a drunkard and a man described in her pleadings by the respondent as "बुरे चरित्र का व्यक्ति", that would most closely translate into English, for a philanderer. He would abuse the respondent in vulgar language.

8. It is also pleaded by the respondent that the appellant has a number of women friends who have been described in the pleadings as *"Mahila Mitra"*. The appellant would bring them home along and upon the respondent asking him not to do so, would beat her up. It is also pleaded that the appellant is an experienced hand at computers and has doctored e-mails in her account to serve his purpose. The respondent has blamed the appellant and his mother of

demanding dowry from her father and in connection with the demand, treating the respondent to vulgar abuses, besides inflicting violence. It is pleaded that fed up with the appellant's behaviour, the respondent called her father over telephone to Ghaziabad and on 22.11.2007, lodged a report with the Indirapuram Police Station. It is also pleaded that the respondent requested the appellant a number of times to permit her and the children to stay with him, but he refused. Left with no other option, the respondent has brought proceedings for maintenance before the Court at Jamshedpur, that were pending until the respondent put in her pleadings.

9. The Trial Court on the pleadings of parties framed the following issues (translated into English from Hindi):

"(1) Whether the opposite party tortured the petitioner physically and mentally, amounting to cruel behaviour, on account of which, it is not possible for the petitioner to stay together with the opposite party?

(2) Whether the petitioner is entitled to a decree of divorce against the opposite party?

(3) Whether the case is undervalued and the court-fee paid insufficient?

(4) Whether the petitioner is entitled to any other relief?"

10. The appellant, in support of his case, filed fourteen documents through a list, Paper No.7ग and another twelve through a separate list, bearing Paper No.43ग. The appellant examined himself as PW-1, filing for his examination-in-chief a duly sworn affidavit, marked Paper No.27क1. He appeared in the dock to face cross-examination.

11. The respondent examined herself in support of her defence as DW-1, and in lieu of her examination-in-chief in the witness-box, filed an affidavit bearing Paper No.41क1. She entered the witness-box to face cross-examination as DW-1. Likewise, another witness, DW-2, Gajendra Tyagi was also examined, who filed his evidence on affidavit that he supported in the witness-box under the grill of cross-examination.

12. The Trial Court did not find on Issue No.1 a case of cruelty established and while returning finding on Issue No.2, held that a case for annulling the marriage on ground that the respondent's consent to it was secured by fraud as to a material fact concerning the respondent, to be not open in view of the bar of limitation under Section 12(2)(i) & (ii) read with Section 12(1)(c) of the Hindu Marriage Act, 1955. So far as the ground urged under Section 13(1)(i) of the Hindu Marriage Act is concerned, the Trial Court opined that there was no evidence to show that the respondent had violated the aforesaid mandate of the law. On these findings broadly, the Trial Court dismissed the petition.

13. The appellant carried an appeal to the District Judge under Section 28 of the Hindu Marriage Act, 1955. The appeal was numbered on the file of the District Judge, Ghaziabad as Civil Appeal No.167 of 2012, where in the grounds of appeal together with cruelty, a case of desertion on the pleaded facts was also raised. It appears that when the appeal was argued before the Lower Appellate Court, a case for divorce as also a decree of annulment was argued, based on act(s) of adultery by the respondent under Section 13(1)(i); a case based on cruelty and desertion under

Sections 13(1)(ia) and 13(1)(1b) of the Hindu Marriage Act; a case for annulment based on fraud practiced by the respondent in obtaining the appellant's consent to the marriage under Section 12 of the Hindu Marriage Act; and, a case for divorce based on irretrievable breakdown of marriage on foot of the provisions of Section 13(1)(1A) of the Hindu Marriage Act. It is on the aforesaid grounds that the Lower Appellate Court extensively examined the evidence led by parties, both oral and documentary, and dismissed the appeal.

14. Aggrieved, this appeal from the appellate decree has been preferred.

15. The appeal was admitted to hearing vide order dated 28.05.2013, when the following two substantial questions of law were formulated:

"(A) Whether the opposite party leaving the Matrimonial home for more than five years amounts also to leaving the appellant, thereby amounting to desertion under Section 13(1)(b) of Hindu Marriage Act, 1955?

(B) Whether desertion without a reasonable cause and without the consent of the party aggrieved during the wedlock shall amount to cruelty under Section 13 of the Hindu Marriage Act?"

16. Before commencement of hearing, a further substantial question of law, marked (C) was formulated on 06.08.2021. It reads:

"(C) Whether it is open to the High Court to pass a decree of divorce on the ground of irretrievable break down of marriage in a petition brought for divorce under Section 13 of the Hindu Marriage Act, 1955?"

17. The respondent, despite all efforts to serve her, did not appear. Those efforts included substituted service by publication. Service was held sufficient vide order dated 04.07.2019. From 2019 till the appeal proceeded to hearing, no one appeared on behalf of the respondent. The appeal was, therefore, heard ex parte and judgment reserved.

18. Heard Mr. Anand Kumar Srivastava, learned Counsel for the appellant.

19. So far as Substantial Question of Law (A) is concerned, it is to be seen whether the five years that the respondent completely forsook her matrimonial home amounts to desertion within the meaning of Section 13(ib) of the Hindu Marriage Act. The Lower Appellate Court in examining the question of desertion, coupled with cruelty, has assessed it on five parameters, to wit, (i) the *factum* of separation; (ii) *animus deserendi* or intention to desert; (iii) desertion should be without consent of the appellant; (iv) desertion should be without any reasonable cause; and, (v) the statutory period of two years of desertion, should elapse immediately preceding the presentation of the petition. The Lower Appellate Court has held, on appreciation of evidence, that the *factum* of separation, desertion being without the consent of the appellant and the desertion continuing across a period of more than two years preceding the presentation of the petition are well established. The Lower Appellate Court, however, has held that *animus diserendi* and further that the desertion is one that is without reasonable cause, are not established. In reaching those conclusions, the Lower Appellate Court has evaluated the conduct of the respondent to hold that she did not harbour an intention to

desert and was impelled by the appellant's conduct into withdrawing from his company. What conduct of the appellant, the Lower Appellate Court and the Trial Court too have taken into account, in order to reach that conclusion, would be shortly noticed.

20. Before the substantial question of law involved is answered, it is imperative to examine the law governing actionable desertion under the Hindu Marriage Act, 1955 and the standard by which it is required to be proved. There is a classic statement about the law relating to desertion to be found in **Savitri Pandey v. Prem Chandra Pandey, (2002) 2 SC 73**, where it has been held:

"8. "Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the views of various authors, this Court in *Bipinchandra Jaisinghbai Shah v. Prabhavati* [AIR 1957 SC 176] held that if a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. It further held : (AIR pp. 183-84, para 10)

"For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the *factum* of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to

the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* coexist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the *animus deserendi* coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years' period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decide to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court."

9. Following the decision in Bipinchandra case [AIR 1957 SC 176] this Court again reiterated the legal position in *Lachman Utamchand Kirpalani v. Meena* [AIR 1964 SC 40] by holding that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the *factum* of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

10. To prove desertion in matrimonial matter it is not always necessary that one of the spouses should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case."

21. The Lower Appellate Court, while appreciating the evidence of parties, has acknowledged the fact that it is a case where the parties have traded allegations of immorality and soiling the marital bond against each other. It is true that these allegations have figured in the evidence of both parties. But the Courts below, particularly the Lower Appellate Court, has accepted it for a reasonable cause for the wife to leave her matrimonial home, her case about the husband being a drunkard, a wife-beater and a man given to the vice of illicit relations with women. The Lower Appellate Court has been impressed by the fact that some women have been named by the wife, who were brought home by the appellant to gratify his immoral needs.

22. There are allegations, on the other hand, by the appellant against the respondent about speaking to men over social networking sites etc. These allegations have been discarded, for the documentary evidence about them being not proved according to Section 65-B(4) of the Indian Evidence Act, 1872. The respondent has emphasized somewhere that up to the month of August, 2007, it was the respondent alone, who was at the receiving end of the appellant's beating, but the children were not the victims of it. Therefore, the respondent was suffering the violence until then. Later on, the children too would be beaten up. From all this evidence, the Courts below have concluded that the respondent had reasonable cause to leave her matrimonial home.

23. This Court is of opinion that approach of the Courts below, particularly the Lower Appellate Court, that has attempted a more wholesome appraisal of the evidence, suffers from fundamental errors of a kind that bordering on perversity. The reason is that the allegations of the wife in the witness-box have been accepted to be proof of themselves, ignoring glaring circumstances that are essential to judge the veracity of the parties' statements in the dock in a matter like the present one. It is a case where the strained spouses have come up with nothing more than allegations said on oath. The Courts below have not been wrong in discarding the appellant's allegations about the respondent's fidelity; but they are wrong to the extent of defiance of logic in accepting every word that the respondent has said in justification of her action in leaving the matrimonial home. The most crucial point, that appears to have been missed by the Courts below, is that there is nothing on record to suggest that there was any particular event on 22.11.2007 when the respondent left her matrimonial home and went over to her parents. On that date, she left an information with the Police, that was never registered as a case, saying that she was subjected to violence by the appellant, not permitted to speak to anyone, even her parents and had been attempted to be throttled to death on two occasions. Thereafter, she somehow managed to leave her matrimonial home along with the two sons, informing the Police. However, much by contrast in her dock evidence during cross-examination, the respondent has said that she was thrown out of her matrimonial home on 22.11.2007, and, therefore, while leaving, she had informed the Police. It is not this essential contradiction in evidence that troubles this Court, for we are not a Court of fact. The crucial point, that the Courts below have completely ignored to reach an illogical and perverse conclusion from this evidence, is that about all these violent happenings that the respondent alleges, there is no circumstance or contemporaneous evidence that may lend

any support to it. There is no evidence like a complaint to any Authority at any time prior to 22.11.2007 about all this physical violence or even some kind of a correspondence, electronic or in ink, exchanged by the respondent with her parents about this distress in her life. Prior to 22.11.2007, there is hardly anything on record to show that the respondent was ever battered or attempted to be throttled, or that she was in great distress because the appellant was a drunkard or a man given to a lecherous way of life. There is not an iota of evidence about all this. The only inference, therefore, from the allegations traded on both sides that can be drawn is that the couple have not got along, despite being blessed with two children and have not been able to overcome the wear and tear of married life. The fact that the respondent and the appellant could not get along in matrimony, is by itself not a reasonable cause, justifying the respondent's action in leaving her matrimonial home.

24. The way the evidence appears in this case, there is not a hint of evidence to show that the appellant has indulged in the immoral way of life, as the respondent alleges. The appellant in his cross-examination has stoutly denied any amorous relationship with woman/women. He has not been confronted with any fact during his cross-examination, requiring him to explain any circumstance going against him on this count. It is well reputed that it is difficult to prove a negative fact. In the absence of the respondent placing on record some evidence to show the waywardness she alleges for the appellant, he cannot be saddled with the burden of establishing that he is not a drunkard, or a man of immoral character or a wife-beater. In accepting the wife's oral testimony as proof of itself, the Courts below have virtually placed burden upon the husband to prove the non-existence of these blameworthy facts, that would justify the wife's action in withdrawing from the husband's company. This approach of the Courts below is fundamentally flawed and perverse.

25. On the other hand, the appellant's case that the respondent has not been serving meals to his mother on time or giving her her medicines, may show a mindset that does not accord well with contemporary social values and the marital roles for spouses. Likewise, the appellant suspecting the respondent for interacting on social media with a long list of friends, may also be the pitfall of a value gap between the spouses, or the appellant and the respondent representing two different social outlooks in a society that is in the throes of transition about gender roles generally, particularly, in matrimony. But, all these differences, that have marred the parties' marriage, would not, by a reasonable standard, serve as a justification for the wife to permanently forsake the husband's company. These truly do not go beyond what is conventionally called "wear and tear of marriage'.

26. The course of events in this case show that the respondent has not ever made any effort or taken any step to resume her matrimonial life with the appellant. She left her matrimonial home on 22.11.2007, never to return. We think that it would be unreasonable to assume that the wife must come back to her husband's home always, as if it were the employers' premises. The integrity of marriage lies in the husband and wife being together, even if they are separated by distance. The matrimonial home has to remain intact to sustain a

marriage and not a matrimonial house, as if it were. Here, the *animus deserdendi,* by no possible approach, can be found to be wanting in the respondent's conduct, a conclusion that the Lower Appellate Court has drawn on a perverse approach to the evidence. The respondent left home on 22.11.2007 and ever since, it has been a complete disjunct between the spouses. The appellant has said in his evidence during cross-examination, in answer to a recorded question, that during the six months after the respondent left her matrimonial home, he made efforts to re-unite, but ceased to do so upon the respondent launching a prosecution under Section 498A IPC etc. against him. The Lower Appellate Court, however, has concluded against the appellant about the fact that he never attempted a restoration of the parties' matrimonial bond, going by the fact that he admittedly did not bring a petition for restitution of conjugal rights. It must be remarked that mere failure to institute a petition for restitution of conjugal rights is no index of the lack of will or intention of a party to the marriage, who says that he/ she tried to restore the ruptured bond. The appellant here has not been contradicted about the assertion that during the six months before commencement of prosecution by the respondent against him, he made efforts towards reunion. The only question put to him appears to be about his failure to institute a petition for restitution of conjugal rights, that he had not done. The fact remains that by now, it has been a period of fourteen years since the respondent withdrew from matrimonial life, forsaking the appellant's company. Ever since, there has been no resumption or revival of the matrimonial ties. In the face of all this evidence to conclude that there has been no desertion within the meaning of Section 13(ib) of the Hindu Marriage Act, 1955, is an approach that is fundamentally flawed and impossible to countenance.

27. This Court, in the exercise of powers under Section 100 of the Code of Civil Procedure, 1908 is not completely denuded of jurisdiction to go into questions of fact, howsoever perversely determined by the Courts below. Decisions that are fundamentally flawed and illogical by all demonstrable standards can be corrected by this Court in exercise of jurisdiction under Section 100 of the Code, as held by the Supreme Court in **K.N. Nagarajappa and others v. H. Narsimha Reddy, AIR 2021 SC 4259.**

28. In the circumstances, this Court is of opinion that Substantial Question of Law (A) has to be answered in the **affirmative**, holding a case of desertion established within the meaning of Section 13(ib) of the Hindu Marriage Act, 1955.

29. The next question that falls for consideration is Substantial Question of Law (B), which is to the effect, *"Whether desertion without a reasonable cause and without the consent of the party aggrieved during the wedlock shall amount to cruelty under Section 13 of the Hindu Marriage Act?"*. To this, it may be added that this question would have to be judged with reference to the provisions of Section 13(ia) of the Hindu Marriage Act, 1955.

30. It has been mooted by the learned Counsel for the appellant that an unduly longed separation brought about by the offending spouse, evidencing no concern about the other, would qualify for mental cruelty. This Court has found elsewhere that the evidence is unmistakable that the respondent is now staying away from the

appellant for a period as long as fourteen years. To this may be added the fact that during these fourteen years, there has been nothing of the kind happening that the relationship of matrimony between parties evidences. During all these fourteen years the emotions that are the hallmark of a marriage have become extinct, with the parties not knowing what has become of the other. It has been found elsewhere that it is the respondent who walked away never to return or resume the pious relationship.

31. The concept of 'mental cruelty' has received a most comprehensive consideration in the context of Section 13(ib) of the Hindu Marriage Act, 1955 by the Supreme Court in **Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511**. In expositing the concept of mental cruelty, their Lordships of the Supreme Court in **Samar Ghosh** *(supra)* have observed:

"98. On proper analysis and scrutiny of the judgments of this Court and other courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of "mental cruelty" within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

(Emphasis by Court)

32. In the facts here, the separation between parties has been fourteen long years after the respondent left the matrimonial home on 22.11.2007. All signs of life have been snuffed out of the marriage leaving behind nothing more than a legal skeleton of obligations, and of course, the parties' children. The long separation of fourteen years between parties would lead to an inference of mental cruelty within the meaning of Section 13(ib) of the Hindu Marriage Act, 1955. The Courts below have overlooked this

obvious conclusion on facts that admit of no other inference.

33. Substantial Question of Law (B) is, therefore, answered in the **affirmative** to hold that the long desertion and separation of a spouse would constitute mental cruelty within the meaning of Section 13(ib) of the Hindu Marriage Act.

34. Now, Substantial Question of Law (C) has been addressed at great length by the learned Counsel for the appellant and he submits that whatever be the conclusion on the other two questions, this question ought to be decided.

35. The submission is that the marriage between parties has irretrievably broken down. Given the facts and evidence that we have noticed elsewhere in this judgment, and conclusions already recorded, there is no manner of doubt that it is a dead marriage. The relationship between parties is extinct and no amount of pretense of the marriage surviving by refusing a decree of divorce would bring it back to life. The question, however, is that can this Court pass a decree of divorce on the ground of irretrievable breakdown of marriage? There is some cleavage of opinion amongst various High Courts on the point, and in this Court too, there is division of vote.

36. The question fell for consideration before a Division Bench of this Court in **Smt. Shashi Bala v. Rajendrapal Singh, 2020 (2) AWC 149.** In **Smt. Shashi Bala,** Rajeev Misra, J., speaking for the Division Bench, opined:

"20. The issue relating to irretrievable break down of marriage has been considered by a Division Bench of this Court in First Appeal No. 525 of 2006 (Smt. Kavita Sharma Vs. Neeraj Sharma) decided on 7.2.2018, wherein it has been observed as follows in paragraph 28:-

"28. The above findings recorded by Court below could not be shown perverse or contrary to record. Having considered the fact that parties are living separately from decades, we are also of the view that marriage between two is irretrievable and has broken down completely. Irretrievable breakdown of marriage is not a ground for divorce under Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, Courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree. On the ground of irretrievable marriage, Courts have allowed decree of divorce and reference may be made to Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558 and Rishikesh Sharma Vs. Saroj Sharma, 2006(12) SCALE 282. It is also noteworthy that in Naveen Kohli v. Neelu Kohli *(supra)* Court made recommendation to Union of India that Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for grant of divorce. "

21. Similarly this Court in First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs. Smt. Anita) decided on 17.11.2016 has also considered this question and observed as follows in paragraphs 7, 8, 10, 11, 12 and 13:-

"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground which was not subject matter of

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage.

10. This aspect has been considered by this Court in Ram Babu Babeley Vs. Smt. Sandhya AIR 2006 (All) 12 = 2006 AWC 183 and it has laid down certain inferences from various authorities of Supreme Court, which read as under:-

"(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat versus D. Bhagat, AIR 1994 SC 710.

(ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Dass Versus Kamla Devi, AIR 2001 SC 1709, Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and Shyam Sunder Kohli v. Sushma Kohli, (2004) 7 SCC 747.

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties can not live together as laid down in Chandra Kala Trivedi versus Dr. SP Trivedi, (1993) 4 SCC 232.

(iv)The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one party have been so much painful for the other party (who is not at fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat versus D. Bhagat, *(supra)*, Ramesh Chander versus Savitri, (1995) 2 SCC 7, Ashok Hurra versus Rupa Bipin Zaveri, 1997(3) AWC 1843 (SC), 1997(3) A.W.C. 1843(SC) and A. Jayachandra versus Aneel Kaur, (2005) 2 SCC 22.

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the judgment in the case of V. Bhagat and Mrs. D. Bhagat, AIR *(supra)* and at para 12 in the case of Shyam Sunder Kohli versus Sushma Kohli, *(supra)*."

11. The above authorities have been followed by this Court in "Pradeep Kumar Vs. Smt. Vijay Lakshmi' in 2015 (4) ALJ 667 wherein one of us (Hon'ble Sudhir Agarwal,J.) was a member of the Bench.

12. In Vishnu Dutt Sharma Vs. Manju Sharma, (2009) 6 SCC 379, it was held that under Section 13 of Act 1955 there is no ground of irretrievable breakdown of marriage for granting decree of divorce. Court said that it cannot add such a ground to Section 13, as that would amount to amendment of Act, which is the function of legislature. It also referred to

some judgments of Supreme Court in which dissolution of marriage was allowed on the ground of irretrievable breakdown but held that those judgments do not lay down any precedent. Supreme Court very categorically observed as under:-

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Court. Hence, we do not find force in the submission of learned counsel for the appellant."

13. The above view has been followed in Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1. Similar view was expressed in "Gurubux Singh Vs. Harminder Kaur' (2010) 14 SCC 301. This Court also has followed the above view in Shailesh Kumari Vs. Amod Kumar Sachan 2016 (115) ALR 689."

37. There is a contrary view expressed by another Division Bench of this Court sitting at Lucknow in **Puneet Kumar Trivedi v. Smt. Nikita Pathak, First Appeal No.76 of 2014, decided on 29.04.2020.** In **Puneet Kumar Trivedi** *(supra)*, their Lordships opined in favour of granting a divorce on the ground of irretrievable breakdown marriage, though, it must be said that no principle was laid down there that it is open to this Court to grant divorce on the ground of irretrievable breakdown. In **Puneet Kumar Trivedi,** after considering the decision of this Court in **Shailendra Kumar Singh v. Reeta Singh and another, 2019 SCCOnline All 5316,** it was held:

"Taking into consideration the above said position of law on the ground of irretrievable breakdown of marriage and the facts of the present case including the fact that admittedly the parties are living separately since 17.02.2006 till date, meaning thereby that the parties are living separately for more than fourteen years and litigation between the parties was initiated by filing divorce suit by the appellant in the year 2008, as also the observation made by the trial Court, quoted above, to the effect that the efforts to continue with the marriage have been failed and there is no possibility of reunion between the parties and the statement of counsel for the appellant to the effect that even at this stage there is no hope of settlement or reunion between the parties and no fruitful purpose would be served in maintaining the matrimonial relations between the parties as the matimonial bond is beyond repair and the relations between the parties are sufficiently spoiled and for all practical purpose there is an irretrievable break down of marriage, we are of the considered opinion that the finding given by the trial Court that the appellant is not entitled for decree of divorce on the ground of long separation/irretrievable breakdown of marriage is liable to be interfered and the judgment passed by the trial court is liable to be set aside and the appellant is entitled to decree of divorce. In addition to above, we have also observed, herein above, that while recording the finding with regard to the fact related to consumption of pesticide (poison) the Trial Court committed an error of law and fact both as while giving the finding the Trial Court did not consider the statement of P.W.-2 and P.W.-4."

38. The controversy has arisen in the context of the law, which does not provide for irretrievable breakdown of marriage as

a ground for divorce. The Hindu Marriage Act does not envisage such a ground. However, their Lordships of the Supreme Court, in a number of cases have proceeded to grant divorce in those cases where the marriage was absolutely extinct. But in those cases, the power was exercised under Article 142 of the Constitution in order to do complete justice. The decisions in cases decided by the Supreme Court would be of little assistance to parties before this Court, who are able to demonstrate on facts a case of irretrievable breakdown. The obvious reason is that the power available to their Lordships under Article 142 of the Constitution is not available with any other Court, including this Court, whatever be the nature of jurisdiction exercised. It is for the said reason that in **Munish Kakkar v. Nidhi Kakkar, (2020) 14 SCC 657,** their Lordships of the Supreme Court, while exercising the power to grant divorce on the ground of irretrievable breakdown administered a word of caution, reminding other Courts of not being possessed of like authority. In **Munish Kakkar** *(supra)*, it was remarked:

"19. We may note that in a recent judgment of this Court, *in R. Srinivas Kumar v. R. Shametha* [*R. Srinivas Kumar v. R. Shametha*, (2019) 9 SCC 409 : (2019) 4 SCC (Civ) 522] , to which one of us (Sanjay Kishan Kaul, J.) is a party, divorce was granted on the ground of irretrievable breakdown of marriage, after examining various judicial pronouncements. It has been noted that such powers are exercised not in routine, but in rare cases, in view of the absence of legislation in this behalf, where it is found that a marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably. That was a case where parties had been living apart for the last twenty-two (22) years and a re-union was found to be impossible. We are conscious of the fact that this Court has also extended caution from time to time on this aspect, apart from noticing that it is only this Court which can do so, in exercise of its powers under Article 142 of the Constitution of India. If parties agree, they can always go back to the trial court for a motion by mutual consent, or this Court has exercised jurisdiction at times to put the matter at rest quickly. But that has not been the only circumstance in which a decree of divorce has been granted by this Court. In numerous cases, where a marriage is found to be a dead letter, the Court has exercised its extraordinary power under Article 142 of the Constitution of India to bring an end to it.

21. The provisions of Article 142 of the Constitution provide a unique power to the Supreme Court, to do "complete justice" between the parties i.e. where at times law or statute may not provide a remedy, the Court can extend itself to put a quietus to a dispute in a manner which would befit the facts of the case. It is with this objective that we find it appropriate to take recourse to this provision in the present case." (Emphasis by Court)

39. There are some pertinent remarks in this connection to be found in a decision of this Court in **Pooja Suri v. Bijoy Suri, 2016 SCC OnLine All 300,** where it has been very pertinently observed:

"25. Although "irretrievable breakdown of marriage' is not a ground specifically mentioned in Section-13 of the Hindu Marriage Act, but it, in fact, is the basis of the principle underlying decree of divorce under this provision, as is evident from the meticulous appreciation of the provisions of this Section. The grounds like

cruelty, desertion of not less than two years, conversion to another religion, unsoundness of mind, mental disorder, suffering from incurable leprosy, or venereal disease in a communicable form, or renouncement of world, not been heard of as being alive for seven years; or (as incorporated by U.P. State Amendment) reasonable apprehension of harm or injury, non-cohabitation after judicial separation mentioned in Section 13 of the Hindu Marriage Act leads to inference that when such situation has arisen that parties cannot live as spouse and there appears no chances of their re-conciliation, which means the marriage has irretrievably broken down of marriage and there is no chance of it being repaired, then under provisions of Section 13, divorce should be granted. But as Hon'ble Apex Court held that this cause, in its isolation, being not mentioned in Section 13, cannot be taken as ground for granting the divorce. Therefore, although the lower courts had granted the divorce on two independent grounds of cruelty and irretrievable breakdown of marriage, but the second ground of irretrievable breakdown of marriage is exclusive within jurisdiction of Hon'ble Apex Court and is beyond jurisdiction of any other Court in India; therefore, second substantial question of law is decided in affirmative and in favour of appellant.

26. When it is obvious that the marriage between the two cannot, under any circumstances, continue any further and the marriage becomes practically dead, then considering the matters of "irretrievable breakdown of marriage', or where the repair of broken marriage becomes impossible, it appears appropriate that such grounds may be accepted as ground for divorce. Therefore, this Court suggests the Law Commission of the State to take appropriate steps to consider for incorporating the ground of "irretrievable breakdown of marriage' as grounds of divorce in Section 13 of the Hindu Marriage Act." (Emphasis supplied)

40. There is very recent decision of a Division Bench of this Court in **Reeta v. Ankit Kumar, AIR 2021 All 225**, where it has been categorically held that the power to grant divorce on the ground of irretrievable breakdown of marriage is not available to this Court or any other Court under Section 13 of the Hindu Marriage Act, 1955. The power can only be exercised by the Supreme Court under Article 142 of the Constitution. In **Reeta** *(supra)*, it has been held:

"26. When we go through Section 13 of the Hindu Marriage Act, 1955, we find that there is no such ground as 'irretrievable breakdown of marriage' of divorce and, thus, the Family Court could not have granted the divorce except on the grounds mentioned in Section 13 of the Hindu Marriage Act, 1955

32. The power exercised by the Apex Court under Article 142 of he Constitution being extraordinary, no benefit can be taken by the respondent-husband from the said decision."

41. The decision, therefore, of the Division Bench of this Court in **Puneet Kumar Trivedi** must be held confined to its own facts and not a binding precedent.

42. In the circumstances, Substantial Question of Law (C) is answered in the **negative** and it is held that this Court has no power to grant a decree of divorce under Section 13 of

the Hindu Marriage Act on the ground of irretrievable breakdown of marriage.

43. In view of the answer to Substantial Questions of Law (A) and (B), this appeal must succeed.

44. In the result, this appeal **succeeds** and is **allowed.** The impugned decree dated 19.02.2013 passed by the Lower Appellate Court and that dated 12.09.2012 passed by the Trial Court are set aside and reversed. The divorce petition is **allowed**. There shall be a decree dissolving the marriage between the appellant and the respondent forthwith.

45. Costs easy.

46. Let a decree be drawn up accordingly.

47. The lower court records shall be sent down at once to the Family Court along with a certified copy of this judgment.

(2022)04ILR A201
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2022

BEFORE

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

Second Appeal No. 657 of 2003

Babu Ram & Ors. ...Appellants
Versus
Om Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri U.K. Mishra, Sri A.K. Mishra, Sri Ashutosh Mishra, Sri I.B. Yadav, Sri K. Mishra, Sri V.K. Mishra

Counsel for the Respondents:
Sri Y.S. Bohra, Ms. Pooja Agarwal

A. Civil Law - Specific Relief Act, 1963 - Section 16 - Bars to relief - Specific performance of a contract cannot be enforced in favour of a person who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract, which are to be performed by him - Issue - Whether a suit for specific performance can be decreed without an issue about readiness and willingness being framed where the issue is substantially suited between parties? - *Held* - a suit for specific performance can be decreed without an issue about readiness and willingness being framed, provided readiness and willingness are substantially pleaded and proved by the parties' evidence, where the parties have gone to trial conscious of the plea, with opportunity to the defendants, to dispel the same - decree would not vitiate where the parties had notice of the case about readiness and willingness and had opportunity to lead evidence about it, with no prejudice being occasioned to the defendants on account of the failure to specifically frame that issue (Para 39, 40)

B. Civil Law - Specific Relief Act, 1963 - U.P. Consolidation of Holdings Act, 1953 - Section 30 - Transfer of Property Act, 1882 - Section 54 - Whether specific performance can be granted in relation to agricultural land that has been the subject matter of consolidation operations where the vendee has been moved to different plots, different from those that are subject matter of the suit agreement ? - Held - where agricultural land, subject matter of consolidation, that is agreed to be sold, is consolidated and the defendant-vendor is moved to different plots, the contract would frustrate; but it would not frustrate where substantially, the subject matter of the suit agreement remains the same, with minor or negligible changes - Once the chak allotted to the defendant-vendor is substantially the same land, that is subject matter of the suit agreement, the contract would not frustrate - Minor

adjustments in the area of the plots or exclusion of a plot number of negligible area from the consolidated holding would not, in any manner, change the identity of the subject matter (Para 45, 46)

C. Civil Law - Specific Relief Act, 1963 - Section 20, Substituted performance of contract - Transfer of Property Act, 1882 - Section 52, Transfer of property pending suit relating thereto – lis pendens - a transfer pendente lite confers title upon the purchaser, who takes the risk subject to the rights of his vendor - If the vendor fails in the litigation, the purchaser pendente lite has no right of his own or equities to plead - There is only one eventuality under which the transferee pendente lite may acquire rights that would not be affected by the decree, and that is if the transfer has been made with permission of the Court, where the suit about rights of parties is pending, Else, a purchaser pendente lite has no rights under the law (Para 50, 51)

Suit was instituted by the plaintiff-vendees on 20th August, 1998 for specific performance of contract, to execute sale deed - the defendant- vendor executed a registered sale deed relating to the suit property in favour of the defendant-purchasers on 16.09.1998 - the sale deed hit by the principle of lis pendens - defendant-purchasers have not taken the suit property through a sale deed that was executed with the permission of the Court - suit property have been transferred very shortly after the suit was instituted - Sale dded have been executed to defeat the rights of the plaintiff-vendees - discretion to grant specific performance has been rightly exercised by the two Courts below (Para 51)

Dismissed. (E-5)

List of Case cited:-

1. M/ s. J.P. Builders & anr. Vs A. Ramadas Rao & anr. (2011) 1 SCC 429

2. Atma Ram Vs Charanjit Singh (2020) 3 SCC 311

3. Dhanu Vs Ajai Kant & ors. 2019 SCC OnLine All 5148

4. Channayya & anr. Vs Annapurna 2006 SCC OnLine Kar 24

5. Official Liquidator, Supreme Bank Ltd. Vs P.A. Tendolkar (dead) by LRs & ors. (1973) 1 SCC 602

6. P. Purushottam Reddy & anr. Vs Pratap Steels Ltd (2002) 2 SCC 686

7. Piarey Lal Vs Hori Lal (1977) 2 SCC 221

8. Baikunthi Devi & ors. Vs Mahendra Nath & anr. (1977) 2 SCC 496

9. A. Nawab John & ors. Vs Subramaniyam (2012) 7 SCC 738

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

1. This is a defendants' second appeal, arising out of a suit for specific performance of contract.

2. Om Singh and Jay Bhagwan, who are the two respondents to this appeal, instituted Original Suit No. 769 of 1998 against Bhawar Singh, Suresh Pal, Rajpal, Tejpal, Babu Ram and Jagpal, all of whom are the appellants here, seeking a decree for specific performance of contract. It was the plaintiffs' case that defendant no. 1 to the suit, Bhawar Singh is the *bhumidhar* of agricultural land comprising plot no. 248(M) admeasuring 0.008 hectares, plot no. 250 admeasuring 0.010 hectares, plot no. 251(M) admeasuring 1.354 hectares, plot no. 252/1 admeasuring 0.086 hectares, plot no. 252/2 admeasuring 0.020 hectares and plot no. 253 admeasuring 0.089 hectares, aggregating an area of 1.567 hectares, situate at Village Harchandpur, *Tehsil* and District Baghpat. Out of the said plots, he had sold away on 15.06.1994, a substantial part in favour of the plaintiff-

vendees, leaving a residue of 0.237 hectares. The defendant-vendor Bhawar Singh executed a registered agreement to sell, relating to the remainder of 0.237 hectares of land in the plots above detailed, in favour of plaintiff-vendees Om Singh and Jay Bhagwan, covenanting to sell the said property for a total sale consideration of Rs. 48000/-. Bhawar Singh received in earnest a sum of Rs. 5000/- out of the contracted sale consideration.

3. The agreement to sell was admitted to registration by the Sub-Registrar on 15.06.1994. It was covenanted that the conveyance in terms of the suit agreement shall be executed by Bhawar Singh (hereinafter referred to as the "defendant-vendor') within a period of 1 year and 3 months, that is to say, by 15.09.1995. The plaintiffs, Om Singh and Jay Bhagwan pleaded that they have been ever ready and willing to get a conveyance executed and registered in accordance with the suit agreement and have never neglected to perform their part of the contract. Om Singh and Jay Bhagwan shall hereinafter be referred to as the "plaintiff-vendees'.

4. The plaintiff-vendees requested the defendant-vendor many a times over by word of mouth to come forward and execute the sale deed as covenanted after receipt of the balance sale consideration of Rs. 43,000/-, but the defendant-vendor would ward off responding to his obligation. The plaintiff-vendees, faced with inaction, caused a registered notice dated 14.08.1995 to be served upon the defendant-vendor through their learned Counsel Mr. Chashmveer Singh, an Advocate at Baghpat, calling upon the defendant-vendor to appear before the Sub-Registrar's office at Baghpat on 15.09.1995 and execute the requisite sale deed in terms of the suit agreement, upon receipt of the balance sale consideration. The notice aforesaid was served upon the defendant-vendor in due time and on 15.09.1995, the plaintiff-vendees attended the office of the Sub-Registrar at Baghpat, but the defendant-vendor did not appear to fulfil his obligation under the suit agreement. The plaintiff-vendees, on 15.09.1995, reached the Sub-Registrar's office at Baghpat, along with balance sale consideration and waited outside the office throughout the day for the defendant-vendor. The plaintiff-vendees got their attendance marked with the Sub Registrar in accordance with rules. The defendant-vendor got the plaintiff-vendees' notice dated 14.08.1995 replied to through his Counsel *vide* a memo dated 23.08.1995, carrying incorrect facts. The defendant-vendor's reply to the notice dated 14.08.1995 assured the plaintiff-vendees that the former had turned dishonest and was disinclined to execute a sale deed in terms of his obligations under the suit agreement.

5. Accordingly, the plaintiff-vendees instituted Original Suit No. 769 of 1998 before the Court of Civil Judge (Senior Division), Meerut on 20.08.1998, seeking a decree of specific performance, ordering the defendant-vendor to execute the requisite sale deed in terms of the suit agreement after receipt of the balance sale consideration. It was further prayed that in the event the defendant-vendor does not comply with the decree within the time provided by Court, sale deed be executed in favour of the plaintiff-vendees through process of Court in accordance with law and actual physical possession over the suit property be delivered to them. The plaint, as originally drawn up, arrayed the defendant-vendor alone as the defendant

and it was against him alone that the relief was sought.

6. A written statement dated 23.11.1998 was filed by the defendant-vendor, traversing the plaintiff-vendees' case. He denied executing the suit agreement or receiving any earnest. It was pleaded that on 15.06.1994, that is to say, the date when the suit agreement is said to have been executed, the defendant-vendor had executed a sale deed of all his agricultural holding in favour of the plaintiff-vendees, under the pressure of his son. The suit property was all that had been left with him. The defendant-vendor's son was given to vices and had subjected the defendant-vendor to undue influence, asking him to execute a conveyance on 15.03.1994 in favour of the plaintiff-vendees. In deference to his son's wishes, the defendant-vendor executed a sale deed in favour of the plaintiff-vendees, but was not paid any sale consideration. All that is shown as consideration in the sale deed would have been paid to the vendor's son. The vendor did not receive anything towards consideration. It was denied that any notice was served upon the defendant-vendor, asking him to appear before the Sub-Registrar and further that he never caused a reply to that notice to be sent to the plaintiff-vendees through his Counsel. He never instructed any Counsel to answer the plaintiff-vendees' notice. It was the defendant-vendor's case that he never instructed any Counsel and if a reply had been sent to the plaintiff-vendees, it was a got up one, which the plaintiff-vendees got served upon themselves through Counsel, set up on the defendant-vendor's behalf, without the latter's authority.

7. It was further pleaded that the defendant-vendor is an illiterate and a poor man. He has a lone son, who is given vices and stays away from the village. The son brought undue influence to bear upon the defendant-vendor, forcing him to sell his land. Acting under his son's pressure and influence, the defendant-vendor parted with 16 *bighas (kachcha)* of his agricultural holding in favour of the plaintiff-vendees through a registered sale deed dated 15.06.1994. The sale consideration set forth in the sale deed was never received by the defendant-vendor. He does not know how much money was paid. Whatever consideration was paid by the plaintiff-vendees was received by the defendant-vendor's son, who never accounted for it. It is pleaded that the defendant-vendor had a total of 19 *bighas (kachcha)* of agricultural holding, out of which he had a remainder of three *bighas* after execution of the sale deed last mentioned. He had retained the said land in order to feed his cattle. On the date the sale deed was executed in favour of the plaintiff-vendees, they had got a number of papers thumb marked by him and out of those papers, some were utilised to manufacture the suit agreement. The defendant-vendor came to know of all this transaction carried in the suit agreement, when he was served with the Court's summons dated 19.08.1998 on 16.10.1998, asking him to appear and put in his written statement.

8. It is the vendor's case that the plaintiff-vendees had got the suit agreement executed by playing fraud, taking undue advantage of his lack of understanding. They got the papers carrying the suit agreement thumb-marked by practising fraud and on the basis of that fraudulent agreement, they have instituted the present suit. The vendor never consciously executed the suit agreement nor did he come to know of this fraud in good time. It

is also the defendant-vendor's case that he is a humble farmer and had no occasion to purchase land or so to speak, experience of transacting sale/ purchase of land.

9. The plaintiff-vendees are natives of village Sunheda. They had their land in Village Harchandpur, which they have sold off and purchased land from the defendant-vendor worth the proceeds that they received from the sale of their land. The defendant-vendor agreed to sell that land in deference to his unworthy son's wishes. He never wished to sell his land, but did not have the courage to disoblige his son. He was left with three *bigha (kachcha)* land (the suit property) that he utilizes to earn his livelihood. He owned a buffalo that yielded milk, but the same was not sufficient to feed himself and his ageing wife. He has purchased, therefore, a bullock-cart after selling off his buffalo to make his ends meet.

10. It appears that pending suit, on 16.09.1998, the defendant-vendor sold off the suit property through a registered conveyance in favour of Babu Ram, Jagpal, Tejpal and Rajpal, all sons of Preetam Singh and Suresh Pal son of Dalel. In order to avoid any legal complication, these defendant-purchasers *pendente lite* were applied to be impleaded as defendants to the suit by the plaintiff-vendees and necessary amendment sought to the plaint, both of which were granted. Accordingly, appellant nos. 1 to 5 to this appeal were impleaded as defendant nos. 2 to 6 to the suit. The defendants-appellant nos. 1 to 5 shall hereinafter be referred to as the defendant-purchasers. It appears that pending suit, the suit property, in relation whereto, the suit agreement was executed, was the subject matter of consolidation, in consequence whereof the plot numbers mentioned in the suit agreement were assigned a new number bearing *khasra no*. 530. Therefore, along with the amendment sought to implead the defendant-purchasers and bringing on record facts about the sale deed in their favour, an amendment was also sought to the plaint, pleading that the old plot numbers, subject matter of the suit agreement, have been assigned a new *khasra* number bearing no. 530 during consolidation with an identical area.

11. The written statement filed by the defendant-vendor was amended twice; once on 12.10.2000 and the other on 11.04.2001. By the amendment of 12.10.2000, it was pleaded that the plaintiff-vendees never expressed their willingness to purchase the suit property and never demanded execution of a conveyance on the basis of the suit agreement.

12. By the other amendment dated 11.04.2001, it was pleaded that the defendant-purchasers have purchased the defendant-vendor's entire land comprising plot no. 530 admeasuring 0.237 hectares, whereof the defendant-vendor was the sole *bhumidhar*, the said land being allotted to him under Section 30 of the U.P. Consolidation of Holdings Act, exclusively, and in relation whereto, he had complete rights under the law to transfer in favour of the defendant-purchasers. It was pleaded that the transfer made in favour of the defendant-purchasers was valid and the said conveyance does not entitle the plaintiff-vendees to any compensation from the defendant-vendor. A plea was further incorporated to the effect that the suit is barred by limitation.

13. A separate written statement was filed on behalf of the defendant-purchasers jointly on 10.04.2000, in substance,

pleading a case that they were the *bona fide* purchasers for value without notice. The other pleadings raised are the same as those raised by the defendant-vendor that the suit agreement was secured by the plaintiff-vendees through the practice of fraud etc. which does not confer any right upon them.

14. On the pleadings of parties, the Trial Court framed the following issues (translated into English from Hindi):

"1. Whether the plaintiffs are entitled to get a sale deed executed in their favour on the basis of the disputed agreement to sell dated 15.06.1994 as pleaded in plaint?

2. Whether the disputed agreement was executed by Bhawar Singh in favour of the plaintiffs is without consideration as pleaded in paragraph no. 11 of the written statement bearing paper no. 18 ka-1, if yes, its effect on the suit?

3. Whether the disputed agreement to sell dated 15.06.1994 was got executed by the plaintiffs by defrauding the defendant, as pleaded in paragraph no. 13 of the written statement?

4. Whether defendant nos. 2 to 6 are bona fide purchasers for value without notice as pleaded in paragraph no. 18 of their written statement bearing paper no. 31 ka-1?

5. Relief, to which the plaintiffs are entitled?

6. Whether the suit is time barred?

7. Whether defendant no. 1 has exclusive right to the suit property?

8. Whether defendant nos. 2 to 6 in their capacity as the transferees of the disputed land have exclusive right to it, if yes, its effect?"

15. The plaintiff-vendees, in support of their case, have led documentary evidence that *inter alia* includes the suit agreement in original, marked Ex. ka-2, the notice dated 14.08.1995 in original, marked as Ex. ka-1, registered postal receipt paper no. 10-ga, the A.D. Card paper no. 11-ga, the reply to the notice dated 23.08.1995, paper no. 12-ga, a certified copy of the application for attendance, paper no. 13-ga Ex. ka-3, a certified copy of the application for attendance Ex. ka-4, a certified copy of CH-Form Ex. ka-1, a certified copy of CH-Form-41, Ex. 2. In addition, oral evidence was led on behalf of the plaintiff-vendees comprising PW-1 Om Singh, PW-2 Shiv Charan and PW-3 Virendra Kumar.

16. The defendant-vendor and the defendant-purchasers filed the sale deed in original executed by the defendant-vendor in favour of defendant-purchasers dated 16.09.1998 paper no. 43-ka. In their oral testimony, the defendant-vendor and the defendant-purchasers examined DW-1 Bhawar Singh and DW-2 Babu Ram.

17. The Trial Court, by its judgment and decree dated 08.05.2002, decreed the plaintiff-vendees' suit for specific performance of contract, ordering the defendant-vendor to execute the requisite sale deed in favour of the plaintiff-vendees within a month after receiving the balance sale consideration.

18. The defendant-purchasers and the defendant-vendor together carried an appeal to the learned District Judge, Meerut from the Trial Court's decree. The appeal was numbered as Civil Appeal No. 130 of 2002 and came up for determination before the learned District Judge, Meerut on 11.02.2003. The learned District Judge,

Meerut dismissed the appeal with costs, affirming the Trial Court.

19. Aggrieved, this appeal from appellate decree has been carried by the defendant-vendor and the defendant-purchasers together. The appeal was admitted to hearing on 22.05.2003 and by a separate order of the said date, operation of the decree for specific performance was stayed. Since the order of admission made on 22.05.2003 did not formulate the substantial questions of law involved, but admitted the appeal with reference to the question no. 9-B as framed at the foot of the appeal, this Court, before the opening of hearing, proceeded to formulate the substantial questions of law involved vide order dated 01.09.2021. The substantial questions of law involved in this appeal read:

(1) Whether a suit for specific performance can be decreed without an issue about readiness and willingness being framed?

(2) Whether a suit for specific performance can be decreed without an issue of readiness and willingness being framed where the issue is substantially suited between parties?

(3) Whether specific performance can be granted in relation to agricultural land that has been the subject matter of consolidation operations where the vendee has been moved to different plots, different from those that are subject matter of the suit agreement

(4) Whether the Court while granting specific performance ought to exercise discretion according to the principles settled under Section 20 Specific Relief Act?

20. Heard Mr. Ashutosh Mishra, learned Counsel for the defendant-vendor and the defendant-purchasers. Ms. Pooja Agarwal, learned Counsel appearing on behalf of the plaintiff-vendees, has been heard in answer.

21. Substantial Questions of Law Nos.1 and 2 are essentially the same, with the second question carrying the essence of the proposition involved to its last detail. As such, both the questions are being dealt with together.

22. It is submitted by Mr. Ashutosh Mishra, learned Counsel for the defendants that in a suit for specific performance, it is essential that the plaintiffs must show their readiness and willingness at all times. Readiness connotes financial capacity of the one who seeks to enforce specific performance, whereas willingness distinctly refers to his personal or mental inclination to enforce performance of the contract. Section 16(c) of the Specific Relief Act, 1963 mandates 'readiness' and 'willingness' on the plaintiffs' part and is a condition precedent to the grant of relief of specific performance. The law requires that the plaintiffs must allege and prove a continuous 'readiness' and 'willingness' from the date of the contract till the institution of the suit. It is emphatically argued that the Trial Court's failure to frame an issue with regard to the plaintiffs' 'readiness' and 'willingness' renders the decree passed by the two Courts below unsustainable in law. It is pointed out by the learned Counsel for the defendants that failure of the Trial Court to frame a proper issue with regard to 'readiness' and 'willingness' and the resultant failure of justice was culled out as a ground in the memorandum of appeal lodged before the

Lower Appellate Court, that has been asserted in Paragraph No.8 thereof.

23. Elaborating these submissions, it is argued that the plaintiff-vendees have failed to establish their 'readiness' in view of the specific averments carried in Paragraph No.14 of the written statement filed on behalf of the defendant-purchasers. In support of his submission on this score, Mr. Ashutosh Mishra has placed reliance on the decision of the Supreme Court in **M/s. J.P. Builders and another v. A. Ramadas Rao** and another1. It is next submitted that without framing an issue about readiness and willingness, the Trial Court has returned a finding about willingness alone, with nothing said on the point of readiness. To this end, learned Counsel for the defendants has drawn the attention of the Court to the findings of the Trial Court recorded on Issue Nos.1 and 2.

24. It is submitted by Mr. Mishra that the plaintiff-vendees have failed to prove their readiness and willingness from 15.09.1995 (the date when they appeared before the Sub-Registrar) to 20.08.1998 (the date of institution of the suit). The Courts below, in the submission of the learned Counsel for the defendants, have failed to take into consideration the plaintiff-vendees' failure to prove their "readiness' and "willingness' throughout the aforesaid period of time. Instead, the Lower Appellate Court has returned a perverse finding that the suit can be filed even on the last date of limitation with a remark that people tend to avoid litigation. It is urged that the Lower Appellate Court has committed a manifest error of law in not appreciating the fact that "readiness' and "willingness' had to be established on the last day of limitation also. The Lower Appellate Court, according to the learned Counsel for the defendants, has confounded the limitation prescribed for instituting the suit with the requirement of readiness and willingness to get a conveyance executed in terms of the contract, a matter generically different from limitation. In support of his contention, learned Counsel for the defendants has further placed reliance on the decision of the Supreme Court in **Atma Ram v. Charanjit Singh2,** the decision of this Court in **Dhanu v. Ajai Kant and others3** and the authority of the Karnataka High Court in **Channayya & another v. Annapurna4.**

25. The learned Counsel for the plaintiff-vendees, Ms. Pooja Agarwal, has refuted the submissions advanced on behalf of the defendants on the questions under consideration. She submits that a perusal of the record indicates that the plaintiff-vendees have categorically averred in the plaint that they are ever ready and willing to perform their part of the contract and had given notice to the defendant-vendor to appear in the Office of the Sub-Registrar, Baghpat on 15.09.1995 to execute the covenanted sale deed. It was the defendant-vendor, who was in breach and did not turn up all through the day before the Sub-Registrar. It is pointed out that oral and documentary evidence have been led by the plaintiff-vendees to establish the twin facts of readiness and willingness. She submits that by deciding Issue No.1 along with Issue No.7, the Trial Court has wholesomely tried the issues of readiness and willingness. Upon consideration of the relevant evidence, the Trial Court has found the plaintiff-vendees ready and willing to perform their part of the contract under the suit agreement. It is the learned Counsel's submission that a finding has been recorded by the Trial Judge that the notice dated 14.08.1995 was received by the defendant-

vendor, but he did not appear before the Sub-Registrar on 15.09.1995 to execute the sale deed. It has also been found that the plaintiff-vendees had appeared and their attendance was recorded by the Sub-Registrar, Baghpat on 15.09.1995.

26. It is urged that the Lower Appellate Court has also recorded a finding of fact that the plaintiff-vendees were ready and willing to perform their part of the suit agreement. The learned Counsel for the plaintiff-vendees has relied upon the decision of the Supreme Court in **Official Liquidator, Supreme Bank Ltd. v. P.A. Tendolkar (dead) by LRs and others5** and further upon the authority of their Lordships in **P. Purushottam Reddy and another vs. Pratap Steels Ltd.6** It is submitted by Ms. Pooja Agarwal that failure to frame a specific issue on "readiness' and "willingness', may be an irregularity, but in a case like the one here, where both parties have led oral and documentary evidence, bearing on the issue directly, which has been adjudicated by both Courts of fact below, the decree of specific performance, resultant on those findings, cannot be held vitiated.

27. This Court has given a thoughtful consideration to the very detailed submissions addressed by both the learned Counsel.

28. It is true that generally, in a suit for specific performance, an issue about readiness and willingness ought to be framed so that parties lead evidence in support of and against the case. The substantial requirement, however, is that the plaintiff-vendees, who seek relief of specific performance of contract must aver and prove their readiness and willingness to perform their part of the contract throughout from the date the performance falls due under the contract and until the decree is passed. If the parties go to trial, conscious of the other side's case and wholesomely lead evidence on the point of readiness and willingness, mere failure to formally frame an issue about readiness and willingness would not be fatal.

29. The submissions of the learned Counsel for the defendants that "readiness' and "willingness' is an issue that is imperative to frame, draw support from the following remarks of the Karnataka High Court in **Channayya** *(supra)*:

"9. It is well-settled that in a suit for specific performance, the person who is seeking specific performance should aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant, in view of the provisions of Section 16(c) of the Act and in the absence of proof of the said fact, specific performance of the contract cannot be enforced in favour of the person seeking specific performance. It is clear from the issues framed by the Trial Court that no specific issue has been framed regarding the readiness and willingness on the part of the plaintiff in performing his part of the contract. Similarly, the first Appellate Court has also not framed any point for determination regarding the readiness and willingness on the part of the plaintiff in performing his part of the contract. However, both the Courts below have proceeded on the basis that in view of the fact that Rs. 7,162-50 Ps., was paid in the execution of the decree in O.S. No. 181 of 1980, the plaintiff has paid the consideration amount. The said

reasoning of the Courts below without framing an issue or point for determination regarding the readiness and willingness on the part of the plaintiff in performing his part of the contract and without considering the question as to whether it was stipulated in the agreement of sale that the plaintiff should pay the amount due to the Bank and as to whether the said payment of Rs. 7,162-50 Ps., is pursuant to the agreement of sale, is erroneous and cannot at all be sustained. The decisions relied upon by the Courts below lay down that if the plaintiff was ready and willing to perform his part of the contract, he is entitled to decree for specific performance and readiness and willingness cannot be treated as a strait-jacket formula and the same have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of party concerned and when the entire consideration amount has been paid after obtaining receipt of last payment, necessary allegations have to be presumed and literal compliance of language of provision of Section 16(c) of the Specific Relief Act is not imperative. However, in view of the fact that both the Courts below have not framed any issue or point for determination regarding readiness and willingness on the part of the plaintiff in performing his part of the contract, it is clear that they were not justified in decreeing the suit of the plaintiff without framing an issue on the said condition precedent required to be satisfied for entitlement of decree for specific performance, which has caused prejudice to the defendant as parties have not led any evidence regarding the said issue. Therefore, it is clear that the substantial question of law has to be answered in the affirmative by holding that the Courts below were not justified in decreeing the suit of the plaintiff for specific performance without framing an issue or point for determination regarding the readiness and willingness on the part of the plaintiff in performing his part of the contract in the absence of any issue and finding on the basis of the evidence led on the said issue, it is clear that the decree passed for specific performance cannot be sustained in view of the provisions of Section 16(c) of the Specific Relief Act....."

30. The principle in **Channayya** has been laid down in the context that on account of the failure of the Trial Court to frame an issue regarding readiness and willingness, prejudice had been caused to the defendants, as parties did not lead any evidence regarding the said issue. This is not the case here. The Court has framed Issue No.1 in the following terms (translated into English from Hindi):

"1. Whether the plaintiff are entitled to get a sale deed executed in their favour on the basis of a disputed agreement to sell dated 15.06.1994 as pleaded in plaint?"

31. This issue has been tried together with Issue No.7. The Trial Court on this issue has recorded a finding about readiness and willingness of the plaintiff-vendees and the circumstances attending it in the following words:

"उक्त मुहायदाबय में दिनांक 15.9.95 तक प्रश्नगत् 3 बीघे कच्ची जमीन का बैनामा भवर सिंह को वादीगण के पक्ष में कर देना था। भवर सिंह ने उक्त जमीन का बैनामा वादीगण के पक्ष में करने हेतु कभी कोई इच्छा जाहिर नहीं की जिसके कारण दिनांक 14.8.95 को अपने अधिवक्ता के माध्यम से वादीगण ने नोटिस भवर सिंह को प्रेषित किया जिसकी प्रति

प्रदर्श क-1 को साक्षी ओम सिंह बतौर पी.डब्लू.1 ने सिद्ध किया है। उक्त नोटिस भवर सिंह को भेजी गई जिसकी रसीद शामिल मिशल है। उक्त नोटिस भवर सिंह को प्राप्त हुआ जिसकी बावत शामिल मिशल 11ग है। जिसे ओम सिंह साक्षी ने अपनी मुख्य परीक्षा में तसदीक किया है। इस साक्षी ने बतौर पी.डब्लू. 1 अपनी मुख्य परीक्षा में कहा है कि यह एग्रीमेंट दिनांक 15.9.95 तक हुआ था। इस बीच में मेरे हक में बैनामा नहीं किया तो मैंने एक नोटिस दिनांक 14.8.95 को चश्मवीर एडवोकेट बागपत द्वारा दिलवाया। इस गवाह ने कागज संख्या 9ग को देखकर कहा कि यह वही नोटिस है जिसे उसने अपने अधिवक्ता से दिलाया था जिसे उन्हें लिखते-पढ़ते देखा है और उसे तसदीक किया। यह नोटिस भवर सिंह को प्राप्त हुआ।"

32. It has been recorded by the Trial Court in its finding on Issues Nos.1 and 2 thus:

"प्रतिवादपत्र की धारा 17 में कहा गया है कि कथित इकरारनामे के विषय में उसने नोटिस नहीं भेजा। परन्तु उक्त नोटिस के फर्जी होने की बावत उसने कोई भी उल्लेख कहीं नहीं कहा। वादीगण द्वारा उसे प्राप्त प्रतिवादी सं0 1 का उन्होंने पेपर संख्या 12ग को तस्दीक किया है कि उक्त नोटिस उनके नोटिस दिनांकित 14.08.95 के उत्तर में उन्हें प्राप्त हुआ था। उक्त नोटिस के द्वारा उन्होंने प्रतिवादी सं0 1 से यह अपेक्षा की थी कि दिनांक 15.09.95 को रजिस्ट्री ऑफिस में आकर प्रश्नगत भूमि का बैनामा कर दें जिसकी बावत इकरारनामा प्रदर्श क-2 में तय पाया गया था। दिनांक 15.09.9 को वादीगण सबरजिस्ट्रार कार्यालय में उपस्थित हुए, उन्होंने अपनी हाजिरी दर्ज करायी जिसकी बावत प्रलेख प्रदर्श क-3 व प्रदर्श क-4 निष्पादित किया गया। प्रलेख प्रदर्श क-3 व प्रदर्श क-4 दिनांक 15.6.94 को उपनिबन्धक बागपत में रजिस्टर्ड कराई गई जिससे सिद्ध होता है कि ओम सिंह व जयभगवान प्रश्नगत् विवादित संपत्ति का इकरारनामा महायदा बय दिनांक 15.6.96 के आधार पर बैनामा कराने हेतु उपस्थित रहें। परंतु प्रतिवादी सं0 1 उपस्थित नहीं हुआ। ओम सिंह वादी बतौर साक्षी पी.डब्लू.1 ने अपनी मुख्य परीक्षा में कहा है कि दिनांक 15.9.95 को हम रजिस्ट्री बागपत गए और भवर सिंह का इंतजार करते रहे। जब वह नहीं आया तो हमने रजिस्ट्री में अपनी हाजिरी कराई। पहले 11-12 बजे करायी फिर 3 बजे करायी। इस साक्षी का कथन कि उसके द्वारा दाखिल प्रलेख प्रदर्श-3 व प्रदर्श-4 से भी सिद्ध होता है कि वह प्रश्नगत भूमि की रजिस्ट्री कराने दिनांक 15.8.94 को उपनिबंधक कार्यालय में उपस्थित हुआ, जिस दिन उक्त इकरारनामा की मियाद खत्म हो रही थी। परंतु भवर सिंह रजिस्ट्री कराने उपस्थित नहीं हुआ। उक्त इकरारनामे के आधार पर अपनी हाजिरी की बाबत निष्पादित प्रदर्श-3 व प्रदर्श-4 प्रलेखों से यह स्पष्ट होता है कि वादीगड़ हमेशा बैनामा कराने के लिए इच्छुक रहे। परंतु भवर सिंह बैनामा कराने हेतु सबरजिस्ट्रार कार्यालय बागपत में उपस्थित नहीं हुआ। जबकि उसके व वादी गण के मध्य 5,000/- रुपये प्रतिफल की धनराशि प्राप्त करते हुए दिनांक 15.6.94 को इकरारनामा में मुहायदा बय उपनिबंधक कार्यालय में पंजीकृत हुई थी, जिसकी मियाद दिनांक 15.9.95 तक थी। इस प्रकार दिनांक 15.9.95 तिथि तक वादीगण उक्त संपत्ति के बैनामा कराने के हमेशा इच्छुक रहे और वह प्रश्नगत् संपत्ति का बैनामा प्रतिवादी सं0-1 से कराने के हकदार रहे।"

33. In his examination-in-chief, PW-1 Om Singh, who is one of the plaintiff-vendees, has testified on oath as follows:

"मैं इस एग्रीमेंट वाली जमीन को लेने के लिए सदैव तैयार रहा हूं और समय-2 पर इन्हें

बैनामा करने के लिए भी कहता रहा हूं तथा आज भी बैनामा कराने को तैयार हूं।"

In his cross-examination, this witness has stated about his financial means on the date he purchased the larger part of the defendant-vendor's holding, that is on 15.06.1994, and also on the day that he went to the Sub-Registrar's office to get a sale deed executed, after calling upon the defendant-vendor in terms of the suit agreement. He has clearly mentioned that on the date he went to the Sub-Registrar's office and got his attendance marked, he had with him a sum of Rs.48,000/- that his brother had brought along from Delhi. These facts are recorded in the cross-examination of PW-1, in the followings words:

"हमारे हक में भवर सिंह का बैनामा 15-6-94 को हुआ था। स्टेट बैंक बागपत में मेरा खाता है। भवर सिंह से जो बैनामा हमने लिया था उसका रुपया हमने अपनी जमीन बेच कर दिया था। हमारी जमीन ढाई लाख की बिकी थी उतने का ही बैनामा कराया था। जिस दिन हमने बैनामा किया उस दिन हमारे पास 212000/- फालतू थे। यह कहना गलत है कि उस रोज हमारे पास जितने का बैनामा लिया हो उससे ज्यादा रुपया न हो। भवर सिंह का बैनामा व मायदा भवर सिंह का एक दिन पहले बैनामा हुआ फिर उसी दिन इकरार नामा हुआ। हम उस दिन भी तैयार थे उसने कह दिया था कि बोने को चाहिये कुछ दिन बाद बैनामा करूंगा। रजिस्ट्री हाजिरी पर हम 43 हजार उसे देने को तथा 5000/- खर्च के लेकर गए थे। उस दिन हम जब जयभगवान, शिवचरण, वीरिंद्र प्रीतव गए थे। उस दिन 48000/- मेरा भाई दिल्ली से लाया था। भाई इकट्ठे करके लाया था। वह मांग कर लाया था या उसके पास थे। मुझे उसके खाते के बारे में नहीं पता किस बैंक में है।"

34. The aforesaid evidence is eloquent about the fact that the parties were not at all prejudiced about the plaintiffs' case of readiness and willingness for the Trial Court's failure to specifically frame an issue, mentioning those words. The parties went to trial conscious of the case about readiness and willingness, where evidence was also led on the point and the plaintiff and his witnesses were subjected to cross-examination. Therefore, the principles enunciated in **Channayya** would not be attracted at all to the facts here. Likewise, the decision of the Supreme Court in **Atma Ram** *(supra)* also does not apply to the facts obtaining here. In **Atma Ram**, the remarks of their Lordships bearing on the point, which the defendants moot, read:

"9. Coming to the second aspect revolving around Section 16(c), a look at the judgment of the trial court would show that no issue was framed on the question of readiness and willingness on the part of the petitioner-plaintiff in terms of Section 16(c) of the Specific Relief Act, 1963. The fact that the petitioner chose to issue a legal notice dated 12-11-1996 and the fact that the petitioner created an alibi in the form of an affidavit executed before the Sub-Registrar on 7-10-1996 (marked as Ext. P-2) to show that he was present before the Sub-Registrar for the purpose of completion of the transaction, within the time stipulated for its performance, was not sufficient to conclude that the petitioner continued to be ready and willing even after three years, on 13-10-1999 when the plaint was presented. No explanation was forthcoming from the petitioner for the long delay of three years, in filing the suit (on 13-10-1999) after issuing a legal notice on 12-11-1996. The conduct of a plaintiff is very crucial in a suit for specific performance. A person who issues a legal notice on 12-11-1996 claiming readiness and willingness, but who institutes a suit only on 13-10-1999 and that too only with

a prayer for a mandatory injunction carrying a fixed court fee relatable only to the said relief, will not be entitled to the discretionary relief of specific performance."

35. **Atma Ram** was a case, where the plaintiff had instituted a suit after a delay of three years, which carried a relief for mandatory injunction alone, though court fee for specific performance without amending the suit to bring in a relief of specific performance was sought. It was in that context that the absence of an issue about readiness and willingness to a plea under Section 16(c) of the Specific Relief Act was held fatal. Here, the facts are absolutely different, where the suit was instituted properly framing a relief of specific performance. There is a clear averment in the plaint to the effect that the plaintiff-vendees, in accordance with the suit agreement, have always been ready and willing to get a sale deed executed. This averment and related facts are specifically pleaded in Paragraph No.5 of the plaint. The omission by the Trial Court, therefore, to frame an issue about readiness and willingness, is no more than an irregularity arising from oversight or the Court's casual approach. However, the issue substantially is part of Issue No.1 and parties have consciously gone to trial, bearing in mind the case about readiness and willingness urged by the plaintiff-vendees. The parties, particularly the plaintiff-vendees, have led evidence on the point of readiness and willingness and have been cross-examined. Thus, by application of no principle or yardstick, can it be said that it is a case where failure to frame an issue about readiness and willingness has prejudiced the parties' case, particularly of the defendants.

36. Further reliance that has been placed by the learned Counsel for the defendants on the decision of this Court in **Dhanu** *(supra)* does not also lead to a favourable perspective for the defendants on the substantial questions of law under consideration. In **Dhanu**, I held:

"24. This Court is not unmindful of the well established legal principle that "readiness' and "willingness' are matters that have to be proved substantially and not left to mere ceremony and form. About readiness also, therefore, it has been said on high judicial authority that there should be consistent proof of capacity to pay the sale consideration, which this Court thinks should be there throughout, and it is not necessary that the plaintiffs should be carrying around requisite money with him at all times after performance falls due and till such time that a decree is passed. But those authorities do not absolve the plaintiffs of proving their capacity at all times after performance has fallen due, by leading appropriate evidence in the circumstances obtaining. The aforesaid principle of substantial compliance in the matter of establishing readiness and willingness is most eloquently exposited by the Hon'ble Supreme Court in *A. Kanthamani v. Nasreen Ahmed 3*, where their Lordships held thus in paragraphs 24, 25 & 26 of the report:

"24. The expression "readiness and willingness" has been the subject-matter of interpretation in many cases even prior to its insertion in Section 16(c) of the Specific Relief Act, 1963. While examining the question as to how and in what manner, the plaintiff is required to prove his financial readiness so as to enable him to claim specific performance of the contract/agreement, the Privy Council in a leading case which arose from the Indian courts (Bombay) in Bank of India Ltd. v. Jamsetji A.H. Chinoy [*Bank of India Ltd. v. Jamsetji A.H. Chinoy, 1949 SCC OnLine*

PC 81 : (1949-50) 77 IA 76 : AIR 1950 PC 90], approved the view taken by Chagla A.C.J., and held *inter alia* that

"it is not necessary for the plaintiff to produce the money or vouch a concluded scheme for financing the transaction to prove his readiness and willingness."

25. The following observations of the Privy Council are apposite: (*Jamsetji case [Bank of India Ltd. v. Jamsetji A.H. Chinoy,* 1949 SCC OnLine PC 81 : (1949-50) 77 IA 76 : AIR 1950 PC 90], SCC OnLine PC)

"... Their Lordships agree with this conclusion and the grounds on which it was based. It is true that Plaintiff 1 stated that he was buying for himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But in order to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact, and in the present case the appellate court had ample material on which to found the view it reached. Their Lordships would only add in this connection that they fully concur with Chagla A.C.J. when he says:

"In my opinion, on the evidence already on record it was sufficient for the court to come to the conclusion that Plaintiff 1 was ready and willing to perform his part of the contract. It was not necessary for him to work out actual figures and satisfy the court what specific amount a bank would have advanced on the mortgage of his property and the pledge of these shares. I do not think that any jury--if the matter was left to the jury in England--would have come to the conclusion that a man, in the position in which the plaintiff was, was not ready and willing to pay the purchase price of the shares which he had bought from Defendants 1 and 2.'

For the foregoing reasons, their Lordships answer Question (4) in the affirmative." (emphasis supplied)

28. The decisions above referred are expressions of high judicial opinion, and for whatever is said there, there cannot be any quarrel. But, it has to be seen on the facts obtaining in the case in hand, which includes pleading as also the evidence, in what manner the principles relating to substantial compliance with the requirement of proving readiness and willingness would operate. It is for the Courts of fact again to determine this question. Illustratively, in A. Kanthamani *(supra)* the agreement to sell was executed between parties on 5th March, 1989 for a total sale consideration of Rs. 3,43,200/-. A sum of Rs. 1,30,000/- was paid by the vendee to the vendor as earnest. Close on heels, a sum of Rs. 20,000/- was further paid towards sale consideration on 03.04.1989, Rs. 10,000/- on 04.05.1989, Rs. 15,000/- on 03.07.1989, Rs. 15,000/- on 06.07.1989 and Rs. 16,000/- on 16.08.1989, aggregating a sum of Rs. 76,000/-. This figure added to the initial earnest of Rs. 1,30,000/-, would make the advance payment, a figure of Rs. 2,06,000/-. It was also found there that the vendor orally agreed to transfer to the vendee, an additional area of 132.25 square feet, at the ground floor, and, an undivided share. In relation to the additional property covenanted to be sold, the vendee paid his vendor a sum of Rs. 46,000/-, as earnest. Upon the total advance money paid, the Courts of fact in that case found that the vendee had paid more than Rs. 2 lacs to the vendor, of the total agreed sale consideration, where a balance sum of Rs. 1,47,200/- remained to be paid. Added to it was the conduct of the vendee, sending the

vendor, a draft sale deed on 10.11.1989, for an area admeasuring 847.25 square feet and one ½ undivided share. It is also noticed that the vendor had orally agreed to sell an additional area of land, but on receipt of the draft sale deed, she refused to do so and returned the draft sale deed to the vendor on 04.12.1989 for his approval, asking him to treat the sum of Rs. 46,000/- paid by him for the additional area, as further advance, paid in relation to the registered agreement dated 05.03.1989. Thereafter, on 15.12.1989, the vendor sent another draft sale deed for approval of the vendee, effecting necessary changes there."

37. Admittedly, there are two Courts of facts here, who, after consideration of evidence about readiness and willingness, have reached a plausible conclusion about it. Moreover, **Dhanu** was not a case where the Court was confronted with the proposition about the effect of a formal failure of the Court to frame an issue about readiness and willingness, notwithstanding its substantial consideration with parties pleading about it and leading evidence. The principles there were laid down in the context of what readiness and willingness occurring in Section 16(c) of the Specific Relief Act oblige a plaintiff to prove, before he can get a decree of specific performance. The said decision, for the aforesaid reason also, is not of much assistance to the defendants on the substantial questions of law under consideration.

38. The principle that governs the answer to the substantial questions of law under consideration finds eloquent enunciation in the holding of their Lordships of the Supreme Court in **P. Purushottam Reddy** *(supra)*, where it has been observed:

"11. ..... It is true that a specific issue was not framed by the trial court. Nevertheless, the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not -- in law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision.

12. Assuming that there was any deficiency in the pleadings and also an omission on the part of the trial court to frame a specific issue, the present one is a case where the applicability of the law laid down by this Court in *Nagubai Ammal v. R. Shama Rao* [AIR 1956 SC 593] was squarely attracted. In *Nagubai case* [AIR 1956 SC 593] this Court was called upon to examine if the plea of *lis pendens* was not open to the plaintiff on the ground that it had not been raised in the pleadings. Neither the plaint nor the reply statement of the plaintiff contained any averment that the sale was affected by the rule of *lis pendens*. There was no specific issue directed to that question. However, evidence was adduced by the plaintiff on the plea of *lis pendens* and not objected to by the defendants. The question was argued and tested by taking into consideration the evidence that the proceedings were collusive in character with a view to avoid operation of Section 52 of the TP Act. This Court felt satisfied that the defendants went to trial with full knowledge that the question of *lis pendens* was in issue, had

ample opportunity to adduce their evidence thereon and fully availed themselves of the opportunity. This Court formed the opinion that in the circumstances of the case, absence of a specific pleading on the question was a mere irregularity which resulted in no prejudice to the defendants. After having noticed the rule of pleadings as applicable to civil law that "no amount of evidence can be looked into upon a plea which was never put forward", this Court held: (AIR p. 598, para 12)

"The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present in the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto."

39. Thus, the principle on which the answer to these questions would turn, given the way the parties have pleaded their case and led evidence on the issue of readiness and willingness, is that a substantial compliance with the requirement of proving readiness and willingness at the trial by the plaintiff in a suit for specific performance would not vitiate the decree for the mere failure of framing a specific issue; of course, this would be so where the parties had notice of the case about readiness and willingness and had opportunity to lead evidence about it, with no prejudice being occasioned to the defendants on account of the failure to specifically frame that issue.

40. Therefore, Substantial Question of Law (1) is answered in the **affirmative**, in terms that a suit for specific performance can be decreed without an issue about readiness and willingness being framed, provided readiness and willingness are substantially pleaded and proved by the parties' evidence, where the parties have gone to trial conscious of the plea, with opportunity to the defendants, to dispel the same. Substantial Question of Law No.2 is also answered in the **affirmative**, accordingly.

41. So far as the third substantial question of law is concerned, the same appears to be fairly well crystallized that where, in relation to the agricultural land subject matter of consolidation operations, the plaintiff-vendees have moved to different plots different from those that are subject matter of the suit agreement, the contract would frustrate. Learned Counsel for the defendants has placed emphatic reliance upon the decision of their Lordships of the Supreme Court in **Piarey Lal v. Hori Lal7** to submit that once consolidation takes place and the subject matter of the contract moves out of the plaintiff-vendees' hands, who are given a different parcel by allotment of a *chak*, the contract frustrates under Section 56 of the Indian Contract Act, 1872. In **Piarey Lal** *(supra)* interpreting Section 30 of the U.P. Consolidation of Holdings Act, 1953 together with Section 54 and 55(1)(d) of the Transfer of Property Act, 1882, it has been held:

"5. As is obvious, clause (a) of Section 30 does not bear on the question in controversy because it only provides for the cessation of the rights, title, interests and liabilities both of the tenure-holder to whom the "*chak*" has been allotted, and of the former tenure-holder of the plots comprising the "*chak*" in their respective

"original holdings". There is no controversy that this was so in the present case. It is also nobody's case that the rights, title, and interests of the tenure-holder entering into possession of his "*chak*" have any bearing on the controversy relating to the specific performance of the agreement for sale, for all that has been urged before us is that the defendant, as the tenure-holder of the new holding or "*chak*" had the same "liabilities" in that "*chak*" as he had in the original holding. What therefore remains for consideration is whether, on the defendant's entering into possession of his new land or "*chak*", there was the same liability "in" the new land as "in" the original holding. It has therefore to be examined whether, by virtue of the agreement for sale, any liability accrued "in" the original holding?

6. A cross-reference to Section 54 of the Transfer of Property Act shows that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It has however been specifically provided in the section that such a contract "does not, of itself, create any interest in or charge on such property". It would therefore follow that the agreement for sale in the present case did not give rise to any interest "in" the original holding of the defendant as the tenure-holder. That being so, there could be no occasion for the transfer of any such liability "in" the new land or "*chak*" of the defendant so as to attract clause (b) of Section 30 of the Act. In fact what the defendant was bound to do under Section 55(1)(d) of the Transfer of Property Act was to execute a proper conveyance of "the property" which was the subject-matter of the contract for sale, and not of any other property. So when he lost that property as a result of the scheme of consolidation and his rights, title and interests ceased in that property by virtue of clause (a) of Section 30 of the Act, the agreement for sale became void within the meaning of Section 56 of the Contract Act, and it is futile to urge that they were saved by clause (a) or clause (b) of Section 30 of the Act."

42. As already noted, there is little quarrel about the proposition that if the entire identity of land changes in consequence of consolidation, the suit agreement would frustrate. But the moot question is whether there has been such a change of identity of land between what was contracted to be sold by the defendant-vendor to the plaintiff-vendees through the suit agreement and what has remained with the defendant-vendor post consolidation, when the action came up for trial. While Mr. Ashutosh Mishra submits that the identity of the plot, subject matter of the suit agreement, is completely different from what has been allowed to the defendant-vendor, as a result of consolidation, Ms. Pooja Agarwal urges the contrary case. She submits that in consequence of consolidation, there has been a marginal or slight change to the identity of the land that is subject matter of the suit agreement. According to her, the land remains substantially unchanged. The only change is that for the six plot numbers, that are subject matter of the suit agreement, five from amongst the same have been allotted, slightly varying their areas, but maintaining the total area of 0.237 hectares. Both the learned Counsel, in this connection, have drawn this Court's attention to the plots that are subject matter of the suit agreement and those that figure in CH Form-41, where out of the six old plot numbers with their specified areas, five are shown allotted, with a slightly individual plot-wise adjusted area, to the defendant-vendor as part of his consolidated holding/ *chak* and assigned a

new number, being Plot No.530. The total area remains unchanged. It would be of immense profit to compare the plot numbers subject matter of the suit agreement and those allotted to the defendant-vendor post consolidation, that figure in CH Form-41 relating to the defendant-vendor. This comparison can best be depicted in tabular form as shown below:

Plot nos. of agreement to sell		Plot nos. constituting new plot no.530	
Plot No.	Area (in hectares)	Plot No.	Area (in hectares)
248M	'0.008	250/1	
250	'0.010	252/1	'0.086
251M	'1.354	252/2	'0.005
252/1	'0.086	251M	'0.131
252/'0.237	'0.020	253M	'0.010
253	'0.089		
Total	minus the area earlier sold = 0.237		'0.237

43. Now, a comparison of the plots that are subject matter of the suit agreement and those left back in the hands of the defendant-vendor post consolidation, would lead one to notice the following facts:

Out of the land that was subject matter of the suit agreement, one Plot No.248M alone has been omitted. The other five have remained back with the defendant-vendor. Plot No.250 shown in the suit agreement and 250/1, where the area has been reduced from 0.010 to 0.005 hectares, are essentially the same plot with a subdivided number. Plot No.251M continues as such in the consolidated holding with a reduced area. Plot No.252/1 is there in CH Form-41 without any change. Plot No.252/2 is part of the consolidated holding. Plot No.253 also continues with the defendant-vendor. No doubt there is a change in area, but this is also attributable to the land already sold by the defendant-vendor to the plaintiff-vendees. The total area of the consolidated holding as shown in CH Form-41, also remains the same.

44. It is not a case where the land that was agreed to be sold through the suit agreement has gone out of the defendant-vendor's hand as a result of consolidation operations and a new holding allotted to him, relieving him of his earlier obligations by virtue of Section 30 of the U.P. Consolidation of Holdings Act, 1953. Once the *chak* allotted to the defendant-vendor is substantially the same land, that is subject matter of the suit agreement, the contract would not frustrate. The above principle has the endorsement of their Lordships of the Supreme Court in **Baikunthi Devi and others v. Mahendra Nath and another8**. The facts and holding in **Baikunthi Devi** *(supra)* read:

"3. In the present case, the facts are brief and the law is clear. One Jeewa Ram, who had a half share in a tract of land Ac. 6-00 in extent with a small house thereon, had entered into an agreement to sell his share for a consideration of Rs 3000 to Respondent 1. This agreement dated June 16, 1960 was sought to be enforced by a suit for specific performance although by that time Jeewa Ram had passed away and his daughter, the present Appellant 1 became his legal representative. The demand for specific performance was made by the plaintiff-first respondent who, incidentally, happens to be the nephew of the late Jeewa Ram. The suit itself was filed after the consolidation proceedings

had come to a close. It so happened that as a result of the consolidation proceedings precisely the same land which was the subject-matter of the agreement to sell, less a tiny bit of Ac. 0-06, was included in the *chak* allotted to Jeewa Ram and the first respondent.

4. The High Court took the view that since substantially the same land as was the subject-matter of the agreement to sell (plus some other plot with which we are not concerned) has been allotted in the consolidation proceedings to Jeewa Ram there was no difficulty at all in enforcing specifically the agreement which was the basis of the suit. Nor do we see any valid objection to the view on the law and the facts taken by the High Court.

5. The only contention urged before us by Shri B.R.L. Iyengar, appearing for the appellants, is that on account of the consolidation proceedings even though the same lands may have been allotted in the new *chak* there was nevertheless a loss of identity, the emergence of a new character, the incarnation of a new entity as it were. On account of this consequence, he urged that specific performance could not be granted as a discretionary relief. We are unable to perceive any force in this submission. Actually, a tiny bit of Ac. 0-06 of land was also due to the first respondent which he gave up. Section 12(2) of the Specific Relief Act covers such a situation. The result is that the first respondent is entitled to enforce specifically the contract in his favour. The consolidation proceedings having concluded there is no bar to a decree being granted in his favour. In this view, there is no merit in this appeal."

45. The principle, to the understanding of this Court, is about the substantial identity of the land subject matter of the suit agreement remaining unchanged in consequence of consolidation, that would save the contract from frustration. Minor adjustments in the area of the plots or exclusion of a plot number of negligible area from the consolidated holding would not, in any manner, change the identity of the subject matter, so as to frustrate the contract by virtue of Section 30 of the of the U.P. Consolidation of Holdings Act, 1953 read with Section 54 of the Transfer of Property Act, 1882.

46. In the opinion of this Court, therefore, Substantial Question of Law No.3 must be answered in the **negative**, in terms that where agricultural land subject matter of consolidation, that is agreed to be sold, is consolidated and the defendant-vendor is moved to different plots, the contract would frustrate; but it would not frustrate where substantially, the subject matter of the suit agreement remains the same, with minor or negligible changes.

47. So far as the fourth substantial question of law is concerned, it is submitted by the learned Counsel for the defendants that grant of relief of specific performance is discretionary with the Court, where all circumstances should be taken into consideration, before a decision is taken about granting the said relief. Learned Counsel points out that defendant-purchasers are *bona fide* purchasers of the suit property, which is now a new plot bearing No.530, admeasuring 0.237 hectares. They had no knowledge of the suit agreement when they entered into the transaction of sale. The sale deed in favour of the defendant-purchasers was executed by the defendant-vendor on 16.09.1998 for a total sale consideration of Rs.68,000/- and ever since, they are in possession. It is

pointed out that this Court protected their possession, initially by an interim order dated 22.05.2003 on an absolute basis, which was subsequently modified on 23.07.2004, directing the defendants to deposit Rs.6500/- annually with the Trial Court pending appeal. It was further ordered that the deposit so made shall be subject to final orders, that may be passed at the hearing of this appeal. It was also ordered that the first annual deposit shall be made by the defendants by the 1st of September, 2004 and subsequent annual deposits shall be made by the 1st September of each succeeding year.

48. It is submitted that the said sum of money can be utilized to refund the earnest paid to the plaintiff-vendees in lieu of specific performance. It is urged that the value of the property has increased manifold over the period of time that the suit was instituted and has remained pending through appeals, whereas the relative value of money has dwindled. It is argued that execution of the sale deed, at this stage, would result in great injustice to the defendant-purchasers, who are in possession of the suit property after *bona fide* purchasing the same from its recorded *bhumidhar*, that is to say, the defendant-vendor. It is submitted on behalf of the plaintiff-vendees that the decision to grant specific performance is essentially a question of fact, where discretion has to be exercised by the Courts of fact on the evidence available. It is pointed out that unless the discretion has been perversely exercised, the same ought not to be interfered with.

49. This Court must remark that the exercise of discretion in the matter of specific performance, according to the current trend of authorities, has been the subject matter of consideration in higher and limited jurisdiction of this Court and their Lordships of the Supreme Court on subtle principles about adjustment of equities. Particularly, there is much emphasis about the legal principles that are designed to eschew arbitrariness in the exercise of discretion under Section 20 of the Specific Relief Act, 1963. So far as the present case is concerned, this Court is of opinion that it does not pose much of a problem about adjustment of equities that invariably arise when a suit for specific performance goes through a long period of pendency to reach its terminus. Here, there is one fact that is very different, and that is that the suit was instituted by the plaintiff-vendees on 20th August, 1998 and the defendant-vendor executed a registered sale deed relating to the suit property in favour of the defendant-purchasers on 16.09.1998. Thus, the sale deed here is hit by the principle of *lis pendens*. Section 52 of the Transfer of Property Act, 1882 reads:

" **52. Transfer of property pending suit relating thereto.**--During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.--For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence

from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

50. It is clear that a transfer *pendente lite* confers title upon the purchaser, who takes the risk subject to the rights of his vendor. If the vendor fails in the litigation, the purchaser *pendente lite* has no right of his own or equities to plead. In this connection, reference may be made to the decision of the Supreme Court in **A. Nawab John and others v. Subramaniyam9,** where it has been held:

"18. It is settled legal position that the effect of Section 52 is not to render transfers effected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The *pendente lite* purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court.

"12. ... The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court." *(Sanjay Verma v. Manik Roy [(2006) 13 SCC 608 : AIR 2007 SC 1332] , SCC p. 612, para 12.)"*

51. There is only one eventuality under which the transferee *pendente lite* may acquire rights that would not be affected by the decree, and that is if the transfer has been made with permission of the Court, where the suit about rights of parties is pending. This is the direct consequent words in Section 52 of the Transfer of Property Act, 1882, which say "except under the authority of the Court and on such terms as it may impose". If a purchaser *pendente lite* has purchased with permission of the Court and subject to the terms that it imposes, some kind of a right independent of the result of the suit pending between parties, may be claimed. Else, a purchaser *pendente lite* has no rights under the law. He has no equities either. Admittedly, the defendant-purchasers have not taken the suit property through a sale deed that was executed with the permission of the Court. The date of the sale deed is certainly one after institution of the suit. In fact, the suit property appears to have been transferred very shortly after the suit was instituted. The temporal placing of events almost suggest an unsavoury hurry on part of the defendant-vendor, that is reminiscent of the typical case of a debtor transferring property to defraud creditors. As soon as the suit here was instituted on 20.08.1998, the sale deed in favour of the defendant-purchasers was executed by the defendant-vendor. It appears to have been executed to defeat the rights of the plaintiff-vendees in the situation that obtains here.

52. This Court is of clear opinion that the discretion to grant specific performance has been rightly exercised by the two Courts below.

53. So far as the defendant-vendor is concerned, there is hardly any right based on law or in equity that arises in his favour. He has sold off the suit property to the defendant-purchasers for a valuable sale consideration of Rs.68,000/-, as would be evident from a perusal of the registered sale deed dated 16.09.1998. He has nothing to lose by the approval of a decree of specific performance passed by the Courts below. Of course, anything said here would not affect the rights and liabilities *inter se* the defendant-vendor and the defendant-purchasers on the basis of conveyance dated 16.09.1998, that would stand effaced in consequence of the decree of specific performance passed in favour of the plaintiff-vendees.

54. Substantial Question of Law (4) is answered in the aforesaid terms.

55. In the result, this appeal fails and stands **dismissed** with costs throughout, to be borne equally between the defendant-vendor and the defendant-purchasers.

56. The interim order dated 22.05.2003 in the terms made absolute on 23.07.2004, is hereby **vacated.** The sum of money deposited by the defendant-purchasers shall be paid to the plaintiff-vendees together with any accrued interest, if earned, within a period of three months from the date of receipt of a copy of this order by the Trial Court.

57. Let a decree be drawn up accordingly.

58. The records of the Courts below shall be sent down at once along with a certified copy of this judgment.

(2022)04ILR A222

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 265 of 2022
&
First Appeal From Order No. 100 of 2014

Smt. Sonia & Ors. ...Appellants
Versus
Jaleel & Ors. ...Respondents

Counsel for the Appellants:
Sri S.D. Ojha

Counsel for the Respondents:
Sri Ram Prakash Vishwakarma, Sri Virendra Prakash

(A) Torts Law - Motor Vehicles Act, 1988 - Section 173 - compensation enhancement - the Income Tax Act, 1961- Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' - if the amount of interest does not exceeds Rs.50,000/- in any financial year - registry of Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income-Tax Authority - compensation for future loss of income . (Para - 11)

Two appeals - claimants - enhancement of amount of compensation - United India Insurance Co. Ltd. - setting aside - claim petition allowed by tribunal - compensation awarded , Rs.4,79,000/- - rate of interest - 6% per annum -(Para - 1,2,)

HELD:-Tribunal has not committed any error in law or in facts in holding that appellant-Insurance Company is liable to pay the amount of compensation to the claimants. Total compensation payable to the claimants Rs.11,71,000/-. Multiplier of 17 applied.40% added to future prospects. (Para -5)

Appeal of claimants partly allowed.

Appeal of Insurance Company dismissed. (E-7)

List of Cases cited:-

1. United India Insurance Co. Ltd. Vs Smt. Suman & ors. , FAFO No.611 of 2013

2. National Insurance Vs Pranay Sethi & ors., 2017 LawSuit (SC) 1093

3. Sarla Verma & ors. Vs Delhi Transport Corp. & anr., 2009 ACJ 1298

4. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd., 2007(2) GLH 291

5. Smt. Sudesna & ors. Vs Hari Singh & anr. , Review Application No.1 of 2020 in F.A.F.O. No.23 of 2001

6. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd., F.A.F.O. No.2871 of 2016

(Delivered by Hon'ble Ajai Tyagi, J.)

1. These two appeals are preferred against the same judgement one FAFO No.265 of 2022 on behalf of the claimants for enhancement of amount of compensation and another FAFO No.100 of 2014 by United India Insurance Co. Ltd. for setting aside the impugned judgement.

2. The impugned judgement was passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.3, Saharanpur on 7.10.2013 in MACP No.146 of 2012, Smt. Sonia and others Vs. Jaleel and others by which the claim petition of the claimants was allowed and Rs.4,79,000/- compensation was awarded with 6% per annum rate of interest.

3. The brief facts of the case are that aforesaid claim petition was filed due to the death of deceased Subhash Chand @ Subhash Kumar in a road accident. It is submitted in petition that on 24.06.2012, the deceased was going from his village with his Bhabhi-Smt. Rachana by Motorcycle No.UP-11 AD 9794. At 07:30 PM when he reached near village Chhibna, a tractor trolley No. UP 11 AC 8341 came from the opposite side which was driven by negligently and rashly by its driver. Deceased stopped his motorcycle at the left side of the road but the tractor driver hit the motorcycle. In this accident, deceased sustained fatal injuries and died on way to the hospital. Owner of the tractor and Insurance Company filed their respective statements. Learned Tribunal allowed the petition and awarded Rs.4,79,000/- with 6% rate of interest as compensation.

4. First of all, we take up the contention of the appeal preferred by the Insurance Company. Insurance Company has preferred the appeal merely on the two grounds. One is that at the time of accident, a trolley was attached to the tractor but the trolley was not insured and second ground that at the time of accident, the tractor was being driven by Muntazir but in order to avoid his liability the owner of the tractor produced Mohd. Farmaan as driver of the vehicle. Learned counsel for the Insurance Company submitted that in fact the driver of the tractor have not having a valid license. First information report was lodged against Muntazir showing him the driver of the tractor but the charge sheet was submitted against Mohd. Farmaan due to

collusion of the owner of the tractor and the investigating officer. Learned counsel next submitted that it is the admitted case of the claimants that the trolley was attached to the tractor and the trolley was not insured hence at the time of accident, the tractor was being used for commercial purpose and it was being applied in breach of the condition of insurance policy. This contention of Insurance Company is vehemently opposed by the learned counsel for the claimants, who submitted that this provision of law has been settled by this Court in **United India Insurance Co. Ltd. vs. Smt. Suman and Others** in FAFO No.611 of 2013 dated 06.03.2013. Shri S.D. Ojha, learned counsel for the claimants submitted that this case is covered by the aforesaid case. It is further submitted by Shri Ojha that it is on record that at the time of accident, trolley was vacant and trolley was not being used for any commercial purpose.

5. So far as the question of driver of the tractor is concerned, we are not convinced with the submission made by the Insurance Company. Charge sheet was submitted by investigating officer against Mohd. Farmaan and not against Muntazir. Charge sheet was submitted after making thorough investigation, hence, now it would not be open for the Insurance Company to contend that it is not liable as the charge sheet is submitted against Mohd. Farmaan and not against Muntazir. Submission of Insurance Company is that the trolley should have been insured but once the tractor is insured, the Insurance Company cannot wriggle out from its liability as held by this Court in United India Insurance Co. Ltd. vs. Smt. Suman and Others in FAFO No.611 of 2013. The submission of Insurance Company that tractor was being used for commercial purpose cannot be accepted in absence of any such evidence because nothing was loaded in the trolley at the time of accident and it was vacant. Hence, in our considered opinion, the learned Tribunal has not committed any error in law or in facts in holding that appellant-Insurance Company is liable to pay the amount of compensation to the claimants.

6. Now we come to the point of amount of compensation awarded by the Tribunal.

7. Learned counsel for the claimants submitted that Tribunal has assessed the income of the deceased as Rs.3,000/- per month, which is very low because deceased was having agriculture income. Hence at least Rs.6,000/- per month income should have been assessed. It is not disputed by Insurance Company that deceased was not agriculturist. Hence, we assess the income of the deceased at Rs.5,000/- per month. Learned Tribunal has not awarded any sum towards future loss of income. In **National Insurance Vs. Pranay Sethi and Others, 2017 LawSuit (SC) 1093**, compensation will be awarded for future loss of income also. The age of deceased was 27 years at the time of accident, hence according to the aforesaid judgement 40% will be added for future prospects. The deceased was survived by his wife and three children and father. Therefore, keeping in view the number of dependents ¼ of income should be deducted towards personal expenses of the deceased. Since the age of the deceased was 27 years, therefore, as per the judgement of Hon'ble Apex Court in **Sarla Verma and Others Vs. Delhi Transport Corporation and Another, 2009 ACJ 1298,** a multiplier of 17 will be applied. Learned Tribunal has awarded Rs.10,000/- for loss of consortium, Rs.5,000/- for loss of estate and Rs.5,000/- for funeral expenses under the

head of non-pecuniary damages, which are on lower side. As per judgement of the Apex Court in Pranay Sethi (supra) claimants shall be entitled to Rs.15,000/- for funeral expenses and Rs.15,000/- for loss of estate. Apart from it, the wife of the deceased shall be entitled to get Rs.40,000/- for loss of consortium. Non-pecuniary damages are with 10% increase every three years. Hence, we grant Rs.1,00,000/- in the head of non-pecuniary damages.

8. Hence, the total compensation payable to the claimants is computed herein below:-

i. Annual Income : Rs.5,000/- x 12 = Rs.60,000/-

ii. Amount towards future prospects : 40% = Rs.24,000/-

iii. Total Income : Rs.60000+ Rs.24,000/- = Rs.84,000/-

iv. Income after deduction of ¼ = 84,000-21,000 = Rs.63,000/-

vi. Multiplier applicable : 17

vii. Total loss of dependency Rs.63,000/- x 17 = Rs.10,71,000/-

viii. Amount under non-pecuniary heads : Rs.1,00,000/-

ix. Total compensation : Rs. 10,71,000 + Rs.1,00,000 = Rs.11,71,000/-

9. As Insurance Company has conciliated the matter, 6% per annum rate of interest should be paid. The insurance company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 6% per annum from the date of filing of the claim petition till amount is deposited. The amount already deposited be deducted from the amount to be deposited.

10. Accordingly, the appeal of claimants is partly allowed and appeal of the Insurance Company is dismissed.

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 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.

12. The record and proceedings be sent back to the Tribunal for disbursement.

(2022)04ILR A225
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1165 of 2009

Prabhat Kumar & Ors. ...Appellants
Versus
Dheeraj Khurana & Anr. ...Respondents

Counsel for the Appellants:
Sri Vishesh Kumar Gupta, Sri A.K. Shukla

Counsel for the Respondents:
Sri Radhey Shyam

(A) Torts Law - Motor Vehicles Act, 1988 - Section 166,173 - compensation enhancement - principles for grant of just compensation - minor who had become practically crippled - sympathetic view required by tribunal in such matters when the child has suffered such a great loss of body part.(Para - 7,16)

(B) Torts Law - Motor Vehicles Act, 1988 - principle of "res ipsa loquitur" - "the things speak for itself" - principle of contributory negligence - A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place. (Para - 10,11)

Victim was minor (age 16 years) - tribunal held - accident taken place due to rash and negligent driving of the motorcyclist - minor was also negligent - contributory negilence of child 10% - injured did not have licence to drive moped when the accident occurred - right side kidney of the appellant damaged - tribunal not taken sympathetic view - child suffered great loss of body part - Theories of just compensation - overlooked by the tribunal - no disability or injury report was filed - award a sum of Rs. 55,363 - rate of interest 65 to accused - multiplier 18.

HELD:-The findings of fact that the child was negligent and accident was between the Scotty which was being driven by the injured is upheld . Perversity in non granting just compensation. Total Compensation Rs. 4,42,160 /-. Rate of interest should be 7.5% from the date of filing of the claim petition till the amount is deposited.(Para -14 ,17,19,22,23)

Appeal partly allowed. (E-7)

List of Cases cited:-

1. Kajal Vs Jagdish Chand & ors. , AIR 2020 SC 776

2. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. ,F.A.F.O. No. 1818 of 2012

3. Bishan Dass Vs Himachal Road Transport Corporation (hrtc) & Ors, AIR 2014 ACJ 1012

4. Hdfc Ergo General Insurance Co. Ltd. Vs Mukesh Kumar, 2021 (0) AJEL-SC 67851

5. Jithendran Vs New India Assurance Co. Ltd., 2021 (0) AIJEL-SC 67944

6. A.V. Padma Vs Venugopal, 2012 (1) GLH (SC), 442

7. Smt. Hansagauri P. Ladhani Vs The Oriental Insurance Co. Ltd., 2007(2) GLH 291

8. Smt. Sudesna & ors. Vs Hari Singh & anr. , F.A.F.O. No.23 of 2001

9. 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 Ajai Tyagi, J.)

1. Heard Shri A.K. Shukla for Vishesh Kumar Gupta, learned counsel for appellants; Shri Radhey Shyam, learned counsel for respondent-insurance company; and perused the judgment and order impugned.

2. This First Appeal From Order has been filed under section 173 of Motor Vehicle Act, 1988 (hereinafter referred to 'Act, 1988') by appellants, being aggrieved by judgment and award dated 20.12.2008 passed by Motor Accident Claims Tribunal, Court No.3, Moradabad (hereinafter referred to as 'Tribunal') in Claim Petition No. 326 of 2006 awarding a sum of

Rs.55,363/- with interest at the rate of 6% to the injured.

3. The accident having taken place is not in dispute. A young boy of 16 years in the year 2006 met with an accident, the learned Tribunal granted a sum of Rs.55,363/- only. The tribunal considered contributory negligence of child to be 10%. The appellant having suffered loss of income besides other grievous injuries in whole of the body and had sustained compound fractures, various operations were carried out on appellant by doctors at Shri Sai Hospital and All India Medical Institute of Delhi whereby his one kidney was removed due to injuries.

4. The vehicle being insured with insurance company and there is no breach of policy condition is not in dispute. The accident occurred way back in the year 2006 is not in dispute. The involvement of the vehicle is not in dispute and it is proved before the Tribunal that the driver of the vehicle was negligent.

5. The appellant challenges the findings being bad on facts against the record as far non grant of compensation and negligence is concerned. A factual data is not adverted to except that the accident occurred on 8.7.2006 at about 9.00 p.m. when the driver of motor cycle rashly and negligently drove Motorcycle No.UP 21 Q 2563 and caused accident injuring the appellant, when the appellant was going on his road side by moped which is proved by appellant by oral and documentary evidence as such appellant sustained injury on right side kidney and lever was badly damaged in the said accident. The appellant (minor) was about 16 years of age when the accident occurred and his **one kidney was removed** and he would be by now 32 years of age. Unfortunately tribunal has awarded only Rs.55363/- with 6% rate of interest in which medical Rs.14,000/- is for permanent disability and Rs.29,363/- for medical expenses and Rs.7000/- for special diet and Rs.5000/- for pain and suffering only.

6. It is submitted by the learned counsel for the appellant claimant that the Tribunal has materially erred in calculating the compensation. Learned counsel for appellant has heavily relied on the judgment of ***Kajal v. Jagdish Chand and others reported in AIR 2020 SC 776*** and has contended that the principles for grant of just compensation has not been followed by the tribunal though the appellant proved that the claimant was operated and one of his kidneys got damaged due to accidental injuries had to be removed. According to learned counsel for appellant it was because of the fault of the opponent driver, that the appellant suffered the injuries. According to the learned counsel for the appellant notional yearly income of the injured should be considered Rs.60,000/- per annum; and 40% be added towards future loss of income; multiplier of 18 be granted; loss of earning be calculated at 30% disability; and Rs.1,00,000/- towards pain and suffering; and Rs.75,000/- for all other non pecuniary damages be granted which would be just and proper and would be adequate compensation. Learned counsel has relied on decision of Apex Court in case titled Kajal (Supra), paragraphs 15 and 16 of the (Kajal Supra) judgment quoted herein below:

"15. In R.D. Hattangadi v. Pest Control (India) Pvt. Ltd.6, dealing with the different heads of compensation in injury cases this Court held thus:

"9. Broadly speaking, while fixing the amount of compensation payable

to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas nonpecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far as non pecuniary damages are concerned, they may include:

(i) damages for mental and physical shock, pain and suffering already suffered or likely to be suffered in the future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, 5 1980 ACJ 55 (SC) 6 (1995) 1 SCC 551 discomfort, disappointment, frustration and mental stress in life."

16. In Raj Kumar v. Ajay Kumar and Others, this Court laid down the heads under which compensation is to be awarded for personal injuries.

"6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i)Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising: (a) Loss of earning during the period of treatment; (b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii) (a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life." 7 (2011) 1 SCC 343"

7. Recently the Supreme Court had an occasion of deciding a similar matter relating to a minor who had become practically crippled. The principles of just compensation have been laid in the said judgment.

8. The Tribunal held that claimant/appellant to be negligent to the tune of 10%. The counsel has submitted that appellant was not at all negligent.

9. The issue of negligence has to be decided from the perspective of the law laid down by the Courts.

10. The term negligence means failure to exercise care towards others which a

reasonable and prudent person would in a circumstance. Negligence can be both intentional or accidental which can also be accidental. More particularly, term negligence connotes reckless driving and the injured of claimants 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 contributory 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.

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 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."

13. The aforesaid judgment would apply to the facts of this case just because the injured did not have licence to drive moped when the accident occurred would not permit us to concur with the tribunal.

14. While going through the record, it is proved that the victim was 16 years of age and was a minor. In our case, the tribunal on the basis of evidence held that accident had taken place due to rash and negligent driving of the motorcyclist and held the minor was also negligent. The tribunal relied on the decision of the Apex Court in ***Bishan Dass v. Himachal Road Transport Corporation (hrtc) And Ors, AIR 2014 ACJ 1012*** and, therefore, the findings of fact that the child was negligent and accident was between the Scotty which was being driven by the injured is upheld. **The driver of the motorcycle did not even appear before the tribunal as the witnesses have been examined who have deposed in favour of the minor.**

COMPENSATION

15. We now decide the compensation the right side kidney of the appellant was damaged is an admitted position of fact which is borne out from the records and the judgment, he was treated by several doctors he was treated in All India Medical Institute, Delhi who was opined as oath as

PW-7 (Dr. Loti P.) just because the respondent has contended that treatment was on Government expenses. The injuries suffered by the appellant go to show that his **one kidney had to be removed.** The learned tribunal has taken a hyper technical view in the matter. The medical treatment papers also go to show that the liver was damaged, there was lot of blood which had to be drained. Dr. Arun and Dr. R.S. Gupta had also examined the juvenile, Dr. Mohit Agarwal who was working with Sai Hospital has also treated him his left kidney have to be removed. There was blood Clots in the stomach and therefore he had to be operated his health though Dr. Mohit Agarwal has been examined as PW-4, who has stated that there was grade-4 injuries to the damage and grade-4 injury means that the kidney was damaged to a great extent.

16. The learned tribunal has not taken sympathetic view which is required by tribunal in such matters when the child has suffered such a great loss of body part. Theories of just compensation has also been overlooked by the tribunal while adjudicating this matter, just because no disability or injury report was filed. Section 166 of the Motor Vehicles Act, 1988 reads as follows:-

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. 1[(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.] 2[***] 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."

17. We reproduce the evidence of doctor, as PW-7 (Dr. Loti) has categorically mentioned that "मरीज के पेट में 600 ml खून जमा था, राइट किडनी को बहार निकल दिया था". The patient was admitted from 9.7.2006 to 15.7.2006, thereafter also he was under constant treatment and it is opined that he would need treatment in future despite that the tribunal has granted a meagre amount of Rs.55,633/- out of Rs.

29,363/- is for medical expenses, and Rs. 5000/- for pain and suffering. This shows the perversity in non granting what is known as just compensation.

18. Victim was 16 years of age. As per the medical report, he has suffered 30% disability for the body as a whole which means it would be 30% disability for earning. The accident occurred before a decade, namely, 2006. Hence he would be at the age of 32 years as of today.

19. We, therefore, would rely on the judgment in case titled Kajal (Supra) and in this backdrop let us evaluate the income in view of the decisions of the Apex Court titled **Hdfc Ergo General Insurance Co. Ltd. v. Mukesh Kumar, 2021 (0) AJEL-SC 67851 and Jithendran v. New India Assurance Co. Ltd., 2021 (0) AIJEL-SC 67944** and, the recalculate the compensation which would be as follows:

i. Income =3,000/-p.m.

ii. Percentage towards future prospects : 40% namely = Rs.1200/- iii. Total income : Rs.3000+1200 = Rs.4200/-

iv. Loss of earning capacity: 30% namely Rs.1260/-

v. Annual Loss : Rs.1260 x 12 = Rs.15,120/-

vi. Multiplier applicable : 18

vii. Total Loss : Rs. 15,120 x 18 = Rs.2,72,160/-

viii. For pain & sufferings : Rs.1,00,000/-(as his one kidney has been removed)

ix. All other heads for non pecuniary damages = Rs.70,000/-

x. **Total compensation (vii+viii+ix)**: Rs.2,72,160 + Rs. 1,00,000 + Rs.70,000 =**4,42,160/-**

20. 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.

21. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagauri 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.

22. 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."

23. 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.

24. We are thankful to learned counsels for the parties for ably assisting the Court

25. The lower court record be sent back, if here, to the tribunal for disbursement.

26. A copy of this order be sent to Shri P.C. Mishra, Additional District Judge/MACT, Court No.3, Moradabad, if he is in service so that he may be more careful in future.

(2022)04ILR A233
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1176 of 2007
&
First Appeal From Order No. 1177 of 2007
&
First Appeal From Order No. 1179 of 2007

Gopi Charan ...Appellant
Versus
Smt. Rekha Dwivedi & Anr. ...Respondents

Counsel for the Appellant:
Sri Anurudh Chaturvedi

Counsel for the Respondents:

(A) Torts Law - Motor vehicle Act,1988 - Section 173 - Contributory negligence - Composite negligence - Pillion rider - Principle of " res ipsa loquitur" - " the things speak for itself" - Mere failure to avoid the collision by taking some extraordinary precaution, does not in itself constitute negligence - Two Pillion riders did not mean that the rider has contributed in the accident - vehicle which is being driven should show more care and caution (Cardinal principle).(Para - 16, 23, 27)

(B) Torts Law - Principle of Contributory negligence - a person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place - that amount will be detected from the compensation payable to him if he is injured - to legal representative if he dies in the accident .(Para - 17)

(C) Torts Law - Principle of Composite negligence - liability is joint and several - claimant entitled to seek compensation either from the driver of both the vehicles or he may seek entire compensation from any of the drivers .(Para - 28)

(D) Tax Law - The Income Tax Act, 1961- Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' - if the amount of interest does not exceeds Rs.50,000/- in any financial year - registry of Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income-Tax Authority. (Para - 39)

Elder son of appellant - along with his mother and younger brother aged 6 were going by motorcycle - Tata Jeep came from opposite direction - driven by its driver - rashly and negligently and dashed with the motorcycle - caused accident, 3 persons scummed to the injuries sustained due to the accident - died on the spot - claimant (father of two deceased and husband of third) - filed claim petition.(Para - 7)

HELD:-Vehicle of the deceased did not meet with the accident because the minor child was accompanying the diseased as a pillion on the vehicle. Accident cannot be said to have occurred because of negligence of the rider of two vehicles. Mother who was riding on the bike as pillion sustain injuries . Husband is entitled to compensation as he is class II heir and , non joinder of the owner and deduction of the amount does not arise . Claimants entitled to Rs 2,25,000/- for deceased (Avanish) , Rs. 5,59,000/- for deceased (Savitri) and Rs. 49,00,000/- for deceased (Manish Singh) . Appellants entitled to the rate of interest at 7.5 % per annum. (Para - 25,35)

Appeals partly allowed. (E-7)

List of Cases cited:-

1. U.P.S.R.T.C. Vs Km. Mamta & ors., AIR 2016 SC 948

2. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & , F.A.F.O. No. 1818 of 2012

3. Patel Roadways & anr. Vs Manish Chhotalal Thakkar &, 2001 ACJ 180

4. United India Insurance Co. Ltd. Vs Kiritikumar Tulsibhai Patel, First Appeal No.1450 of 2016

5. Khenyei Vs New India Assurance Co. Ltd. & &, 2015 LawSuit (SC) 469

6. K. Anusha Vs Regional Manager, Shriram General Insurance Co. Ltd., 2021 (4) TAC 341

7. Archit Saini & anr. Vs Oriental Insurance Co. Ltd., AIR 2018 SC 1143

8. Mohammad Siddique & anr. Vs National Insurance Co. Ltd. & &, 2020 (3) SCC 57

9. Bijoy Kumar Dugar Vs Bidyadhar Dutta & &, 2006 (1) TAC 969

10. Manju Devi's case, 2005 (1) TAC 609 = 2005 AICC 208 (SC)

11. Munna Lal Jain & anr. Vs Vipin Kumar Sharma & &, 2015 (4) AWC 3845 (SC)

12. National Insurance Co. Ltd. Vs Mannat Zohal & &, 2019 (2) TAC 705 (SC),

13. A.V. Padma Vs Venugopal, 2012 (1) GLH (SC), 442

14. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Co. Ltd., 2007(2) GLH 291

15. Smt. Sudesna & anr. Vs Hari Singh & anr. , F.A.F.O.No.23 of 2001

16. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors.

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajai Tyagi, J.)

1. Heard Sri Anurudh Chaturvedi, learned counsel for the appellant, Sri S.K. Mehrotra, learned counsel for the respondent-Insurance Company and

perused the record. None appears for the owner or driver of offending vehicle.

2. These appeals, under Section 173 of Motor Vehicles Act, 1988 (hereinafter referred to as "Act'), are preferred at the behest of the claimant challenging the judgment and award dated 12.01.2007 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.3, Kanpur Dehat (hereinafter referred to as 'Tribunal') in M.A.C.P. Nos.398/2005, 399/2005 and 400/2005 (the Tribunal has passed separate awards).

3. The challenge to the decision regarding negligence of deceased and compensation for the death of two children of the appellant and his wife in the road accident which occurred on the fateful day are the twin issues posed for our decision. The finding of Tribunal about liability of insurance company has attained finality and there is no dispute about the same. The accident having caused death of three persons is not in dispute. The involvement of two vehicles is not in dispute. The age of deceased is also not in dispute before us.

4. The parties are referred to as claimant/appellant and the respondent/Insurance company.

5. The Apex Court in ***UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SC 948,*** has held that all the issues raised in the memo of appeal are required to be addressed and decided by the first appellate court.

6. The issues before us are to decide the twin issues posed for our consideration namely (1) Whether deceased driving motorcycle had contributed to the accident having taken place and, therefore, the deduction of the compensation for death of all three by the Tribunal is justified or not? (2) (a) The quantum of compensation awarded requires any re-computation (b) Whether percentage of interest granted requires interference by this Court or not?

7. The brief facts as culled out from record and necessary for our purpose are that on 17.5.2005 at about 4:30 p.m. elder son of appellant along with his mother and younger brother aged 6 were going from their house to Bangarmau by motorcycle, bearing no.UP70AU-2377. The deceased along with his mother and younger brother was plying his motorcycle and when he reached near Udaipur crossing in the district Kanpur Nagar, Tata Jeep, bearing no.UP77C-3262 came from opposite direction which was being driven by its driver rashly and negligently and dashed with the motorcycle and caused the accident, 3 persons scummed to the injuries sustained due to the accident and died on the spot. The claimant, who is father of two deceased and husband of third, filed claim petition. Owner of the Jeep and its Insurance company filed their respective written statements which were of denial.

8. The claimant examined himself as PW1. The documentary evidence was filed and proved so as to prove that accident occurred due to rash and negligent driving of Jeep driver. The Tribunal after framing issues and on conclusion of evidence returned the finding that as there was head on collision, both were equally negligent.

9. The appeal, being appeal no.1176 of 2007, pertains to the death of younger son of the appellant Avanish whose age was between 6 - 7 years at the time of accident. Learned Tribunal has considered contributory negligence of driver of the

offending Jeep and motorcycle to the tune of 50% each. The Tribunal awarded Rs. 2,25,000/- but deducted 1/2 from the calculated compensation and ultimately has awarded Rs. 1,14,500/- as compensation. The deduction of 1/2 or 50% was on account of contributory negligence of the driver of the motorcycle. These two aspects are under challenge. The appeal no.1177 of 2007 relates to wife of appellant and appeal no.1179 of 2007 is preferred by the father of the deceased, who was driving the vehicle.

10. Learned Counsel for the appellant submitted that there were three deaths in the accident. The deceased was younger brother of the driver of motorcycle. The minor child was pillion rider and he had not contributed to the accident having taken place, hence, there was no justification for deduction of 50% compensation to be granted to claimant by the Tribunal. It was not a case of contributory negligence qua deceased child. It is next submitted by the learned Counsel that the Tribunal has not awarded any sum for love and affection and mental agony to the appellant/claimant, who was the father of the child. The mother of the deceased was also not a contributory to the accident having taken place qua her, it was a case of composite negligence despite that the Tribunal deducted 50% from the compensation awarded which, according to the learned Counsel for the appellant, is bad in the eye of law.

11. Learned Counsel also submitted that the Tribunal has directed that no interest shall be paid if payment of compensation is made by the Insurance company within 2 months from the date of award and in case if the same is not deposited within 2 months, then the appellant would be entitled to 6% interest from the date of filing of claim petition. Learned Counsel submitted that 18% interest should have been awarded and this conditional order is against the mandate of Section 171 of the Act and the said direction requires to be modified.

12. Learned Counsel for the Insurance company in F.A.F.O. No.1176 of 2007 vehemently objected to the submission advanced by the Counsel for appellant and submitted that the deceased was a child of 7 years of age and he was not earning member. It is further submitted that the Tribunal has rightly assessed his notional annual income at Rs. 15,000/- per years and damages for funeral expenses are also granted by the Tribunal. Learned Counsel submitted that as per II Schedule of Act, the Tribunal has calculated just compensation which does not call for any interference by this Court.

13. The learned Counsel for appellant has submitted that learned Tribunal has lost total sight of the fact that it was not a case of contributory negligence qua 2 persons. As far as the younger son and wife of appellant are concerned, it was a case of composite negligence and not contributory negligence.

14. It is further submitted by the learned Counsel for Insurance Company that In this case, it is an admitted position of fact that there was collusion between motorcycle and Jeep. It is further submitted that learned Tribunal has fixed contributory negligence of both the drivers to the tune of 50% each. It is not in dispute that the deceased child and mother were pillion riders on the motorcycle. They were not driving the motorcycle yet the Tribunal deducted 50% amount from total compensation payable, which is not bad

and not against the principles of composite negligence.

15. While dealing with submission on issue of negligence raised by the learned counsel for the appellant, it would be relevant to discuss the principles for deciding contributory negligence and for that the principles for considering negligence will also have to be looked into.

FINDINGS ON ISSUE OF NEGLIGENCE

16. The term negligence means failure to exercise care towards others, which a reasonable and prudent person would in a circumstance or take action which such a reasonable person would not. Negligence can be both intentional or accidental though it is normally accidental. More particularly, it connotes reckless driving and the injured or the claimants namely legal representative of deceased 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.

17. The principle of contributory negligence has been discussed time and again. A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place and that amount will be deducted from the compensation payable to him if he is injured and to legal representatives if he dies in the accident.

18. Reference to certain judicial precedents would make things clear. 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."

19. If we uphold the finding of negligence of the deceased in those circumstances, the judgment of ***Khenyie (infra)*** will have to be interpreted in a different manner. It was the wife, who was

riding on the back as pillion and she sustained fatal injuries. It is husband of the deceased, who is entitled to the claim as he is the sole survivor. It has not been brought on record whether the motorcycle owned by the deceased or his father namely the claimant-appellant, then as per the judgment of Khenyie, no doubt it is the right of the claimant to claim any of the tortfeasors, who were the tortfeasors, would be the rider of the motorcycle and, therefore, the Insurance company cannot be directed to recover from the said tortfeasor and, therefore, the amount has to be deducted from available corpus.

20. The extent of the share of the husband should be deducted. However, this would depend on the fact whether we hold the deceased liable for contributory negligence or not. We are fortified by our view in the case of ***Patel Roadways and another Vs. Manish Chhotalal Thakkar and others, 2001 ACJ 180,*** and decision of the Gujarat High Court in ***United India Insurance Company Ltd. Vs. Kiritikumar Tulsibhai Patel, First Appeal No.1450 of 2016,*** decided on 1.9.2016.

21. As we are even concerned as to whether qua the death of two pillion riders whether deduction is proper or not reference to case titled ***Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469***, is necessary wherein the Apex Court 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

22. The 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.**

23. The Hon'ble Supreme Court in ***K. Anusha Vs. Regional Manager, Shriram General Insurance Co. Ltd., 2021 (4) TAC 341,*** has observed that mere failure to avoid the collision by taking some extraordinary precaution, does not in itself constitute negligence.

24. Reference to the decision of the Apex Court in ***Archit Saini and Another Vs. Oriental Insurance Company Limited, AIR 2018 SC 1143,*** can be made wherein the finding of the Tribunal was upheld by Apex Court holding that driver of scooter was not negligent. The findings are verbatim referred as they are very important for our purpose would be very relevant for our purpose so as to decide whether driver of motor cycle has been rightly held to be negligent to the tune of 50%:

"5.The respondents had opposed the claim petition and denied their liability but did not lead any evidence on the relevant issue to dispel the relevant fact. The Tribunal after analysing the evidence, including the site map (Ext. P-45) produced on record along with charge-sheet filed against the driver of the Gas Tanker and the arguments of the respondents, answered Issue 1 against the respondents in the following words:

"21. Our own Hon'ble High Court in a case captioned Lakhu Singh v. Uday Singh [Lakhu Singh v. Uday Singh, 2007 SCC OnLine P&H 865 : PLR (2007) 4 P&H 507] held that while considering a claim petition, the Tribunal is required to

hold an enquiry and act not as criminal court so as to find whether the claimants have established the occurrence beyond shadow of any reasonable doubt. In the enquiry, if there is prima facie evidence of the occurrence there is no reason to disbelieve such evidence. The statements coupled with the facts of registration of FIR and trial of the accused in a criminal court are sufficient to arrive at a conclusion that the accident has taken place. Likewise, in Kusum Lata v. Satbir [Kusum Lata v. Satbir, (2011) 3 SCC 646 : (2011) 2 SCC (Civ) 37 : (2011) 2 SCC (Cri) 18 : (2011) 2 RCR (Civil) 379] the Hon'ble Apex Court has held that in a case relating to motor accident claims, the claimants are not required to rove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind. 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.

22. After considering the submissions made by both the parties, I find that PW 7 Sohan Lal eyewitness to the occurrence has specifically stated in his affidavit Ext. PW 7/A tendered in his evidence that on 15-12-2011 at about 20.30 p.m. he along with PHG Ajit Singh was present near Sanjha Chulha Dhaba on the National Highway leading to Jammu. All the traffic of road was diverted on the eastern side of the road on account of closure of road on western side due to construction work. In the meantime a Maruti car bearing No. HR 02 K 0448 came from Jammu side and struck against the back of Gas Tanker as the driver of the car could not spot the parked tanker due to the flashlights of the oncoming traffic from front side. Then they rushed towards the spot of accident and noticed that the said tanker was standing parked in the middle of the road without any indicators or parking lights.

23. The statement of this witness clearly establishes that this was the sole negligence on the part of the driver of the Gas Tanker especially when the accident was caused on 15-12-2011 that too at about 10.30 p.m. which is generally time of pitch darkness. In this way, the driver of the car cannot be held in any way negligent in this accident. Moreover, as per Rule 15 of the Road Regulations, 1989 no vehicle is to be parked on busy road.

24. The arguments of the learned counsel for the respondent that PW 7 Sohan Lal has stated in his cross-examination that there was no fog at that time and there were lights on the Dhaba and the truck was visible to him due to light of Dhaba and he was standing at the distance of 70 ft from the truck being road between him and the truck and he noticed at the car when he heard voice/sound caused by the accident so Respondent 1 is not at all negligent in this accident but these submissions will not make the car driver to be in any way negligent and cannot give clean chit to the driver of the Gas Tanker because there is a difference between the visibility of a standing vehicle from a place where the person is standing and by a person who is coming driving the vehicle because due to flashlights of vehicles coming from front side the vehicle coming from opposite side cannot generally spot the standing vehicle in the road that too in night-time when there is neither any indicator or parking lights nor blinking lights nor any other indication given on the back of the stationed vehicle, therefore, the driver of the car cannot be held to be in any way negligent rather it is the sole negligence on

the part of the driver of the offending Gas Tanker as held inGinni Devi case [Ginni Devi v. Union of India, 2007 SCC OnLine P&H 126 : 2008 ACJ 1572] , Mohan Lal case [New India Assurance Co. Ltd. v. Mohan Lal, 2006 SCC OnLine All 459 : (2007) 1 ACC 785 (All)] . It is not the case of the respondent that the parking lights of the standing truck were on or there were any other indication on the backside of the vehicle standing on the road to enable the coming vehicle to see the standing truck. The other arguments of the learned counsel for Respondent 3 that the road was sufficient wide road and that the car driver could have avoided the accident, so the driver of the car was himself negligent in causing the accident cannot be accepted when it has already been held that the accident has been caused due to sole negligence of the driver of the offending stationed truck in the busy road. The proposition of law laid down in Harbans Kaur case [New India Assurance Co. Ltd. v. Harbans Kaur, 2010 SCC OnLine P&H 7441 : (2010) 4 PLR 422 (P&H)] and T.M. Chayapathi case [New India Assurance Co. Ltd. v. T.M. Chayapathi, 2004 SCC OnLine AP 484 : (2005) 4 ACC 61] is not disputed at all but these authorities are not helpful to the respondents being not applicable on the facts and circumstances of the present case. Likewise, non-examination of minor children of the age of 14 and 9 years who lost their father and mother in the accident cannot be held to be in any way detrimental to the case of the claimants when eyewitness to the occurrence has proved the accident having been caused by the negligence of Respondent 1 driver of the offending vehicle.

25. Moreover, in Girdhari Lal v. Radhey Shyam [Girdhari Lal v. Radhey Shyam, 1993 SCC OnLine P&H 194 : PLR (1993) 104 P&H 109] , Sudama Devi v. Kewal Ram [Sudama Devi v.Kewal Ram, 2007 SCC OnLine P&H 1208 : PLR (2008) 149 P&H 444] andPazhaniammal case [New India Assurance Co. Ltd. v. Pazhaniammal, 2011 SCC OnLine Ker 1881 : 2012 ACJ 1370] our own Hon'ble High Court has held that "it is, prima facie safe to conclude in claim cases that the accident has occurred on account of rash or negligent driving of the driver, if the driver is facing the criminal trial on account of rash or negligent driving.'

26. Moreover, Respondent 1 driver of the offending vehicle has not appeared in the witness box to deny the accident having been caused by him, therefore, I am inclined to draw an adverse inference against Respondent 1. In this context, I draw support from a judgment of the Hon'ble Punjab & Haryana High Court reported asBhagwani Devi v. Krishan Kumar Saini[Bhagwani Devi v. Krishan Kumar Saini, 1986 SCC OnLine P&H 274 : 1986 ACJ 331] . Moreover, Respondent 1 has also not filed any complaint to higher authorities about his false implication in the criminal case so it cannot be accepted that Respondent 1 has been falsely implicated in this case.

27. In view of above discussion, it is held that the claimants have proved that the accident has been caused by Respondent 1 by parking the offending vehicle bearing No. HR 02 AF 8590 in the middle of the road in a negligent manner wherein Vinod Saini and Smt Mamta Saini have died and claimants Archit Saini and Gauri Saini have received injuries on their person. Shri Vinod Saini, deceased who was driving ill-fated car on that day cannot be held to be negligent in any way. Accordingly, this issue is decided in favour of claimants." (emphasis supplied)"

25. We are fortified in our view by the judgment of the Apex Court in ***Mohammad Siddique and another Vs. National***

Insurance Company Limited and others, 2020 (3) SCC 57, wherein it has been held that two pillion riders did not mean that the rider has contributed in the accident. In our case, if we see the site map, it is clear that the vehicle of the deceased did not meet with the accident because the minor child was accompanying the deceased as a pillion on the vehicle. The accident cannot be said to have occurred because of negligence of the rider of two vehicles. The mother, who was riding on the bike as pillion, sustained injuries. Her husband is entitled to compensation as he is class II heir and as we upturn the finding of fact as far as negligence is concerned, non-joinder of the owner and deduction of the amount does not arise. The motorcyclist was not negligent which is proved by (a) oral testimony (b) F.I.R. (c) Site Plan (d) Chargesheet (e) evidence by best witness i.e. driver of Car if Car was a bigger vehicle (g) strayed from its path came and dashed with motorcycle which was driven on its correct side.

26. The appellant has examined himself. He was not an eye witness. PW2 - Sarvesh Kumar is the person, who has lodged the F.I.R. The chargesheet was led against the driver of Tata Spacio and PW-2 in his oral testimony has categorically mentioned that the accident occurred due to rash and negligent driving of Tata Spacio. The Tribunal has relied on the decision of ***Bijoy Kumar Dugar Vs. Bidyadhar Dutta and others, 2006 (1) TAC 969,*** so as to come to the conclusion that as the accident occurred and as it was a head-on-collision, both the drivers are held to be equally negligent. The learned Tribunal has not given any cogent reason as to why it held both the drivers to be equally negligent. One of the reasons given is that the vehicle was carrying more persons than its capacity of sitting.

27. While going through the F.I.R., the chick F.I.R. and Chargesheet of the site plan, it is clear that the accident did not occur because the vehicle was having three persons but, it was because of the tata scorpio which was being plied on the same direction, came and dashed the motorcyclist from behind. It is cardinal principle that the vehicle which is being driven should show more care and caution. The driver and owner of the Car tata spacio have not stepped into the witness box. Having a minor child on the motorcycle was itself not a cause of the accident. This finding of fact by the Tribunal is absurd. This takes us what was the negligence of the motorcycle. He stayed trying to save the dash from another vehicle and from truck.

28. The factual scenario in this case goes to show that the deceased pillion riders were not at all responsible for the accident in question and it was a case of composite negligence qua them. In case of composite negligence, the claimant is entitled to seek compensation either from the driver of both the vehicles or he may seek entire compensation from any of the drivers because in case of composite negligence, the liability is joint and several. Hence, we upturn the finding of the learned Tribunal regarding contributory negligence as far as the petition regarding the death of pillion riders is concerned.

29. This takes us to the issue of quantum of compensation and directions for grant of interest which are as under:

FIRST APPEAL FROM ORDER NO.1176/2007

30. As far as deceased-Avanish is concerned, he was minor and the Tribunal has considered Rs.2,25,000/- as compensation which is just proper even in view of the decision in **Manju Devi's case,**

2005 (1) TAC 609 = 2005 AICC 208 (SC) of this High Court. The claimant would be entitled to Rs.2,25,000/- with interest.

FIRST APPEAL FROM ORDER NO.1177/2007

31. As far as deceased-Savitri is concerned. The Tribunal has considered the notional income of deceased at Rs.3000/- per month in view of the decisions of the Apex Court and High Courts, we are also of the considered view that the notional income of the deceased can be assumed at Rs. 3,000/- per month as the deceased was house wife and accident took place in 2005. To which, 40% should be added towards future loss of income. The multiplier applicable would be 15 in view of the decision in **Sarla Verma (supra)**. Deduction of 1/3rd towards personal expenses decided by Tribunal is just and proper. Further, the appellant is also entitled to a sum of Rs. 40,000/- for filial consortium for loss of wife and Rs. 15,000/- for funeral expenses. Hence, the appellant is entitled to following amount towards compensation:-

i. Monthly Income Rs. 3,000/-

ii. Percentage towards future prospects : 40 % namely Rs.1200/-

iii. Total income : Rs. 3000 + 1200 = Rs. 4200/-

iv. Income after deduction of 1/3rd: Rs. 2800/-

v. Annual income : Rs.2800 x 12 = Rs.33,600/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.33,600 x 15 = Rs. 5,04,000/-

viii. Amount under non pecuniary heads : Rs.40,000 + 15,000 = Rs.55,000/-

ix. Total compensation : Rs. 5,59,000/-

32. The claimant would be entitled to Rs.5,59,000/- with interest as decided herein after.

FIRST APPEAL FROM ORDER NO.1179/2007

33. As far as deceased-Manish Singh is concerned, the deceased was 24 years of age and was an Engineer in Infosys Technologies Ltd. Bangalore and was earning Rs. 38,778/- per month. The Tribunal has considered his income to be Rs. 8,470/-.

34. The income of the deceased was to be assessed as Rs.38,778/- per month and deduct 20% (as Income Tax from the same and other deductible allowances). We consider allowable amount for grant of compensation to be Rs.30,000/- (round figure) per month. To which 50% will have to be added towards future loss of income as he was salaried person in view of U.P. Motor Vehicles Rules 2011 amended and decision of ***Pranay Sethi.*** The deduction towards personal expenses would be 1/2 instead of 1/3rd as granted by the Tribunal as the deceased was bachelor. The Tribunal has granted multiplier of 11 considering the age of the parents which is bad and it should be 18 looking to the age of the deceased and in view of the decision in **Sarla Verma (Supra) and *Munna Lal Jain and another Vs. Vipin Kumar Sharma and others, 2015 (4) AWC 3845 (SC).*** The claimant would be entitled to Rs.40,000/- towards filial consortium as per the decision in ***Pranay Sethi (Supra)***. Hence, the total compensation would be as follows:

i. Monthly Income Rs.30,000/- (rounded up)

ii. Percentage towards future prospects : 50% namely Rs.15,000/-

iii. Total income : Rs.30,000+ 15,000 = Rs.45,000/-

iv. Income after deduction of 1/2 : Rs. 22,500/-

v. Annual income : Rs.22,500 x 12 = Rs.2,70,000/-

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.2,70,000 x 18 = Rs. 48,60,000/-

viii. Amount under non pecuniary heads : Rs.40,000/-

ix. Total compensation : Rs.49,00,000/-

35. We hold that in view of the latest decision of the Apex Court in ***National Insurance Company Limited Vs. Mannat Zohal and others, 2019 (2) TAC 705 (SC)***, the appellant shall be entitled to the rate of interest at 7.5% per annum in all the three appeals.

36. In view of the above, all the three appeals are partly allowed. The award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent - Insurance company shall deposit the difference amount within 8 weeks from today with interest @ 7.5% per annum 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.

37. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any.

38. 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 shall not be passed by Tribunal as 17 years have elapsed and appellant is in prime of life.

39. 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 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.

40. 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 judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

41. Registrar General to circulate a copy of this order with request to the

Tribunals to decide matters arising out of same accident by a common judgment and award and not by separate awards which may cause disparity.

42. The claimant-appellant is not an illiterate person and the matters are pending since 2007 before the High Court and since 2005 before the Tribunal, hence, the purpose of keeping the money in Fixed Deposit would not serve any purpose as the amount can be disbursed as per the judgment in **Bajaj Allianz General Insurance Company Pvt. Ltd. Vs. Union of India and others,** vide order dated 27.1.2022. The appellant may give his accounts detail so that the money can be directly disburse to him as and when the Insurance company deposits the same.

43. We hope this direction would be circulated by Registrar General after obtaining permission from Hon'ble the Chief Justice so that in future the Tribunal will follow this direction of disbursement of amount.

(2022)04ILR A247
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1249 of 2008

Smt. Sarika Gupta & Ors. ...Appellants
Versus
The New India Insurance Co. Ltd. & Anr. ...Respondents

Counsel for the Appellants:
Sri Namit Kumar Sharma, Sri Nitinjay Pandey

Counsel for the Respondents:
Sri Nagendra Kumar Srivastava

(A) Torts Law - Motor vehicle Act,1988 - Section 173 - quantum of compensation - beneficial difference of limitation - strict rules of civil procedure and evidence act are no required to adhered to.(Para - 8)

(B) Tax Law - The Income Tax Act, 1961- Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' - if the amount of interest does not exceeds Rs.50,000/- in any financial year - registry of Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income-Tax Authority. (Para - 12)

Accident occurred - causing death - deceased aged about 42 years of age - left behind him, widow and three minor children - Tribunal has assessed the income of the deceased to be Rs.2000/- per month - awarding a sum of Rs.3,67,000/- with interest at the rate of 6% as compensation - aggrieved by order - hence appeal.

HELD:-Total compensation : Rs.18,99,280/- . Direction to respondent-Insurance Company to 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. Amount already deposited be deducted from the amount to be deposited. Amount already deposited be deducted from the amount to be deposited.(Para - 11,14)

Appeal partly allowed. (E-7)

List of Cases cited:-

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors. , 2017 0 Supreme (SC) 1050

2. Vimla Devi & ors. Vs National Insurance Company Ltd. & anr. , (2019) 2 SCC 186

3. Anita Sharma Vs New India Assurance Co. Ltd. (2021), 1 SCC 171

4. Vimal Kanwar & ors. Vs Kishore Dan & ors., AIR 2013 SC 3830

5. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

6. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

7. Sarla Verma Vs Delhi Transport Corp., (2009) 6 SCC 121

8. A.VS Padma Vs Venugopal, 2012 (1) GLH (SC), 442

9. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd., 2007(2) GLH 291

10. Smt. Sudesna & ors. Vs Hari Singh & anr. , First Appeal From Order No.23 of 2001

11. National Insurance Co. Ltd. Vs Mannat Johal & ors., 20 19 (2) T.A.C. 705 (S.C.)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajai Tyagi, J.)

1. Heard learned counsel for the appellants; Shri Nagendra Kumar Srivastava, learned counsel for the respondents; and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment & order dated 28.1.2008 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.3, Mathura (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.437 of 2005 awarding a sum of Rs.3,67,000/- 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. Learned counsel for appellant submitted that deceased was Business partner of M/s Sri Devi Pustak Bhawan, Agra by profession and was getting Rs.1,37,087/- per annum as per the ITR of the year 2004-05. It is also submitted that as the deceased was survived by his widow and three minor children and hence the deduction towards personal expenses of the deceased as 1/4 is not in dispute. The multiplier has to be as per age of deceased should have been granted 15 is also not in dispute.

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 and it is also contended that the multiplier has to be as per age of

deceased should have been granted 14 in place of 15.

6. Having heard learned counsel for the parties and considered the factual data, this Court found that the accident occurred on 24.10.2005 causing death of Anil Kumar Gupta who was 42 years of age and left behind him, widow and three minor children. The Tribunal has assessed the income of the deceased to be Rs.2000/- per month. The deceased was Business partner of M/s Sri Devi Pustak Bhawan, Agra by profession, the tribunal has committed grave error in not considering that the appellants had proved the income of the deceased by proper evidence. The witness was also examined so as to bring whom the contention that the deceased was a Business partner of M/s Sri Devi Pustak Bhawan, Agra by profession. The evidence of the witnesses has not been accepted which is also against the Judgment in the case of the Apex Court in Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186, and, therefore, we are obliged to hold that the deceased died due to the accidental injuries.

7. The judgment of the Apex Court in **Anita Sharma v. New India Assurance Co. Ltd. (2021), 1 SCC 171** would also apply to the facts of this case.

8. As far as beneficial difference of limitation is concerned, the strict rules of civil procedure and evidence act are no required to adhered to.

9. In our case, prima facie it was proved that his income was Rs.11,424/- as ITR of the year 2004-05. In view of the judgment of **Vimal Kanwar and others v. Kishore Dan and others, AIR 2013 SC 3830** except income Tax no amount could have been deducted by the tribunal in the year of question, i.e., 2005. The tribunal has erred itself in not considering the income of the deceased and has deducted amount which it could not deduct holding that they were personal benefits to the deceased. We cannot concur with the tribunal as far as holding that the deceased was earning Rs.11,424/- per month. The income has to be considered to be Rs.11,424/- per month, would be the income of the deceased. The deceased was age bracket of 40 to 50 years as Business partner, 25% 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.** The multiplier of 14 granted is just and proper and not 15 as per the judgment in Pranay Sethi (supra) where awarded sum of Rs.70,000+30,000 interest, we round up the same figure Rs.1,00,000/-.

10. In this backdrop were evaluate the income in view of the judgment of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050 and Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** and, the recalculation of compensation would be as follows:

i. Income Rs.11,424/- p.m.

ii. Percentage towards future prospects : 25% namely Rs.2856/-

iii. Total income : Rs. 11,424 + 2856 = Rs.14,280/-

iv. Income after deduction of 1/4 : Rs.10710/-

v. Annual income : Rs.10,710 x 12 = Rs.1,28,520/-

vi. Multiplier applicable : 14 (as the deceased was in the age bracket of 41-45 years)

vii. Loss of dependency: Rs.1,28,520 x 14 = Rs.17,99,280/-
viii. Amount under non pecuniary heads (Rs.70,000+30,000) = 1,00,000/-
ix. Total compensation (vii + viii): **Rs.18,99,280/-.**

11. 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.

12. 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.

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. We are thankful to learned counsels for the parties for ably assisted the Court.

16. Record be sent back to court below forthwith, if any.

(2022)04ILR A251
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1427 of 2021

Vipin Kumar ...Appellant
Versus
Reliance General Insurance Com. Ltd. & Ors. ...Respondents

Counsel for the Appellant:
Sri Bed Kant Mishra

Counsel for the Respondents:
Sri Vijay Prakash Mishra

(A) Torts Law - Motor vehicle Act,1988 - Sections 163A,166 & 173 - quantum of compensation - if the injury is not specified in Schedule on such percentage of compensation would be payable in case of permanent total disablement proportionate to loss of earning capacity.(Para - 8)

(B) Tax Law - The Income Tax Act, 1961- Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' - if the amount of interest does not exceeds Rs.50,000/- in any financial year - registry of Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income-Tax Authority.(Para - 14)

Claimant earning Rs. 18,200/- age 22 years - Accident - Functional disability 25% - Awarding a sum of Rs.2, 30,000/- as compensation with interest at the rate of 7% - aggrieved by order of tribunal - hence appeal.

HELD:-Finding of Tribunal against the contours of grant of compensation for injuries. Functional disability 25%, to which he would be entitled to Rs.50,000/- towards pain, shock and suffering . Sum of Rs. 50,000/- granted for other non pecuniary damages. Total compensation: 17,06,420/-. Direction to respondent-Insurance Company to 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. Amount already deposited be deducted from the amount to be deposited. (Para - 7,8,9, 12)

Appeal partly allowed. (E-7)

List of Cases cited:-

1. Sanjay Kumar Vs Ashok Kumar & anr., (2014) 5 SCC 330

2. Syed. Sadiq & ors. Vs Divisional Manager, U.I.I.C.L. , (2014) 2 SCC 735

3. V. Mekala Vs M. Malathi & anr., (2014) 11 SCC 178

4. Hari Babu Vs Amrit Lal & ors., 2019 (2) T.A.C. 718 (All.)

5. Anthony @ Anthony Swamy Vs Managing Director, K.S.R.T.C., 2020 (0) AIJEC-SC 66306

6. Anita Sharma Vs New India Assurance Co. Ltd., 2020 (0) AIJEL-SC 66810

7. Oriental Insurance Co. Ltd. Vs Pankaj, 2014 (2) TAC 240 All

8. Shivdhar Kumar Vashiya Vs Ranjeet Singh & ors., 2022 (0) Supreme (SC) 40

9. Raj Kumar Vs Ajay Kumar & anr., (2011) 1 SCC 343

10. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

11. A.V. Padma Vs Venugopal, 2012 (1) GLH (SC), 442

12. Smt. Hansaguti P. Ladhani Vs The O.I.C.L., 2007(2) GLH 291

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajai Tyagi, J.)

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

2. This appeal, at the behest of the injured-claimant challenges the judgment and award dated 27.10.2016 passed by the Motor Accident Claims Tribunal/Additional District & Sessions Judge, Court No.5, Meerut (hereinafter referred to as 'Tribunal') in Claim Petition No. 1151 of 2014 awarding a sum of Rs.2,30,000/- as compensation with interest at the rate of 7%.

3. We do not burden the judgment with unnecessary facts except the facts needed for computing the compensation as all other issues have attained finality as neither Insurance Company nor the owner has filed any cross-objection and/or appeal. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent-Insurance Company has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation as the Tribunal very strangely did not grant any amount for future loss of income, actual loss of income though the claimant who was 22 years of age on 29.5.2014.

4. Learned counsel for the appellant, so as to challenge the order of the Tribunal has relied upon the following decisions :

(i) Sanjay Kumar Vs. Ashok Kumar and another, (2014) 5 SCC 330;

(ii) Syed. Sadiq and others Vs. Divisional Manager, United India Insurance Company Limited, (2014) 2 SCC 735;

(iii) V. Mekala Vs. M. Malathi and another, (2014) 11 SCC 178; and

(iv) Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011.

(v) Hari Babu Vs. Amrit Lal and others, 2019 (2) T.A.C. 718 (All.).

5. As narrated above, the accident is not in dispute. The negligence of the driver is also not in dispute. The injured sustained 53% injuries on his different parts of body is proved by evidence of Orthopaedic Surgeon, Dr. R.P. Mishra, who has given the disability certificate as the treating doctor did not give any disability certificate. The injured had to go to a private doctor. The petitioner was hospitalized from 29.5.2014 to 12.6.2014. It is an admitted position from prescription and the injury certificates of the hospital that he was treated by Dr. Atul Rastogi and Dr. Nitin Gupta at Jaswant Rai Speciality Hospital. He was an indoor patient from 29.5.2014 to 12.6.2014. Several time he was subjected to different kind of C.T. Scans. He was having crushed injuries on his left hand. He had injuries on the lower limb also. The Tribunal very strangely granted medical expenses but as the certificate was given by private Doctor, refuse to grant any amount for loss of income despite the fact that there was X-ray report which shows fixation device. There was healed fracture of superior ramus of right pubis and inferior rami of both pubis. X-ray report of right leg shows that there are old healed fracture (with callus formation) of lower 1/3rd of shaft of

right tibia is seen, fixation of device was seen and there are old healed fracture with callus formation of upper 1/3rd of shaft of right fibula is seen. X-ray report of left thigh shows there are old healed fracture (with callus formation) of lower 1/3rd of shaft of left femur is seen and fixation is seen in situ.

6. The Tribunal while deciding the issue of compensation payable has come to the conclusion that the injuries are non Scheduled injuries. The Tribunal considered that the disability given by the doctor was not acceptable as he was not the treating doctor and only for taking certificate of disability he had approached Dr. R.P. Mishra and he brushed aside the evidence of Dr. R.P. Mishra and came to the conclusion that the injured cannot be said to have contracted any permanent partial disablement and, therefore, he was not entitled for any amount as the certificates did inspire confidence. In our view, this finding is against the contours of beneficial piece of legislation. Dr. R.P. Mishra had also referred the patient to get his X-ray done. In his medical certificate, he has considered all this facts and, therefore the judgment of Apex Court in **Anthony Alias Anthony Swamy v. Managing Director, K.S.R.T.C., 2020 (0) AIJEC-SC 66306 and Anita Sharma v. New India Assurance Co. Ltd., 2020 (0) AIJEL-SC 66810** will apply in full force as the certificate speaks about history, examination, latest x-rays. The x-ray dated 29.4.2014 was also evaluated by him. From the X-rays, nailing was done in left femur and right fibia bone screw fixation was done medial malleolus. There was fracture in the pelvic region and his left hand flap surgery by a plastic surgeon. could this be brushed aside on the basis that the doctor had not treated him. Dr. R.P. Mishra, holds the degree of Orthopaedic Surgeon and was retired medical superintendent. He has even withstood the cross examination by the counsel for the Insurance Company. Even in the discharge summary of the claimant, all these facts are mentioned and, therefore, the finding that it cannot be conclusively said and held that he had any kind of disability is absurd. All the witnesses have proved the injuries on the appellant namely P.W.1 injured himself, P.W.2 Doctor, P.W.3, the clerk of the hospital where the appellant was treated, P.W.4 Arun Goel, owner of Medical Store. The Insurance Company has not produced any witness to show that the medical certificate could not be read into evidence. Decision in **Oriental Insurance Co. Ltd. v. Pankaj, 2014 (2) TAC 240 All,** states that it would not be proper to hold that disability certificate cannot be given by a qualified doctor who examined injured/claimant subsequently to assess extent of his permanent disability, the Tribunal returned correct finding on all issues involved in the case.

7. Thus, the finding of the Tribunal is against the contours of grant of compensation for injuries. The judgment of the Apex Court in **Shivdhar Kumar Vashiya v. Ranjeet Singh and others, 2022 (0) Supreme (SC) 40** will enure for the benefit of the appellant. Hence the judgment would have to re-evaluated for grant of compensation.

8. The record goes show that the injured was serving with Impression Service Pvt. Ltd. NOIDA and where he was getting salary Rs.18,200/- per month and due to these injuries he lost his job. In that view of matter the inured being 22 years of age at the time of accident and in view of the decision in **Raj Kumar Vs. Ajay Kumar and another, reported in**

(2011) 1 SCC 343, wherein it has been held that if the injury is not specified in Schedule on such percentage of compensation would be payable in case of permanent total disablement proportionate to loss of earning capacity. In our case we can consider his functional disability to be 25%. The Tribunal has not considered any of the decision cited before it and has brushed aside all the authoritative pronouncement. The claimant was earning Rs.18,200/- to which being 22 years of age, 40 will have to be added towards future loss of income and as we hold that his functional disability would be 25%, to which he would be entitled to Rs.50,000/- towards pain, shock and suffering. Looking to the age of the deceased, the multiplier applicable would be 18. The Tribunal has given a meagre amount of Rs.5,000/- as per Section 163 A of the Motor Vehicles Act, 1988 though the petition was under Section 166 of the Act. We grant the said amount as there were multiple surgeries and multiple foreign instruments were inserted in the body of the young man. To this we grant Rs.2,30,500/- granted by the Tribunal for medical expenses. We grant a sum of Rs. 50,000/- for other non pecuniary damages.

9. Hence, the total compensation payable to the appellant is computed herein below:

i. Income : Rs.18,200/-

ii. Percentage towards future prospects : 40% namely Rs.7280/-

iii. Total income : Rs. 18,200 + 7280 = Rs.25480-

iv. Loss of earning capacity : 25% namely Rs.6,370-

v. Annual loss : Rs.6,370 x 12 = Rs.76,440/-

vi. Multiplier applicable : 18

vii. Total loss : Rs.76,440 x 18 = Rs.13,75,920/-

viii. Medical expenses : Rs.2,30,500/-

ix. Amount under pain, shock and suffering : Rs.50,000/-

x. Amount under all other non-pecuniary heads : 50,000

xi. Total compensation : 17,06,420/-

10. 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."

11. No other grounds are urged orally when the matter was heard.

12. In view of the above, the appeal is partly allowed. 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.

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 applicants /claimants are neither illiterate or rustic villagers.

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. 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 judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

(2022)04ILR A255
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1654 of 2021

Smt. Munni & Ors. ...Appellants
Versus
M/S Ahamdabad Bangal Roadways Pvt. Ltd. New Delhi & Ors. ...Respondents

Counsel for the Appellants:
Sri Virendra Singh, Sri Akhilesh Kumar Singh

Counsel for the Respondents:
Sri Sushil Kumar Mehrotra

(A) Torts Law - Motor Vehicle Act,1988 - Sections 163A,166 & 173 - quantum of compensation - The Uttar Pradesh State Motor Vehicles Rules, 1998(amended in 2011) - Section 220 - compensation should not be bonanza to the claimants nor should be such a meager amount - notional income cannot be considered when there is documentary evidence.(Para - 7)

(B) Tax Law - The Income Tax Act, 1961- Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any

financial year exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' - if the amount of interest does not exceeds Rs.50,000/- in any financial year - registry of Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income-Tax Authority.(Para - 15)

Appellants filed a motor accident claim petition - seeking compensation of her husband - selling whole-sale vegetables - died in a road accident - Awarded compensation Rs.7,77,500/- with interest at the rate of 6% per annum - tribunal not granted any amount for future of loss of income - aggrieved hence appeal.

HELD:-Total compensation: 19,00,000/-. Direction to respondent-Insurance Company to 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. Amount already deposited be deducted from the amount to be deposited.(Para -14)

Appeal partly allowed. (E-7)

List of Cases cited:-

1. N.I.A.C.L. Vs Reshma Devi & ors.., III (2017) ACC 68 (DB)

2. St. of Har. & ors.. Vs Jasveer Kaur & ors.. ACC 2004 (4)

3. Divisional Controller K.S.R.T.C. Vs Mahadev Sethi & ors. 2003 (2) 326

4. N.I.I.C.L.Vs Satendra & ors.. 2007 (324)

5. N.I.I.C.L. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

6. Vimla Devi & ors. Vs N.I.C.L.& anr., (2019) 2 SCC 186

7. Smt. Meena Pawaia & ors.. Vs Ashraf Ali & ors.. 2021 0 Supreme (SC) 694

8. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

9. N.I.C.L.Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

10. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

11. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Company Ltd., [2007(2) GLH 291

12. Smt. Sudesna & ors. Vs Hari Singh & anr., First Appeal From Order No.23 of 2001

13. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd., F.A.F.O.No.2871 of 2016

14. Bajaj Allianz General Insurance Company Privae Ltd. Vs U.O.I. & ors.

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. This appeal has been preferred by the claimants-appellants against the judgement and award passed by Motor Accident Claims Tribunal/XI Additional District & Sessions Judge, Bulandshahr dated 27.09.2018 in MACP No.404 of 2016 (Smt. Munni & others Vs. M/s Ahmadabad Bangal Roadways Pvt. Ltd and others), by which the Tribunal has awarded compensation Rs.7,77,500/- with interest at the rate of 6% per annum.

2. Heard learned counsel for the appellants and learned counsel for respondents.

3. Brief facts of the case are that appellants filed a motor accident claim petition for seeking compensation of her husband, who died in a road accident. As per averments in the petition, on 20.06.2016 at about 3:00 pm-4:00 pm, the deceased along with Anand, Mahesh and

Arun was going from Nachkauli to Dadari Mandi on a Vehicle bearing No.UP 13 T 5479. After sometime, when they reached at Payal Family Dhaba, their tyre got punctured. Teetu and his colleague were repairing the puncture of the vehicle by parking the vehicle on the left corner, a truck bearing No.H.R. 38 U 2577 2023, which was being driven by its driver very rashly and negligently, hit the aforesaid vehicle from behind. In this accident Teetu @ Mahendra got injured. Teetu died on the spot.

4. The accident is not in dispute. The insurance company has not challenged the judgement and award of the Tribunal nor it has challenged the liability to pay compensation. The issue of negligence has attained finality as no appeal or cross objections are filed by the insurance company. Hence, the only question remains to be decided in this appeal is with regard to the quantum of compensation and hence, additional facts are avoided.

5. Learned counsel for the appellants has submitted that the learned Tribunal has not awarded just compensation. Learned counsel submitted that the deceased was an agriculturalist. The learned Tribunal did not consider the actual income of the deceased and rather assumed his earning only Rs.6,000/- per month. It is next submitted by learned counsel for the appellants that the learned Tribunal has awarded only Rs.5,000/- for loss of love and affection, Rs.2,500/- for loss of estate and Rs.2,000/- for funeral expenses, which are on lower-side and not granted as per decisions of the Apex Court. With regard to the rate of interest, it is submitted that the Tribunal has awarded 6% per annum rate of interest which is even lower then the statutory rate of interest stipulated in U.P. Motor Vehicles Rules, 1998 (amended in 2011).

6. *Per contra*, learned counsel for the insurance vehemently submitted that appellants have not led any evidence regarding the income of the deceased. It is submitted by learned counsel that learned Tribunal has rightly assessed the income of the deceased as Rs.6,000/- per month because it is not proved that the deceased was an agriculturist. It is further submitted that the amount under the head of non-pecuniary damages is properly granted. It is submitted by learned counsel that there is no infirmity or illegality in the impugned award which calls for any interference by this Court.

7. While considering the compensation, the Tribunal has not considered the income of the deceased. The deceased was also selling whole-sale vegetables for which documentary evidence as Ext.-31C2/1 & 31C2/65 and likewise documents were produced. The counsel for the appellants before the Tribunal also had relied on the decision of this Court in **III (2017) ACC 68 (DB) New India Assurance Co. Ltd. Vs. Reshma Devi & others.** The Tribunal brushed aside the documentary evidence. The Tribunal relied on **State of Harayan & Others Vs. Jasveer Kaur & Others ACC 2004 (4), Divisional Controller K.S.R.T.C. Vs. Mahadev Sethi & Others 2003 (2) 326** and **New India Insurance Co. Ltd Vs. Satendra & others 2007 (324)** and held that compensation should not be bonanza to the claimants nor should be such a meager amount and relying on the judgement of Reshma Devi (supra), the Tribunal considered the income of the deceased to be Rs.6,000/- per month. On what basis,

Tribunal came to the conclusion that the income was Rs.6,000/- per month cannot be fathomed. The notional income cannot be considered when there was documentary evidence. Documentary evidence goes to show from the record that from wholesale business of the deceased he used to earn at least Rs.8,000/- per month as the bills range from Rs.10,000/- for 21.03.2014 & 23.07.2014 and therefore, he was in the business cannot be brushed aside. Hence, this Court considers the income of the deceased to be Rs.10,000/- and just because the documents were xerox copies the same could not have been brushed aside. This is supported in its view by decision of the Apex court in cases titled (i) **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** and (ii) **Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186** as the documents go to show that even for the year 2014 and 2016 the income of the deceased can be considered to be Rs.10,000/- per month at least for a month from the documentary evidence. On which, reliance is laid, therefore this Court holds that the income of the deceased would be Rs.10,000/- per month. The Tribunal has misinterpreted the word "self-employed' and has not granted any amount for future of loss of income. The term "self-employed' would mean ***a person doing his own business. We clarify this aspect as we have come across many judgements in which this apparent error on the face of the record is found.*** We would clarify that in Pranay Sethi (supra) and the judgement of the Apex Court in decision, namely, **Smt. Meena Pawaia & others Vs. Ashraf Ali and others 2021 0 Supreme (SC) 694,** has also considered the term employment. The term "self-employed' is being explained by us and therefore, the income is held to be Rs.10,000/- per month plus 40% as the judgement of Pranay Sethi (supra) would apply and as the deceased was below 40 years this Court further has come across error on the part of the Tribunal which is and we would like to emphasize upon the Tribunals in the State not to go by the Second Schedule as it is meant for compensation under Section163A of Motor Vehicles Act, 1988 and not claim for Section 166 of Motor Vehicles Act, 1988. As far as Section 166 of Motor Vehicles Act, 1988 is concerned, the judgement of the Apex Court in Pranay Sethi (Supra) has to be followed and the later judgements which lay down grant of non-pecuniary damages. As far as rate of interest is concerned, the Tribunal could not have granted 6% which is even less than statutory rate of interest as per Section 220 of the Uttar Pradesh State Motor Vehicles Rules, 1998 (amended in 2011).

8. The learned Tribunal has rightly deducted 1/3 for personal expenses in accordance with the judgement of the Apex Court in ***Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121*** . We are not convinced with the multiplier applied by the Tribunal. The learned Tribunal has applied multiplier of 16 while it should have been of 15 as the deceased was in the age bracket of 36-40.

9. Under non-pecuniary heads, learned Tribunal has awarded only Rs.5,000/- for loss of love and affection, Rs.2,500/- for loss of estate and Rs.2,000/- for funeral expenses, which is not in consonance with the judgement of Apex Court in ***National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050 ,*** hence, the appellants shall be entitled to get Rs.70,000/- for non-pecuniary heads. The

deceased had three minor children, they would be entitled to consortium of Rs.50,000/- each as they have lost the affection of father at a very tender age.

10. Hence, the total compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

i.	Annual Income	Rs.10,000/- x 12	Rs.1,20,000/-
ii.	Percentage towards Future-Prospects (40%)	Rs.1,20,000 /- x 40%	Rs.48,000/-
iii.	Total Income	Rs. 1,20,000/- + Rs. 48,000 /-	Rs.1,68,000/-
iv.	Income after deduction of 1/3	Rs.1,68,000/- - Rs.56,000/-	Rs.1,12,000/-
v.	Multiplier applicable	15	
vi.	Loss of dependency	Rs.1,12,000 /- x 15	Rs.16,80,000/-
vii.	Amount under Non-pecuniary Heads	Rs.1,50,000/- +Rs.70,000/-	Rs.2,20,000/-
ix.	Total Compensation	Rs.16,80,000/- +Rs.2,20,000/-	Rs.19,00,000/-

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."

13. Learned Tribunal has awarded rate of interest as 6% per annum but we are fixing the rate of interest as 7.5% on enhanced compensation in the light of the above judgment.

14. In view of the above, the appeal is **partly allowed.** Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The insurance company shall deposit the 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. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd.,*** [2007(2) GLH 291] and this High Court if 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 any 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 but 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)*** 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.

16. The Tribunal shall follow the guidelines issued by the Hon'ble Apex Court in ***Bajaj Allianz General Insurance Company Privae Ltd. vs. Union of India and others*** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. Since long time has elapsed, the amount be deposited in the Saving Bank Account of claimant(s) in a nationalized Bank.

17. We request the Registrar General to place a copy of this Judgement before the Hon'ble the Chief Justice for circulating it to the Tribunals for their guidances, so that, the Tribunals may not commit the same error as committed in this litigation.

(2022)04ILR A260

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 2368 of 2003
with
First Appeal From Order No. 1530 of 2008

NTPC ...Appellant

Versus

ESIC, Sarvodaya Nagar Kanpur & Anr. ...Respondents

Counsel for the Appellant:

Sri Santosh Kumar Tripathi, Sri N.C. Rajvanshi, Sri Piyush Bhargava, Sri Vivek Ratan Agrawal.

Counsel for the Respondents:

(A) Civil Law - Employee State Insurance Act,1948 - beneficial peace of legislation - Applicability of the Act - Section 45A - Determination of contributions in certain cases ; Section 75,75(g),75(2B) - matters to be decided by the Employees Insurance court - Court has power to waive or reduce the amount where the dispute goes to the root of the dispute that the appellant is not liable, the jurisdiction and powers of the Court were with them - provisions of law demanding of 50% would be a directly order but provisions of Section 75 (2B) are not mandatory. (Para - 5,12)

Order of Commissioner and subsequent order - under challenge - grounds - no final order under Section 45-A of Act passed against plaintiff/Appellant - amount mentioned in show cause noyice cannot be treated as amount due against - direction to deposit 50% of amount - provisions of Section 75(2B) of Act not applicable - refused to decide application for grant of temporary injunction - reliefs sought -

set aside order - direction to decide applicability of Act upon it without insisting for depositing anything .(Para - 1,2)

HELD:-Matter remanded back to E.S.I court who shall not insist for any amount to be deposit . Direction to E.S.I court to decide the deleted issue no. 4 which is deleted without any application and decide the matter in view of the prevailing law and the provisions of Section 75 (2B) , Section 75(1) (g) and proviso of Section (1)(4) of the Act. Orders passed are bad in eye of law. Question of law decided in favour of appellant and against the respondent.(Para - 9,10,11)

Appeals allowed. (E-7)

List of Cases cited:-

1. D.L.F Power Ltd. Vs Regional Director, (2009) 123 FLR 964 (P&H)

2. ESI Corpn. Vs C.C. Santhakumar, (2007) 1 SCC 584: (2007) 1 SCC (L&S) 413

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajai Tyagi, J.)

1. Heard Sri Vivek Ratan Agarwal, learned counsel for the appellant and Sri Brahmdev Dwivedi, learnd counsel for the respondent who due to physical ailment has joined through video conferencing.

"The reliefs sought in the aforesaid Appeal are that this Hon'ble Court may graciously be pleased to allow this Appeal, set aside the order dated 22.08.2003 passed by the court below in ESI case No. 4 of 2003 with costs throughout, direct the court below to decide the question raised by the appellant about the applicability of the Act upon it without insisting for depositing anything, and/or may grant such other and further relief which Hon'ble Court may deem just, fit and proper in the facts and circumstances of the cases to meet the ends of justice."

2. Facts:- The appellant has challenged the order of the Commissioner challenging 1st order and then subsequent order on following grounds:-

"A. Because as yet no final order under Section 45-A of the Act has been passed against the plaintiff/Appellant and as the amount mentioned in the show cause noyice dated 20/23.06.2003 cannot be treated as amount due against the plaintiff/Appellant and as such the court below was not justified in passing the impugned order directing the Plaintiff/Appellant to deposit 50% of the amount mentioned in show cause notice dated 20/23.06.2003 and further holding that only thereafter the application for grant of temporary injunction and other pleas raised by the Plaintiff/Appellant would be considered.

B. Because in the facts and circumstances of the case, the provisions of Section 75(2B) of the Act are not applicable and as such the court below acted illegality and with material irregularity in refusing to decide the application for grant of temporary injunction unless 50% of the amount shown in the show cause notice dated 20/23.06.2003 is deposited by the Plaintiff/Appellant."

3. Both the appeals requires to be allowed for the reasons as below:-

4. The provisions of Section 75(g) plays a pivotal role as jurisdiction of Insurance Court is obliged to decide the issue as to whether any organisation is covered by Employee State Insurance Act,1948 ('Act' for short). Object of Act is to provide certain benefits to the employees

and there is waive power to predeposit. All these aspects were to be decided by the Court. The Employees State Insurance Act though being beneficial peace of legislation:-

"A plain reading of this Section provides that a dispute between the principal employer and Corporation in respect of any contribution or any other dues could not be raised by the principal employer in the 'Employees' Insurance Court only after depositing 50% of the amount claimed by the Corporation. The only relief is provided in the Proviso of the said section is that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited. As per the proviso recording reasons in writing would arise in a situation where the Court decides to waive or reduce the amount to be deposited. In case the Court is not waiving off or is not reducing the mandatory deposit of the amount of 50%, the Court is not required to record reasons in writing, ***D.L.F Power Ltd. V. Regional Director, (2009) 123 FLR 964 (P&H). ESI Corpn. v. C.C. Santhakumar, (2007) 1 SCC 584: (2007) 1 SCC (L&S) 413."***

5. The Court has power to waive or reduce the amount where the dispute goes to the root of the dispute that the appellant is not liable, the jurisdiction and powers of the Court were with them. Obligations to adjudicate as per the judgement of Modi Steels Unit-A v. ESI Court, (1984) 2 LLN 655 has been not adhered to.

6. We are not going into the merits of the matter as there is no adjudication that the appellant is under duty to pay the amount claimed. They have raised objections as their liability is also not there as they have their own rules which covers their employees which are much better than the Act. We are not going into this aspect.

7. We also hope that the respondent will also look into this issue as the medical benefits given to the employees according to the appellant is much more than the benefits which would accrue under the Act. We are not going into the same. The appropriated Government would look into this issue also.

8. Appeals allowed.

9. Matter be remanded back to the E.S.I court who shall not insist for any amount to be deposit as the National Thermal Power Corporation Ltd. has raised an issue that they are not covered by Employees State Insurance Act and N.T.P.C as a better came for its employees. All these contentions have not been considered by the court below while rejecting both the applications, i.e set aside.

10. The E.S.I court will decide the issues. We direct the E.S.I court to decide the deleted issue no. 4 which is deleted without any application and decide the matter in view of the prevailing law and the provisions of Section 75 (2B) relied by Sri. Brahmdev Dwivedi, learned counsel for the respondent and Section 75(1) (g) and proviso of Section (1)(4) of the Act.

11. With all these observations, we prima-facie hold that orders passed are bad in eye of law. This question of law is decided in favour of the appellant and against the respondent.

12. Record be send back to the E.S.I court to decide the matter within 12 week's from today as they are pending since long.

We make it clear that the provisions of law demanding of 50% would be a directly order but provisions of Section 75 (2B) are not mandatory.

13. We are thankful to both the counsels for ably assisting us.

(2022)04ILR A263
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 2744 of 2010

Smt. Shalini Srivastava & Ors. ...Appellants
Versus
U.P.S.R.T.C. & Ors. ...Respondents

Counsel for the Appellants:
Sri Sharve Singh

Counsel for the Respondents:
Sri Dinkar Mani Tripathi, Sri Samir Sharma

(A) Torts Law - Motor vehicle Act,1988 - quantum of compensation - Principle of " res ipsa loquitur" - " the things speak for itself" - composite/contributory negligence - head on collision - 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 .(Para - 10)

(B) Torts law - Principle of Contributory negligence - a person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place - that amount will be detected from the compensation payable to him if he is injured - to legal representative if he dies in the accident .(Para - 7)

(C) Tax Law - The Income Tax Act, 1961- Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' - if the amount of interest does not exceeds Rs.50,000/- in any financial year - registry of Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income-Tax Authority. (Para - 21)

Accident - Bus knocked down Motorcyclist - died - Tribunal took the income of the deceased to be a notional income of Rs.3,000/- only - 50% negligent held by tribunal - Awarding a sum of Rs. 2,21,500/- as compensation - interest at the rate of 6% - against Rs.60,00,000/- claimed by the claimants-appellants - aggrieved hence appeal. (Para -)

HELD:-Court held the driver of the Bus 75% negligent and the deceased to be 25% negligent. income of the deceased to be Rs.7,500/- per month.Total compensation payable to the appellants is 11,62,500/-. Direction to respondent-U.P.S.R.T.C. to 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. Amount already deposited be deducted from the amount to be deposited.(Para - 11,13,16)

Appeal partly allowed. (E-7)

List of Cases cited:-

1. General Manager, Kerala S.R.T.C. Vs Susamma Thomas, 1994 SCC (2) 176

2. Sarla Verma & ors. Vs D.T.C. & anr., 2009 LawSuit (SC)

3. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors., F.A.F.O. No. 1818 of 2012

4. Khenyei Vs New India Assurance Company Ltd. & ors., 2015 LawSuit (SC) 469

5. T.O. Anthony Vs Karvarnan & ors. ,2008 (3) SCC 748

6. Archit Saini & anr. Vs Oriental Insurance Company Ltd., AIR 2018 SC 1143

7. Anita Sharma Vs New India Assurance Co. Ltd. (2021) 1 SCC 171

8. Smt. Meena Pawaia & ors. Vs Ashraf Ali & ors. 2021 0 Supreme (SC) 694

9. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 LawSuit (SC) 1093

10. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

11. A.V. Padma Vs Venugopal, 2012 (1) GLH (SC), 442

12. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Company Ltd., 2007(2) GLH 291

13. Smt. Sudesna & ors. Vs Hari Singh & anr., F.A.F.O. No.23 of 2001

14. Bajaj Allianz General Insurance Company Pvt. Ltd. Vs U.O I. & ors.

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajai Tyagi, J.)

1. Heard Sri Sharve Singh, learned counsel for the appellant and Sri Dinkar Mani Tripathi, learned counsel for the respondent.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 31.5.2010 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.14, Varanasi (hereinafter referred to as 'Tribunal') in M.A.C.P No.84 of 2008 awarding a sum of Rs.2,21,500/- as compensation with interest at the rate of 6% against Rs.60,00,000/- claimed by the claimants-appellants.

3. The accident took place on 12.12.2007 at 12.00 noon on Varanasi-Jaunpur Road near Reliance Petrol Pump within Police Station Bara Gaon, District Varanasi. Bus of U.P. State Road Transport Corporation is alleged to have knocked down the Motorcyclist who died in the said accident. It is an admitted position of fact and not disputed that the deceased died on the spot. The deceased at the time of accident was a medical officer namely Senior Territory Executive and was aged about 38 years of age. He was getting Rs.7500/- along with Rs.200/- allowance per day if he went out of headquarter. While deciding the claim petition, the Tribunal has granted sum of Rs.2,21,500/-. The Tribunal took the income of the deceased to be a notional income of Rs.3,000/- only as according to the Tribunal, it was not proved that he was in service. The salary certificate, Income Tax Returns and appointment letter which was not even rebutted by the respondent, was brushed aside by the Tribunal. Tribunal in the year of accident was governed by the judgment by the Apex Court in **General Manager, Kerala S.R.T.C. vs. Susamma Thomas, 1994 SCC (2) 176,** this fact was also not looked into. The decision in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC),** though pressed into service by the appellants-claimants was not considered.

4. The Tribunal hold the deceased to be 50% negligent. This twin issues are

posed for consideration namely whether the deceased was contributed to the accident having taken place if yes, to what extent and what is the compensation to be paid to the claimants.

5. While dealing with submission on issue of negligence raised by the learned counsel for the appellant, it would be relevant to discuss the principles for deciding contributory negligence and for that the principles for considering negligence will also have to be looked into.

6. 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.

7. The principle of contributory negligence has been discussed time and again. A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place and that amount will be deducted from the compensation payable to him if he is injured and to legal representatives if he dies in the accident.

8. 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

9. 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

10. 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. Considering the facts and circumstances of the case we hold the deceased to be 25% negligent as the evidence of D.W.1 goes to show that the death of the deceased occurred on the spot. We are even fortified in our view by the decision of the Apex Court in **Archit Saini and Another Vs. Oriental Insurance Company Limited, AIR 2018 SC 1143** wherein the finding of the Tribunal was upheld by adverting to the same more particularly the Apex Court has upheld the finding in paragraph 21 to 27 in its judgment. The paragraph 5 of the said Apex Court's judgment is reproduced hereinbelow:

"5.The respondents had opposed the claim petition and denied their liability but did not lead any evidence on the relevant issue to dispel the relevant fact. The Tribunal after analysing the evidence, including the site map (Ext. P-45) produced on record along with charge-sheet filed against the driver of the Gas Tanker and the arguments of the respondents, answered Issue 1 against the respondents in the following words:

"21. Our own Hon'ble High Court in a case captioned Lakhu Singh v. Uday Singh [Lakhu Singh v. Uday Singh, 2007 SCC OnLine P&H 865 : PLR (2007) 4 P&H 507] held that while considering a claim petition, the Tribunal is required to hold an enquiry and act not as criminal court so as to find whether the claimants have established the occurrence beyond shadow of any reasonable doubt. In the enquiry, if there is prima facie evidence of the occurrence there is no reason to disbelieve such evidence. The statements coupled with the facts of registration of FIR and trial of the accused in a criminal court are sufficient to arrive at a conclusion that the accident has taken place. Likewise, in Kusum Lata v. Satbir [Kusum Lata v. Satbir, (2011) 3 SCC 646 : (2011) 2 SCC (Civ) 37 : (2011) 2 SCC (Cri) 18 : (2011) 2 RCR (Civil) 379] the Hon'ble Apex Court has held that in a case relating to motor accident claims, the claimants are not required to rove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind. 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.

22. After considering the submissions made by both the parties, I find that PW 7 Sohan Lal eyewitness to the occurrence has specifically stated in his affidavit Ext. PW 7/A tendered in his evidence that on 15-12-2011 at about 20.30 p.m. he along with PHG Ajit Singh was present near Sanjha Chulha Dhaba on the National Highway leading to Jammu. All the traffic of road was diverted on the eastern side of the road on account of closure of road on western side due to construction work. In the meantime a Maruti car bearing No. HR 02 K 0448 came from Jammu side and struck against the back of Gas Tanker as the driver of the

car could not spot the parked tanker due to the flashlights of the oncoming traffic from front side. Then they rushed towards the spot of accident and noticed that the said tanker was standing parked in the middle of the road without any indicators or parking lights.

23. The statement of this witness clearly establishes that this was the sole negligence on the part of the driver of the Gas Tanker especially when the accident was caused on 15-12-2011 that too at about 10.30 p.m. which is generally time of pitch darkness. In this way, the driver of the car cannot be held in any way negligent in this accident. Moreover, as per Rule 15 of the Road Regulations, 1989 no vehicle is to be parked on busy road.

24. The arguments of the learned counsel for the respondent that PW 7 Sohan Lal has stated in his cross-examination that there was no fog at that time and there were lights on the Dhaba and the truck was visible to him due to light of Dhaba and he was standing at the distance of 70 ft from the truck being road between him and the truck and he noticed at the car when he heard voice/sound caused by the accident so Respondent 1 is not at all negligent in this accident but these submissions will not make the car driver to be in any way negligent and cannot give clean chit to the driver of the Gas Tanker because there is a difference between the visibility of a standing vehicle from a place where the person is standing and by a person who is coming driving the vehicle because due to flashlights of vehicles coming from front side the vehicle coming from opposite side cannot generally spot the standing vehicle in the road that too in night-time when there is neither any indicator or parking lights nor blinking lights nor any other indication given on the back of the stationed vehicle, therefore, the driver of the car cannot be held to be in any way negligent rather it is the sole negligence on the part of the driver of the offending Gas Tanker as held inGinni Devi case [Ginni Devi v. Union of India, 2007 SCC OnLine P&H 126 : 2008 ACJ 1572] , Mohan Lal case [New India Assurance Co. Ltd. v. Mohan Lal, 2006 SCC OnLine All 459 : (2007) 1 ACC 785 (All)] . It is not the case of the respondent that the parking lights of the standing truck were on or there were any other indication on the backside of the vehicle standing on the road to enable the coming vehicle to see the standing truck. The other arguments of the learned counsel for Respondent 3 that the road was sufficient wide road and that the car driver could have avoided the accident, so the driver of the car was himself negligent in causing the accident cannot be accepted when it has already been held that the accident has been caused due to sole negligence of the driver of the offending stationed truck in the busy road. The proposition of law laid down in Harbans Kaur case [New India Assurance Co. Ltd. v. Harbans Kaur, 2010 SCC OnLine P&H 7441 : (2010) 4 PLR 422 (P&H)] and T.M. Chayapathi case [New India Assurance Co. Ltd. v. T.M. Chayapathi, 2004 SCC OnLine AP 484 : (2005) 4 ACC 61] is not disputed at all but these authorities are not helpful to the respondents being not applicable on the facts and circumstances of the present case. Likewise, non-examination of minor children of the age of 14 and 9 years who lost their father and mother in the accident cannot be held to be in any way detrimental to the case of the claimants when eyewitness to the occurrence has proved the accident having been caused by the negligence of Respondent 1 driver of the offending vehicle.

25. Moreover, in Girdhari Lal v. Radhey Shyam [Girdhari Lal v. Radhey

Shyam, 1993 SCC OnLine P&H 194 : PLR (1993) 104 P&H 109] , Sudama Devi v. Kewal Ram [Sudama Devi v.Kewal Ram, 2007 SCC OnLine P&H 1208 : PLR (2008) 149 P&H 444] andPazhaniammal case [New India Assurance Co. Ltd. v. Pazhaniammal, 2011 SCC OnLine Ker 1881 : 2012 ACJ 1370] our own Hon'ble High Court has held that "it is, prima facie safe to conclude in claim cases that the accident has occurred on account of rash or negligent driving of the driver, if the driver is facing the criminal trial on account of rash or negligent driving.'

26. Moreover, Respondent 1 driver of the offending vehicle has not appeared in the witness box to deny the accident having been caused by him, therefore, I am inclined to draw an adverse inference against Respondent 1. In this context, I draw support from a judgment of the Hon'ble Punjab & Haryana High Court reported asBhagwani Devi v. Krishan Kumar Saini[Bhagwani Devi v. Krishan Kumar Saini, 1986 SCC OnLine P&H 274 : 1986 ACJ 331] . Moreover, Respondent 1 has also not filed any complaint to higher authorities about his false implication in the criminal case so it cannot be accepted that Respondent 1 has been falsely implicated in this case.

27. In view of above discussion, it is held that the claimants have proved that the accident has been caused by Respondent 1 by parking the offending vehicle bearing No. HR 02 AF 8590 in the middle of the road in a negligent manner wherein Vinod Saini and Smt Mamta Saini have died and claimants Archit Saini and Gauri Saini have received injuries on their person. Shri Vinod Saini, deceased who was driving ill-fated car on that day cannot be held to be negligent in any way. Accordingly, this issue is decided in favour of claimants."

(emphasis supplied)"

11. The evidence of P.W.2 and D.W.1 read with each other goes to show that the Motorcyclist while trying to save a cyclist dashed with the bus of U.P.S.R.T.C. Had the driver of the bus of U.P.S.R.T.C. which was a bigger vehicle taken more caution, the accident could have been avoided but as there was head on collision, the Tribunal has apportioned the liability on the basis of head on collision. Rather the driver of U.P.S.R.T.C. Bus has taken stand that his vehicle did not dashed with the motorcyclist. Injury goes to show that the impact was such that the deceased died due to accidental injuries cause by the big vehicle. The driver driving bigger vehicle on the highway is supposed to take more caution. We, therefore, hold the driver of the Bus of U.P.S.R.T.C. 75% negligent and the deceased to be 25% negligent.

12. This takes us to the issue of quantum of compensation awarded. It is submitted by learned counsel for the appellant that the finding of fact of the Tribunal that Income Tax Return of earlier years cannot be considered which was just preceding the year when the deceased died is perverse. The accident occurred in the month of December, 2007, the Income Tax Return, Pay slip and other material were before the Tribunal. The Tribunal has not properly scrutinized the same, and has wrongly considered the minimum amount as income and considered that the deceased was earning only Rs.3,000/- per month. The income was below the taxable limit but as he was service personnel, the income tax return was filed which is on record. The finding is not only perverse finding but absurdity has percolated in the award of the Tribunal. The salary certificate shows the income of the deceased to be Rs.7,500/- per month.

13. This Court is unable to accept the submission of Sri Dinkar Mani Tripathi,

learned counsel for the respondent that this salary certificate cannot be taken in evidence. We are fortified in our view by the decision in **Anita Sharma v. New India Assurance Co. Ltd. (2021) 1 SCC 171.** It is also an admitted position of fact that for each day when the deceased would go in the territory, he would be entitled to a sum of Rs.100/- per day as allowance. We do not consider the same. We consider the income of the deceased to be Rs.7,500/- per month. To which as the deceased was below 40 years and was salaried person 50% to be added towards future loss of income of the deceased in view of the decision in **Smt. Meena Pawaia & others Vs. Ashraf Ali and others 2021 0 Supreme (SC) 694 and National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093.**

14. The deceased was survived by widow, two minor children and parents. The Tribunal has deducted 1/3rd towards personal expenses of the deceased. Learned counsel for the appellant states that it should be 1/4th but the same is objected by Sri Dinkar Mani Tripathi, learned counsel for the respondent. We are in agreement with learned counsel for the respondent that deduction of 1/3rd towards personal expenses is just and proper. Tribunal has granted multiplier of 16, which according to learned counsel for the respondent would be 15. We accept the same looking to the age of the deceased.

15. As far as amount under non-pecuniary heads is concerned, the appellants would be entitled to Rs.70,000/- + 10% rise in every three years in view of the decision of the Apex Court in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093,** hence, we grant Rs.1,00,000/- (rounded figure) towards non pecuniary damages. We award Rs.50,000/- each to minor children of the deceased towards love and affection who have lost their father at a very prime age.

16. Hence, the total compensation payable to the appellants is computed herein below:

i. Monthly Income: Rs.7,500/-

ii. Percentage towards future prospects : 50% namely Rs.3,750/-

iii. Total income : Rs.7,500 +3,750 = Rs.11,250/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.7,500/-

v. Annual income : Rs.7,500 x 12 = Rs.90,000/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.90,000 x 15 = Rs.13,50,000/-

viii. Amount under non pecuniary heads : Rs.1,00,000 + Rs.50,000 + Rs.50,000 = Rs.2,00,000/-

ix. Total compensation : Rs.15,50,000/-

x. Amount payable to claimants after deducting 25% negligence of the deceased : 11,62,500/-

17. 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."

18. No other grounds are urged orally when the matter was heard.

19. In view of the above, the appeal is partly allowed. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-U.P.S.R.T.C. 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.

20. 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 by Tribunal..

21. 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 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.

22. 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 judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

23. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As 15 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

24. This Court is thankful to both the counsels for getting this old matter decided.

(2022)04ILR A274
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.02.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE KRISHAN PAHAL, J.

First Appeal From Order No. 3192 of 2017

National Insurance Co. Ltd., Ashok Nagar, Kanpur ...Appellant
Versus
Smt. Archana Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri Radhey Shyam, Sri Sushil Kumar Mehrotra

Counsel for the Respondents:
Sri Mohd. Naushad Siddiqui, Sri Shirish Srivastava

(A) Torts Law - Motor Vehicle Act,1988 - Sections 163-A ,166 & 173 - quantum of compensation - juxtaposition - U.P. Motor Vehicles (Eleventh Amendment) Rules, 2011 - Rule 220-A(2)(ii)and(iii) , Rule 220-A 3(iii) , Rule 220-A (3) - for the deduction towards personal and living expenses of a married person (deceased), a minor dependent will be counted as half - Principle of standardisation - when a person is in a permanent job, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter - in case of self-employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. (Para - 3,4,12)

Deduction of 1/4th for personal expenses of deceased - dependent family members of deceased - claim petition and noted by the Tribunal - are five (5); wife, two minor children, mother and father of the deceased - deceased was admittedly more than 31 years of age on the date of the accident - multiplier of 17 applied by tribunal .

HELD:-Deduction of 1/4th towards personal and living expenses of deceased cannot be said to be unjust or in contravention of Rule 220-A(2)(ii) and (iii) . Court cannot curtail the benefits provided by the Statute to the claimant/respondent when the statutory provision was very much available in the statute book . Declined to interfere in the decision of the Tribunal in applying multiplier of 17 as per the Second Schedule while computing the compensation payable to the dependent of deceased/claimants herein.(Para - 4,15,16)

Appeal dismissed .(E-7)

List of Cases cited:-

1. Sarla Verma & ors. Vs Delhi Transport Corp. & anr.,2009 (6) SCC 121

2. New India Assurance Co. Ltd. Vs Urmila Shukla & ors., Civil Appeal no. 4634 of 2021

3. National Insurance Co. Ltd. Vs Pranay Sethi, 2017 (16) SCC 680

4. Kerala SRTC Vs Susamma Thomas, 1994 (2) SCC 176

5. U.P. SRTC Vs Trilok Chandra, (1996) 4 SCC 362

6. New India Assurance Co. Ltd. Vs Charlie, (2005) 10 SCC 720

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Krishan Pahal, J.)

1. Heard Sri Sushil Kumar Mehrotra learned counsel for the appellant and Sri Shirish Srivastava, leaned Advocate holding brief of Mohd. Naushad Siddiqui learned counsel for the claimants-respondents.

2. The challenge to the award passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No. 7, Kanpur Nagar is confined to the issue of quantum of compensation, i.e. the alleged illegality in the computation made by the Tribunal. The issue no. 5 in the decision of the Tribunal under challenge is on the quantum of compensation.

3. The arguments of the learned counsel for the appellant-Insurance Company are two folds: the first is that the Tribunal had wrongly made deduction to the extent of 1/4th for personal expenses of deceased in ignorance of U.P. Motor Vehicles (Eleventh Amendment) Rules, 2011 (In short as "the Rules, 2011) which provides in Rule 220-A (3) that for the purposes of calculation of number of family members as per Clauses (ii) and (iii) of the said sub-rule (2), i.e. for the deduction towards personal and living expenses of a married person (deceased), a minor dependent will be counted as half.

The contention is that as the deceased was survived by two minor children apart from his wife, total number of dependent family members would be two (2). The Tribunal, therefore, ought to have made deduction of 1/3rd in the said category.

4. To deal with this submission, suffice it to note that the dependent family members of deceased as narrated in the claim petition and noted by the Tribunal are five (5); wife, two minor children, mother and father of the deceased. A categorical statement has been made in the claim petition that the claimant wife, her children and parents of deceased were wholly dependent upon him. Nothing contrary could be brought before us. Considering the number of dependent family members being five, we find that the Tribunal had correctly applied the ratio given in Rule 220-A(2)(ii) of the Rules, 2011.

Even if the arguments of the learned counsel for the appellant-Insurance Company regarding application of sub rule (2)(iii) are accepted in this regard, counting minor dependents as half, the total number of dependent family members would be four (4). In both the eventuality, the dependent family members being between four(4) to six(6) in number, the deduction of 1/4th towards personal and living expenses of deceased cannot be said to be unjust or in contravention of Rule 220-A(2)(ii) and (iii).

The first ground of challenge is, therefore, turned down.

5. The second limb of argument of the learned counsel for the appellant is on the multiplier chosen by the Tribunal.

The contention is that the deceased was admittedly more than 31 years of age on the date of the accident. As per the principle laid down by the Apex Court in **Sarla Verma and others vs. Delhi Transport Corporation and another1,** the multiplier in the table in paragraph '40' was to be applied as against the multiplier mentioned in the Second Schedule for claims under Section 163-A of the Motor Vehicles Act. As per Column (4) of the table given in **Sarla Verma (supra)**, multiplier of 16 had to be applied for the deceased his age being in the bracket of 31 to 35 years. The Tribunal has erred in choosing the multiplier of 17 from the table in the Second Schedule to the Motor Vehicles Act, 1988 (In short as "the Motor Vehicles Act").

6. To contradict this submission, learned counsel for the respondent has

placed reliance on a decision of the Apex Court in **New India Assurance Co. Ltd. vs. Urmila Shukla and others2,** wherein the decision of this Court in a First Appeal against the order passed by the Motor Accident Claims Tribunal was challenged on the ground that Rule 3(iii) of U.P. Motor Vehicles Rules, 1998 is contrary to the conclusions drawn by the Constitution Bench of the Apex Court in **National Insurance Company Ltd. vs. Pranay Sethi3**

The challenge in the said appeal was to the quantum of compensation on the premise that addition of 20% of the salary in the future prospects of deceased, more than 50 years of age was illegal.

It was contended therein that by application of sub-rule 3(iii) of Rule 220-A of the Rules 1998, the Tribunal has committed an error in taking decision in contravention of the conclusions arrived by the Constitution Bench of the Apex Court wherein it was held that there should be an addition of 15% in case of the deceased between the age of 50 to 60 years and there should be no addition thereafter.

The Apex Court, however, had turned down the objection of the appellant-Insurance Company noticing that the validity of the Rules was not in question in the said matter and the Court cannot restrict the scope of the Rules which afford a favourable treatment to the claimant.

7. Based on this decision, it is vehemently argued by the learned counsel for the respondent claimants that on the date of the decision given by the Tribunal, the Second Schedule was very much in existence on the statute book. The Tribunal, therefore, cannot be said to have erred in giving benefit of the multiplier provided in the Second Schedule.

8. In rejoinder, learned counsel for the appellant, however, asserted that the table given in paragraph '40' of the decision of the Apex Court in **Sarla Verma (supra)** is final and binding on the High Court and submits that in any case, the Tribunal or this Court cannot deviate from the said decision.

9. To deal with the above contentions, we would be required to go through the decision of the Apex Court in **Sarla Verma (supra)**, specifically paragraphs '13' to '42' which contain the discussion on the question of selection of multiplier. The Apex Court had noticed therein various discrepancies/errors in the multiplier scale given in the Second Schedule table and found that it prescribes a lesser compensation for cases where a higher multiplier of 18 is applicable and a larger compensation with reference to cases where a lesser multiplier of '15', '16' or '17' is applicable. It was, therefore, inferred that a clerical error has crept in the Schedule and the multiplier figure got wrongly typed therein.

Another incongruity which was noticed therein is that the table prescribed the compensation payable even in cases where the annual income ranges between Rs. 3000/- to Rs.12000/- whereas the notional minimum income of non-earning persons is prescribed therein as Rs. 15,000/- per annum. This has led to a situation where the compensation will be higher in cases where the deceased was idle and not having any income than in cases where the deceased was already earning an income ranging between Rs. 3000/- and Rs.12,000/- per annum.

10. The Apex Court, thereafter, considered its earlier decisions in **Kerala**

SRTC vs. Susamma Thomas4, U.P. SRTC vs. Trilok Chandra5 and New India Assurance Co. Ltd. vs. Charlie6 to consider the multiplier indicated therein for claims under Section 166 of the Motor Vehicles Act, in juxtaposition with the multiplier mentioned in the Second Schedule for claims under Section 163-A of the Motor Vehicles Act for carving out the table in paragraph '40' of the decision in **Sarla Verma (supra)**. It was, thereafter, stated that in order to avoid any inconsistency in the cases falling under Section 166 of the Motor Vehicles Act, the multiplier to be used should be as mentioned in Column (4) of the table given in paragraph '40', which was prepared by applying **Kerala SRTC vs. Susamma Thomas** (supra), **U.P. SRTC vs. Trilok Chandra** (supra) and **New India Assurance Co. Ltd. vs. Charlie** (supra).

It is evident from Column (4) of the table in **Sarla Verma (supra)** that multiplier of 16 for age bracket 31 to 35 years has to be applied whereas Second Schedule to Motor Vehicles Act provides multiplier of 17 for this age bracket. There is no dispute about the age of deceased and that he was above 31 years on the date of accident.

11. We may further note the decision of Apex Court in **New India Assurance Co. Ltd.** (supra) dated 6th August, 2021, wherein categorical challenge was to the percentage of salary applied for the future prospects of deceased more than 50 years of the age. The percentage of 15% of salary towards future prospects has been carved out by the Apex Court in **National Insurance Company Ltd. vs. Pranay Sethi** (supra). Some of the observations of the Apex Court in **National Insurance Company Ltd. vs. Pranay Sethi** (supra), specifically paragraphs '31' and '55' to '58' were noted by the Apex Court in **New India Assurance Co. Ltd.** (supra).

12. From the careful reading of the extracted paragraphs of **National Insurance Company Ltd. vs. Pranay Sethi** (supra), it is evident that while applying the principle of standardisation, the Apex Court while dealing with the issue of fixation of future prospects in cases of deceased who are self-employed or on a fixed salary has held that though the decision in **Sarla Verma (supra)** says that where the age of deceased is more than 50 years, there should be no addition on future prospects, however, taking judicial notice of the fact that the salary does not remain the same, to lay down as a thumb rule that no addition be made after 50 years will be an unacceptable concept. It was, therefore, held that the Court found it appropriate that when a person is in a permanent job, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self-employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. It was then stated that the aforesaid yardstick has been fixed so that there can be consistency in the approach by the Tribunals and the Courts.

13. It is this observations in the Constitution Bench judgment of the Apex Court in **National Insurance Company Ltd. vs. Pranay Sethi** (supra) which was the bone of contention of the appellants in Civil Appeal No. 4634 of 2021 decided on 6th August, 2021. As against the direction of the Apex Court, the Tribunal had relied on sub-rule 3(iii) of Rule 220-A which provides addition of 20% of the salary for the future prospects of deceased more than

50 years of age. It is in this context the Apex Court in **New India Assurance Co. Ltd.** (supra) has observed in paragraphs '10' and '11' as under:-

"10. The discussion on the point in Pranay Sethi was from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in Pranay Sethi cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in Pranay Sethi cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid."

The crux of the decision of the Apex Court in **New India Assurance Co. Ltd.** (supra) to our understanding is that if the statutory instrument affords a favourable treatment, the decision of the Court cannot limit the operation of such statutory provision specially when the validity of the Rules was not put under challenge. In other words, if the formula devised by the statutory instrument affords better or greater benefits, such statutory instrument must be allowed to operate unless it is otherwise found to be invalid.

14. Applying the same principle, we may note that the table carved out in **Sarla Verma (supra)** was to remove the discrepancies in the multiplier scale with reference to the quantum of compensation given in the Second Schedule table where lesser compensation for higher multiplier and larger compensation with reference to lesser multiplier has been applied. The clerical mistake in the Second Schedule as per the observation made by the Apex Court in **Sarla Verma (supra)**, has been corrected. However, it may be noted that the Second Schedule in Motor Vehicles Act, 1988 was very much on the statute book when the Motor Accident Claims Tribunal gave the decision under challenge. The multiplier of 17 applied by the Tribunal is in conformity with the Second schedule. As per **Sarla Verma (supra)**, the multiplier of 16 should have been applied in the age bracket of 31 to 35 years. The formula as provided in the Second Schedule is found to be beneficial to the claimant/respondent herein.

15. Applying the principle laid down by the Apex Court in **New India Assurance Co. Ltd.** (supra), we are of the considered view that the Court cannot curtail the benefits provided by the Statute to the claimant/respondent herein when the statutory provision was very much available in the statute book.

16. Applying the above principle, we are not inclined to interfere in the decision of the Tribunal in applying multiplier of 17 as per the Second Schedule while computing the compensation payable to the dependent of deceased/claimants herein.

17. In view of the above discussion, on both the above counts, we do not find merit in the appeal.

No other ground has been pressed.

The appeal is **dismissed** being devoid of merits.

(2022)04ILR A279
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2022

BEFORE

THE HON'BLE SUBHASH CHANDRA SHARMA, J.

First Appeal From Order No. 3492 of 2009

National Insurance Co. Ltd., Navyug Market, Ghaziabad ...Appellant
Versus
Kewal Krishna Arora & Ors. ...Respondents

Counsel for the Appellant:
Sri Anand Kumar Sinha

Counsel for the Respondents:
Sri Anurag Sharma, Sri Anurag Singh, Sri Anurag Sinha, Km. Pratima Srivastava, Sri S. Shekhar, Sri Sharve Singh, Ms. Nirja Singh, Sri Chandra Shekhar Singh

(A) Torts Law - Motor Vehicle Act,1988 - Section 166 - Application for compensation , Section 173 - Appeals - extent of care/diligence expected of the employer/insured while employing a driver - Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time are not in themselves defences available to the insurer against either the insured or the third parties - To avoid its liability towards the insured the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care.(Para - 19,22)

(B) Torts Law - Motor Vehicle Act,1988 - Section 140 - Liability to pay compensation in certain case on the principle of no fault , Section 149(2)(a) - breach of conditions , Section 149(2)(a)(ii) - conditions regarding driving liscence - claim for compensation - open to the insurer under Section 149(2)(a)(ii) to take a defence - driver of the vehicle involved in the accident was not duly licensed - onus is on the insurer - if the owner was aware of the fact that the licence was fake and still permitted the driver to drive the vehicle, then the insurer would stand absolved - mere fact that the driving licence is fake, per se, would not absolve the insurer. (Para - 20,21)

Deceased S/o claimant - returning home from his office by motorcycle - truck driven by its driver rashly and negligently dashed - causing injuries - died same day - sum of Rs.12,70,406/- alongwith 6 % interest awarded as compensation - driver of offending vehicle had no valid license at the time of accident - liability for payment of compensation cannot be fastened with insurance company - compensation payable by owner of the offending vehicle - M.A.C.T. held - insurer was liable even though the driver had a fake license.(Para -2 to 11)

HELD:-Not proved by appellant that owner/respondent no.3 had not taken adequate care and caution to verify the genuineness of the driving licence of the driver at the time of his employment and that the owner was aware or had notice that the licence was fake or invalid and still permitted him to drive the offending vehicle.Cannot be said that the insured/owner is at fault in having employed a person whose licence has been found to be fake by the insurance company. Appellant/Insurance Company liable to indemnify respondents.(Para - 24,25)

Appeal dismissed. (E-7)

List of Cases cited:-

1. United India Insurance Co. Ltd. Vs Lehru & ors., (2003) 3 SCC 338

2. National Insurance Co. Ltd. Vs Swaran Singh & ors., (2004) 3 SCC 297

3. National Insurance Co. Ltd. Vs Laxmi Narain Dhut, 2007 (3) SCC 700

4. Pepsu Road Transport Corp.Vs National Insurance Com. (2013) 10 SCC 217

5. Ram Chandra Singh Vs Rajaram & ors., A.I.R. 2018 SC 3789

6. Pepsu Road Transport Corp. (supra) & Premkumari Vs Prahlad Deo, (2008) 3 SCC 193

7. Nirmala Kothari Vs United India Insurance Co. Ltd., 2020 (4) SCC 49

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

1. Heard Sri Anand Kumar Sinha, learned counsel for the appellant- National Insurance Company, Sri S. Shekhar, learned counsel for respondent nos.1 & 2 and Ms. Nirja Singh, learned counsel for the respondent no.3.

2. This appeal under Section 173 of Motor Vehicle Act has been filed by the National Insurance Company/opposite party no.2/appellant challenging the judgment and order dated 28.09.2009 passed by Additional District Judge/Special Judge (SC/ST)/M.A.C.T., Ghaziabad by which a sum of Rs.12,70,406/- alongwith 6 % interest has been awarded as compensation on account of death of deceased against the appellant.

3. Facts in brief are that an application u/s 166 & 140 M. V. Act was filed by the claimant/respondent no.1 & 2 seeking compensation to the tune of Rs.42,66,000/- alongwith 18% interest alleging that on 09.03.2005 deceased Vikas Arora S/o claimant was returning to his home from his office by motorcycle and when he reached near Mohan Nagar police outpost, Ghaziabad at 7:00 P.M. a truck bearing no. AS 01 F 4749 driven by its driver rashly and negligently dashed him from behind causing injuries to him as a result he died on the same day in the hospital. F.I.R. in this regard was lodged by the brother of deceased on the same day at police station concerned against unknown driver of the said truck bearing no. AS 01 F 4749 as Case Crime No.189 of 2005, under Section 279, 304A I.P.C.

4. Deceased was aged about 26 years and was earning Rs.9500/- from Kamdhenu Inspat Ltd. and Rs.3000/- from accountancy in Agarwarl Timber and Bans Company. Truck owner as well as insurance company contested the proceedings by filing written statement and denying the allegations made by the claimant/respondent nos.1 & 2.

5. Learned tribunal on the basis of pleadings and after appreciating the evidence brought on record by the parties, both oral and documentary determined that incident took place due to rash and negligent driving of the driver of offending vehicle. It recorded finding on the basis of oral testimony of eye-witness PW-2 Kamal Arora who proved the manner and mode of accident. It was stated by him that he was waiting for his brother at the police outpost Mohan Nagar and accident took place in his presence on 09.03.2005 at about 7:00 P.M. A truck bearing no.AS 01 F 4749 was coming from the opposite direction and driver of the truck was driving it rashly and negligently which dashed the motorcycle of deceased from behind in which deceased got injuries and was taken to the hospital where he died. He informed to the police station and lodged F.I.R. PW-1 Kewal Krishna Arora is father of deceased who had not seen the incident. The testimony of PW-2 was found to be unshakable in cross-examination. F.I.R. was lodged by PW-2

who had seen the incident and this was also taken into account by the learned tribunal.

6. On the question of quantum, learned tribunal found that deceased who was working as accountant in Kamdhenu Ispat Ltd. from where he was earning Rs.9500/- per month as salary and was also working in Agarwal Timber and Bans Company from where he earned Rs.26,500/- per year. In this regard statements of PW-3 Sushil Bhardawaj, Assistant Regional Manager, Sales & PW-4 Puneet Agarwal care taker of his father's business were recorded and relied on. Deceased filed I.T.R. in assessment year 2004-05 in which he showed his income as Rs.1,05,700/- on the basis of which his income was assumed to be Rs.1,05,700/- out of which 1/3 of the annual income was deducted as personal expenses of deceased and after applying multiplier of 18 on the age of the deceased determined the compensation to the tune of Rs.12,68,406/- and further awarded a sum of Rs.2000/- for funeral expenses. In this way, a total sum of Rs.12,70,406 was determined as compensation payable to the claimant/respondent nos.1 & 2.

7. Learned tribunal found that at the time of accident driver of the truck causing accident, had no valid driving license, even though liability was fastened against the insurance company the appellant.

8. Learned counsel for the appellant submits that the learned tribunal has wrongly assessed the income of deceased on the basis of income as shown in the I.T.R. filed by the deceased in Income Tax Department and assessed the compensation on higher side.

9. Learned counsel for respondent nos.1 & 2 urged that the argument made by learned counsel for the appellant is not tenable regarding income of deceased and amount of compensation as determined by the learned tribunal but said nothing about the liability for payment of compensation.

10. In this regard it is to note that learned tribunal has not added any amount under the head of future prospects and conventional head as provided in the case of ***Sarla Verma and Pranay Sethi,*** so it cannot be said that the amount of award is on higher side. Since learned counsel for claimant/respondent nos.1 & 2 has made no any objection relating to the awarded amount, therefore, this Court is not inclined to disturb the assessment of amount of compensation as determined by the learned triubnal.

11. It is further submitted that driver of the offending vehicle had no valid license at the time of accident, therefore, liability for payment of compensation cannot be fastened with the insurance company and compensation was payable by the owner of the offending vehicle. In this regard, learned tribunal has recorded its finding while deciding issue no.3 & 4. that owner of the vehicle has committed breach of conditions of insurance policy, therefore, insurance company is not liable for making payment of compensation but fastened the liability on the insurance company which is illegal. Learned tribunal has also mentioned in the judgment that if owner of the vehicle makes breach of conditions of insurance policy, insurance company is entitled to recover the amount of compensation from owner of the vehicle even though in the operative portion liability has been fastened on the insurance company without giving it right to recovery.

12. Learned counsel for the respondent no.3 (owner of the vehicle) has contended

that in this case driver of the vehicle held driving license at the time of accident which was issued from Transport Authority, Muzaffarpur but during investigation by the insurance company it was found to be fake which was not in his knowledge. The driving license was valid at the time of accident and he employed the driver with due care and caution as having valid driving license, therefore, he cannot be held liable for making payment of compensation.

13. The main question involved in this appeal is whether the M.A.C.T. was not right in holding that insurer was liable even though the driver had a fake license.

14. To understand the correct legal position regarding liability of the insurance company where the driver of the offending vehicle possessed a fake driving license, I have to go through the provisions u/s 149(2)(a) & 149(2)(a)(ii) Motor Vehicle Act, 1988 and various pronouncements made by Hon'ble the Apex Court in this regard.

15. **Section 149(2)(a) and Section 149(2)(a)(ii)** are as under:-

"(2) No sum shall be payable by an insurer under Section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specific condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licenced, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification;"

16. Breach of conditions under Section 149(2)(a) of the Motor Vehicles Act, 1988 absolves the insurer of its liability to the insured. Section 149(2)(a)(ii) deals with the conditions regarding driving licence. In case the vehicle at the time of accident is driven by a person who is not duly licensed or by a person who has been disqualified from holding or obtaining a driving licence during the period of disqualification, the insurer is not liable for the compensation. In the instant case, we are called upon to deal with a situation where the driver allegedly possessing only a fake driving licence.

17. In ***United India Insurance Company Limited vs. Lehru and others (2003) 3 SCC 338,*** a two-Judge Bench of Hon'ble The Apex Court has taken the view that the insurance company cannot be permitted to avoid its liability only on the ground that the person driving the vehicle at the time of accident was not duly

licensed. It was further held that the willful breach of the conditions of the policy should be established. Still further it was held that it was not expected of the employer to verify the genuineness of a driving licence from the issuing authority at the time of employment. The employer needs to only test the capacity of the driver and if after such test, he has been appointed, there cannot be any liability on the employer. The situation would be different when the employer was told that the driving licence of its employee is fake or false and yet the employer not taking appropriate action to get the same duly verified from the issuing authority. We may extract the relevant paragraphs from the judgment:

"18. Now let us consider Section149(2). Reliance has been placed on Section149(2)(a)(ii). As seen in order to avoid liability under this provision it must be shown that there is a "breach". As held in Skandia and Sohan Lal Passi cases the breach must be on part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the Insurance Company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance. The injured or relatives of the person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the Legislature, in its wisdom, has made insurance, at least third party insurance, compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is insurance. In all businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in aforementioned cases viz that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The insurance company must establish that the breach was on the part of the insured."

"20. When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that insurance companies expect owners to make enquiries with RTOs, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section149(2)(a)(ii). The Insurance Company would not then be absolved of liability. If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a

case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed therein and see no reason to take a different view."

18. The matter was subsequently considered by a three-Judge Bench of Hon'ble the Apex Court in **National Insurance Company Limited vs. Swaran Singh and others (2004) 3 SCC 297.** The said Bench was of the view that in case the insured did not take reasonable and adequate care and caution to verify the genuineness or otherwise of the licence, the liability would still be open-ended and will have to be determined on the basis of facts of each case. The relevant discussions are available at paragraphs 92, 99, 100 and 101, which are extracted below:

"92. It may be true as has been contended on behalf of the petitioner that a fake or forged licence is as good as no licence but the question herein, as noticed hereinbefore, is whether the insurer must prove that the owner was guilty of the wilful breach of the conditions of the insurance policy or the contract of insurance. In Lehru case, the matter has been considered in some detail. We are in general agreement with the approach of the Bench but we intend to point out that the observations made therein must be understood to have been made in the light of the requirements of the law in terms whereof the insurer is to establish wilful breach on the part of the insured and not for the purpose of its disentitlement from raising any defence or for the owners to be absolved from any liability whatsoever."

"99. So far as the purported conflict in the judgments of Kamla and Lehru is concerned, we may wish to point out that the defence to the effect that the licence held by the person driving the vehicle was a fake one, would be available to the insurance companies, but whether despite the same, the plea of default on the part of the owner has been established or not would be a question which will have to be determined in each case."

"100. This Court, however, in Lehru must not be read to mean that an owner of a vehicle can under no circumstances have any duty to make any enquiry in this respect. The same, however, would again be a question which would arise for consideration in each individual case."

"101. The submission of Mr. Salve that in Lehru case, this Court has, for all intent and purport, taken away the right of insurer to raise a defence that the licence is fake does not appear to be correct. Such defence can certainly be raised but it will be for the insurer to prove that the insured did not take adequate care and caution to verify the genuineness or otherwise of the licence held by the driver."

19. Swaran Singh's case (supra) was subsequently considered by Hon'ble the Apex Court in ***National Insurance Company Limited vs. Laxmi Narain Dhut 2007 (3) SCC 700***. It was explained that:

"Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed

driver or one who was not disqualified to drive at the relevant time..."

20. In the case of ***Pepsu Road Transport Corporation vs. National Insurance Company (2013) 10 SCC 217*** Honb'le the Apex Court after considering the law as laid down in aforementioned cases, has held in para 8 which is as under:-

8.In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation.

21. In the case of ***Ram Chandra Singh vs. Rajaram & others, A.I.R. 2018 SC 3789,*** Hon'ble the Apex Court by considering the judicial precedents in the case of ***Pepsu Road Transport Corporation (supra) & Premkumari vs. Prahlad Deo (2008) 3 SCC 193*** ruled in para 11 which is given as under:-

11. Suffice it to observe that it is well established that if the owner was aware of the fact that the licence was fake and still permitted the driver to drive the vehicle, then the insurer would stand absolved. However, the mere fact that the driving licence is fake, per se, would not absolve the insurer. Indubitably, the High Court noted that the counsel for the appellant did not dispute that the driving licence was found to be fake, but that concession by itself was not sufficient to absolve the insurer.

22. Again in a recent case of ***Nirmala Kothari vs. United India Insurance Company Ltd. 2020 (4) SCC 49*** Hon'ble the Apex Court considered the aforementioned position of law and explained about the extent of care/diligence expected of the employer/insured while employing a driver. The relevant para no.9, 10 & 11 are as under:-

9. While the insurer can certainly take the defense that the license of the driver of the car at the time of incident was

invalid/fake however the onus of the proving that the insured did not take adequate care and caution to verify the genuineness of the license or was guilty of willful breach of the conditions of the insurance policy or the contract of insurance lies on the insurer.

10.The view taken by the National Commission that the law as settled in the Pepsu case (Supra) is not applicable in the present matter as it related to third-party claim is erroneous. It has been categorically held in the case of ***National Insurance Co. Ltd vs. Swaran Singh & Ors.***

"110. (iii).... Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licenced driver or one who was not disqualified to drive at the relevant time."

11. While hiring a driver the employer is expected to verify if the driver has a driving license. If the driver produces a licence which on the face of it looks genuine, the employer is not expected to further investigate into the authenticity of the licence unless there is cause to believe otherwise. If the employer finds the driver to be competent to drive the vehicle and has satisfied himself that the driver has a driving licence there would be no breach of Section 149(2)(ii) and the Insurance Company would be liable under the policy. It would be unreasonable to place such a high onus on the insured to make enquiries with RTOs all over the country to ascertain the veracity of the driving licence. However, if the Insurance Company is able to prove that the owner/insured was aware or had notice that the licence was fake or invalid and still permitted the person to drive, the insurance company would no longer continue to be liable.

23. In the present case opposite party no.1/respondent no.3 owner of the offending vehicle had stated in his written statement that on the date of accident Ram Naresh was driver on his vehicle. He had valid dirving licence. It was issued from the office of District Transport Officer, Muzaffarpur. On investigation by the Insurance company/appellant, this driving licence was found to be fake as per report of Investigator Mr. Arvind Kumar Misra but he had not entered into the witness box to prove the contents of his report which was based on the observation of dealing assistant. Even the dealing assistant of the office of District Transport Officer, Muzaffarpur has also not been examined to prove that the seal and signature of District Transport Officer in the xerox copy of driving licence were not found to be correct.

24. Further it was also not proved by the appellant that the owner/respondent no.3 had not taken adequate care and caution to verify the genuineness of the driving licence of the driver at the time of his employment and that the owner was aware or had notice that the licence was fake or invalid and still permitted him to drive the offending vehicle. In such circumstances, it cannot be said that the insured/owner is at fault in having employed a person whose licence has been

found to be fake by the insurance company before the learned tribunal. Therefore, there exists no any cause to disturb the findings recorded by learned tribunal in this regard.

25. In view of the above, this appeal is ***dismissed.*** The appellant/Insurance Company is liable to indemnify the respondents. Claimants be given the same without keeping in the fixed deposit as more than 16 years have elapsed.

26. There is no order as to costs.

(2022)04ILR A287
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.03.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE VIKRAM D CHAUHAN, J.

Government Appeal No. 1450 of 1989

The State of U.P. ...Appellant
Versus
Dharmu @ Dharam Singh ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:
Sri Vinay Saran, Sri Virendra Saran, Sri Ajay Kumar Srivastava

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 378 - Indian Penal Code,1860-Sections 376-challenge to-acquittal-victim aged about 9 years did not budge from the prosecution version, she identified the accused, she stated time and place of accident which has been duly testified and proved by the informant (PW-1)-blood stained underwear was recovered-Moreso, she declined the specific query whether she has been tutored-testimony of the victim duly corroborated by the medical expert opinion, merely for the reason that the supplementary medical examination report that the offence was committed 24-30 hrs and the same was not noted by the medical expert while examining the prosecutrix would not reject the testimony of the victim-The conviction of the accused can rest on the sole testimony of the prosecutrix provided she is a sterling witness; her testimony is credible, truthful and trustworthy-Further the shortcoming of the prosecution, if any, would not benefit the defence-The sole testimony of the victim was sufficient to have convicted the accused.(Para 1 to 25)

B. The sterling witness should be of a very high quality. to test the quality of such witness, what would be more relevant would be the consistency of the statement right from the starting point till the end, it should be natural. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstances should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it.(Para 18)

The appeal is allowed. (E-6)

List of Cases cited:

1. Rai Sandeep Vs St. (NCT of Delhi) (2012) 8 SCC 21

2. Sham Singh Vs St. of Har. (2018) 18 SCC 34

3. St. of Punj. Vs Gurmit Singh (1996) 2 SCC 384

4. Ranjit Hazarika Vs St. of Assam (1998) 8 SCC 635

5. St. of M.P. Vs Babulal (2008) 1 SCC 234

6. Dinesh Vs St. of Raj. (2006) 3 SCC 77

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

1. Heard Sri Vikas Goswami, learned Additional Government Advocate and Sri Ajay Kumar Srivastava learned counsel appearing for the accused respondent.

2. The instant appeal is directed against the judgment and order dated 25 February 1989 passed by the Sessions Judge, Farrukhabad in Sessions Trial No. 784 of 1988 (State vs. Dharmu alias Dharam Singh) arising from Case Crime No. 183 of 1988, under Section 376 IPC, Police Station Kannauj, District Farrukhabad, whereby, accused-respondent was acquitted.

3. As per prosecution case FIR came to be lodged on 21.05.1988 at 18:40 hours, alleging that daughter of the complainant, aged about 10 years, had gone out at 10:00 a.m. to graze goats, accused reached at the field where accused caught hold of his daughter and dropped her on the ground holding her mouth and committed offence of rape. The persons passing nearby exhorted the accused, he thereafter ran away. It is further alleged that the victim was bleeding from her private part; on return, to the house after selling bangles, complainant was informed of the incident.

4. The victim was medically examined on 22.05.1988 at 3:00 p.m. Supplementary medical report was prepared after receiving the x-ray report; age of the victim was assessed 9 years; in the opinion of the medical expert, rape was committed 24 to 30 hours earlier.

5. The charge-sheet came to be filed against the accused respondent under Section 376 IPC. The accused respondent was summoned to stand trial. In defence, he denied the allegations and demanded trial. No defence witness was produced. The Trial Court acquitted the accused as the prosecution failed to prove the charge beyond reasonable doubt. Trial Court reached a finding that the victim was tutored and that the time of the alleged incident as per the medical expert opinion does not corroborate with the alleged time of the incident.

6. Prosecution to prove the charge examined in all 5 witnesses of fact; complainant, Ram Sewak (PW-1), father of the victim, victim (PW-2), Dr. P. Singh (PW-3), S.I. A.K. Singh (PW-4), Head Moharrir Ganga Prasad (PW-5).

7. The following documents were exhibited:

1.	**F.I.R.**	**21.05.1988**	**Ex. Ka. 8**
2.	**Written Report**	**21.05.1988**	**Ex. Ka. 1**
3.	**Recovery Memo and supurdginama of ''Under-Wear'**	**21.05.1989**	**Ex. Ka.7**
4.	**Injury Report**	**22.05.1988**	**Ex. Ka. 2**
5.	**Supplementary Report**	**24.05.1988**	**Ex. Ka. 3**
6.	**Site Plan with Index**	**22.05.1988**	**Ex. Ka. 6**

8. PW-1, father of the victim, in Examination-in-Chief stated that when he returned home at 3:00 p.m. on the day of incident he saw that the physical condition of his daughter was in bad state; private part of the prosecutrix was bleeding, blood was visible on her underwear. He further stated that he was informed by the victim that accused had committed the offence of rape. He further stated that he got the report transcribed by Jeetan Lal on his dictation. He further stated that at 4:00 p.m., he alongwith his daughter and other villagers had gone to the police station. In cross-examination, he reiterated the FIR version

and stated that on returning to his house at 3:00 p.m., 3-4 persons of the village had assembled and were talking with his daughter, she informed him of the incident; he denied the suggestion that he had reported the incident after due consultation.

9. PW-2, victim stated that she is aged about 9-10 years, the Trial Court assessed her intelligence by putting several question to ascertain as to whether victim understood the questions. On specific query of the court, she stated that she is not educated, she was aware of her father's earning by selling bangles, 4 bangles are sold for one rupee; 8 bangles in 2 rupee. On specific query, she recognised the accused respondent present in the court and narrated the incident stating that accused had caught hold of her and dropped her on the ground, removed her underwear and committed the offence. She incurred injuries; blood had come out and stained her underwear, thereafter, accused escaped from the spot. On specific query, she stated that she narrated the incident to her father, thereafter, report was lodged. She further stated that she accompanied her father to the police station. On query she stated that the incident had occurred at the agricultural field of Jhabba. On specific query by the defence as to whether she had been tutored, she denied and answered in negative.

10. Dr. P. Singh, PW-3, stated that she examined the victim on 22.05.1988; she did not find injury on the body of victim on external examination; on internal examination injury was found on the private part and it was bleeding; to ascertain the age of the victim she advised x-ray; supplement report was prepared on 24.05.1988 after receiving the x-ray report. In her opinion, the victim was aged about 9 years; incident of rape occurred 24 to 30 hours; she prepared the supplementary report; x-ray report dated 24.05.1988 was prepared by Dr. S.K. Rathour.

11. On specific query by the Trial court as to why she did not give her opinion of rape on examining the victim on 22.05.1988; the witness replied that she was awaiting the x-ray report, therefore, she did not give any opinion. She further stated that normally the information of rape is given after receiving the x-ray report; in this case there is no report of pathology otherwise opinion is generally given after receiving either x-ray report or pathology report. She further stated that the x-ray of the victim was done for the purposes of determining the age and not to ascertain whether offence of rape was committed. On drawing the attention of the witness (PW-3) with regard to her opinion that "I came to conclusion that her age is about Nine Years. Rape has been done. Duration of injury about twenty four to thirty Hrs". On query she stated that victim was not produced on 24.05.1988; opinion of the approximate time of the crime of offence is based on medical examination report dated 22.05.1988 when the victim was produced for medical examination and the opinion is based on the injury report dated 22.05.1988. On suggestion as to whether the victim could have incurred injury on her private part by falling from a cot or any other manner, the witness declined and answered in negative. The witness categorically stated that injury could not have been caused by falling from a cot.

12. S.I. A.K. Singh, (PW-4), deposed that the investigation was entrusted to him on 22.06.1988. He recorded the statement of the victim and the complainant on 16.07.1988. On 12.08.1988 he recorded the statement of the accused in jail. The site

plan was prepared on 22.05.1988; recovery memo of underwear of the victim was prepared by the constable Ganga Prasad. Charge-sheet was filed on 12.08.1988.

13. Head Moharrir Ganga Prasad (PW-5), deposed that he had taken the underwear of the victim on 21.05.1988 at police station.

14. The Trial Court rejected the testimony of the victim on being tutored, hence, not trustworthy. The opinion of the medical expert (PW-3) was also rejected as in the opinion of the court in the supplementary examination report dated 24.05.1988, it was opined that rape has been committed on the prosecutrix and duration of injury was 24 to 30 hours. The probable time recorded in the supplementary affidavit does not corroborate the time of the alleged incident of rape. It is further noted that PW-3, Dr. P. Singh was unable to submit plausible explanation as to why she did not record her opinion on the point of rape on 22.05.1988 itself when she examined the victim as also the duration of injury. According to the Trial Court, negligence on the part of the medical expert was considered fatal to the case of the prosecution. Further, the court directed District Magistrate and Chief Medical Officer to inquire into the circumstances under which PW-3 failed to give proper opinion on the point of rape and duration of injury on 22.05.1988. The relevant portion of the judgment is extracted:

"A perusal of the aforesaid statement of the prosecutrix reveals that the reply which the prosecutrix gave to the questions put to her by the Public Prosecutor was probably the result of tutoring. ..... In the instant case before this court, I find that even the Investigating Officer S.I. A.K. Singh had examined the prosecutrix after a lapse of a period of one month and 22 days, the occurrence having taken place on 21.05.1988 **(wrongly mentioned as 21.06.1988)** and the statement of the prosecutrix having being recorded on 16.07.1988. The circumstances that even the Investigating agency never bothered to record the statement of the prosecutrix promptly fully go to show that the answers to the questions which the prosecutrix has given in reply to the questions put to her by the Public Prosecutor is the out come of her tutoring.

"Now coming to the evidence of Dr. (Smt.) P. Singh (P.W. 3), Medical Officer, Women Hospital, Fatehgarh, I find that on 25.05.1988, Dr. (Smt.) P. Singh never gave any opinion on the point of rape. She mentioned in her supplementary medical examination report dated 24.05.1988 that rape has been committed upon the prosecutrix and the duration of injury was 25 to 30 hours. Dr. (Smt.) P. Singh was unable to submit any plausible explanation as to why she did not state her opinion on the point of rape right on 22.05.1988 as also the duration of injury. When Dr. (Smt.) P. Singh had medically examined the prosecutrix on 22.05.1988 and when the prosecutrix was referred to her for examination as a case of rape by the Police, it was her bounden duty to have given her opinion on the point of rape right on 22.05.1988. She ought to have mentioned the duration of injury right on 22.05.1988. The negligence on the part of Dr. (Smt.) P. Singh in this behalf is considered fatal to the case of prosecution. I leave it to the discretion of the District Magistrate and the Chief Medical Officer to enquire into the circumstances under which Dr. (Smt.) P. Singh failed to give her proper opinion on the point of rape and duration of

injury on 22.05.1988 and under what circumstances she wrote after two days in her injury report that rape had been committed and that the duration of the injury was about 25 to 30 hours".

15. It is settled legal position that the evidence of rape victim stands at par with the evidence of an injured witness. Injury of the rape victim being physical, as well as, psychological in the form of traumatised assault and ravishment of her chastity and womanhood. It is also settled that if the evidence of the prosecutrix inspires confidence and appears to be trustworthy and natural, no further corroboration by an independent eye-witness is required. Corroboration from medical evidence varies from case to case as it depends upon the circumstances of each case.

16. We have gone through the cross-examination of the victim. It runs into 9 typed pages; the Trial Court, the defence counsel and the prosecution, severely grilled the victim, aged about 9-10 years. However, we find that the victim did not budge from the prosecution version; she identified the accused; she categorically stated that the accused respondent commited the offence; she further stated the time of incident; site of the incident; and on specific query as to whether she has deposed on being tutored, she declined. The court after examining the witnesses of fact and considering the circumstances was of the opinion that the victim is intelligent enough and is able to understand the questions. It is to be noted that there is no major contradiction in her statement with regard to the incident; and her testimony is truthful, credible and trustworthy having regard to the fact that victim is illiterate/villagers, coming from marginalised section of society and is not worldly-wise; statement of the victim supports the prosecution case which has been duly testified and proved by the informant (PW-1). The site plan prepared on 22.05.1988, as per the persecution version i.e. agricultural field of Chhabi Nath.

17. The fact that witness being a tutored one should be reflected from the over all style of deposition and all the attending circumstances. A tutored witness normally sticks to his/her earlier statement very faithfully. This is also not the case in the present matter because the testimony of the witness before the court is silent about a few facts.

18. Who can be said to be a "sterling witness', has been dealt with and considered in Rai Sandeep v. State (NCT of Delhi)1. In para 22, it is observed and held as under:

"In our considered opinion, the "sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the

cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a "sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

19. In the case of ***Sham Singh v. State of Haryana2***, it is observed that testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. The courts should not get swayed by minor or insignificant contradictions/ discrepancies in the statement of the prosecutrix. In paragraphs 6 & 7, it is observed and held as under:

"6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults. [See: **State of Punjab v. Gurmit Singh3].**

7. It is also by now well settled that the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the

veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. (See: **Ranjit Hazarika v. State of Assam4).**

20. Further, the testimony of the victim is duly corroborated by the medical expert opinion, internal medical examination notes the injury on the private part including blood seen therein; blood stained underwear of the victim was recovered on the date of incident at the police station (per PW-5). The factum of injury and the blood present on the private part is duly corroborated by statement of the informant, victim and medical expert opinion. The contents of the report has not been doubted by the defence. The medical opinion was doubted merely for the reason that in the medical examination report the expert has not mentioned the probable time of rape. The Trial Court committed serious error in rejecting the testimony and the report of the medical expert (PW-3), merely for the reason that the supplementary medical examination report notes that the offence was committed 24-30 hours and the same was not noted by the medical expert while examining the prosecutrix on 22.05.1988. The short coming of the prosecution, if any, would not benefit the defence, nor can the defence take any advantage. The prosecution case has to stand on its own legs, and the incriminating circumstances has to be proved beyond reasonable doubt.

21. The conviction of the accused respondent can rest on the sole testimony of the prosecutrix provided she is a sterling witness; her testimony is credible, truthful and trustworthy. Further, the accused cannot take any advantage that there was some short coming in the investigation i.e. the statement of the victim not recorded promptly by the Investigating Officer or the medical expert not recording her opinion that rape was committed on the report when the victim was examined.

22. We have no hesitation, in the given facts, and having regard to the testimony of victim (PW-2) and medical expert (PW-3), the charge against the accused respondent stands proved beyond reasonable doubt. The sole testimony of the victim was sufficient to have convicted the accused respondent. In our opinion, the finding reached by the Trial Court is per-se perverse and against the testimony of the victim, duly supported by medical evidence.

23. The courts are expected to try and decide cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized Judge is a better armour in cases of crime against women

than long clauses of penal provisions, containing complex exceptions and complicated provisos.

24. Once a person is convicted for an offence of rape, he should be treated with a heavy hand. An undeserved indulgence or liberal attitude in not awarding adequate sentence in such cases would amount to allowing or even to encouraging 'potential criminals'. The society can no longer endure under such serious threats. Courts must hear the loud cry for justice by society in cases of heinous crime of rape and impose adequate sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. [Refer: **State of M.P. v. Babulal5** and **Dinesh Vs. State of Rajshtan]6**

25. In view thereof, government appeal is **allowed.** The order dated 25 February 1989, passed by the Sessions Judge, Farrukhabad in Sessions Trial No. 784 of 1988 (State vs. Dharmu alias Dharam Singh) arising from Case Crime No. 183 of 1988, under Section 376 IPC, Police Station Kannauj, District Farrukhabad, is set aside.

26. Accused-respondent Dharmu alias Dharam Singh is, hereby, held guilty. He is convicted under Section 376 IPC and sentenced to 10 years rigorous imprisonment with fine of Rs.25,000/-, on default of deposition of fine the accused respondent shall serve one year simple imprisonment. Rs.20,000/- of the fine so realized, shall be given to the victim towards compensation. The accused, Dharmu alias Dharam Singh, is on bail. His bail bonds are cancelled and sureties are discharged. He should be taken into custody forthwith to serve out the sentence awarded to him. The office is directed to communicate this order to the CJM concerned within a week for compliance.

27. The trial court record, along with the copy of this order, be returned forthwith.

(2022)04ILR A294
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.03.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Govt. Appeal No. 1000636 of 2006

State of U.P. ...Appellant
Versus
Lallan & Ors. ...Respondents

Counsel for the Appellant:
Mr. C.S. Pandey, A.G.A.

Counsel for the Respondents:

A. Criminal Law - Code of Criminal Procedure, 1973-Section 378 - Indian Penal Code, 1860-Sections 498-A, 304-B & 201 & Dowry Prohibition Act, 1961-Section 3/4-challenge to-acquittal-deceased died an unnatural death in her matrimonial home-she committed suicide by hanging-she was suffering from 'fits of unconciousness'-father of the deceased PW-1 stated in his cross-examination that he incurred all expenditure of treatment till she was alive-demand of passion motorcycle by in-laws is false, at that relevant time Passion motorcycle was not launched in the market, to prove the same letter of the concerned Agency was filed-Moreso, the incident did not occur within seven years of the marriage of the deceased, but after seven years-accused not only proved that the marriage was solemnized before 7 years by producing

marriage card but also prescription of the doctor that the deceased was mentally ill and the same was corroborated by PW-1- To hold guilty the person accused of offence u/s 304-B it must be proved that the death of woman was caused by an unnatural death within seven years of marriage and soon before her death, she was subjected to cruelty in her matrimonial home in connection with any demand of dowry-Thus, the ingredients required u/s 304-B have not been established as to raise the presumption u/s 113-B of Indian Evidence Act against the appellants.(Para 1 to 8)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Achhar Singh Vs St. of H.P. (2021) 5 SCC 543

2. Maya Devi & anr. Vs St. of Har. (2015) 17 SCC 405

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This Criminal Appeal has been filed by the appellant- State of U.P. against the judgment and order dated 02.012.2005 passed by Additional Sessions Judge Court No.1, District Kheri in Sessions Trial No.797 of 2003 under Sections 498-A, 304-B, 201 of the Indian Penal Code, 1860 (in short I.P.C.) and Section ¾ of Dowry Prohibition Act (in short D.P. Act), whereby the accused/respondents were acquitted.

2. The facts necessary for disposal of this appeal as culled out are as under:-

i. A First Information Report (in short ***F.I.R.***) was registered at Case Crime No.443 of 2002 under Sections 498-A, 304-B, 201 of I.P.C. and Section ¾ of Dowry Prohibition Act on the basis of written report submitted by the complainant Mustakim. it was described in the written report that the complainant married his daughter Parvin aged about 24 years in June 1996 to Lallan son of Asgar. After the marriage Lallan and other family members i.e. Asgar (mother-in-law) Sahnoor (Jeth), Khanney (jeth), Laddan (dewar), wife of Sahnoor (jethani) and wife of Khanney (jethani) started complaining about the less dowry given in the marriage and used to demand Passion Motorcycle. The complainant gave dowry in the marriage according to his status and capacity, but due to scarcity of money he could not give motorcycle. For this reason, Lallan and other family members used to beat his daughter. Just eight days ahead of the incident Lallan came to take his daughter and when he left the house of the complainant he asked him to arrange the motorcycle within eight days otherwise that will not be good. On 24.12.2002 at about 2:00 P.M. Vasir informed to the complainant that his daughter Parvin had died in the night. On this information he reached the matrimonial home of his daughter and found the dead body lying in the home and all accused persons fled away. Only the mother-in-law of the deceased was present there. The villagers and Gram Pradhan who were present there tried to allure him by offering Rs.20 thousand and not to report to the police, when complainant refused the offer, they did not even gave the dead body to him. Thereafter the complainant went to the police station Oel district Kheri, but his report was not lodged and he was asked to present a written report that his daughter was killed by the accused persons in the night of 23/24.12.2002.

After investigation the chargesheet was submitted against all the accused persons in the Court. The concerned Magistrate after taking cognizance committed the case to Sessions

Court for trial. Sessions Judge framed the charges against all the accused persons on 07.07.2004. All the accused persons denied the crime and claimed to be tried.

In order to prove its case the prosecution examined the following witnesses:-

(i) P.W.1 Mustakim, complainant.

(ii) P.W.2 Mubarak Ali, brother of the deceased

(iii) P.W. 3 Mr. Vijay Vardhan Tomar, Naib Tehsildar who prepared the inquest report and send the dead body for post-mortem alongwith necessary police papers

(iv) P.W.4 Dr. A.K. Malik, who conducted the post-mortem on the cadaver of the deceased.

Apart from the above oral evidence, documentary evidence Exhibit-Ka 1 to Exhibit Ka-9 were also proved. These exihibits are as under:-

(i) Exhibit Ka-1, written report,.

(ii) Exhibit Ka-2 inquest report.

(iii) Exhibit Ka-3 Police Form 13.

(iv) Exhibit Ka-4 Police Form 33.

(v) Exhibit Ka-5 Photo Nash.

(vi) Exhibit Ka-6 report of R.I.

(vii) Exhibit Ka-7 report to C.M.O. for conducting postmortem.

(viii) Exhibit- Ka-8 specimen seal.

(ix) Exhibit Ka-9 post-mortem report.

After close of evidence by prosecution the statement of accused persons were recorded under Section 313 of Code of Criminal Procedure (in short Cr.P.C.), wherein they denied the crime and stated that marriage of the deceased with Lallan was solemnized in the year 1995 and the deceased was ill, so she committed suicide by hanging. Accused Lallan examined herself as D.W.1 after seeking permission of the trial Court and proved two documents, Exhibit Kha-1 marriage card of the deceased with accused Lallan and Exhibit Kha-2 prescription of a doctor who treated the deceased.

The trial court after hearing the arguments of both the sides on the basis of evidence available on record reached on the conclusions that the marriage of the deceased with accused/appellant Lallan was solemnized in the year 1995 and incident did not take place within seven years of marriage. The trial court also concluded that deceased was mentally ill as has been proved by Lallan examined as D.W.1 and evident from Exhibit Kha-2 the prescription of treatment by Dr. Dinesh Dua of the deceased. P.W. 1. Mustakim, the father of the deceased has also stated in his cross examination that Pravin was ill and he incurred all expenditure of treatment till the deceased was alive and treatment was going on in Laherpur. Exhibit Kha-2 shows that the deceased was suffering from 'fits of unconsciousness', so she committed suicide. As far as demand of Passion Motorcycle is concerned learned trial Court has observed that at the relevant time Passion Motor Cycle was not launched in the market, hence the allegation of demand of Passion Motorcycle is also false, hence the learned trial Court acquitted all the appellants/accused persons of the charges levelled against them. Being aggrieved by this acquittal this appeal has been filed by the State Government.

3. Heard Mr. C.S. Pandey, learned Additional Government Advocate/ (A.G.A.) for the State-appellant.

4. Learned A.G.A. submitted that the impugned judgment is against facts and evidence available on record. Learned trial Court has not appreciated the evidence in right perspective and has committed the

grave error by acquitting the appellant/accused persons. The factum of demand of dowry has been proved by the witnesses of facts, the complainant and the brother of the deceased, but the trial court has wrongly disbelieved them and also wrongly disbelieved the evidence that marriage of the deceased was solemnized with the accused/appellant Lallan in the year 1997, hence the impugned judgment should be set-aside.

5. Considered the submissions made by learned A.G.A. and perused the original record.

6. The Hon'ble Supreme Court in the case of **Achhar Singh Vs. State of Himachal Pradesh : (2021) 5 SCC 543,** has laid down as under (para 16) :-

"16. It is thus a well crystalized principle that if two views are possible, the High Court ought not to interfere with the trial Court's judgment. However, such a precautionary principle cannot be overstretched to portray that the "contours of appeal" against acquittal under Section 378 CrPC are limited to seeing whether or not the trial Court's view was impossible. It is equally well settled that there is no bar on the High Court's power to re-appreciate evidence in an appeal against acquittal. This Court has held in a catena of decisions (including Chandrappa v. State of Karnataka, State of Andhra Pradesh v. M. Madhusudhan Rao, And Raveen Kumar v. State of Himachal Pradesh) that the Cr.P.C does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal and that the appellate Court is free to consider on both fact and law, despite the self-restraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused".

7. Before moving forward, it appears appropriate to go through 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 above mentioned 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."

8. Thus to hold guilty the person accused of offence under Section 304-B it must be proved that the death of woman was caused by any burns or bodily injury or she died an unnatural death within seven years of her marriage. It should also be proved that soon before her death the deceased was subjected to cruelty or harassment in connection with any demand of dowry. In the present matter the deceased died an unnatural death in her matrimonial home. Though it has been alleged in the FIR as well as in the statement of the complainant that the marriage of the deceased with the accused/appellant Lallan was solemnized in June 1996, but that fact could not be proved by the prosecution because P.W.1 and P.W.2 in this regard have given contradictory statements. P.W.1 has stated that marriage was solemnized in June 1996, while the P.W.2 brother of the deceased has stated that marriage of the deceased was solemnized in June 1997. The accused/appellant Lallan as D.W.1 has stated that his marriage with the deceased was solemnized in June 1995. To prove this fact he (Lallan) produced marriage card Exhibit Kha-1 and the trial Court has rightly relied on that evidence and came to the conclusion that marriage of the deceased with accused/appellant Lallan was solemnized in June 1995. The incident took place on 24.12.2002, thus the incident did not occur within seven years of the marriage of the deceased, but after seven years. Further the accused/appellant Lallan has proved that the deceased was mentally ill by producing the Exhibit Kha-2 the prescription of the doctor Dinesh Dua, wherein it has been recorded by the doctor that the deceased was suffering from 'fits of unconsciousness'. The factum of illness of the deceased has also been corroborated by P.W.1 the father of the deceased, as in his cross-examination he has stated that her daughter was being treated in Laherpur and

he incurred all the expenses of treatment. Further the learned trial Court has rightly reached to the conclusion that at the time of alleged demand Honda Passion Motorcycle was not launched in the market as the letter of the concerned Agency has been filed by the appellant on the record in the Court, wherein it has been mentioned that Honda Passion Motorcycle was launched in the market in the year 2001: Hence the learned trial Court has rightly came to the conclusion that the ingredients required under Section 304 B have not been established as to raise the presumption under Section 113-B of Indian Evidence Act against the appellants / accused. In such a situation the learned trial Court rightly acquitted the appellant/accused persons. There appears no error in the findings of the learned trial Court further more the view taken by the learned trial Court is a possible view. Thus there appears no convincing reason to interfere with the acquittal recorded by the learned trial Court. Hence this appeal deserves dismissal and is ***dismissed*** accordingly.

(2022)04ILR A299
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIVEK VARMA, J.

Civil Misc. Review Application No. 22 of 2022
In
First Appeal Defective No. 817 of 2000

Malhan & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:

Madan Mohan Chaurasisa

Counsel for the Opposite Parties:

A. Civil Law - Code of Civil Procedure, 1908 - Section 114 - review-review application filed with a delay of about 6 years-the appeal came to be partly allowed way back in the year 2016-the kind of explanation rendered that they were not aware of the legal provisions or delay due to covid-19 herein does not satisfy the observations of the Apex Court-this is a case which shows complete careless and reckless long delay on the part of applicants which has remained virtually unexplained at all-Thus, no reason to exercise judicial discretion to justify condonation of delay in the present case-delay defeats equity-the court help those who are vigilant and do not slumber over their rights.(Para 1 to 20)

B. There is no presumption that delays in approaching the court is always deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then words "sufficient cause" show that delay if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but it should be bona fide. Lapse on the part of litigant in approaching Court within time is understandable but total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.(Para 7 to 16)

The application is dismissed. (E-6)

List of Cases cited:

1. Narendra & ors.. Vs St. of U.P. & ors.. (2017) 9 SCC 426

2. Collector, Land Acquisition Vs Katiji (1987) 2 107

3. P.K. Ramachandran Vs St. of Ker. (1998) AIR SC 2276

4. Shakuntala Devi Jain Vs Kuntal Kumari (1969) AIR SC 575

5. Brij Indar Singh Vs Kanshi Ram (1918) ILR 45 Cal 94

6. Nagaland Vs Lipok AO & ors.. (2005) AIR SC 2191

7. Vedabai @ Vaijayanatabai Baburao Vs Shantaram Baburao Patil & ors. (2001) JT 5 SC 608

8. Pundlik Jalam Patil (dead) by LRs Vs Executive Engineer, Jalgaon Medium Project & Anr (2008) 17 SCC 448

9. Maniben Devraj Shah Vs Municipal Corp. of Brihan Mumbai (2012) 5 SCC 157

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Vivek Varma, J.)

In re: Civil Misc. Delay Condonation Application No. Nil of 2022

1. This is an application filed under Section 5 of the Limitation Act, 1963 (hereinafter referred to as the "Act, 1963") seeking condonation of delay in filing the review application, which is reported to have been filed with a delay of 1900 days i.e. about six years.

2. The review-applicants are co-share holders and they have preferred the instant review application under Section 114 of the Code of Civil Procedure, 1908 read with Chapter V Rule 12 of the Allahabad High Court Rules. The judgment under review was passed on 06.10.2016 in First Appeal Defective No. 817 of 2000 (Malhan v. State of U.P. and another). It is stated that they were not in a position to file the review as they were not aware of the legal provisions. The appeal came to be partly allowed way back in the year 2016 and the appellants-applicants were awarded compensation of Rs.297/- per square yard. Just because in Village Kakrala, the Apex Court had determined compensation of Rs.449/- per square yard, the applicants preferred this review application. The applicants have also stated that they could not file the review application within time due to the blockage of public transportation on account of COVID-19 guidelines.

3. The appeals were disposed of by the Apex Court in the year 2016. The pandemic struck India only in 2020-2021. It cannot be said as stated in Paragraph No. 8 of the affidavit filed in support of the delay condonation application that due to the guidelines of the Central Government and the State Government the public transportation was blocked, therefore, the applicants could not come to Allahabad to file the review. The decision in **Narendra and others Vs. State of U.P. and others, (2017) 9 SCC 426,** cannot be of any avail to the appellants. The delay in filing the review application is absolutely deliberate. There is no reason why the appellants, who are sixteen in number, waited for six long years.

4. We have heard Sri Madan Mohan Chaurasiya, learned counsel for the review applicants, and requested him to explain the delay in filing the review application, to which he gave a strange reply that he advised his clients that they may take a chance by filing this review application after a period of six years. We are pained to note that an advocate should not give such an advise when there is no error apparent on the face of record nor was there any

other reason that why the matter be re-agitated after it was finally decided.

5. In the present case, not only the appeal was heard and decided on merits but the legal heirs of the deceased appellants were also gracefully permitted by the Court to be substituted. The facts of the case will not permit us to condone the delay in filing the review application for the reasons which are given in the undermentioned paragraph.

6. Recently, the Apex Court has held that after transfer or retirement of a Judge, it is not good to file a review application without any rhyme or reason. In the instant case, the delay in filing the substitution application was condoned on 06.10.2016, and by the same order the appeal was also decided as the identical issue arising out of same reference order was involved in First Appeal No. 31 of 2011, which came to be decided with the same directions way back in the year 2014. We do not find any reason to condone the delay of six years, which is not explained as to why this review application is filed after such an inordinate delay. It is not even pointed out that other litigants had moved the Supreme Court or there is any other order, which can be followed by us, or which may be a subsequent order of the Apex Court that may guide us.

7. The expression "sufficient cause" in Section 5 of Act, 1963 has been held to receive a liberal construction so as to advance substantial justice and generally a delay in preferring appeal may be condoned in interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to parties, seeking condonation of delay. In **Collector, Land Acquisition Vs. Katiji, 1987(2) SCC 107,** the Court said, that, when substantial justice and technical considerations are taken against each other, cause of substantial justice deserves to be preferred, for, the other side cannot claim to have vested right in injustice being done because of a non deliberate delay. The Court further said that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

8. In **P.K. Ramachandran Vs. State of Kerala, AIR 1998 SC 2276** the Court said:

"Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds."

9. The Rules of limitation are not meant to destroy rights of parties. They virtually take away the remedy. They are meant with the objective that parties should not resort to dilatory tactics and sleep over their rights. They must seek remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The statute relating to limitation determines a life span for such legal remedy for redress of the legal injury, one has suffered. Time is precious and the wasted time would never revisit. During efflux of time, newer causes would come up, necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The statute providing limitation is founded on public

policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). It is for this reason that when an action becomes barred by time, the Court should be slow to ignore delay for the reason that once limitation expires, other party matures his rights on the subject with attainment of finality. Though it cannot be doubted that refusal to condone delay would result in foreclosing the suiter from putting forth his cause but simultaneously the party on the other hand is also entitled to sit and feel carefree after a particular length of time, getting relieved from persistent and continued litigation.

10. There is no presumption that delay in approaching the court is always deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then the words "sufficient cause" show that delay, if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but, it should be bona fide, and, for the reasons beyond his control, and, in any case should not lack bona fide. If the explanation does not smack of lack of bona fide, the Court should show due consideration to the suiter, but, when there is apparent casual approach on the part of suiter, the approach of Court is also bound to change. Lapse on the part of litigant in approaching Court within time is understandable but a total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.

11. We need not to burden this judgment with a catena of decisions explaining and laying down as to what should be the approach of Court on construing "sufficient cause" under Section 5 of Act, 1963 and it would be suffice to refer a very few of them besides those already referred.

12. In **Shakuntala Devi Jain Vs. Kuntal Kumari, AIR 1969 SC 575** a three Judge Bench of the Court said, that, unless want of bona fide of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

13. The Privy Council in **Brij Indar Singh Vs. Kanshi Ram ILR (1918) 45 Cal 94** observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. This principle still holds good inasmuch as the aforesaid decision of Privy Council as repeatedly been referred to, and, recently in State of **Nagaland Vs. Lipok AO and others, AIR 2005 SC 2191.**

14. In **Vedabai @ Vaijayanatabai Baburao Vs. Shantaram Baburao Patil and others, JT 2001(5) SC 608** the Court said that under Section 5 of Act, 1963 it should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. In the former case consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard and the basic guiding factor is advancement of substantial justice.

15. In **Pundlik Jalam Patil (dead) by LRs Vs. Executive Engineer, Jalgaon Medium Project and Anr. (2008) 17 SCC 448,** in para 17 of the judgment, the Court said :

"...The evidence on record suggests neglect of its own right for long time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not slumber over their rights."

16. In **Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157**, in para 18 of the judgment, the Court said as under:

"What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and / or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest."

17. In our view, the kind of explanation rendered herein does not satisfy the observations of Apex Court that if delay has occurred for reasons which does not smack of mala fide, the Court should be reluctant to refuse condonation. On the contrary, we find that here is a case which shows a complete careless and reckless long delay on the part of applicants which has remained virtually unexplained at all. Therefore, we do not find any reason to exercise our judicial discretion exercising judiciously so as to justify condonation of delay in the present case.

18. Even on merits, we find no reason to interfere with the well reasoned judgment of the Court. Hence, the review application is also liable to be dismissed.

19. In view of the above, we dismiss the delay condonation application with a token cost of Rs.10,000/-.

20. Consequently, the review application is also dismissed as we have refused to condone the delay.

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.

&

Hon'ble Vivek Varma, J.)

1. Since this review application has been filed beyond time and application seeking condonation of delay has been rejected vide order of date, this review application stands dismissed being barred by limitation.

2. For order, see our order of the date passed on Civil Misc. Delay Condonation Application No. Nil of 2022.

(2022)04ILR A304
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.03.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 No. 1273 of 2022

Ram Kishor Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Himanshu Kumar Srivastava

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Sections 482 & 311 - Indian Penal Code, 1860 - Sections 498-A, 304-B - Dowry Prohibition Act, 1961-Section ¾-rejection-recall of witness-question framed by the applicant in which the applicant want to cross-examination of the PW-1 was already done before 20 years ago-the case was pending for last 20 years-Calling of witnesses for cross-examination after long gap is deprecated by Apex Court-Trial court rightly rejected the application u/s 311 Cr.P.C. to recall the witness.(Para 1 to 11)

B. Any court may, at any stage of any inquiry or other proceeding under this code summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined if it is essential to the just decision of the case.(Para 6,7)

The application is dismissed. (E-6)

List of Cases cited:

1. Rajaram Prasad Yadav Vs St. of Bih. & ors. AIR SC 3081

2. Vinod Kumar Vs St. of Punj. (2015) 3 SCC 220

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

1. This application under Section 482 Cr.P.C. has been filed with a prayer to pass an order or direction thereby quashing the impugned order dated 22.2.2022 S.T. No. 674 of 2001 (State Vs. Pramod Kumar Singh and others) initiated on the basis of case crime no. 64 of 2001 under Sections 498-A, 304-B I.P.C. and 3/4 of the D.P. Act Police Station- Saraini, District- Raibareli.

2. Learned counsel for the applicants submitted that marriage of the sister of the respondent no. 2 namely Smt. Suman Singh was solemnized on 19.4.2000 and due to an accident she was died while cooking on 25.5.2001 and due to which respondent no. 2 has lodged an F.I.R. as case crime no. 64 of 2001 under Sections 498-A, 304-B and 3/4 of the D.P. Act. Police Station- Saraini, District- Raibareli. After recording the statement of the accused under Section 313 Cr.P.C. trial was fixed for defence evidence. During the pendency of this trial an application under 311 Cr.P.C. for summoning and cross examination of P.W.-1 i.e. respondent no. 2 was moved on

7.2.2022. Learned counsel for the applicants submitted that specific question was framed under Section 311 Cr.P.C. but the trial court without giving opportunity for re-examination of the P.W.-1 wrongly rejected the application under Section 311 Cr.P.C.

3. The main contention of the learned counsel for the applicants is that in the interest of justice an application under Section 311 should be allowed.

4. Learned A.G.A. submitted that there is no illegality in the order passed by the trial court, as every aspects has been touched in the order of the trial court.

5. Being aggrieved with the order of the trial court this petition under Section 482 Cr.P.C. has been filed by the applicants.

6. The provisions of the Section 311 Cr.P.C. is quoted herein below:-

"311. Power to summon material witness, or examine person present. *Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."*

7. The relevant paragraph no. 23 of the Judgment of Hon'ble Apex Court in the case of ***Rajaram Prasad Yadav Vs. State of Bihar and others; AIR SC 3081.***

23. From a conspectus consideration , while dealing with an application under Section 311 Code of Criminal Procedure read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Code of Criminal Procedure should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Code of Criminal Procedure should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for

further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Code of Criminal Procedure simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Code of Criminal Procedure must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

8. I have heard learned counsel for the parties and perused the order dated 22.2.2022 of the learned trial court. From the perusal of the order of learned trial court it indicates that while passing order on application under Section 311 Cr.P.C. it is clearly mentioned that the chief examination of the P.W.-1 was conducted on 16.7.2003 and the accused persons were cross examined on 16.7.2003, 2.8.2003 and 13.8.2003. Thus, the evidence of P.W.-1 was concluded on 13.8.2003 apart from P.W.-1, the witness of fact and other witnesses had already been examined and other witnesses did not support the version of the prosecution and they had already been declared hostile. This application has been filed after lapse of 20 years. Calling of witnesses for cross examination after long gap depricated by the Hon'ble Apex Court in the case of ***Vinod Kumar Vs. State of Punjab (2015) 3 SCC 220.***

9. In the application for re-examination of witness P.W.-1 certain questions framed by the applicant before the trial court and trial court clearly discussed each and every point raised by

the applicant. Learned trial court opined that the question framed by the applicant in which the applicant want to cross examination of the P.W.-1, which has already been done. The P.W.-1 was already cross examined before the trial court before 20 years ago. The case is pending for the last 20 years and the occurrence is of the year, 2001. The order dated 22.2.2022 passed by the learned trial court is well reasoned and well discussed, thus learned trial court has rightly, rejected the application under Section 311 Cr.P.C. to recall the witness, P.W.-1 for further cross examination. Thus, there is no illegality, irregularity or perversity in the order passed by the learned trial court.

10. In view of above, the present application under Section 482 Cr.P.C. is devoid of merit and is liable to be dismissed.

11. The application under Section 482 Cr.P.C. is, accordingly, dismissed.

12. Order of the this Court be communicated to learned trial court for necessary compliance.

(2022)04ILR A307
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.03.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 No. 1325 of 2021

Anant Mishra @ Amit Mishra @ Surya Prakash Mishra ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Ravindra Shukla

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Section 364-A/34-quashing of charge-sheet-Informant PW-1 lodged an FIR against the unknown persons that accused abducted his brother PW-3-three witnesses, PW-1 (informant), PW-2 (niece of abductee) and PW-3(abductee) himself denied the prosecution case stating that nobody abducted him nor any ransom was demanded-All three accused persons were exonerated of the charges-Later, Investigating Officer intentionally filed charge-sheet ignoring the judgment passed by trial court-no criminal proceeding can be sustained against co-accused on the same set of witnesses-In the present case too, there is no separate witness and on the basis of testimony of same prosecution witnesses, main accused was acquitted by the court below-The principle of stare decisis will apply in the present case and the criminal proceeding cannot be sustained-Hence, quashed.(Para 1 to 14)

B. If two persons are prosecuted, though separately, under the same charge for offences having been committed in the same transaction and on the basis of the same evidence, and if one of them is acquitted for whatever may be the reason and the other is convicted, then it will create an anamalous position in law and is likely to shake the confidence of the people in the administration of justice. The principle of stare decisis will apply and the applicant's conviction cannot be sustained.(Para 11)

The application is allowed.(E-6)

List of Cases cited:

Diwan Singh Vs St. (1964) Lawsuit (All) 182

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

1. Heard learned counsel for petitioner, learned A.G.A. for the State and perused the material available on record.

2. By means of this petition under Section 482 Cr.P.C. the petitioner has sought following reliefs:-

"Wherefore it is most respectfully prayed that this Hon'ble Court may graciously be pleased to quash the impugned charge sheet no. 02 of 2018 dated 4.12.2018 submitted by the police relating to Case Crime No. 372 of 2016, under Section 364-A/34 IPC, Police Station Lambhuwa, District Sultanpur against the petitioner and summoning order dated 18.01.2019 passed by learned Chief Judicial Magistrate, Court No. 16, Sultanpur in Criminal Case No. 141 of 2019 (State of U.P. Vs. Anand Deep Dubey and others) and the entire proceedings of aforesaid case may also be quashed."

3. Brief facts giving rise to the present petition are that opposite party no. 2 - Matadeen lodged an FIR on 08.10.2016 against the unknown persons bearing Case Crime No. 372 of 2016 under Section 364 IPC, Police Station Lambhuwa, District Sultanpur with the allegation that some unknown accused abducted his brother Sikander. During investigation, the name of five persons, namely, Jitendra Pandey alias Chintu, Jitenra Pathak, Dharam Raj Nishad, Anand Deep Dubey alias Ashu Deubey and Anan Mishra (present applicant) came into light. Thereafter the police submitted charge sheet against JItendra Pandey, Jitendra Pathak and Dharam Raj Nishad and they were arrested. The trial against three persons were commenced before the learned Additional District Judge Court No. 3 Sultanpur vide Sessions Trial No. 111 of 2017 in which statement of PW-1 complainant Matadeen was recorded on 06.03.2018.

4. Learned counsel for petitioner has submitted that in this case three witnesses were examined. PW-1 Matadeen is the first informant, brother of the abductee has not supported the prosecution case. PW-2 Monu alias Dilip Kumar, who is niece of abductee, has clearly stated that no one had called him on mobile phone for ransom of Rs.25,00,000/- and he also did not support the prosecution case. PW-3 is the abductee Sikander. He also did not support the prosecution case. He clearly stated that nobody abducted him nor any ransom was demanded. Thus PW-3 has also not supported the case of the prosecution. Therefore, all the three accused persons were exonerated of the charges levelled against them under Section 364-A IPC and they have been acquitted by learned IIIrd Additional Sessions Judge, Sultanpur vide order dated 28.09.2018.

5. Further submission of learned counsel for petitioner is that after passing the judgment of trial court dated 28.09.2018, this fact was within the knowledge of Investigating Officer but the Investigating Officer intentionally filed charge sheet on 24.12.2018 before the court concerned ignoring the judgment passed by trial court dated 28.09.2018.

6. It is further submitted that since the witnesses were examined in Sessions Trial No. 111 of 2017 and they did not support the prosecution case, so it will be futile exercise to face the trial. In support of his

submission, learned counsel for petitioner has relied upon a judgment of this Court in the case of ***Diwan Singh Vs. State reported in 1964 Lawsuit (All) 182,*** in that case also the accused were discharged on the ground of acquittal of co-accused, which are having the similar allegation and same prosecution witnesses.

7. Learned counsel for petitioner has submitted that in the case of ***Diwan Singh (supra)*** it was held that if the allegation and witnesses are same and after examination of witnesses one accused is acquitted, then other co-accused can be punished or not. this Court has clearly held that under such circumstances the conviction of co-accused cannot be sustained.

8. Learned AGA for the State has opposed the prayer made by learned counsel for the applicants, but could not dispute the fact of acquittal of other co-accused persons.

9. I have considered the rival submissions made by learned counsel for the parties, perused the record and the judgements relied upon by learned counsel for the applicant.

10. In the matter of ***Diwan Singh (Supra)***, this was the issue that if allegation & witnesses are same and after examination of witnesses one accused is acquitted, then other co-accused can be punished or not. This Court has clearly held that under such circumstances the conviction of co-accused cannot be sustained.

11. Relevant paragraph Nos. 4, 5 & 6 of the judgment of ***Diwan Singh (supra)*** are quoted hereinbelow:-

"4. Learned counsel for the applicant has argued that both Manohar and the applicant were arrested together, searched together and as a single recovery list was prepared about the articles alleged to have been recovered from them and as the same witnesses were examined. by the prosecution in both the trials before the Magistrate, it will be incongruous to convict one of them on the basis of the same evidence and to acquit the other. I find force in this contention,

5. The judgment of the learned Sessions Judge in Criminal Appeal No. 262 of 1963 setting aside the conviction and sentence of Manoliar was not challenged by the State by filing an appeal and, as such, has become final. It is no doubt true that the learned Sessions fudge acquitted Manohar on a technical ground because, in his opinion, "the prosecution suffers from a patent infirmity creating reasonable doubt regarding the identity of the alleged fire arms". He did not disbelieve the evidence of the prosecution on facts. The reasoning given by the learned Sessions Judge in acquitting Manohar is not very appealing but the fact remains that Manohar who was arrested along with the applicant on the same charge and against whom the same evidence has been produced by the prosecution, has been acquitted, while the appeal of the applicant against his conviction was dismissed by the learned 1st Additional Sessions Judge of Etawah. In view of the acquittal of Manohar on the same facts and on the same evidence which has become absolute, it is not possible to maintain the conviction of the applicant.

6. If two persons are prosecuted, though separately, under the same charge for offences having been committed in the same transaction and on the basis of the same evidence, and if one of them is acquitted for whatever may be the reason

and the other is convicted, then it will create an anamalous position in law and is likely to shake the confidence of the people in the administration of justice. Justice is not only to be done but also seem to be done. Therefore, I am clearly of opinion that as has been held in the case of Pritam Singh v. State of Punjab. (S) AIR 1956 SC 415, the principle of stare decisis will apply in the present case and the applicant's conviction cannot be sustained."

12. After going through the judgements relied by learned counsel for the applicant, it is very much clear that Court has held that considering the testimony of witnesses, if one accused is acquitted, no criminal proceeding can be sustained against co-accused on the same set of witnesses and in the present case too, there is no separate witness and on the basis of testimony of same prosecution witnesses, main accused was acquitted by the court below, Whenever there is no prospect of the case ending in conviction, valuable time of court should not be wasted for holding trial only for the purpose of completing the procedure to pronounce the conclusion on future date. Therefore, criminal proceeding cannot be permitted to continue against the applicant.

13. Therefore, under such facts and circumstances of the case as well as law laid down by the Apex Court, criminal proceeding against the applicants in Criminal Case No. 141 of 2019 (State of U.P. Vs. Anand Deep Dubey and others), arising out of Case Crime No. 372 of 2016, under Section 364-A/34 IPC, Police Station Lambhuwa, District Sultanpur cannot be sustained and is hereby quashed.

14. With the aforesaid observation/direction, this petition under Section 482 Cr.PC. is allowed.

15. Office is directed to communicate this order to the trial court concerned for necessary action and compliance.

(2022)04ILR A310
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.07.2021

BEFORE

THE HON'BLE RAJEEV MISRA, J.

Application U/S 482 No. 8634 of 2021

Ram Sajan Verma ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Sheshadri Trivedi, Sri Gopal Swarup Chaturvedi, (Senior Adv.), Sri Satish Trivedi (Senior Adv.), Neetu Patel

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860 - Section 409-quashing of impugned order-embezzlement of public money-re-investigation-FIR lodged by first informant in his official capacity as a public servant-After submission of final report, protest petition filed by first informant-Concerned magistrate rejected the final report and directed for re-investigation-this order challenged by one of the accused and was ultimately set aside by revisional court, matter was remanded with a direction to concerned Magistrate to pass fresh order-thereafter, first informant showing his agreement with final report filed an affidavit and the same was accepted, which order was challenged by first informant himself by means of criminal revision wherein impugned order has been passed-no estoppel can be pleaded by accused against first informant-Concerned Magistrate in complete ignorance of

Section 190 Cr.P.C. to see that offence complained of which is cognizable and non-bailable offence is duly investigated, accepted the consent of first informant showing his agreement with the police report which otherwise he was not competent to give-More so, the sanction from competent authority would be required to take cognizance and no such sanction had been obtained in respect of the officer-Thus, concerned magistrate committed a jurisdictional error-first informant brought to the notice this mistake to the Revisional court by himself-Revisional court rightly allowed the revision-quashing of impugned order is refused and the same may be further investigated by a different Investigating Officer.(Para 1 to 41)

B. Criminal Law - Code of Criminal Procedure, 1973 -Section 197 -seeks to protect an officer from unnecessary harassment, who is accused of an offence committed while acting or purporting to act in the discharge of his official duties and, thus, prohibits the court from taking cognizance of such offence except with the previous sanction of the competent authority. Public servants have been treated as a special category in order to protect them from malicious or vexatious prosecution. the yardstick to be followed is to form a prima facie view whether the act of omission for which the accused was charged had a reasonable connection with the discharge of his duties.(Para 37)

The application is dismissed. (E-6)

List of Cases cited:

1. M/s India Caret Pvt. Ltd. Vs St. of Karn. & ors..(1989) AIR SC 885

2. Gangadhar Janardan Mahtre Vs St. of Mah. (2005) SCC Crl. 404

3. Minoo Kumari Vs St. of Bih. (2006) 4 SCC 359

4. Sanjay Bansal & ors. Vs Jawahar Lal Bats & ors. (2007) 59 SCC 1050

5. Vishnu Kumar Tiwari Vs St. of U.P. & anr. (2019) 8 SCC 27

6. Bhagwant Singh Vs Commr. of Police (1985) 2 SCC 537: 1985 SCC(Cri) 267 : AIR 1985 SC 1285

7. Chandra Babu @ Moses Vs St. Inspr. of Police & ors.. (2015) 8 SCC 774

8. Vinay Tyagi Vs Irshad Ali (2013) 5 SCC 762: (2013) 4 SCC Cri. 557

9. Reeta Nag Vs St. of W. B. (2009) 9 SCC 129: (2009) 3 SCC Cri 1051

10. Ram Naresh Prasad Vs St. of Jharkhand (2009) 11 SCC 299: (2009) 3 SCC Cri 1336

11. Randhir Singh Rana Vs St. of (Delhi Admn.) (1997) 1 SCC 361

12. Municipal Corp. of Delhi Vs Jagsish Lal & anr. (1969) 3 SCC 389

13. National Small Industries Corp. Ltd. Vs St. (NCT of Delhi) & ors. (2009) 1 SCC 407

14. Indra Devi Vs St. of Raj. & anr. (2021) 3 RCR Cri. 621

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

1. Heard Mr. Satish Trivedi alongwith Mr. G. S. Chaturvedi, learned Senior Counsel assisted by Mr. Sheshadri Trivedi, learned counsel for applicant and learned A.G.A. for State.

2. Perused the record.

3. Present application under Section 482 Cr.P.C. has been filed challenging order dated 17.02.2021, passed by Sessions Judge, Maharajganj, in Criminal Revision No. 8 of 2021 (Bhanu Pratap Singh Vs. State of U.P. and others), whereby aforesaid revision preferred by first informant/opposite party-2 against order

dated 25.10.2019, by which Chief Judicial Magistrate, Maharajganj, accepted final report no.20 of 2015, dated 17.2.2015 (submitted in Case Crime No. 1223 of 2014 under Section 409 I.P.C, P.S. Kotwali, District-Maharajganj), has been set aside and matter has been remanded to concerned Magistrate to pass a fresh order on aforesaid final report in the light of observations made in above mentioned order of Revisional Court.

4. Record shows that an F.I.R. dated 26.8.2014, was lodged by first informant/opposite party-2, Bhanu Pratap Singh, which was registered as Case Crime No. 1223 of 2014, under Section 409 I.P.C, P.S. Kotwali, District-Maharajganj. In the aforesaid F.I.R., three persons namely, R. S. Verma (the then Executive Engineer), Pateshwari Prasad Singh (contractor) and Smt. Asha Singh (contractor) have been nominated as named accused.

5. In brief, as per prosecution story as unfolded in F.I.R., it is alleged that F.I.R. has been lodged in compliance of letter dated 6.8.2014 issued by State Government. The F.I.R. further states that accused persons are guilty of embezzlement of public money to the tune of Rs. 26,82,300/-.

6. Subsequent to aforesaid F.I.R., Investigating Officer proceeded with statutory investigation of above mentioned case crime number in terms of Chapter XII Cr.P.C. After completion of investigation, Investigating Officer submitted a police report under Section 173 (2) Cr.P.C. (final report no.20 of 2015 dated 17.02.2015) on the grounds that F.I.R. has been lodged without obtaining permission of Law Department, Government of U.P., no sanction as required under Section 197 Cr.P.C. has been obtained. As such, proceedings of above mentioned case crime number cannot continue. F.I.R. has been lodged on account of prejudice and ill-will and therefore, proceedings are being terminated by submitting a final report.

7. Upon submission of above noted final report, concerned Magistrate issued notice to first informant/opposite party-2. Thereafter, first informant/opposite party-2 filed an application dated 18.05.2015, in terms of Regulation 122 (3) of Police Regulations stating therein that final report dated 17.02.2015, be rejected and directions be issued for further investigation.

8. Concerned Magistrate upon examination of record concluded that Investigating Officer has not investigated the crime in question according to law. As such investigation so conducted becomes suspicious and doubtful. Accordingly, concerned Magistrate, vide order dated 19.02.2016, rejected final report dated 17.02.2015, with a direction to Superintendent of Police, Maharajganj to appoint a new Investigating Officer for re-investigation of above mentioned case crime number.

9. Feeling aggrieved by above noted order dated 19.02.2016, one of the named accused namely Smt. Asha Singh (contractor) filed Criminal Revision No. 25 of 2016 (Smt. Asha Singh Vs, State of U.P. and others) before District and Sessions Judge, Maharajganj. Same was allowed vide order 06.08.2016, passed by Sessions Judge, Maharajganj. Revisional Court concluded that concerned Magistrate could not have passed an order of fresh investigation, but only re-investigation. Accordingly, it remanded the matter before

concerned Magistrate with direction to pass fresh order in the light of observations contained in above order of revisional court.

10. Subsequent to order dated 06.08.2016, first informant opposite party-2 appeared before concerned Magistrate and filed a protest petition dated 11.06.2019, (Annexure 7 to the affidavit) against final report dated 17.02.2015.

11. Thereafter, on 17.08.2019, first informant/opposite party-2 filed an affidavit dated 17.08.2019, before concerned Magistrate (Annexure 8 to the affidavit filed in support of present application) stating therein that he is satisfied with the final report dated 17.02.2015 and therefore, he does not wish to contest the case. An endorsement to that effect was also made by him on 11.06.2019

12. In view of above, concerned Magistrate, vide order date 25.10.2019, accepted the affidavit dated 17.08.2019, filed by first informant/opposite party-2. Consequently, final report dated 17.02.2015, was also accepted at the risk of first informant/opposite party-2.

13. The Court is astonished as to how Magistrate could have proceeded to pass the order dated 25.10.2019, whereby he virtually accepted the consent of opposite party showing his agreement with final report which otherwise opposite party-2 was not competent to give. Concerned Magistrate in exercise of jurisdiction under Section 190 Cr.P.C. was required to examine that offence complained of, which is a conizable, non-bailable offence has been duly investigated or not. This aspect shall be further dealt with in later part of this judgement.

14. Contrary to the stand taken by first informant/opposite party-2 before concerned Magistrate, first informant/opposite party-2, thereafter challenged order dated 25.10.2019, passed by Magistrate (whereby final report no. 20 of 2015 dated 17.02.2015 was accepted) before District and Sessions Judge, Maharajganj by filing Criminal Revision No. 8 of 2021 (Bhanu Pratap Singh Vs. State of U.P. and two others). Record shows that one of the named accused namely Pateshwari Prasad Singh (contractor) was not impleaded as an opposite party in aforesaid criminal revision.

15. Notices were issued on aforesaid revision by revisional court to the two accused, who were impleaded as opposite parties therein. Revisional Court, thereafter, vide judgement and order dated 17.02.2021, allowed above noted criminal revision and remanded the matter before concerned Magistrate with a direction to pass fresh order on the final report dated 17.02.2015, submitted by Investigating Officer, in the light of observations made in the order aforesaid.

16. Perusal of order dated 17.02.2021, goes to show that court below examined allegations made in F.I.R. dated 26.08.2014, and also the material on record. Thereafter, Revisional Court referred to the following judgements:

1. M/s India Caret Pvt. Ltd Vs. State of Karnatk and others, AIR 1989 SC 885

2. Gangadhar Janardan Mahtre vs. State of Maharastra (2005) SCC Criminal 404

3. Minoo Kumari Vs. State of Bihar (2006)4 SCC 359

4. Sanjay Bansal and othrs Vs. Jawahar Lal Bats and others 2007 (59) SCC 1050

After noticing aforesaid judgements court below held that upon submission of a police report (under Section 173 (2) Cr.P.C.) which in this case was a final report, concerned Magistrate has following four options:

1. Magistrate can accept the police report.

2. Magistrate can disagree with the police report and take cognizance on the basis of material appended alongwith police report under Section 190 (1) (b) Cr.P.C.

3. Magistrate can direct police for further investigation under Section 156 (3) Cr.P.C.

4. Magistrate can treat the protest petition submitted against police report as a complaint and thereby take cognizance under Section 190 (1) (a) Cr.P.C.

17. Having taken note of Case Law on the point and Section 190 Cr.P.C., Revisional Court proceeded to examine the veracity of order dated 25.10.2019. Upon consideration, court below held that F.I.R. dated 26.08.2014, was lodged by first informant/opposite party-2 herein namely Bhanu Pratap Singh in compliance of letter dated 06.08.2014, issued by Deepak Singhal, Principal Secretary, Government of U.P. As such, F.I.R. dated 24.09.2019, was lodged by first informant (who was at that time working as Executive Engineer) as a public servant and not in his private capacity.

18. Revisional Court further held that after submission of protest petition by first informant/opposite party-2 against final report dated 17.02.2015, Magistrate examined the matter. Concerned Magistrate specifically enquired from first informant/opposite party-2 as to whether protest petition dated 11.06.2019, (Annexure 7 to the affidavit) was filed by first informant/opposite party-2 in his personal capacity or on behalf of Department of Irrigation. First informant/opposite party-2 categorically submitted before Magistrate that same has been filed on behalf of Department of Irrigation as an embezzlement of Rs. 26.82 Lacs is involved.

19. On the basis of above, court below concluded that first informant/opposite party-2 had lodged F.I.R. not in his personal capacity but as a public servant. Protest petition dated 11.06.2019, was filed on the direction of Department of Irrigation. However, without obtaining written permission from Department of Irrigation/Government of U.P. to file an affidavit disclosing agreement with final report, first informant/opposite party-2 has himself filed subsequent affidavit dated 17.08.2019, stating therein that as first informant/opposite party-2 is satisfied with the police report (final report no. 20 of 2015 dated 17.02.2015), therefore, he does not wish to contest the case any longer. As such, matter be decided in light of aforesaid. Revisional Court thus came to the conclusion that first informant/opposite party-2 has no right or authority to herself file the application dated 17.08.2019.

20. In view of above, court below allowed criminal revision filed by first informant/opposite party-2 vide order dated 17.02.2021, whereby order dated 25.10.2019, passed by Chief Judicial Magistrate, Maharajganj, in F. R. No. 497 of 2015 (accepting final report no. 20 of 2015 dated 17.02.2015) was set aside and

matter was remanded to concenred Magistrate to pass fresh order on the final report so submitted in accordance with law after hearing State Government/Department of Irrigation .

21. Thus, feeling aggrieved by order dated 17.02.2021, one of the named accused namely R. S. Verma (the then Executive Engineer) has now approached this Court by means of present application under Section 482 Cr.P.C.

22. Mr. Satish Trivedi, learned Senior Advocate alongwith Mr. G. S. Chatruvedi, learned Senior Counsel assisted by Mr. Sheshadri Trivedi, learned counsel for applicant submits that order impugned in present application is manifestly illegal and without jurisdiction. Consequently, same is liable to be quashed by this Court. It is then contended that once first informant/opposite party-2 had filed an affidavit dated 17.08.2019, wherein he had categorically stated that he is satisfied with the police report (final report no.20 of 2015 dated 17.02.2015) and on basis thereof, Chief Judicial Magistrate, Maharajganj, passed order dated 25.10.2019, accepting final report, consequently, first informant/opposite party-2 was estopped from challenging order dated 25.10.2019, by filing a Criminal Revision. It is also contended by learned Senior Counsel appearing for applicant that admittedly present criminal proceedings have been initiated against applicant for certain acts which are alleged to have been committed in discharge of his official duty. Since no prior sanction was obtained in terms of Section 197 Cr.P.C. before lodging the F.I.R., no illegality was committed by Investigating Officer in submitting police report (final report no.20 of 2015 dated 17.02.2015) by taking above also as a ground for submitting the same. Till today, no sanction in terms of Section 197 Cr.P.C. has been granted by competent authority for prosecution of applicant. Therefore no criminal proceedings pursuant to order of remand passed by Revisional Court, by means of impugned order dated 17.02.2021, can be allowed to continue. Revisional Court while passing impugned order has completely ignored aforesaid aspect, which has vitiated the impugned order. On the cumulative strength of aforesaid submissions, it is vehemently urged that impugned order dated 17.02.2021, passed by court below cannot be sustained and therefore, liable to be quashed by this Court.

23. Per contra learned A.G.A. has opposed this application. Learned A.G.A. has invited attention of Court to the impugned order dated 17.02.2021. On the basis of same, it is urged by learned A.G.A. that court below has exercised it's jurisdiction under Section 397 Cr.P.C. with due diligence. Court below has neither committed any jurisdictional error nor has exercised it's jurisdiction with material irregularity, as such no interference is warranted by this Court. Court below has categorically recorded that protest petition dated 11.06.2019, (Annexure 7 to the affidavit) was filed by first informant/opposite party-2 on behalf of Department of Irrigation, Government of U.P. and not in his personal capacity. The Magistrate had duly ascertained aforesaid fact as is evident from order dated 06.01.2016, passed by Magistrate. On the aforesaid premise, learned A.G.A. contends that informant/opposite party-2 could not have taken a summer-sault and filed the subsequent affidavit dated 17.08.2019, (Annexure-8 to the affidavit). The prosecution of applicant and two

others was set in motion with the lodging of F.I.R. dated 26.08.2014, by first informant/opposite party-2, pursuant to letter dated 06.08.2014, issued by Mr. Deepak Singhal, Principal Secretary, Government of U.P. Lucknow. As such, aforesaid F.I.R. was lodged by first informant/opposite party-2 in compliance of order of higher authority which he was bound to comply as first informant/opposite party-2 was working as Executive Engineer and under the control of Principal Secretary Department of Irrigation. As such F.I.R. was lodged by first informant in his official capacity and not in his personal capacity. In the absence of any written permission from State Government/Department of Irrigation, Govt. of U.P., not to challenge the final report dated 17.02.2015, first informant/opposite party-2 had no right or authority to file the subsequent affidavit dated 17.08.2019 himself. In the submission of learned A.G.A. above mentioned affidavit dated 17.08.2019, is void ab-initio and therefore could not have been considered by Magistrate. As such, no illegality has been committed by court below in allowing the revision. Consequently, present application is liable to be dismissed.

24. Having heard learned counsel for applicant, learned A.G.A. for State and upon perusal of record, the Court finds that following issues arise for determination in present application.

i. What is the procedure, which shall be followed by Magistrate upon submission of a police report under Section 173 (2) Cr.P.C.

ii. The concept of re-investigation/further investigation with reference to Section 173 (8) Cr.P.C.

iii. Whether estoppel can be pleaded against informant/opposite party-2 in the facts and circumstances of the case.

iiv. Whether sanction as required under Section 197 Cr.P.C. is to be necessarily granted/obtained before lodging of F.I.R. or same has to be granted /obtained before taking cognizance, by court concerned.

(v) Whether order impunged in present application is liable to be quashed.

25. Taking the first issue first, the Court finds that same is no longer res-integra and stands concluded by the judgement of Apex Court in **Vishnu Kumar Tiwari Vs. State of U.P. and another (2019) 8SCC 27,** wherein Court after considering the entire gamut of Case Law on the point has observed as follows in paragraphs 20, 21 and 27, which are reproduced herein-under:

20. In Gangadhar Janardan Mhatre v. State of Maharashtra, this Court reiterated that Magistrate can, faced with a final report, independently apply his mind to the facts emerging from investigation and take cognizance under Section 190 (1)(b), and in this regard, is not bound to follow the procedure under Sections 200 and 202 of the Code for taking cognizance under Section 190(1)(b). It was, however, open to the Magistrate to do so.

21. In regard to the filing of protest petition by the informant who filed the First Information Report, it is important to notice the following discussion by this Court:

"6. There is no provision in the Code to file a protest petition by the informant who lodged the first information report. But this has been the practice. Absence of a provision in the

Code relating to filing of a protest petition has been considered. This Court in Bhagwant Singh v. Commr. of Police [(1985) 2 SCC 537:1985 SCC (Cri) 267 : AIR 1985 SC 1285] stressed on the desirability of intimation being given to the informant when a report made under Section 173(2) is under consideration. The Court held as follows: (SCC p. 542, para 4) 4 (2004) 7 SCC 768 "There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report."

9. When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e. (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section

202 also. [See India Carat (P) Ltd. v. State of Karnataka [(1989) 2 SCC 132 : 1989 SCC (Cri) 306 : AIR 1989 SC 885] .] The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the first information report lodged becomes wholly or partially ineffective. Therefore, this Court indicated in Bhagwant Singh case [(1985) 2 SCC 537 : 1985 SCC (Cri) 267 : AIR 1985 SC 1285] that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard." (Emphasis supplied)

27. It is undoubtedly true that before a Magistrate proceeds to accept a final report under Section 173 and exonerate the accused, it is incumbent upon the Magistrate to apply his mind to the contents of the protest petition and arrive at a conclusion thereafter. While the Investigating Officer may rest content by producing the final report, which, according to him, is the culmination of his efforts, the duty of the Magistrate is not one limited to readily accepting the final report. It is incumbent upon him to go through the materials, and after hearing the complainant and considering the contents of the protest petition, finally decide the future course of action to be, whether to continue with the matter or to bring the curtains down."

26. In view of aforesaid authoritative pronouncement of Apex Court, it cannot be said that concerned Magistrate had no jurisdiction to reject the police report. and direct for further investigation.

27. Learned A.G.A. contends that unfortunately, in present case the Magistrate, while passing order dated 19.2.2016, directed for re-investigation. Consequently, this order dated 19.2.2016, came to be challenged by one of the accused namely Asha Singh (contractor) on the ground that Magistrate had no jurisdiction to direct re-investigation. Revisional Court by means of order dated 6.8.2016, allowed the revision and directed the Magistrate to pass a fresh order on the final report dated 17.2.2015. Subsequently, vide order dated 17.02.2021, passed by revisional court, which has been impugned in present application, court below again directed concerned Magistrate to pass fresh order on final report no. 20 of 2015 dated 17.02.2015. Once, the order of Magistrate dated 25.10.2019, was set aside, court below could have itself directed for further investigation as the tenor of the term re-investigation has now to be construed as further investigation.

28. The issue that arises for consideration in the context of above is regarding meaning of the terms "further investigation" and "re-investigation". This issue need not detain this Court as it now stands settled by Apex Court in **Chandra Babu @ Moses Vs. State Inspector of Police and others, reported in 2015 (8) SCC 774,** wherein Court considered the earlier judgement in Vinay Tyagi Vs. Irshad

Ali @ Deepak and others, (2013) 5 SCC, 762 and held as under in paragraphs 16, 17, 18, 19, 20 and 21:-

"16. We have referred to the aforesaid authorities to reiterate the legal position that a Magistrate can disagree with the police report and take cognizance and issue process and summons to the accused. Thus, the Magistrate has the jurisdiction to ignore the opinion expressed by the investigating officer and independently apply his mind to the facts that have emerged from the investigation.

17. Having stated thus, we may presently proceed to deal with the facet of law where the Magistrate disagrees with the report and on applying his independent mind feels, that there has to be a further investigation and under that circumstance what he is precisely required to do. In this regard, we may usefully refer to a notable passage from a three-Judge Bench decision in Bhagwant Singh v.Commr. of Police[(1985) 2 SCC 537 : 1985 SCC (Cri) 267] , which is to the following effect:

"4. Now, when the report forwarded by the officer in charge of a police station to the Magistrate under sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things:

(1) he may accept the report and take cognizance of the offence and issue process, or (2) he may disagree with the report and drop the proceeding, or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report.

The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding, or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process, or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156. Where, in either of these two situations, the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected nor is the injured or in case of death, any relative of the deceased aggrieved, because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the first information report, the informant would certainly be prejudiced because the first information report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the first information report lodged by him is clearly recognised by the provisions contained in sub-section (2) of Section 154, sub-section (2) of Section 157 and sub-section (2)(ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be

culmination of the first information report lodged by him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process.

We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the first information report has to be communicated to the informant and a copy of the report has to be supplied to him under sub-section (2)(i) of Section 173 and if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant.

Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate."

18. Relying on the said paragraph, a two-Judge Bench in Vinay Tyagi v. Irshad Ali [(2013) 5 SCC 762 : (2013) 4 SCC (Cri) 557] , has opined thus:

"37. In some judgments of this Court, a view has been advanced, [amongst others in Reeta Nag v. State of W.B.[(2009) 9 SCC 129 : (2009) 3 SCC (Cri) 1051] , Ram Naresh Prasad v State of Jharkhand [(2009) 11 SCC 299 : (2009) 3 SCC (Cri) 1336] and Randhir Singh Rana v. State (Delhi Admn.) [(1997) 1 SCC 361]] that a Magistrate cannot suo motu direct further investigation under Section 173(8) of the Code or direct reinvestigation into a case on account of the bar contained in Section 167(2) of the Code, and that a Magistrate could direct filing of a charge-sheet where the police submits a report that no case had been made out for sending up an accused for trial. The gist of the view taken in these cases is that a Magistrate cannot direct reinvestigation and cannot suo motu direct further investigation.

38. However, having given our considered thought to the principles stated in these judgments, we are of the view that the Magistrate before whom a report under Section 173(2) of the Code is filed, is empowered in law to direct ''further investigation' and require the police to submit a further or a supplementary report. A three-Judge Bench of this Court in Bhagwant Singh has, in no uncertain terms, stated that principle, as aforenoticed.

39. The contrary view taken by the Court in Reeta Nag and Randhir Singh do not consider the view of this Court expressed in Bhagwant Singh.

The decision of the Court in Bhagwant Singh in regard to the issue in hand cannot be termed as an obiter. The ambit and scope of the power of a Magistrate in terms of Section 173 of the Code was squarely debated before that Court and the three-Judge Bench concluded as aforenoticed. Similar views having been taken by different Benches of this Court while following Bhagwant Singh , are thus squarely in line with the doctrine of precedent. To some extent, the view expressed in Reeta Nag ,Ram Naresh and Randhir Singh, besides being different on facts, would have to be examined in light of the principle of stare decisis."

And eventually the Division Bench ruled:

"40. Having analysed the provisions of the Code and the various judgments as aforeindicated, we would state the following conclusions in regard to the powers of a Magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code:

40.1. The Magistrate has no power to direct ''reinvestigation' or ''fresh investigation' (de novo) in the case initiated on the basis of a police report.

40.2. A Magistrate has the power to direct ''further investigation' after filing of a police report in terms of Section 173(6) of the Code.

40.3. The view expressed in sub-para 40.2 above is in conformity with the principle of law stated in Bhagwant Singh case by a three-Judge Bench and thus in conformity with the doctrine of precedent.

40.4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

40.5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the court to the extent that even where the facts of the case and the ends of justice demand, the court can still not direct the investigating agency to conduct further investigation which it could do on its own."

19. We have reproduced the conclusion in extenso as we are disposed to think that the High Court has fallen into error in its appreciation of the order passed by the learned Chief Judicial Magistrate. It has to be construed in the light of the eventual direction. The order, in fact, as we perceive, presents that the learned Chief Judicial Magistrate was really inclined to direct further investigation but because he had chosen another agency, he has used the word "reinvestigation". Needless to say, the power of the Magistrate to direct for further investigation has to be cautiously used. In Vinay Tyagi it has been held:

"The power of the Magistrate to direct ''further investigation' is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the court in its supervisory capacity is required to ensure the same. Further investigation conducted

under the orders of the court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code."

20. In the said case, the question arose, whether the Magistrate can direct for reinvestigation. The Court, while dealing with the said issue, has ruled that:

"At this stage, we may also state another well-settled canon of the criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct ''further investigation', ''fresh' or ''de novo' and even ''reinvestigation'. ''Fresh', ''de novo' and ''reinvestigation' are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection."

And again:

"Whether the Magistrate should direct ''further investigation' or not is again a matter which will depend upon the facts of a given case. The learned Magistrate or the higher court of competent jurisdiction would direct ''further investigation' or ''reinvestigation' as the case may be, on the facts of a given case. Where the Magistrate can only direct further investigation, the courts of higher jurisdiction can direct further, reinvestigation or even investigation de novo depending on the facts of a given case. It will be the specific order of the court that would determine the nature of investigation.

21.We respectfully concur with the said view. As we have already indicated, the learned Chief Judicial Magistrate has basically directed for further investigation. The said part of the order cannot be found fault with, but an eloquent one, he could not have directed another investigating agency to investigate as that would not be within the sphere of further investigation and, in any case, he does not have the jurisdiction to direct reinvestigation by another agency.

Therefore, that part of the order deserves to be lancinated and accordingly it is directed that the investigating agency that had investigated shall carry on the further investigation and such investigation shall be supervised by the Superintendent of Police concerned. After the further investigation, the report shall be submitted before the learned Chief Judicial Magistrate who shall deal with the same in accordance with law. We may hasten to add that we have not expressed any opinion relating to any of the factual aspects of the case."

29. It is thus urged by learned A.G.A. that in view of aforesaid authoritative pronouncement of Supreme Court, Revisional Court instead of directing Court below to pass a fresh order on final report should have directed further investigation in continuation of order dated 19.02.2016, earlier passed by Magistrate. This is on the ground that earlier order dated 19.02.2016, was set-aside only on the ground that concerned Magistrate could not have passed an order of re-investigation.

30. Taking aid of observations made by Apex Court as noted herein above, learned A.G.A. contends that a period of almost seven years has rolled by from the date of F.I.R. dated 26.8.2014 but the same has not yet been investigated. He, therefore, contends that this Court in exercise of it's jurisdiction under section 482 Cr.P.C. as well as Article 227 of the Constitution of Inida can modify the orders dated 6.8.2016 as well as 17.2.2021, passed by Revisional Court and direct for further investigation of concerned case crime number by a different Investigating Officer.

31. Whether in the facts and circumstances of case, submission urged by learned A.G.A. is liable to be accpted or not shall be dealt with in the concluding part of this order.

32. This takes me to the third issue which arises for consideration as to whether estoppel can be pleaded against first informant/opposite party-2. Facts of the case shall be repeated but of necessity they are being repeated for the sake of coherency. Admittedly, the F.I.R. dated 24.09.2018, was lodged by first informant/opposite party-2 in his official capacity i.e. in discharge of his duties as a public servant. After submission of final report, first informant/opposite party-2 had filed protest petition dated 17.02.2015, praying therein that final report so submitted be rejected and directions be issued for further investigation. Concerned Magistrate on the basis of above and further upon evaluation of record rejected the final report and directed for re-investigation vide order dated 19.02.2016. This order came to be challenged by one of the accused namely Smt. Asha Singh (Contractor) and was ultimately set aside vide order dated 06.08.2016, passed by revisional court, whereby order dated 19.02.2016, was set aside and matter was remanded with a direction to concerned Magistrate to pass fresh order. It is, thereafter, that first informant/opposite party-2 on his own filed an affidavit dated 17.08.2019, showing his agreement with final report dated 17.02.2015. Same was accepted by concerned Magistrate and consequently, the final report dated 17.02.2015, was accepted, which order was challenged by first informant himself by means of criminal revision no. 8 of 2021, wherein order impugned in present application has been passed.

33. On the aforesaid factual premise, learned Senior Counsel contend that once first informant/opposite party-2 had himself filed an affidavit dated 17.8.2009, showing his agreement with Police report dated 17.2.2015. Concerned Magistrate acted upon same and accepted, final report dated 17.02.2005. However, subsequently, first informant/opposite party 2 could not have taken a somersault and filed a criminal revision challenging order dated 25.10.2019, whereby final report so submitted was accepted by concerned Magistrate.

34. Learned A.G.A., on the other hand, contends that first informant/opposite party-2 on his own could not have filed the subsequent affidavit dated 17.08.2019, showing his agreement with the police report i.e. final report no. 20 of 2015 dated 17.02.2015, in the absence of any permission having been granted by State Government/Department of Irrigation in this regard. Admittedly, F.I.R. was lodged by first informant/opposite party-2 in his official capacity and in the absence of any authorization/permission from Department of Irrigation/Government of U.P. to file an

affidavit showing agreement with final report so submitted. First informant/opposite party-2 had no right or authority to file the subsequent affidavit dated 17.8.2019. Since aforesaid affidavit was filed by first informant/opposite party-2 himself, it was thus in his personal capacity which capacity he did not possess for filing aforesiad affidavit. Consequently, subsequent affidavit dated 17.8.2019, filed by first informant/opposite party-2 on the basis of which order dated 25.10.2019, was passed, is not only illegal but void ab initio. It is thus urged that in view of above, no estoppel can be pleaded, by accused against first informant/opposite party-2.

35. Rule of estoppel is basically a Rule of Evidence embodied in Section 115 of Indian Evidence Act. What is sought to be urged before Court by learned Senior Counsel appearing for applicant, is basically estoppel by conduct aginst first informant/opposite party-2. Essentially estoppel is a Rule of Civil action. It has no application to criminal proceedings though in such proceedings it would be prejudicial to set up a different story. Consequently, this Court comes to the firm conclusion that no estoppel by conduct can be pleaded by accused applicant against first informant/opposite party-2.

36. At this statge, reference may also be made to the judgements of Apex Court where the distinciton and effect of informant in his official capacity and informant in his private capacity have been explained in **Municipal Corporation of Delhi Vs. Jagsish Lal and another, 1969 (3) Suprement Court Cases 389,** wherein following observations have been made at page 392:

"In the present case Shri Sham Sundar Mathur, Municipal Prosecutor filed the complaint under s. 20 of Act 37 of 1954 under L14Sup.C.I/69-8 the authority given to him by the resolution of the Municipal Corporation. Since the Municipal Corporation, Delhi, is a local authority within the meaning of S. 20 of Act 37 of 1954 and since it conferred authority on the Municipal Prosecutor the complaint was properly filed by Sham Sundar Mathur. The question is whether the Delhi Municipal Corporation or Shri Mathur was the complainant within the - meaning of S. 417(3) of the Code of Criminal Procedure. It was argued on behalf of the respondent that the complainant was Shri Sham Sundar Mathur, the Municipal Prosecutor and the Delhi Municipal Corporation was not competent to make an application for special leave unders. 417(3), Cr. P.C. We are unable to accept this argument as correct. It is true that Shri Sham Sundar Mathur filed the complaint petition on August 29, 1960. But in filing the complaint Shri Mathur was not acting on his own personal behalf but was acting as an agent authorised by the Delhi Municipal Corporation to file the complaint. It must, therefore, be deemed in the contemplation of law that the Delhi Municipal Corporation was the complainant in the case. The maxim qui per alium facit per seipsum facere videtur (he who does an act through another is Jeemed in law to do it himself) illustrates the general doctrine on which the law relating to the rights and liabilities of principal and agent depends. We are, therefore, of opinion that Shri Mathur was only acting in a representative capacity and that the Delhi Municipal Corporation was the complainant within the meaning of S. 417(3) of the Code of Criminal Procedure and the petition for special leave and the appeal petition were

properly instituted by the Delhi Municipal Corporation. For these reasons we allow the appeal, set aside the judgment of the High Court dated April 9, 1965 and direct that the appeal should be remanded to the High Court for being heard afresh and disposed of according to law."

37. To the similar effect in the judgement in **National Small Industries Corporation Limited Vs. State (Nct of Delhi) and others, (2009) 1 Supreme Court Cases 407,** wherein Court has observed as under in paragraph-13:-

"13. When an employee of a Government company or statutory corporation, who is a public servant, acts or purports to act in the discharge of his official duties, it necessarily refers to doing acts done or duties discharged by such public servant, for and on behalf of his employer, namely, the government company/statutory corporation. Any complaint by a public servant (if he happens to be an employee of a government company) acting or purporting to act in the discharge of his official duties, can only be in regard to the transactions or affairs of the employer company. When an offence is committed in regard to a transaction of the Government company, it will be illogical to say that a complaint regarding such offence, if made by an employee acting for and on behalf of the company will have the benefit of exemption under clause(a) of the proviso tosection 200 of the Code, but a complaint in regard to very same offence, if made in the name of the company represented by the said employee, will not have the benefit of such exemption. The contention of the second respondent, if accepted, would mean that a complaint by `The Development Officer, NSIC' as the complainant can avail the benefit of exemption, the same complaint by `NSIC represented by its Development Officer' as complainant will not have the benefit of exemption. Such an absurd distinction is clearly to be avoided."

Iv. The last issue as to whether sanction as required under Section 197 Cr.P.C. is to be necessarily granted/obtained before lodging of F.I.R. or same has to be granted /obtained before taking cognizance stands settled by Apex Court recently in **Indra Devi Vs. State of Rajasthan and another reported in 2021 (3) RCR (Criminal) 621**. For ready reference paragraphs 9, 10, 11 of aforesaid judgement which are relevant for the controversy in hand are reproduced herein-below:

" 9. We have given our thought to the submissions of learned counsel for the parties. Section 197 of the CrPC seeks to protect an officer from unnecessary harassment, who is accused of an offence committed while acting or purporting to act in the discharge of his official duties and, thus, prohibits the court from taking cognisance of such offence except with the previous sanction of the competent authority. Public servants have been treated as a special category in order to protect them from malicious or vexatious prosecution. At the same time, the shield cannot protect corrupt officers and the provisions must be construed in such a manner as to advance the cause of honesty, justice and good governance. [See Subramanian Swamy Vs. Manmohan Singh4]. The alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. However, such sanction is necessary if the

offence alleged against the public servant is committed by him "while acting or purporting to act in the discharge of his official duty" and in order 2 (1979) 4 SCC 177 3 (1993) 3 SCC 339 4 (2012) 3 SCC 64to find out whether the alleged offence is committed "while acting or purporting to act in the discharge of his official duty", the yardstick to be followed is to form a prima facie view whether the act of omission for which the accused was charged had a reasonable connection with the discharge of his duties. [See State of Maharashtra Vs. Dr. Budhikota Subbarao]5. The real question, therefore, is whether the act committed is directly concerned with the official duty.

10. We have to apply the aforesaid test to the facts of the present case. In that behalf, the factum of Respondent No.2 not being named in the FIR is not of much significance as the alleged role came to light later on. However, what is of significance is the role assigned to him in the alleged infraction, i.e. conspiring with his superiors. What emerges therefrom is that insofar as the processing of the papers was concerned, Surendra Kumar Mathur, the Executive Officer, had put his initials to the relevant papers which was held in discharge of his official duties. Not only that, Sandeep Mathur, who was part of the alleged transaction, was also similarly granted protection. The work which was assigned to Respondent No.2 pertained to the subject matter of allotment, regularisation, conversion of agricultural land and fell within his domain of work. In the processing of application of Megharam, the file was initially put up to the Executive Officer who directed the inspection and the inspection was carried out by the Junior Engineer and only thereafter the Municipal Commissioner signed the file. The result is that the superior 5 supraofficers, who have dealt with the file, have been granted protection while the clerk, who did the paper work, i.e. Respondent No.2, has been denied similar protection by the trial court even though the allegation is of really conspiring with his superior officers. Neither the State nor the complainant appealed against the protection granted underSection 197of the CrPC qua these two other officers.

11. We are, thus, not able to appreciate why a similar protection ought not to be granted to Respondent No.2 as was done in the case of the other two officials by the Trial Court and High Court respectively. <u>The sanction from competent authority would be required to take cognisance and no sanction had been obtained in respect of any of the officers.</u> It is in view thereof that in respect of the other two officers, the proceedings were quashed and that is what the High Court has directed in the present case as well."

38. In view of the discussion made above, this court has no hesitation to conclude that Court below has allowed criminal revision by recording cogent findings. Court below has neither committed a jurisdictional error nor has it exercised it's jurisdiction with material irregularity. The facts noted for allowing the revision could not be disputed by learned Senior Counsel. On the basis of above, findings recorded in impugned order passed by Court below could not be dislodged by learned Senior counsel appearing for applicant as being illegal, perverse or erroneous. Once the findings could not be dislodged, the conclusion cannot be altered.

39. Apart from above, it is apposite to mention here that order dated 25.10.2019, passed by Magistrate was itself illegal as concerned Magistrate was under legal obligation by virtue of Section 190 Cr.P.C. to see that offence complained of which is a cognizable and non-bailable offence is duly investigated (vide paragraph 27 of judgement in Vishnu Kumar Tiwari (Supra). Concerned Magistrate in complete ignorance of above, accepted the consent of first informant/opposite party-2 showing his agreement with the police report (final report dated 17.02.2015), which otherwise he was not competent to give. Thus, concerned Magistrate had clearly committed a jurisdictional error. It is this mistake which was brought to the notice of Revisional Court in the Revision filed by first informant/opposite party-2, himself. Revisional court has, therefore, rightly allowed the revision.

40. In view of above, no case for quashing of impugned order dated 17.02.2021, passed by Sessions Judge, Maharajganj in Criminal Revision No. 08 of 2021 (Bhanu Pratap Singh Vs. State of U.P. and others) has been made out. Consequently, the prayer for quashing of impugned order is refused.

41. However, for the facts and reasons noted above, particularly, paragraphs 26, 27, 28, 29 and 30 of this order, I am of the view that order impugned in present application needs to be modified by this Court in exercie of jurisdiction under section 482 Cr.P.C./Article 227 of Constitution of India. The F.I.R was lodged on 26.8.2014 and a period of almost seven years has rolled by from the date of F.I.R. but same has not yet been investigated. Considering the totality of facts and circumstances, the orders dated 6.8.2016 and 17.02.2021, passed by Revisional Court, I am of the view that interest of justice shall be served in case aforesaid orders are modified to the extent that Case Crime No. 1223 of 2014 under Section 409 I.P.C. P.S. Kotwali, District-Maharajganj shall be further investigated by a different Investigating Officer, by examining all concerned.

42. With the aforesaid modification, this application is finally disposed of.

(2022)04ILR A327
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2022

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Application U/S 482 No. 20096 of 2021

Akhilesh Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Sunil Kumar Yadav

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860 - Sections 272 & 420 - Excise Act- Sections 60/72-challenge to-impugned order regarding release of vehicle-police party intercepted 3 four-wheelers and 200 ltrs adulterated illicit liquor-applicant moved application for release of vehicle on the ground that he is the registered owner of the vehicle and his driver took away the vehicle in marriage of his relative-release application was dismissed by lower court - during the pendency of confiscation proceedings u/s 72 of U.P. Excise Act, The

magistrate has no jurisdiction to release the vehicle seized-The findings recorded by the Learned Magistrate and upheld by revisional court are according to law in view of law propounded by Division Bench of Allahabad High Court.(Para 1 to 11)

The application is dismissed. (E-6)

List of Cases cited:

1. St. (NCT) of Delhi Vs Narendra (2014) 13 SCC 100

2. Mustafa Vs St. of U.P. Civil Appeal No. 6438 of 2019

3. Virendra Gupta Vs St. of U.P. (2019) 6 ADJ 432

4. Murad Ali Vs St. of U.P Appl. u/s 482 No. 21547 of 2021

5. Chandra Pal Vs St. of U.P. Appl. u/s 482 No 1325 of 2021

6. Nand Vs St. of U.P. (1997) 1 AWC 41

7. Rajeev Kumar Singh Vs St. of U.P. & ors.. (2017) 5 ADJ 351

8. Ved Prakash Vs St. of U.P. (1982) AWC 167

9. Virendra Gupta Vs St. of U.P. (2019) 6 ADJ 432 DB

10. Sunderbhai Ambalal Desai Vs St. of Guj. (2002) 10 SCC 283

11. State GNCJ of Delhi Vs Narendra (2014) 13 SCC 100

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. This criminal misc. application under section 482 Cr.P.C. is filed challenging the order dated 16.04.2021 passed by Chief Judicial Magistrate, Mainpuri and order dated 02.09.2021 passed by Sessions Judge, Mainpuri in criminal revision no.28 of 2021 *(Akhilesh Kumar vs. State of U.P.)* in crime no.165 of 2021 under Sections 60/72 Excise Act and Section 272, 420 IPC, P.S. Kotwali, District Mainpuri.

2. In brief the facts are that an FIR crime no.165 of 2021 was lodged on 16.03.2021. According to prosecution case on 16.03.2021, the police party on information received from informer, intercepted 3 four wheelers and on search recovered 200 ltrs adulterated illicit liquor contained in five jerrycans and seized two vehicles Mahindra Marazzo, Registration No. UP 84 CA 5621 and a Toyota Qualis bearing no. UP83 AR 4994. The police also arrested seven persons who are named in the FIR. The applicant moved an application before the Chief Judicial Magistrate, Mainpuri for release of vehicle No. UP 84 CA 5621 Mahindra Marazzo, on the ground that he is the registered owner of the vehicle. On 15.03.021 his driver has took away the vehicle in marriage of his relative. The police seized the vehicle from the house of the driver and implicated it in this case. This release application was dismissed by the Chief Judicial Magistrate, Mainpuri by the impugned order dated 16.04.2021. Aggrieved with it, the applicant preferred criminal revision no.28 of 2021 which has also been dismissed by the Sessions Judge, Mainpuri vide impugned judgment and order dated 02.09.2021.

3. Learned counsel for the applicant submitted that applicant is the owner of the vehicle and GPS system clearly shows that the vehicle in question was not present at the spot as told by the prosecution. The applicant has filed release application during pendency of the confiscation proceedings. The vehicle is standing in the

open space and there is chance of natural decay. The vehicle is a court property and court has power to release it in favour of the registered owner during pendency of the trial. The property is mechanical in nature and if it remain unused and not taken due care, it may became useless. It is also contended that no offence under section 60/72 Excise Act and Sections 272 & 420 IPC is made out. The impugned orders passed by the Chief Judicial Magistrate, Mainpuri and Sessions Judge, Mainpuri are wholly illegal and bad in the eyes of law. Learned counsel also contended that the learned Magistrate has rejected the application on the ground that he has no jurisdiction as confiscation proceeding is pending. The view taken by the learned Magistrate is erroneous. The revisional court has adopted the same view and relying on the citation of ***State (NCT) of Delhi. vs. Narendra 2014 (13) SCC 100 and Mustafa vs. State of U.P. Civil Appeal No.6438 of 2019 (arising out of SLP (Civil) No.1111 of 2018) and Virendra Gupta vs. State of U.P. 2019 (6) ADJ 432*** Division Bench Allahabad High Court has dismissed the revision also. Both the courts below have misinterpreted the aforesaid citations and have failed to apply the correct law. The jurisdiction of the Magistrate is not barred. Learned counsel placed reliance on the case of ***Murad Ali vs State of U.P. decided on 23.11.2021 in application U/s 482 Cr.P.C. No.21547 of 2021 and the case of Chandra Pal vs. State of U.P., application U/s 482 Cr.P.C No.1325 of 2021 decided on 12.02.2021.***

4. Learned A.G.A. contended that the vehicle is involved in a crime under Excise Act. Police has seized the vehicle and has reported the seizure to the District Magistrate. Confiscation proceeding is pending and the learned Magistrate has rightly held that as the confiscation proceeding is pending, the Magistrate has no jurisdiction with regard to release. Learned revisional court has also upheld it. There is no illegality or infirmity in the impugned orders.

5. It is undisputed that vehicle Mahindra Marazzo registration no.UP 84 CA 5621 has been seized by the police in crime no.165 of 2021 under section 60/72 of U.P. Excise Act and Section 272, 420 IPC. The confiscation proceedings has been initiated. Revisionist is the registered owner of the vehicle and he moved release application before the concerned Magistrate during confiscation proceeding. Learned Magistrate rejected the aforesaid application on the ground that during pendency of the confiscation proceedings under section 72 of U.P. Excise Act, the Magistrate has no power to release the vehicle. The revisional court also upheld it.

6. Now the question is whether during confiscation proceedings under section 72 of U.P. Excise Act, the Magistrate is empowered to release the vehicle. In case of ***(Nand vs. State of U.P.) 1997 (1) AWC 41 and (Rajeev Kumar Singh vs. State of U.P. and ors) 2017 (5) ADJ 351***, the learned Single Judge of this Court held that the Magistrate has jurisdiction while in the case of ***Ved Prakash vs. State of U.P. 1982 AWC 167*** another Bench of this Court held that the Magistrate has no jurisdiction in the matter. The matter again came before another learned Single Judge of this Court and taking notice of the conflicting views the learned Single Judge referred the matter to Division Bench. The Division Bench in ***(Virendra Gupta vs. State of U.P). 2019 (6) ADJ 432 (DB)***, on the aforesaid reference formulated the following question:

"Whether pending confiscation proceedings under Section 72 of the U.P. Excise Act before the Collector, the Magistrate/ Court has jurisdiction to release any property subject-matter of confiscation proceedings in exercise of powers under Sections 451, 452 or 457 of the Code of Criminal Procedure?"

7. The Division Bench interpreting the various provisions of Cr.P.C. and U.P. Excise Act and the law laid down by the Apex Court in ***(Sunderbhai Ambalal Desai vs. State of Gujarat), 2002 (10) SCC 283 and (State GNCJ of Delhi) vs. Narendra (2014) 13 SCC 100*** answered the aforesaid question in para no.20 of the judgment which is reproduced as below:

" In view of the foregoing discussion, we find that the case of Ved Prakash (supra) lays down the correct law on the subject-matter of this reference and neither Nand vs. State of U.P., 1997 (1) AWC 41 or Rajiv Kumar Singh vs. State of U.P. and others, 2017 (5) ADJ 351 nor Sunderbhai Ambalal Desai vs. State of Gujarat, 2002 (10) SCC 283, can be said to be authorities on the power of the Magistrate to release anything seized or detained in connection with an offence committed under the ''Act' in respect of which confiscation proceedings under Section 72 of the U.P. Excise Act are pending before the Collector."

8. So the law has been settled by the Division Bench of this Court which has held that during confiscation proceeding, the Magistrate has no power under sections 451 or 457 Cr.P.C. to release the vehicle.

9. Learned counsel for the revisionist has placed reliance on the case of ***Chandra Pal vs. State of U.P.*** in Application U/s 482 Cr.P.C. No.1325 of 2021 decided on 21.02.2021 and ***Murad Ali vs. State of U.P. and two ors*** in Application U/s 482 Cr.P.C. No.21547 of 2021 decided on 23.11.2021. In the aforesaid case, the learned Single Judge has held that Magistrate has jurisdiction to release the vehicle during confiscation proceedings but in view of the law propounded by the Division Bench of Allahabad High Court this view cannot be adopted.

10. From the aforesaid discussion, it is clear that during confiscation proceedings, the Magistrate has no jurisdiction to release the vehicle seized under section 72 of U.P. Excise Act. The findings recorded by the learned Magistrate and upheld by the revisional court are according to law. There is no illegality or infirmity in the impugned order and the application U/s 482 Cr.P.C. is liable to be dismissed.

11. According the application U/s 482 Cr.P.C. is hereby ***dismissed.***

(2022)04ILR A330
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482 No. 28477 of 2021

Yashpal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Raghvendra

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Excise Act, 1910- Sections 60/72-release of vehicle-vehicle in question has been confiscated by the District Magistrate and the applicant has not challenged the order of confiscation before the Appellate Court-As per Section 72(7) of U.P. Excise Act, Civil appeal would lie before the District Judge against the order of confiscation passed by the District Magistrate-thus, the instant application is not maintainable on account of having alternative statutory remedy available to the applicant.(Para 1 to 12)

The application is dismissed. (E-6)

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

1. Heard learned counsel for the applicant, learned AGA for opposite party no. 1 and perused the record.

2. The instant application under Section 482 Cr.P.C. has been preferred by the applicant to quash the order dated 08.10.2021 passed by Judicial Magistrate, Court No. 2, Mainpuri whereby an application for release of Vehicle No. UP-84-AH-0198 of the applicant has been rejected mainly on the ground that Vehicle No. UP-84-AH-0198 of the applicant which was seized in Case Crime No. 144 of 2021, under Section 60 Excise Act, Police Station Ghiror, District Mainpuri has been confiscated by the order of District Magistrate in favour of the State, therefore, application under Section 457 Cr.P.C. for release of the said vehicle by the applicant is not maintainable.

3. Learned counsel for the applicant submits that aforesaid vehicle of the applicant is lying in police station and in case, the same is not released in favour of the applicant, the condition of the vehicle will be deteriorated, therefore, no useful purpose would be served in keeping the said vehicle in the police station.

4. Learned AGA submits that in view of the alternative remedy available under the U.P. Excise Act, 1910 for filing civil appeal against the order of confiscation of vehicle, the instant application is not maintainable and there is no illegality in the impugned order dated 08.10.2021.

5. Having examined the matter in its entirety, it is relevant to mention that clause (e) of sub-Section (1) of Section 72 of U.P. Excise Act, 1910 provides that whenever an offence is punishable under this Act, every animal, cart, vessel or other conveyance used in carrying such receptacle or package shall be liable to confiscation. The power of confiscation of vehicle has been given to the Collector of the District and sub-section 7 of Section 72 provides appeal against the order of confiscation under sub-section 2 or sub-section 6 of Section 72 to the Judicial Authority as the Government may appoint.

6. Sub-section 7 of Section 72 of U.P. Excise Act, 1910 is being reproduced as under:-

"(7) Any person aggrieved by an order of confiscation under sub-section (2) or sub-section (6) may, within one month from the date of the communication to him of such order, appeal to judicial authority as the State Government may appoint in this behalf and the judicial authority shall, after giving an opportunity to the appellant to be heard, pass such order as it may think fit, confirming, modifying or annulling the order appealed against."

7. It is noteworthy that for the purpose of section 72(7) of U.P. Excise Act vide Notification No.4986 (E)/XIII-517 dated June 4th, 1978 of आबकारी अनुभाग , appellate judicial authority appointed by the State Government is **"District Judge"** and an appeal should be regarded as Civil Appeal (not Criminal) and is required to be decided by the District Judge himself.

8. In view of the above, there is no dispute that as per provisions of Section 72(7) of U.P. Excise Act, 1910, against the order of confiscation passed by the District Magistrate, Civil Appeal would lie before the District Judge of the respective District.

9. Having heard learned counsel for the parties, I find that learned counsel for the applicant does not dispute the aforesaid fact that vehicle in question has already been confiscated by the District Magistrate and the applicant has not challenged the order of confiscation before the Appellate Court.

10. Accordingly, the instant application is not liable to be entertained on account of having alternative statutory remedy available to the applicant as mentioned above.

11. The application lacks merit and is accordingly dismissed.

12. However, it is open for the applicant to file civil appeal as per the provisions of U.P. Excise Act, 1910 before the competent Civil Courts, the District Judge, Mainpuri subject to law of limitation.

(2022)04ILR A332

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 23.03.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 37040 of 2016

Arvind Upadhyay ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rahul Mishra

Counsel for the Opposite Parties:
A.G.A., Sri Anil Kumar Chaudhary, Sri Ved Prakash Shukla

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Protection of Women from Domestic Violence Act, 2005-Section 31 - quashing of entire proceeding-maintenance- Harassment faced by wives even after several years from the date of orders-appeal- no relief regarding right to residence was given-execution- applicant does not comply the order for five years- Instead, an FIR was lodged about the applicant's missing - applicant escaping from his wife and daughter deliberately-the matter could not be resolved even giving opportunity to the parties before the court -Several cases, are pending and even notices have not been served upon the parties due to which women are suffering-to safeguard the right of maintenance of wives, direction given to thee Director General of Police to ensure the summons are served upon the person concerned.(Para 1 to 21)

The application is dismissed. (E-6)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. On 4th February, 2021, this Court passed following order:

"On 5th December, 2016, a Coordinate Bench of this Court passed following order:

"The present application u/s 482 Cr.P.C. has been filed with the prayer to quash the entire proceedings of case no. 8008 of 2016, under Sections 31 Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Act), Police Station Civil Lines, District Allahabad pending in the court of Addl. Chief Judicial Magistrate, Court No. 10, Allahabad. Further prayer has been made to stay further proceedings of the aforesaid case.

Heard learned counsel for the applicant as well as the learned AGA.

It is submitted by the learned counsel for the applicant that during the pendency of the appeal filed against the order under Section 12 of the Act an application under Section 31 of the Act was moved by the aggrieved party. Concerned Magistrate exceeding the jurisdiction passed the orders dated 4.11.2016 and 8.11.2016. In the original order passed passed under Section 12 of the Act no relief/protection of right to residence was given. Since Section 31 of the Act is related to the execution of the order passed under Section 12 of the Act, no further order could be passed under Section 31 of the Act. It was further argued that Section 31 of the Act only deals with the penalty for breach of protection order by respondent. It was further argued that the impugned order passed by the court concerned in the proceedings under Section 31 of the Act are not appealable.

Matter requires consideration.

Learned AGA has accepted notice on behalf of the opposite party no.1.

Issue notice to opposite party no. 2.

Steps be taken by Registered Post A.D. within a week.

All the opposite parties may file counter affidavit within four weeks. Rejoinder affidavit may be filed within two weeks thereafter.

List this matter on 30.1.2017 before the appropriate Bench.

Till the next date of listing, effect and operation of the orders dated 4.11.2016 and 8.11.2016 shall remain stayed."

On 26th August, 2019, the same Coordinate Bench of this Court passed following order:

"Present application u/s 482 Cr.P.C. has been filed with a prayer to set-aside the order dated 4.11.2016 passed by the Addl. Chief Judicial Magistrate, Court No.10, Allahabad in the proceedings under section 31 of the Protection of Women from Domestic Violence Act.

Perusal of the record reveals that no such relief was granted in the order dated 22.8.2016 passed in case no.1362 of 2013 (Smt. Priyanka Vs. Arvind Kumar Upadhyay) in the proceedings under section 12 of the Protection of Women from Domestic Violence Act as allowed on 4.11.2016 in the proceeding under section 31 of the Protection of Women from Domestic Violence Act.

Keeping in view the above facts, I find it necessary to call for a report from the court concerned / Addl. Chief Judicial Magistrate, Court No.10, Allahabad whether the order dated 4.11.2016 could be passed in the petition under section 31 of the Protection of Women from Domestic Violence Act beyond the relief granted vide order dated 22.8.2016.
Thus, office is directed to send copy of this order to the court concerned within three days from today through Fax for submission of report.

List this matter on 18.9.2019.

In the meantime, rejoinder affidavit may be filed by the learned counsel for the applicant.

Interim order, if any, is extended till the next date of listing."

On 27th November, 2019, an another Coordinate Bench of this Court passed following order:

"Learned counsel for the applicant is present.

He has mentioned that in compliance of Court's order, dated 6.11.2019, Arvind Upadhayay is not in a position to attend this Court because he is missing and a missing report has been lodged at Police Station, concerned, wherein, a report of Police, dated 16.5.2018, in form of certified copy, has been filed to the court, concerned. The same has been produced before this Court, too, though it is not supported by any affidavit. As the same is certified copy of Civil court, hence, perusal of it, reveals above situation. But, this report is of 16.5.2018, whereas, the order is of 6.11.2019. What was the situation, in between, has not been brought on record.

This Court has directed Arvind Upadhayay for being present before this Court, but, he failed to appear in person before this Court. Hence, let Bailable Warrant be issued against Arvind Upadhayay, through, the Chief Judicial Magistrate, Varanasi, for ensuring presence of Arvind Upadhayay before this Court on the next date fixed.

Smt. Priyanaka Upadhyay, Opposite party no.2, who is present in person, has vehemently argued that Arvind Upadhayay is not missing, rather, for avoiding implementation of order of this Court, this step has been taken by him. Order, passed by the Magistrate, under Protection of Women from Domestic Violence Act, is not being complied with, whereas, stay order has been obtained and the same is being misused.

In view of above contention, it would be appropriate that let the matter be placed on the next date, fixed, to consider as to why stay order, if any, may not be vacated.

Inspite of repeated direction of this Court, calling for explanation from the concerned Court of Additional Chief Judicial Magistrate, Court No.10, Allahabad, compliance report, in the form of explanation, has not been received as yet.

District & Sessions Judge, Allahabad, is being directed for ensuring submission of explanation, in the form of compliance report, by above Court, at the earliest, otherwise, presence of the Presiding Officer, concerned, in person may be directed to be procured, by this court.

List this case, for hearing, on 8th January, 2020."

On 8th January, 2020, the said Coordinate Bench of this Court passed following order:

"Learned counsel for both sides are present.

Report-cum-explanation by Judicial Magistrate, Allahabad, has been filed and taken on record.

Perusal of report reveals that previous report was also submitted but it was not there on record, copy of same has been filed. Impugned order has been passed by the then Additional Chief Judicial Magistrate-X, Neeraj Kumar Garg and present Magistrate, who has filed reply, was of no concern. Even, she was not in service on above date. Hence, District and Sessions Judge, Allahabad, was directed to ensure submission of explanation of Magistrate, who had passed order under

Section 31 of Protection of Women from Domestic Violence Act, 2005. But the explanation by the Magistrate concerned has yet not been filed. District and Sessions Judge, Allahabad, is being directed to ensure submission of explanation of the then Magistrate, over query made by this Court, regarding passing of order, over an application moved under Section 31 of the Act, beyond the order given under Section 12 of the Act.

Arvind Upadhyay was directed to be present before this Court and it has been mentioned by his counsel that he is missing. A missing report was got lodged. The other side Priyanka Upadhyay, in person, had vehemently opposed this fact and had argued that he is at his parental residence and avoiding process of law. If he is missing, then how he is in contact with his counsel, who is arguing in this case. This seems to be a forceful argument. Hence, learned counsel for the applicant to ensure presence of Arvind Upadhyay before this Court.

Let N.B.W. be issued against Arvind Upadhyay, through, C.J.M., Varanasi, for ensuring his presence before this Court.

List in week commencing 24.2.2020.

Interim order, if any, shall continue till the next date. "

Today, on the matter being taken up, learned counsel for the applicant is present and he states that the applicant, namely, Arvind Upadhyay is missing and he has not been traced out. He, therefore, prays that the matter may be posted for some other date and till then, the interim protection granted earlier to the applicant be also extended.

On the other-hand, opposite party no.2, namely, Smt. Priyanka Upadhyay, who is present in person states that the applicant is not missing and deliberately he is disobeying the orders of the Court and enjoying the benefits of the interim order granted earlier to him in collusion with the officials and officers of the Police Department. It is impossible to believe that if the applicant is missing, then how he is in contact with his counsel, who is arguing in this case.

On perusal of the order of the Coordinate Bench of this Court dated 27th November, 2019 quoted herein above, this Court finds substance in the submission made by opposite party no.2 that the applicant is not missing and he has been avoiding the order of this Court and process of law deliberately and due to the same, the Coordinate Bench vide order dated 27th November, 2019, has directed the Chief Judicial Magistrate, Varanasi for issuing bailable warrant against the applicant so that he may be appeared before this Court but he has not appeared. On 8th January, 2020, the said Coordinate Bench has not only directed the Chief Judicial magistrate, Varanasi to issue non-bailable warrant against the applicant for ensuring his presence before this Court but also directed the learned counsel for the applicant to ensure the presence of the applicant before this Court. Despite bailable warrant and non-bailable warrant having been issued and more than one year and two months from the date of the order dated 27th November, 2019 and one year and one month from the date of order dated 8th January, 2020 having been elapsed, the applicant has not appeared before this Court. Learned counsel for the applicant has also not ensured the presence of the applicant before this Court.

In view of the aforesaid, this Court has no other option but to discharge the interim order dated 5th December, 2016 granted to the applicant and to direct the

Senior Superintendent of Police, Varanasi for ensuring the presence of the applicant before this Court on the next date.

The interim order dated 5th December, 2016 is, accordingly, discharged. The Senior Superintendent of Police, Varanasi shall ensure that the applicant, namely, Arvind Upadhyaya, son of Shri Lakshmi Prasad Upadhyaya, resident of 7/5A, Benipur Pahadia, Police Station-Sarnath, District-Varanasi is brought before this Court on the next date.

The status report about the issuance of bailable warrant and non-bailable warrant by the Chief Judicial Magistrate, Varanasi is not on record. The Chief Judicial Magistrate, Varanasi is directed to file the same before this Court on the next date.

The explanation of the then Additional Chief Judicial Magistrate, Court No. 10, Allahabad,namely, Neeraj Kumar Garg (now Additional District and Sessions Judge, Khurja, Bulandshahr), dated 27th January, 2020, who has passed the order dated 4th November, 2016 under Section 31 of the Protection of Women from Domestic Violence Act and the order dated 22nd August, 2016 has been sent to this Court through the District Judge, Allahabad and the same is on record, which is marked as Flag-D of the order-sheet.

Before expressing any opinion on the explanation given by the then Additional Chief Judicial Magistrate, the reply of the learned counsel for the applicant is required.

Office is directed to provide a copy of the explanation dated 27th January, 2020 to the learned counsel for the applicant within three days. On receipt of the same, the learned counsel for the applicant shall file reply to the same by means of a supplementary affidavit.

Opposite party no.2 shall also file counter affidavit on or before the next date.

Put up this case on 22nd February, 2020 in the additional cause list.

The Registrar General is directed to sent a copy of this order to the Senior Superintendent of Police, Varanasi and the Chief Judicial Magistrate, Varanasi for necessary compliance at their end within 48 hours."

2. When the applicant was not being traced out, this Court on 8th September, 2021 passed following order:

"On the matter being taken up, Mr. J.K. Upadhyay, learned A.G.A. assisted by Mr. Gaurav Pratap Singh, brief holder for the State and Mrs. Priyanka Upadhyaya, opposite party no.2 (in person) are present. Mr. Rajiv Upadhyay, Advocate holding brief of Mr. Rahul Mishra, Advocate who has filed an intervention application on behalf of one Laxmi Prasad Upadhyay, who happens to be the father of the applicant is also present. However, neither Mrs. Alka Singh and nor Mr. Vipin Kumar Singh, Advocates who have filed the present application on behalf of the applicant and also appeared before the Court earlier, are not present in the Court today, even in the revised reading of the list.

At this stage, this case has turned into a strange case, in which, being wife i.e. opposite party no.2 filed a case against her husband i.e. the applicant herein under the provisions of Protection of Women from Domestic Violence Act, 2005 before the court below and the court below passed order dated 4th November, 2016 directing the husband to provide a separate living room to wife and daughter as also to give Rs. 1000/- for their maintenance. On the application filed by wife i.e. opposite party no.2, the court

below passed another order dated 8th November, 2016 that if the husband i.e. applicant does not comply the order dated 4th November, 2016, the Station House Officer, Sarnath shall ensure the compliance of the said order. Against both the orders, the present application has been filed by the husband i.e. applicant, who obtained an interim order dated 5th December, 2016 ex parte, whereby the orders dated 4th and 8th November, 2016 were stayed till the next date of listing. Thereafter the wife i.e. opposite party no.2 appeared in the present case to defend her case in the present application. When the Court asked the learned counsel for the applicant to ensure production of the applicant before the Court, it has been informed by the learned counsel for the applicant that he is missing since 9th April, 2017 and a first information report about his missing has also been lodged on 16th May, 2018 at Police Station-Sarnath, District-Varanasi. Learned counsel for the applicant has further informed the Court that now he has no instruction on behalf of the applicant, as he is not in his contact. Thereafter Court passed various orders directing the learned counsel for the applicant as well as District Police Varanasi to ensure the production of the applicant before the Court but the applicant has not been produced before this Court either by the learned counsel for the applicant or by the District Police, Varanasi.

In compliance of the order of the Court dated 28th March, 2021, an affidavit sworn by Mr. Vikrant Vir, Deputy Commissioner of Police, Varuna Zone, Varanasi has been filed today in the Court on behalf of the State, which is taken on record. In paragraph nos. 4 to 6, it has been stated as follows:

"4. That in compliance of the order passed by this Hon'ble Court the earlier Incharge of Police D.I.G./Senior Superintendent of Police, Varanasi has constituted a team for the search of applicant namely Arvind Upadhyay vide order dated 26.02-2021.

5. That the team constituted vide order dated 26.2.201 has with great effort tried to search the whereabouts of the applicant on various dates and places, which has been entered in G.D. record and the same can be produced before this Hon'ble Court as and when the Court wishes to peruse, however, the entire gist with regard to the efforts made by the searching team is being placed before this Hon'ble Court by way of progress report dated 02.04.2021 through the answering respondent. A Photostat copy of the progress report dated 02.04.2021 is being annexed herewith and marked as ANNEXURE-2 to this affidavit.

6.That the police team constituted earlier is still searching the applicant namely Arvind Upadhyay with serious efforts and the same will be produced as and when recovered without wasting any time in compliance of the orders of this Hon'ble Court."

This Court is sorry to record that the affidavit filed on behalf of the District Police of Varanasi is too flimsy to be accepted by this Court. The story made out in the affidavit from the side of Police is highly improbable, which is nothing else but a scene of drama. A person, who is missing since 9th April, 2017 and whose missing report has been lodged on 16th May, 2018, is not traceable inspite of all the efforts of the police. The same appears to be fishy as stated by the wife of the applicant i.e. opposite party no.2 herein. In today's modern era, where the policemen have got all the facilities, yet the police is not able to find out a person, despite several orders of this Court. This creates a doubt in the mind of a common ordinary person. Either the police can say that they

have not got full powers or facilities or they are not able to find out the person, who is missing since 9th April, 2017 and this case should be given to some other agency.

The opposite party no.2, wife of the applicant, who is present, states before this Court that she has disclosed to the Police regarding whereabouts of the applicant but the Police reaches the place after giving space to the applicant to flee from there. It has also been brought to the knowledge of the Court that several cases, wherein maintenance has been awarded by the orders of the court, are pending and even notices have not been served upon the parties due to which women are suffering, as in the present case, which is the best example of harassment faced by the women even after passage of nearly five years from the date of orders in her favour.

An Intervention Application has been filed by Mr. Rahul Mishra, Advocate on behalf of one Laxmi Prasad Upadhyay, who happens to be the father of the applicant. In the affidavit filed in support of the intervention application, it has been stated that it is only because of the applicant's mental imbalance induced due to long standing acrimony, differences, disputes with opposite party no.2 that he went missing and could not be found till date despite Gumshudagi Report lodged in the year 2017 itself. It is further stated that neither he nor any of his relatives have any knowledge about the whereabouts of the applicant-Arvind Kumar Upadhyay and therefore, he and his wife who are ailing senior citizens may be rescued from the police authorities, who are harassing and victimising them on the pretext of complying with various orders of the Hon'ble Court. In the intervention application, it has also been stated that during the pendency of the present application, the applicant-Arvind Kumar Upadhyay suffered with mental imbalance and was subjected to treatment at Mental Hospital, Varanasi and while he was receiving treatment, he left the house and went missing since 9th April, 2017, true copies of medical treatment from Mental Hospital, Varanasi has been enclosed as Annexure-1 to the affidavit accompanying the Intervention Application.

To the averments made in the affidavit accompanying the Intervention Application, opposite party no.2 submits before this Court that the applicant is not missing anywhere, he has deliberately left his house and is hidden somewhere. The father and other family members of the applicant have also helped him only in order to disobey the orders of the court below dated 4th November, 2016 and dated 8th November, 2016. Opposite party no.2 further submits that after the orders of the court below dated 4th and 8th November, 2016, father of the applicant (Intervenor before this Court) has deliberately sold his properties only for harassing opposite party no.2 and her female child as well as to disobey the orders of the court below and this Court. Opposite party no.2 further submits that the averment made in the intervention application that the applicant was suffering from some mental imbalance for which his treatment was going on in Mental Hospital Varanasi, is also incorrect, because the medical prescriptions, which have been enclosed along with the affidavit accompanying the intervention application, do not establish as to the exact mental ailment of the applicant. Lastly, opposite party no.2 submits that the conduct of the father of the applicant (Intervenor) and other family members of the applicant is doubtful.

Prima facie, the submissions made by opposite party no.2 appears to be correct.

Opposite party no.2 may file response, if any, to the aforesaid intervention application on or before the next date.

In this case, there is a question of maintenance of a married woman and her small daughter in these hard days. Now when the husband of a woman (applicant and opposite party no.2 herein) is not available, then her mother-in-law and father-in-law, who are like her father and mother, also become their responsibility. After marriage, a woman's husband and in-laws are everything. In this case, there is a question of peaceful life, safety and education of a girl child, who is none other but grand-daughter of the parents of the applicant. In-laws of a woman or grand parents of a girl child cannot leave her daughter-in-law or grand daughter alone if the husband of said woman or father of the said girl child, is missing.

In view of the present facts and circumstances of the case, this Court is left with no option but to direct the Commissioner of Police, Varanasi to appear before this Court for explaining the fair conduct of the Police of District Varanasi. However, seeing the intricacies, this Court constrains itself in passing such orders without affording one opportunity to such a Senior Officer of the Police Department at Varanasi. This Court, therefore, directs the Commissioner of Police, Varanasi to file his personal affidavit categorically explaining as to why the applicant is not traceable by the Police, despite the fact that a first information report about the missing of the applicant has been lodged on 16th May, 2018 at Sarnath Police Station, Varanasi and various orders have been passed by this Court for production of the applicant before the Court. In the affidavit it shall also be disclosed about the prima facie observations made by this Court herein above. In the affidavit, it shall also be indicated as to how many days, the applicant shall be traceable by the Police. The affidavit shall be filed on or before the next date i.e. 29th September, 2021.

Seeing this pitiable predicament of a woman, who has been grappling from pillar to post and getting hoodwinked by multifarious impediments, which are purportedly for the objective of harbouring the applicant from the shrewdness of this Court, excogitated by the family of the husband, is an archetype illustration of the loopholes in way of our criminal justice system. To counteract and proscribe kindred occurrences in future and to safeguard the right to maintenance of wives, this Court directs the Commissioner of Police, Varanasi also to find out properties/whereabouts of the applicant as well as in-laws of opposite party no.2 promptly and after searching the same, in any one of the property/whereabout, he shall ensure that opposite party no.2 and her daughter are permitted to stay, so that the orders of the court below dated 4th and 8th November, 2016 may be complied with, as interim order granted earlier by this Court staying the operation of the same has not been extended and same stood discharged earlier. He shall also take assistance of opposite party no.2 i.e. wife of the applicant in tracing him as well as finding out the properties of the applicant and his father.

On the next date, the District Judge, Varanasi as well as the Commissioner of Police Varanasi, shall inform the Court of the similar cases, where the maintenance has been awarded by the courts but the same has not been executed, as summons have not been served till date.

On earlier occasions, the Court has been informed that the applicant is not missing and he is in contact with his

counsels, who are not present in the Court today. On the last occasion also i.e. 1st March, 2021, learned counsels for the applicant were not present.

The appearance of Mrs. Alka Singh and Mr. Vipin Kumar Singh, Advocates, who have filed their vakalatnama on behalf of the applicant in the present application and also appeared earlier, before the Court on his behalf, are necessarily required in the present strange case.

The Secretary, Allahabad High Court Bar Association, Allahabad shall ensure that Mrs. Alka Singh (A/A-0060/16) and nor Mr. Vipin Kumar Singh, Advocates, (En. No.-04687105, AOR No.-A/V.-0438/12, Mobile No. 9415630302), resident of 148A, N.B. H.C., Allahabad, appear in the Court on the next date i.e. 29th September, 2021.

Put up this case on 29th September, 2021 at 02:00 p.m.

A copy of this order shall be provided to the learned A.G.A., who shall communicate the same to the District Judge, Varanasi, Commissioner of Police, Varanasi as well as to the Secretary, Allahabad High Court Bar, Association for necessary compliance by Wednesday i.e. 15th September, 2021.

The party shall file computer generated copy of this order downloaded from the official website of the High Court, Allahabad, self attested by the party concerned along with a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked.

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 made a declaration of such verification in writing."

3. Thereafter on 6th October, 2021, 27th October, 2021, 17th November, 2021 and 16th December, 2021, this Court passed orders for tracing out the applicant, namely, Arvind Upadhya. Ultimately, when the matter was taken up on 10th March, 2022, the Court has been informed by Mr. J.K. Upadhaya, learned A.G.A. for the State that the applicant has been recovered by the Police in compliance of the orders of this Court passed earlier. On the said date, for amicably settling the dispute between the applicant and opposite party no.2, this Court passed following order:

"Mr. J.K. Upadhyay, learned A.G.A for the State submits that in compliance of the order of the Court dated 16th December, 2021, he has received instructions and the same has been placed before this Court, which is taken on record.

Pursuant to the order of this Court dated 16th December, 2021, the applicant, namely, Arvind Upadhyaya, has been found by the team of the Police so constituted by the Commissioner of Police, Varanasi in compliance of the earlier orders of this Court. Since the applicant and his parents have misled the government officials and police in order to avoid the orders of this Court as well as court below, a first information report has been lodged by Sub-Inspector, Police Station- Sarnath, District Varanasi on 4th January, 2022,against the applicant and his father and mother, namely, Laxmi Shanker Upadhyay and Radhika Devi, which has been registered as Crime No. 0006 of 2022 under Sections 419, 420, 467, 468, 471, 182, 188 and 120-B I.P.C., Police Station-Sarnath, District Varanasi pursuant to which the applicant has been taken into custody and sent to jail. At present, the applicant is in District Jail, Varanasi.

From the perusal of the entire material available on records of the present application, it is apparently clear that the applicant along with his parents is tried to disobey the orders of this Court and the court below and have also misled the authorities concerned and this Court, hence the appearance of the applicant is required for appropriate adjudication of the matter.

Accordingly, the Commissioner of Police, Varanasi and the Superintendent of District Jail, Varanasi are directed to ensure the appearance of the applicant before this Court on 23rd March, 2022 in the judicial custody.

On the basis of instructions so received by Mr. J.K. Upadhyay, learned A.G.A. for the State and Mr. Gaurav Pratap Singh, learned counsel for the State, it is also clear that the parents of the applicant, namely, Laxmi Shanker Upadhyay and Radhika Devi had also helped the applicant in running away from the Police authorities and in disobeying the orders of this Court and the court below. As such, the presence of the parents of the applicant is also required.

Mr. J.K. Upadhyay, learned A.G.A. for the State and Mr. Gaurav Pratap Singh, learned counsel for the State are directed to make all endeavour to ensure that the parents of the applicant, namely, Laxmi Shanker Upadhyay and Radhika Devi, are appeared before this Court on the next date for which they shall take help of the concerned Police authorities.

For proper adjudication of the present matter, Mrs. Anjali Upadhyay, opposite party no.2, who is present in person, is also directed that on the next date, she shall appear before this Court along with her parents.

List this case on 23rd March, 2022 at 02:00 p.m.

A copy of this order be provided to Mr. J.K. Upadhyay, learned A.G.A. for the State and Mr. Gaurav Pratap Singh, learned counsel for the State by tomorrow i.e. 11th March, 2022, who shall communicate the same to Commissioner of Police, Varanasi and the Superintendent of District Jail, Varanasi for necessary compliance of this order henceforth.

The Registrar General is also directed to communicate this order to the Commissioner of Police, Varanasi and the Superintendent of District Jail, Varanasi for necessary compliance."

4. While exercising its extra ordinary power under Section 482 Cr.P.C., seeing the fact that woman along with her daughter i.e. opposite party no.2 filed a case against her husband i.e. the applicant herein under the provisions of Protection of Women from Domestic Violence Act, 2005 before the court below and the court below passed order dated 4th November, 2016 directing the husband to provide a separate living room to wife and daughter as also to give Rs. 1000/- for their maintenance. On the application filed by wife i.e. opposite party no.2, the court below passed another order dated 8th November, 2016 that if the husband i.e. applicant does not comply the order dated 4th November, 2016, the Station House Officer, Sarnath shall ensure the compliance of the said order. Against both the orders, the present application has been filed by the husband i.e. applicant, who obtained an interim order dated 5th December, 2016 ex parte, whereby the orders dated 4th and 8th November, 2016 were stayed till the next date of listing. Thereafter the wife i.e. opposite party no.2 appeared in person in the present case to defend her case in the present application. When the Court asked the learned counsel for the applicant to ensure production of the

applicant before the Court, it has been informed by the learned counsel for the applicant that he is missing since 9th April, 2017 and a first information report about his missing has also been lodged on 16th May, 2018 at Police Station-Sarnath, District-Varanasi. Learned counsel for the applicant has further informed the Court that now he has no instruction on behalf of the applicant, as he is not in his contact. Thereafter, this Court had come to a conclusion that the applicant is escaping from his wife and daughter only in order to avoid the orders of the Court, whereby he has been directed to pay maintenance to his wife and daughter. Therefore, this Court only in order to ensure that maintenance is provided to a woman and her daughter in accordance with law, for the same various orders have been passed including the order discharging the interim order passed in the present application dated 5th December, 2016. In between, on the discharge application made by both the learned counsel appearing for the applicant that neither they had any instruction on behalf of the applicant nor they were in contact with him, this Court discharged the appearance of both the counsel in the present application and only for ensuring the maintenance for being provided to opposite party no.2, this Court did not dismiss the present application and proceeded further. Therefore, this Court wanted to resolve the matters relating to Family and Marital Disputes arrived between the parties, who are none other than the husband and wife, who have a daughter.

5. This Court very well knew that if any dispute arrives between the husband and wife, the challenge is mostly faced by females because they are assumed to handle the age-old responsibility of taking care of the family and children, it is more of a challenge for a female because when she is earning it becomes even more difficult because she is entrusted with two responsibilities that is of taking care of the house and the children and also to take care of the work and the career they have persuade. One of the major reasons in India for the marital conflict or even dispute to arise is when a woman is married to a man and a man is married to a woman then it is not just enough that they have married just each other but they actually get married to each other's family too. Especially in India, there is a lot of involvement of each other's family into the marital life which can sometimes create a problem. Another reason that can create a problem in the marital relations is dealing with each other's habits and addictions. For example, addiction to alcohol, smoking, television and so on, or the habit of simply coming late back home. These habits might not just give a way to a conflict but can cause disputes for the same. The major objective of this paper is to highlight what problem a woman faces or how domestic violence is a stigma to the society but it is to see how our legal system handles the above-mentioned problems with the tool called Mediation.

6. Considering the aforesaid facts, when the applicant has been recovered by the respondent-Police in compliance of the orders of this Court passed from time to time, this Court vide order dated 10th March, 2022 directed the authorities concerned to ensure the presence of applicant and his parents before this Court on the next date. The Court has also required the opposite party no.2 to remain present on the next date.

7. In compliance of the order of the Court dated 10th March, 2022, the applicant, namely, Arvind Upadhya has

been produced before this Court today in the judicial custody from District Jail, Varanasi by Mr. Shabir, Sub-Inspector, Mr. Anvaar Ahmad, Head Constable and Mr. Ram Kumar, Constable of Police Lines, Commissionerate, Varanasi. Signatures of the applicant has also been identified by the said Police Personnels.

8. Pursuant to the order dated 10th March, 2022, the father and mother of the applicant, namely, Laxmi Shanker Upadhyay and Radhika Devi have also been produced by Mr. Sudhakar, Sub-Inspector, Police Station-Sarnath, District-Varanasi and their signatures have also been identified by Mr. Sudhakar.

9. Mrs. Anjali Upadhyay, opposite party no.2 is also present in the Court today. Despite the fact that this Court on 10th March, 2022 has orally directed Mrs. Upadhyay to appear on the next date along with her father or brother so that a concrete mediation may be done between the parties, she has not brought her father or brother to this Court.

10. Since the dispute between the parties is matrimonial in nature, this matter has been taken up in the Chambers of the Court.

11. To arrive at a amicable settlement between the parties, this Court first called the applicant and his parents to have their say in the matter and this Court asked them as to why they are not keeping the opposite party no.2 Anjali Upadhyay and her daughter and they are not giving money for the house and alimony for his wife and child for their livlihood as maintenance. This Court also asked the applicant as to why he was running away from his wife i.e. opposite party no.2 on which they told that they want to keep Anjali and her daughter but the opposite party no.2 did not live with her in-laws. Opposite party no.2 is not a normal woman. She used to harass, abuse and beat the applicant and his parents. She also calls them stupid, idiots and beggars. She creates one or the other kind of problems to make their lives difficult. The applicant and his parents said that instead of living with her, they would prefer to die. The applicant, with tears in his eyes and and with folded hands, also prayed that he be sent to jail again as he does not come out of jail, because it is better to stay in jail than to live with opposite party no.2.

12. When this Court called opposite party no.2 to talk to her husband and in-laws, so that the matter may be settled amicably, she misbehaved and threatened them to be prepare to go jail, as she will lodge various cases and will make their lives difficult. As this happened in the presence of the Court and the Court and Staff tried to stop her but she stared misbehaving with all present. When this Court warned her, she caught hold of Court's hand and even after repeated warning of the Court, she was not leaving the hands of the Court. This Court tried to convince her again and again so that the differences between the opposite party no.2 and the applicants and her in-laws may come to an end and they may live a happy life but for the reasons best known to opposite party no.2 she was not convinced and she interfered in the administration of justice.

13. Somehow the Court called the Police and got opposite party no.2 Anjali out of the Chambers of the Court.

14. Our intention was only that by calling everyone together, a settlement may

be arrived at between the husband and wife who have a child and everyone may live a happy life. Because fighting gives nothing and everyone's life becomes hell.

15. Mr. J.K. Upadhayay, learned A.G.A. has also submitted before the Court that opposite party no.2 harasses and misbehaves with the Police Officers and threatens that if they do not do of her choice, they would face evil civil consequences as she will not leave them Scott free.

16. Looking at all this, it seems to the Court that the opposite party no.2 does not want to live a happy life with her husband and in-laws. She is a confused/troubled woman herself and wants to trouble her husband and in-laws too.

17. Seeing the facts that even after making all efforts, the Court has failed to bring the husband and wife together along with their daughter, so that they may live happy life, as the disputes between the parties have not been settled amicably, interim order granted earlier dated 5th December, 2016 and appearance of both the counsel appearing for the applicant have already been discharged by this Court, referred to above, as well as the fact that the applicant, who has been produced before this Court in the judicial custody, has prayed that this application be dismissed as not pressed, this Court has no other option but to dismiss the same. It is ordered accordingly.

18. However, it is made clear that both the parties i.e. the applicant and opposite party no.2 shall avail their remedies, which may be permissible under law.

19. It is a different matter that the dispute between husband and wife i.e. applicant and opposite party no.2 could not be resolved in the present case as the no dispute can be brought to its logical end without the consent of the parties, but this Court appreciates Mr. J.K. Upadhyay, learned A.G.A. as well as Police Officers of Varanasi, who have done a commendable job in bringing this case to this point and finding the applicant, who has been missing for more than two years.

20. At the end, this Court is of the opinion that several cases, wherein maintenance has been awarded by the orders of the court, are pending and even notices have not been served upon the parties due to which women are suffering, as in the present case, which is the best example of harassment faced by the women even after passage of nearly five years from the date of orders in her favour. seeing this pitiable predicament of a woman, who has been grappling from pillar to post and getting hoodwinked by multifarious impediments, which are purportedly for the objective of harbouring the applicant from the shrewdness of this Court, excogitated by the family of the husband, is an archetype illustration of the loopholes in way of our criminal justice system. To counteract and proscribe kindred occurrences in future and to safeguard the right to maintenance of wives, this Court directs the Director General of Police, State of U.P. at Lucknow to ensure that the summons are served upon the person concerned, which have been issued, in execution of the maintenance allowance granted by the courts in favour of a married women.

21. This application stands **dismissed**, accordingly.

22. Since this application under Section 482 Cr.P.C. has already been dismissed, no further orders are required to be passed in the Intervention Application filed by Mr. Rahul Mishra, Advocate on behalf of one Laxmi Prasad Upadhyay, who happens to be the father of the applicant and is present in the Court.

23. Mr. J.K. Upadhyay, learned A.G.A. for the State and Mr. Rahul Mishra, Advocate appearing for Laxmi Prasad Uapdhyay, who filed the intervention application are present in the Chambers of the Court

24. Mr. Shabir, Sub-Inspector, Mr. Anvar Ahmad, Head Constable and Mr. Ram Kumar, Constable of Police Lines, Commissionerate, Varanasi are directed to take the applicant Arvind Upadhyay to Central Jain, Varanasi in the judicial custody today itself.

25. A certified copy of this order shall be provided to Mr. J.K. Upadhyay, learned A.G.A. for the State to communicate the same to the the Director General of Police, State of U.P. at Lucknow and the Commissioner, Varanasi Division, Varanasi.

(2022)04ILR A345
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.03.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 483 No. 17 of 2022

Anoop Singh ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Mohammad Irfan Siddiqui, Anjum Ara, Devesh Deo Bhatt, Mohd. Shahanshah Newaz Khan

Counsel for the Opposite Parties:
G.A.

A. Practice & Procedure - The Court directed that all Judicial Officers in State of U.P. shall strictly and literally comply with the circulars issued by this Court. (Para 11)

Application Disposed of. (E-10)

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

1. Heard Mr. Mohammad Irfan Siddiqui, learned counsel for petitioner/applicant, learned A.G.A. for the State and perused the material available on record.

2. By means of this petition under Section 483 Cr.P.C., the petitioner has sought following reliefs:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to direct the opposite party no. 2 to release the accused immediately impugned Case Crime No. (FIR No._ 93 of 2020, under Sections 409, 420, 467, 468, 471 and 120-B IPC Police Station Gomti Nagar, District Lucknow (State Vs. Anoop Kumar) as per circular (C.L. No.3/Admin.(G) dated 16.02.2009, Allahabad) issued by Hon'ble High Court for subordinate court, contained as Annexure No. 1 to this petition.

3. It is further prayed that this Hon'ble Court may kindly be pleased to conduct the inquiry for unnecessary delay to release accused from the jail just for disobedience the circular clear cut and also compensate

to accused for unnecessary detention from the responsible authorities i.e. opposite party no. 3 of present petition."

4. Learned counsel for petitioner/applicant has submits that bail was granted by the learned Additional Sessions Judge, Court No. 5 Lucknow on 30.11.2021. In compliance of bail order, the applicant filed two sureties before the court concerned on 08.12.2021. Thereafter the court below sent the sureties bond for verification to the concerned Police Station and Regional Transport Office, Lucknow but when the verification of surety is not completed by the concerned Police Station and Regional Transport Office then thereafter the petitioner approached the concerned court and filed application dated 22.12.2021 along with circular of this Court with prayer to accept the bail bonds for provisional release of the applicant in the light of circular issued by this Court.

5. On 20.12.2021 both the sureties were present before the court below but the trial court failed to comply the direction issued by this Court vide Circular (C.L. No.3/Admin.(G) dated 16.02.2009) as court below neither provisionally accepted the bail bonds nor passed any order nor assigned any reason. It is further submitted that on 13.01.2022 suo motu passed the order "permitted" without any knowledge of petitioner. It is further submitted that till date the verification of the surety is still pending before the trial court regarding which the questionnaire was filed by the applicant. As per information folio, it indicates that surety Dharam Singh status verification received from Police Station Talkatora, Lucknow on 22.03.2022, and verification of surety Shiv Bihari received from A.R.T.O., Lucknow on 22.03.2022. But the status verification of surety Shiv Bihari is still pending from Police Station concerned. Thus the verification of status is still pending since lapse of 102 days. The trial court did not call any explanation for the delay from the concerned authority nor take any suitable action against the delinquent official so, learned counsel for petitioner prays for taking appropriate action against the official in default.

6. In this regard, a detailed comments of Judicial Magistrate-I, C.B.C.I.D., Lucknow through District Judge, Lucknow was called within seven days on 08.03.2022 and the date was fixed for 21.03.2022. Again on 21.03.2022 the case was fixed for hearing but no report from the court below was received on the said date to this Court. Thereafter again a reminder was issued to trial court concerned and the report of Judicial Magistrate-I dated 16.03.2022, which was duly forwarded by District Judge, Lucknow was received but the explanation of Judicial Magistrate-I C.B.C.I.D. Lucknow was received in the office on 24.03.2022. Thus it is desirable that the District Judge, Lucknow to look into the matter and fix the responsibility of official in default.

7. As per circular, it is clearly mentioned that if the verification report is awaited within time, and the application filed for provisional acceptance of the bail bonds along with surety and prayer for provisional release of the accused then it is the bounden duty of the learned Magistrate concerned to literally comply the order of circular issued by this Court.

8. This is very sorry state of affairs. The explanation submitted by the Judicial Magistrate, C.B.C.I.D. is not convincing. Perusal of the explanation shows that the court below did not assign any reason why

the provisional bail bond was not accepted. The conduct of the Judicial Officer is deprecated and warn be careful in future.

9. The District Judge, Lucknow is hereby directed to circulate the circular (C.L. No.3/Admin.(G) dated 16.02.2009, Allahabad) issued by Hon'ble High Court for subordinate court and among other official with the direction that they do their duties as per aforesaid circular and always take action against the official in default.

10. At the outset, it is necessary to reproduce the Circular (C.L. No. 3/Admin. (G)/Dated : Allahabad: 162.2009) reads as under:

"Upon consideration of the direction of Hon'ble High Court in Criminal Misc. Case No. 4356/08 Shiv Shyam Pandey versus State of U.P. and others and in the wake of receipt of representation of the Bar complaining against considerable delay taking place in respect of verification of the address and status of the sureties filed before the Subordinate Courts, the Hon'ble Court has been pleased to direct that in super session of earlier Circular Letter No.44/98 dated 20.8.1998 and Circular Letter No. 58/98 dated 5.11.1998, the following guidelines shall be followed by the Judicial Officer of Subordinate Courts:-

1. In serious cases such as murder, dacoity rape and cases falling under NDPS Act, two sureties should normally be directed to be filed and the amount of the surety bonds should be fixed commensurate with the gravity of the offence.

2. The address and status verification of the sureties shall be obtained within reasonable time, say seven days in case of local sureties, 15 days in case of sureties being of other district and one month in case of sureties being of other State, positively from the concerned Police and revenue authorities and in case of non receipt of the report within given time, the concerned Court may call for explanation for the delay from the concerned authorities and take suitable action against them and at the same time may consider granting provisional release of the accused person in appropriate cases subject to the condition that in case of any discrepancies being reported by the verifying authorities, the accused shall surrender forthwith.

3. The Courts must insist on filing of black and white photographs of the sureties which must have been prepared from the negative.

4. The copies of the title deeds filed in support of solvency of status should be verified.

5. In cases where the Court feels that there are chances of plantation of drugs to implicate a person in a case covered under the NDPS Act, the amount of surety bonds may be suitable reduced.

I, am therefore, to request you to kindly bring the contents of the Circular Letter to all the Judicial Officers, working under your administrative control for strict compliance of the directions."

11. Keeping in view the direction as issued in the aforesaid circular by this Court, it is desirable that all the Judicial Officers in State of U.P. shall strictly and literally comply the circular issued by this Court. Therefore, it is hereby directed that all the District Judge of Uttar Pradesh shall ensure monthly review in Monitoring Cell Meeting for pending verification of the bail bonds and sureties beyond prescribed time and also ensure whether the proper action was taken against the delinquent official.

12. With the aforesaid observations/ directions this petition under Section 482 Cr.P.C. is disposed of.

13. **The Registrar General of this Court is also hereby directed to circulate the order of this Court as well as circular (C.L. No. 3/Admin. (G)/Dated : Allahabad: 162.2009) among all the Judicial Offices of Uttar Pradesh, all the revenue authorities of U.P. through District Magistrates and D.G.P. of Uttar Pradesh also directed to circulate the order of this Court to all the Police Stations of Uttar Pradesh for strict compliance.**

(2022)04ILR A348
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Special Appeal No. 58 of 2022

Gajraj Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Madan Mohan, Sri Prem Sagar Verma

Counsel for the Respondents:
C.S.C.

A. Civil Law - Societies Registration Act, 1860 – Sections 4-B & 25(2) – General body of the society – Membership – Modification in the member's list – Power of Registrar, extent thereof – Scope of enquiry by the Registrar u/s 4-B – Non-inclusion of petitioner as a member – Effect – Establishment of right as a member of society – Jurisdiction of civil court, when can be availed – Held, the Registrar in order to examine the correctness of the list of members u/s 4-B of the Act is only required to see the inclusion and deletion of the members and to modify the list accordingly. He is not enjoined upon to go into the validity of the list of members already finalized except for deleting some of those members who may have died or ceased to be the members otherwise, which is not the case at hand – Held further, appellant/ writ petitioner is required to establish his rights as a Member of the General Body of the Society before the Civil Court and only thereafter approach the Registrar under Section 4-B of the Act. (Para 13 and 14)

Special Appeal dismissed. (E-1)

List of Cases cited :-

1. T.P. Singh Vs Registrar/Asst. Registrar, Firms Societies & Chits, Teliyarganj & ors.; 2018 (11) ADJ 586

(Delivered by Hon'ble Pritinker Diwaker, J.
&
Hon'ble Ashutosh Srivastava, J.)

1. This intra Court Appeal under the Rules of the Court has been filed questioning the order of the learned Single Judge dated 20.01.2022 passed in Writ-C No.771 of 2022 (Gajraj Singh vs. State of U.P. and 2 others) whereby the second prayer pressed i.e. to issue Mandamus to the second respondent to consider and decide the objections of the appellant/writ petitioner dated 16.11.2021 and 30.11.2021 before finalizing the list of members of the General Body of the Society in question and holding the elections u/s 25(2) of the Societies Registration Act, 1860, has been declined leaving it open for the appellant/writ petitioner to ventilate his grievances at the appropriate stage before the appropriate forum.

2. The record reveals that the registration of the society in question had

been renewed till 10.10.2013. The Sub Registrar, respondent No.2, while considering the rival claims for renewal of the registration of the Society came to the conclusion that no elections of the Committee of Management of the Society had been conducted and there were no valid members of the General Body of the Society amongst whom the elections could be held. The Sub Registrar vide order dated 09.09.2021 required the alive members/office bearers who had signed the list of office bearers at the time of registration to undertake the task of enrolling new members by making publication in the daily news papers. Pursuant thereto, an advertisement is alleged to have been published in the News Daily "Dainik Jagran" New Delhi edition on 21.09.2021. The appellant/writ petitioner is stated to have applied for life membership of the Society. A total of 967 applications so received were found in order and the applicants were inducted as members and the list of such inducted members was forwarded to the office of the Sub Registrar, Meerut. The other applications including the application of the appellant/writ petitioner were found defective and accordingly rejected by the Committee of Management in its special meeting held on 31.10.2021. The rejection has been communicated to the appellant/writ petitioner vide communication dated 15.11.2021 of the respondent No.2 requiring him to take back the 1070 forms submitted.

3. In the aforesaid backdrop the appellant/writ petitioner is stated to have filed the objections dated 16.11.2021 and 30.11.2021 and prayed for decision on the same.

4. It is vehemently contended by the counsel for the appellant that the prayer for decision on the pending objections was liable to the considered but the learned Single Judge committed grave error in declining the said relief. The appellant/writ petitioner could not be termed a 'stranger' in the circumstances so as to refuse the relief prayed for. It is contended that the respondent No.2, Sub Registrar, was under obligation to decide the objections in exercise of the statutory power conferred upon him u/s 4-B of the Societies Registration Act, 1860. Since the objections were not being decided which the Sub-Registrar was duty bound to decide, a writ of Mandamus lay but the learned Single Judge has proceeded to hold otherwise. Reliance has been placed upon a decision of a coordinate Bench rendered in **Writ Petition No. 58426 of 2017 (T.P. Singh vs. Registrar/Asst. Registrar, Firms Societies and Chits, Teliyarganj and others)** decided on 10.10.2018 and reported in **2018 (11) ADJ 586.**

5. We have heard learned counsel for the parties and have perused the record.

6. Much emphasis has been laid by learned counsel for the appellant/writ petitioner upon Section 4-B of Societies Registration Act, 1860, as applicable to the State of U.P. (hereinafter referred to as the 'Act'), inserted by U.P. Act No.23 of 2013 which reads as under:-

"4-B (1) At the time of registration/renewal of a society, list of members of General Bodyof that society shall be filed with the Registrar mentioning the name, father's name, address and occupation of the members. The Registrar shall examine the correctness of the list of members of the General Body of such society on the basis of the register of members of the General Body and minutes book thereof, cash book, receipt book of

membership fee and bank pass book of the society.

(2) If there is any change in the list of members of the General Body of the society referred to in sub-section (1), on account of induction, removal, resignation or death of any member, a modified list of members of General Body, shall be filed with the Registrar, within one month from the date of change.

(3) The list of members of the General Body to be filed with the Registrar under this section shall be signed by two office bearers and two executive members of the society."

7. The above quoted Section 4-B was inserted by the legislature realising that there was no provision of filing of list of General Body of Society and a large number of disputes in Societies arose due to non existence of correct list of General Bodies with the Registrar. It was noticed that in several cases an illegal person fraudulently produced before the Registrar incorrect list of General Body of Society and claimed to be member and office bearer of the Society.

8. A list of members of the General Body of the Society has to be filed at the time of registration or renewal of Society. List must mention names, father's name, address and occupation of members. Registrar is under a statutory obligation to examine correctness of list of members of the General Body of such Society on the basis of register of members of General Body and minutes thereof, cash book, receipt book of membership fee and bank pass book of the society. Apparently, it shows that members included in the list, whether included correctly, has to be examined by the Registrar. If a member is not included in the list, whether such non inclusion also can be examined by Registrar is not very clear from Section 4-B(1) of the Act, but this is made clear by sub-section (2) which says that if there is any change of list of members of General Body of Society referred to in sub-section (1) on account of induction, removal, resignation or death of any member, a modified list of members of General Body shall be filed with Registrar within one month from date of change.

9. A plain reading of the above provision shows that at the time of registration or renewal, a list of members of General body of Society has to be filed before the Registrar. Thereafter whenever there is any change in the said list, same has to be informed to Registrar by submitting a modified list of members of General Body. When such a modified list is submitted to Registrar he is under an obligation to examine the correctness of list of members of General Body as contemplated under sub-section (1), change having arisen on account of induction, removal, resignation or death of any member.

10. The extent of authority of the Registrar to undertake such examination i.e. whether an indepth examination which may be termed as adjudication of dispute or whether a summary enquiry subject to adjudication of dispute by a Court of law came to be examined by a coordinate Bench of this Court in **Writ Petition No. 58426 of 2017 (T.P. Singh vs. Registrar/Asst. Registrar, Firm Societies and Chits, Teliyarganj & others)** reported in **2018 (11) ADJ 586.** The said decision has been relied upon by the appellant/writ petitioner. This Court examined various judicial precedents on the scope of enquiry

by Registrar under Section 4-B of the Act and concluded as under:-

(a) The scope of enquiry by Registrar is to see validity of enrollment of members on the basis of documents referred in Section 4-B and to ensure that outsiders may not be able to control the affairs of Society on the basis of fake documents.

(b) The Registrar is not supposed to make adjudication of dispute of correctness of membership like a court but whenever a list is submitted or there is any change in the list of members and any objection is raised or otherwise, Registrar has to prima facie satisfy himself that change has been made in accordance with provisions of bye laws and prima facie genuine. For this purpose the Registrar may examine agenda, minutes of meeting and other relevant steps take by the Society. To this extent an enquiry can be made by Registrar to find out whether list of members or change in list of members is correct or not.

(c) The Registrar is obliged to examine the question of correctness of alteration or change or modification in the list of members when an objection is taken. Cancellation/termination/removal of membership is a mode of alteration of list of members which can be examined by Registrar. Documents which are supposed to be furnished to Registrar are also specifically mentioned and from those documents whatever facts discern may be seen to find out whether Society in a bona fide manner has followed its own procedure laid down in the bye laws.

11. The claim of the appellant/writ petitioner regarding the membership of the Society in question along with 1070 other applications has been rejected by the Special Meeting of the Society convened on 31.10.2021 for approving/disapproving the induction of new members. The proceedings of the Meeting held on 31.10.2021 which are on record as Annexure -8 reveal that applications for membership were invited between 23.09.2021 upto 01.10.2021. Out of the applications so received a total of 967 applications were scrutinized in terms of the order dated 9.9.2021 of Registrar and found in order in meeting of the Society held on 2.10.2021 whereafter the 967 were inducted as members of the society. The list of members was forwarded to the office of Registrar, Meerut on 6.10.2021. Now, the office of the Registrar vide letter dated 12.10.2021 has intimated to collect 1070 forms received in the office on any working day. The 1070 forms were collected in five bundles, processed and found incomplete and consequently rejected. The findings of the Meeting dated 31.10.2021 is reproduced below:-

"और अब पांच बण्डलों में अहस्ताक्षरित सूची के साथ कार्यालय को आवेदन फार्म किसके द्वारा दिये गए हैं, जिसकी रजिस्ट्रार कार्यालय में प्राप्ति भी नहीं हैंA फिर भी रजिस्ट्रार कार्यालय के आदेश दिनांक 12.10.2021 के अनुपालन में इस पर अपने विचार रखते हुए समिति के आजीवन सदस्य श्री बंशी सिंह जी ने कहा कि इन पांचों बण्डलों के फार्मों की अलग-अलग गणना कर ली जायें A इसके पश्चात ही एक-एक फार्म की जांच की जाये A पांचों बण्डलों को क्रमवार खोला गया तो पहले बण्डल में 199, दूसरे बण्डल में 167, तीसरे बण्डल में 242, चौथे बण्डल में 185 तथा पांचवे बण्डल में 259, आवेदन फार्म प्राप्त हुए, पांचों बण्डलों में कुल 1052 आवेदन फार्म हुये A फिर एक-एक फार्म की जांच की गयी, जिसमें सभी फार्म रजिस्ट्रार कार्यालय के आदेश दिनांक

09.09.2021 के मानक के अनुसार अपूर्ण पाये गये A जिस कारण इनकी सदस्यता स्वीकार नहीं की जा सकता इस पर काफी विचार-विमर्श करने के पश्चात सभा द्वारा आवेदन पत्रों को अस्वीकृति देते हुए प्रस्ताव सर्वसम्मति से पारित कर दिया गया A और सभा में यह भी निर्णय लिया गया की हमने दिनांक 02.10.2021 की बैठक में जिन 967 सदस्यों को सदस्यता ग्रहण कराकर पत्रावली रजिस्ट्रार कार्यालय में दिनांक 06.10.2021 को प्राप्त करा दी थी A उस पर कृत कार्यवाही के लिए रजिस्ट्रार कार्यालय मेरठ से सम्पर्क करके समिति के चुनाव कराने की अग्रिम कार्यवाही किये जाने हेतु श्री रणवीर सिंह जी को अधिकृत किया गया A"

12. The appellant/writ petitioner has not challenged the above resolution of the society. He, however, has preferred objections dated 16.11.2021 and 30.11.2021 before the Registrar. By way of the objections the relief of recall of the order dated 15.11.2021 by which the 1070 forms were returned and compliance of order dated 09.09.2021 has been sought.

13. Having examined the extent of the power of the Registrar under Section 4-B of the Act, we find that the list of members has been finalized and the same has been sent to the office of the Registrar on 06.10.2021. The Registrar in order to examine the correctness of the list of members under Section 4-B of the Act is only required to see the inclusion and deletion of the members and to modify the list accordingly. He is not enjoined upon to go into the validity of the list of members already finalized except for deleting some of those members who may have died or ceased to be the members otherwise, which is not the case at hand. The claim of the appellant/writ petitioner that he along with the 1070 applicants have been denied the membership of the Society cannot be gone into summarily and would require appropriate examination after oral and documentary evidences are led by the parties in a Civil Suit.

14. The reliance placed by the appellant/writ petitioner on the decision rendered in **Writ Petition No. 58426 of 2017 (supra)** is misplaced in as much as in the said case the membership of the petitioner therein was terminated which resulted in change in the list of members of the Society. Since the petitioner therein had been removed from membership of General Body of the Society without following procedure laid down in the bye laws, this Court held that it was within the domain of the Assistant Registrar to consider the objections of the petitioner therein in exercise of powers under Section 4-B of the Act. This is not the case here as the appellant/writ petitioner has not been inducted as a member of the General Body of the Society. In our opinion the appellant/ writ petitioner is required to establish his rights as a Member of the General Body of the Society before the Civil Court and only thereafter approach the Registrar under Section 4-B of the Act.

15. The learned Single Judge has rightly observed that for issuance of a writ of mandamus pre-existing statutory duty must be shown to exist and failure to discharge such statutory duty must also be shown to exist. That stage has yet not come.

16. Accordingly, no interference is warranted in the impugned decision of the learned Single Judge. The Special Appeal lacks merit and is, accordingly, **dismissed.**

(2022)04ILR A353
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.04.2022

BEFORE

THE HON'BLE RAJESH BINDAL,C.J.
HON'BLE JASPREET SINGH, J.

Special Appeal No. 110 of 2022
(Arising out of Contempt Petition No. 716 of 2004)

Dr. J.S. Yadav ...Appellant
Versus
Dr. Anil Kumar Upadhyay & Ors. ...Respondents

Counsel for the Appellant:
Mr. Amit Bose, Senior Advocate with Mr Abhishek Bose, Advocate

Counsel for the Respondents:
Sri Vishal Kumar Upadhyay

A. Contempt of Court Act, 1971 – Sections 12 & 20 – Order could not be complied with, however an order dismissing the contempt proceeding as it become infructuous was passed– An application to recall this order was filed – Maintainability of application challenged – Jurisdiction of contempt court, extent thereof – Order dismissing contempt as infructuous was recalled – Validity challenged – Held, the learned Single Judge rightly passed the order dated 02.12.2021 Ex-debito justitiae. The inherent powers of the Court can very well be utilized to undo a wrong and ensure that the path of justice remains un-polluted and the orders passed by it are taken to its logical conclusion, which in turn reinforces the faith of the public. (Para 34)

B. Constitution of India – Article 215 – Plenary jurisdiction – Court of record – Power of High Court to punish for contempt. Extent of – Source explained – Held, High Court is a court of plenary jurisdiction. The High Court being the court of record has the power to punish for contempt under Article 215 of the Constitution of India. A court of record being a court of superior jurisdiction is entitled to consider the question of its own jurisdiction raised before it. Article 215 specifically confers upon the Court of record such powers including the power to punish for contempt of itself. (Para 20)

C. Practice and procedure – Order passed by the Court of law, compliance thereof – Liability not to leave any order to become a futile order – Public faith in judicial system, liability to maintain it – Held, the Courts of law do not pass futile orders– Once an order is passed, the same is binding on the parties and must be capable of being executed and complied with – The orders passed by the Court have to be taken to their logical conclusion so that the faith of the public at large remains intact and the orders of the Court are not to be taken lightly by those who are bound to comply with the same. (Para 23)

D. Maxim 'Actus Curiae neminem gravabit' – Meaning and scope – It means that the act of the Court shall prejudice no man – The High Court being a court of record by its very constitution and composition is invested with inherent powers. All courts are vested with inherent powers to undo a wrong which may have occurred on account of a mistake of the Court causing prejudice to a party. (Para 25)

Special Appeal dismissed. (E-1)

List of Cases cited :-

1. State Vs Baldev Raj; 1991 SCC Online (Allahabad)1070;

2. Durga Nagpal Vs Committee of Management, Patronage Institute of Management Studies & ors.; 2013 SCC Online All 13298

3. Mahavir Prasad Verma Vs Central AdministrativeTribunal, Lucknow & ors.; 2013 SCC Online All13904

4. South Eastern Coalfields Ltd. Vs St. of M.P.; (2003) 8 SCC 648

5. Ram Chandra Singh Vs Savitri Devi & ors.; (2003) 8 SCC 319

6. Indian Bank Vs Satyam Fibres (India) Pvt. Ltd.; (1996) 5 SCC 550

7. United India Insurance Co. Ltd. Vs RajendraSingh; (2000) 3 SCC 581

8. Hamza Hazi Vs St. of Kerala; (2006) 7 SCC 416

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

1. This instant intra-court appeal has been preferred under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 against the order dated 02.12.2021 passed by the learned Single Judge whereby two applications for recall bearing C.M. Application No. 80976 of 2021 for recall of order dated 26.04.2012 and C.M. Application No. 160117 of 2021 for recall of order dated 28.08.2012 passed in Contempt Case No. 716 of 2004 (Ajay Kumar Pandey and 29 others Vs. Dr. J.S. Yadav) have been allowed and as a result the contempt proceedings have been revived against the appellant.

2. Mr. Amit Bose, learned Senior Counsel assisted by Mr. Abhishek Bose has assailed the impugned order primarily on two grounds:-

(i) It is urged that the learned Single Judge had no jurisdiction to recall the orders, inasmuch as, once the contempt application is disposed of/dismissed, there is no provision for recall of such order. It is urged that in the instant case by means of order dated 28.8.2012 the contempt petition was dismissed as infructuous and the learned Single Judge while exercising powers of the Contempt Judge had no power to recall the said order.

(ii) It is also urged that the said application for recall was also hit by Section 20 of the Contempts of Court Act and for the said reason as well the application for recall was not maintainable as by recalling the order on application which otherwise had been rendered otiose could not be revived.

3. Learned counsel for the respondent on the other hand has submitted that an order was passed by the Writ Court which was affirmed in Special Appeal and almost 20 years have lapsed but the order has not been complied with and for one reason or the other, the appellant has been raising technical objections only to ensure that the order passed by the Court is not complied with.

4. It is further urged that the necessity to file the recall application arose on the ground that on mis-apprehension of facts, the contempt-petition filed by the petitioner was dismissed as infructuous. Elaborating his submissions, it is urged that the contempt petition was preferred by 29 petitioners, however, only in respect of two such petitioners who were being represented by a counsel namely Shailendra Singh Chauhan made a statement that the parties have entered into an amicable settlement and the learned Contempt Judge relying upon the aforesaid statement dismissed the contempt petition as a whole.

5. It is also submitted that the counsel who had made a statement before the Contempt Court was not representing the other contempt-petitioners and at best the statement could have been accepted only in respect of two such contempt-petitioners who did not wish to press the contempt petition but in the garb thereof the petition of the remaining parties could not be dismissed as their right to prosecute the contempt petition was unhampered.

6. It is further submitted that the private respondents had preferred a Special Leave Petition before the Apex Court and where liberty was granted to approach High Court and in furtherance thereof initially a fresh contempt was filed which was thereafter withdrawn and an application for recall was filed which after hearing the parties has been allowed by the learned Single Judge and in the aforesaid facts and circumstances where the order passed by the Writ Court has yet not been complied with, it is not open for the appellant to raise such technical objections and even otherwise the order of recall has not prejudiced any party and the appellant has a right of raising the objections on merits before the Contempt Court. It is urged that if an order has been passed on mis-representation or on incorrect facts, the Court is duly vested with ample powers to recall such an order as an act of Court cannot prejudice any party. In view of the aforesaid, the appeal deserves to be dismissed.

7. The Court has heard the learned counsel for the parties and also perused the material available on record.

8. Before adverting to the respective submissions, it will be worthwhile to take a glance at the facts leading up to the passing of the impugned order of recall dated 02.12.2021.

9. The matter in controversy relates to the admissions of students in pursuance of pre-medical test held in the year 1998. 56 students were admitted in the First Year Course of Bachelor of Dental Science in Chaudhary Multan Singh Memorial Dental College on the basis of marks obtained by them. Some of such students were granted the admission on the basis of their merit obtained in the pre-medical test but some of the students were admitted against the management quota. Later, it revealed that Chaudhary Multan Singh Memorial Dental College, Tundla did not have the approval from the Dental Council of India to admit the students after the first year and it is in the aforesaid backdrop that the aggrieved students preferred several writ petitions before this Court.

10. A bunch of writ petitions bearing No. 1312 (MS) of 2001; 1313 (MS) of 2001; 1909 (MS) of 2001 and 1915 (MS) of 2001 were decided by the learned Single Judge of the Court by means of judgment and order dated 06.08.2001. This judgment came to be challenged in Special Appeal No. 347 of 2001 which was connected with another Special Appeal bearing No. 368 of 2001. Both the Special Appeals were decided by means of the judgment dated 09.11.2001. In the Special Appeal preferred by the Director/Secretary of Chaudhary Multan Singh Memorial Dental College, Tundla, District Firozabad, the Division Bench of the Court while dismissing the appeal directed the Authorities of Chaudhary Multan Singh Memorial Dental College to refund the fee of 60 students who had deposited the fee either for the free seats or the seats under the Management Quota.

11. It is this order passed by the Division Bench in Special Appeal dated 09.11.2001 which was pressed for compliance in Contempt Petition No. 716 of 2004 as the Authorities of Chaudhary Multan Singh Memorial Dental College failed to refund the fee.

12. The record further reflects that the Contempt Petition remained pending since 2004. On 26.04.2012 the contempt petition

was dismissed having become infructuous. The order passed by the Contempt Court dated 26.04.2012 reads as under:-

"In pursuance to the earlier order dated 03.04.2012 passed by this Court, the contemnor Dr. J.S. Yadav as well as Sri Vivek Chauhan & Sri Amit, petitioners are present in person.

Sri Shailendra Singh Chauhan, learned counsel for the petitioners as well as Sri Amit Bose, learned counsel for the contemonor jointly submit that the settlement between the parties have reached amicably and now no contempt exists. Hence, they pray that the contempt petition may kindly be dismissed being infructuous. Notice for personal appearance is discharged.

In view of above, the contempt petition is dismissed being infructuous. "

13. Thereafter C.M. Application No. 51213 of 2012 and 57607 of 2012 were filed by the remaining petitioners seeking recall of the order dated 26.04.2012. The said application for recall was rejected by the Contempt Court noticing that the counsel for the petitioners had given a statement in the open Court that the present contempt petition had become infructuous as the parties had entered into an amicable settlement. Since the said order was passed in open Court, hence, there was no reason to recall the order, consequently, the applications were dismissed.

14. The private respondents being aggrieved preferred a Special Leave Petition before the Apex Court which came to be disposed of by means of order dated 05.07.2019 granting liberty to the petitioners before the Apex Court to move the High Court. The order passed by the Apex Court dated 05.07.2019 reads as under:-

" Heard the learned counsel for the parties.

The order has been passed by the High Court on the basis of the submissions made by the learned counsel that there is a settlement between the parties and now no contempt exists.

It is submitted that the matter was not settled completely and the order of the High Court has not been complied with.

If that be so, the only remedy lies with the petitioners is to approach the same court, instead of filing a Special Leave Petition in this court. The petitioners, if so advised, may move the High Court in case there is some fraud played upon them.

In view of the above, the Special Leave Petitions are disposed of.

Pending interlocutory application (s), if any, is/are disposed of."

15. It is thereafter that the private respondents filed a fresh Contempt Petition bearing No. 878 of 2021 which was withdrawn by them with liberty to pursue the remedy as available to the respondents by filing the Recall Application.

16. It is in the aforesaid backdrop that the recall applications were moved by the private respondents which have been considered. After assessing the entire matter, the learned Single Judge allowed the applications for recall and directed the appellant to appear before the Court on 14.12.2021 for framing of charges.

17. The foremost issue that requires consideration is whether the said application for recall was maintainable before the learned Single Judge. The learned Senior Counsel Mr. Amit Bose making his submissions has urged that once the contempt petition was dismissed and the notices were discharged, the Contempt

Court does not have the jurisdiction to recall the order and as such the order passed by the learned Single Judge is beyond jurisdiction, accordingly, is liable to be set aside.

18. In support of his submissions, he has relied upon a Division Bench decision of this Court in the case of :-

(i) ***State vs. Baldev Raj in 1991 SCC Online (Allahabad) 1070;***

(ii) ***Durga Nagpal Vs. Committee of Management, Patronage Institute of Management Studies and others in 2013 SCC Online All 13298***

(iii) ***Mahavir Prasad Verma Vs. Central Administrative Tribunal, Lucknow and others in 2013 SCC Online All 13904.***

19. Placing reliance on the aforesaid decisions, it is urged that it is no more open to contend that no power to recall has been conferred on the Court under the Contempt of Court Act, consequently, upon the dismissal of the application for contempt, in view of the statement made by the learned counsel for the respondents that the parties had arrived at a settlement the recall application was not maintainable.

20. It will be apropos to examine and look at the entire scenario with a multifocal lens. It is now well settled that the High Court is a court of plenary jurisdiction. The High Court being the court of record has the power to punish for contempt under Article 215 of the Constitution of India. A court of record being a court of superior jurisdiction is entitled to consider the question of its own jurisdiction raised before it. Article 215 specifically confers upon the Court of record such powers including the power to punish for contempt of itself.

21. The contempt jurisdiction of the High Court is not only to ensure the compliance of the orders passed by the Court but also to strike at such acts which tend to adversely affect the administration of justice or has a tendency to impede the course of justice which may shake public confidence in the judicial institution.

22. Thus, it can take note of such act and pass such orders under the contempt jurisdiction where the acts adversely affects the majesty of law or dignity of the Court. However, at the same time, it must be well remembered that the jurisdiction is not to protect the dignity of an individual judge but to protect the administration of justice from being maligned.

23. The Courts of law do not pass futile orders. However, once an order is passed, the same is binding on the parties and must be capable of being executed and complied with. It will be of no value if the Court is unable to get its orders complied with or else, the public shall loose faith and it would reflect most inappropriately on the judicial system. Thus, the orders passed by the Court have to be taken to their logical conclusion so that the faith of the public at large remains intact and the orders of the Court are not to be taken lightly by those who are bound to comply with the same.

24. There is another angle with which the issue at hand can be viewed with. Whether the statement given by a counsel for some of the parties can be treated to be a statement on behalf of all even though they are not represented by such counsel and what would be its effect ?

25. It will be valuable to refer to the maxim **"Actus Curiae neminem gravabit".** In simple words, it means that

the act of the Court shall prejudice no man. The High Court being a court of record by its very constitution and composition is invested with inherent powers. All courts are vested with inherent powers to undo a wrong which may have occurred on account of a mistake of the Court causing prejudice to a party.

26. Applying the aforesaid principles, the Apex Court in ***South Eastern Coalfields Ltd. Vs. State of M.P. (2003) 8 SCC 648*** in para 28 held that the principle "that no one shall suffer by an act of the Court" embraces within its sweep all such acts as to which the Court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly appraised of the fact of law.

27. A perusal of the order dated 26.04.2012 would indicate that the said order was passed on the basis of statement made by Sri Shailendra Singh Chauhan, counsel appearing for the petitioners and Mr. Amit Bose, learned counsel for the contemnor. It could not be disputed by the learned Senior Counsel for the appellant that the settlement, reference of which is made in the order dated 26.04.2012 did not relate to all the contempt petitioners rather it was confined to only two of such contempt petitioners. Mr. Bose also could not dispute the fact that Mr. Shailendra Singh Chauhan whose statement is recorded in the order dated 26.04.2012 by the Contempt Court did not represent all the said contempt petitioners and the statement of Mr. Shailendra Singh Chauhan, learned counsel could not relate to all the contempt-petitioners.

28. The order passed on 28.08.2012 dismissing the recall applications by the Contempt Court, as already reproduced hereinabove first, would indicate that it did not enter into the merits of the matter as to whether the statement as given by Mr. Chauhan on behalf of all the contempt-petitioners was valid and actually whether the alleged settlement was between all the contempt-petitioners and the contemner. It also could not be disputed that the Apex Court in its order dated 05.07.2019 had granted liberty to the respondents to approach the High Court in case if some fraud was played upon them.

29. At this stage, it will be apposite to evaluate the effect of the statement given by the said counsel who was not authorized to make the statement on behalf of all the contempt petitioner and in effect it could not bind such parties. It is not even the case of the appellant that amount of fee had been refunded to the respondents. He has not even apprised the Court about the settlement arrived at between the parties

30. The meaning of the word fraud and misrepresentation has been noticed by the Apex Court in ***Ram Chandra Singh Vs. Savitri Devi and others*** reported in ***(2003) 8 SCC 319*** wherein paras 16 to 22 it has been held as under:-

16. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by

wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

19. In *Derry v. Peek* [(1889) 14 AC 337 : (1886-90) All ER Rep 1 : 58 LJ Ch 864 : 61 LT 265 (HL)] it was held:

In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.

20. *InKerr on Fraud and Mistake,* at p. 23, it is stated:

"The true and only sound principle to be derived from the cases represented by *Slimv. Croucher* [(1860) 1 De GF & J 518 : 29 LJ Ch 273 : 2 LT 103 : 45 ER 462] is this: that a representation is fraudulent not only when the person making it knows it to be false, but also when, as Jessel, M.R., pointed out, he ought to have known, or must be taken to have known, that it was false. This is a sound and intelligible principle, and is, moreover, not inconsistent with *Derry v. Peek* [Arising out of SLP (C) No. 20273 of 2000] . A false statement which a person ought to have known was false, and which he must therefore be taken to have known was false, cannot be said to be honestly believed in. "A consideration of the grounds of belief', said Lord Herschell, "is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so.' "

21. In *Bigelow on Fraudulent Conveyances*, at p. 1, it is stated

"If on the facts the average man would have intended wrong, that is enough."

It was further opined:

"This conception of fraud (and since it is not the writer's, he may speak of it without diffidence), steadily kept in view, will render the administration of the law less difficult, or rather will make its administration more effective. Further, not to enlarge upon the last matter, it will do away with much of the prevalent confusion in regard to "moral' fraud, a confusion which, in addition to other things, often causes lawyers to take refuge behind such convenient and indeed useful but often obscure language as "fraud upon the law'. What is fraud upon the law? Fraud can be committed only against a being capable of rights, and "fraud upon the law' darkens counsel. What is really aimed at in most cases by this obscure contrast between moral fraud and fraud upon the law, is a contrast between fraud in the individual's intention to commit the wrong and fraud as seen in the obvious tendency of the act in question.

22. Recently this Court by an order dated 3-9-2003 in *Ram Preeti Yadav v U.P. Board of High School & Intermediate Education* [(2003) 8 SCC 311 : JT 2003 Supp (1) SC 25] held: (SCC pp. 316-317, paras 13-15)

"13. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the

conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud. (See *Derry v. Peek* [Arising out of SLP (C) No. 20273 of 2000] .

14. In *Lazarus Estates Ltd. v. Beasley* [(1956) 1 All ER 341 : (1956) 2 WLR 502 : (1956) 1 QB 702 (CA)] the Court of Appeal stated the law thus: (All ER p. 345 C-D)

"I cannot accede to this argument for a moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever;'

15. In *S.P. Chengalvaraya Naidu v. Jagannath* [(1994) 1 SCC 1] this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal."

31. In the aforesaid backdrop if the statement made by Sri Chauhan is seen it would lead the Contempt Court to satisfy itself as to veracity of the statement regarding the settlement arrived at between all the contempt petitioners and the contemnor and only once the said fact was verified could the petition be dismissed as infructuous. Even otherwise once the contempt Court takes cognizance of the matter then it is a matter between the contemner and the Court. In this view of the matter, it was all the more important for the Contempt Court to have verified all the facts before discharging the contempt notice.

32. In the instant case, once it is not disputed that the order passed by the Division Bench of the year 2001 had not been complied with, the petition could not have become infructuous. The statement of the counsel, which was beyond his competence and yet made before the Court on behalf of such contempt-petitioners who had not entered into any settlement and it gave an impression to the Court that all the contempt-petitioners had settled the matter with the contemnor, is nothing short of a misrepresentation amounting to fraud, especially when the settlement, if arrived at, by only two of such contempt petitioners could at best be not pressed on their behalf but not on behalf of other co-petitioners and the petition as a whole ought not have been dismissed as having become infructous.

33. It is a case where the appellant has taken recourse to the judicial proceedings to thwart the course of justice and a direction which was issued by the Division Bench in the year 2001 has not been complied with till date. This in itself is a shocking state of affairs which does hurts the judicial conscience and has a deleterious effect on the public at large.

34. In the aforesaid circumstances, the learned Single Judge rightly passed the order dated 02.12.2021 Ex-debito justitiae. The inherent powers of the Court can very well be utilized to undo a wrong and ensure that the path of justice remains un-polluted and the orders passed by it are taken to its logical conclusion, which in turn reinforces the faith of the public.

35. It will be worthwhile to notice the observations made by the Apex Court in ***Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd. (1996) 5 SCC 550*** in para 20, 22 and 23, it held as under:-

20. By filing letter No. 2775 of 26-8-1991 along with the review petition and contending that the other letter, namely, letter No. 2776 of the even date, was never written or issued by the respondent, the appellant, in fact, raised the plea before the Commission that its judgment dated 16-11-1993, which was based on letter No. 2776, was obtained by the respondent by practising fraud not only on the appellant but on the Commission too as letter No. 2776 dated 26-8-1991 was forged by the respondent for the purpose of this case. This plea could not have been legally ignored by the Commission which needs to be reminded that the authorities, be they constitutional, statutory or administrative, (and particularly those who have to decide a lis) possess the power to recall their judgments or orders if they are obtained by fraud as fraud and justice never dwell together (*Fraus et jus nunquam cohabitant*). It has been repeatedly said that fraud and deceit defend or excuse no man (*Fraus et dolus nemini patrocinari debent*)

22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business.

23. Since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practised upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order. (See:*Benoy Krishna Mukerjeev.Mohanlal Goenka*[AIR 1950 Cal 287] ;*Gajanand Sha v. Dayanand Thakur* [AIR 1943 Pat 127 : ILR 21 Pat 838] ; *Krishnakumar v. Jawand Singh* [AIR 1947 Nag 236 : ILR 1947 Nag 190] ;*Devendra Nath Sarkar v. Ram Rachpal Singh* [ILR (1926) 1 Luck 341 : AIR 1926 Oudh 315] ;*Saiyed Mohd. Raza v.Ram Saroop* [ILR (1929) 4 Luck 562 : AIR 1929 Oudh 385 (FB)] ; *Bankey Behari Lal v. Abdul Rahman* [ILR (1932) 7 Luck 350 : AIR 1932 Oudh 63] ; *Lekshmi Amma Chacki Amm v. Mammen Mammen* [1955 Ker LT 459] .) The court has also the inherent power to set aside a sale brought about by fraud practised upon the court (*Ishwar Mahton v. Sitaram Kumar* [AIR 1954 Pat 450]) or to set aside the order recording compromise obtained by fraud. (*Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh* [AIR 1958 Pat 618 : 1958 BLJR 651] ; *Tara Bai v.V.S. Krishnaswamy Rao* [AIR 1985 Kant 270 : ILR 1985 Kant 2930] .)

36. Again in *United India Insurance Co. Ltd. Vs. Rajendra Singh (2000) 3 SCC 581* in para 15 and 16, it has been held as under:-

15. It is unrealistic to expect the appellant Company to resist a claim at the first instance on the basis of the fraud because the appellant Company had at that

stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the Company to file a statutory appeal against the award. Not only because of the bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.

16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.

37. In ***Hamza Hazi Vs. State of Kerala (2006) 7 SCC 416***, the Apex Court in paragraph 26 has held as under:-

26. The High Court, as a court of record, has exercised its jurisdiction to set at naught the order of the Forest Tribunal thus procured by the appellant by finding that the same is vitiated by fraud. There cannot be any doubt that the Court in exercise of its jurisdiction under Article 215 of the Constitution of India has the power to undo a decision that has been obtained by playing a fraud on the Court. The appellant has invoked our jurisdiction under Article 136 of the Constitution of India. When we find in agreement with the High Court that the order secured by him is vitiated by fraud, it is obvious that this Court should decline to come to his aid by refusing the exercise of its discretionary jurisdiction under Article 136 of the Constitution of India. We do not think that it is necessary to refer to any authority in support of this position except to notice the decision in *Ashok Nagar Welfare Assn. v. R.K. Sharma* [(2002) 1 SCC 749 : 2001 Supp (5) SCR 662] .

38. The observations made by the learned Single Judge in its order dated 02.12.2021 in paragraph 12 also amplifies the conduct of the appellant which reads as under:-

"12. After hearing the rival contentions and going through the material on record, this court finds that since the year 2004 the petitioners are make efforts to get the order of Special Appeal court dated 09.11.2001 complied. They have not been able to get any relief. The record of the contempt petition is replete with orders of issuance of warrants and directions for personal appearance of opposite party but the fact remains that the order of this court has not been complied with. Petitioners have been relegated to one forum to the other but the substantial justice stands denied to them. Opposite party no.1 has left no stone unturned to hoodwink this court's and has avoided compliance of this court order for more than 20 years. This is very lamentable and shakes the confidence of the common man in the judicial system of the country when the technicalities are given precedence over substantial justice. It is settled law that admissions made by the counsel unauthorisedly without instructions from his client is not binding on his client. The Apex Court in the case of Himalayan Cooperative Group Housing Society Vs. Balwan Singh and others, 2015 AIR(SC) 2867 has held in para 32 as follows :-

32. Generally, admissions of fact made by a counsel are binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. We hasten to add neither the client nor the court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions? "

39. Having noticed the facts and the law in the preceding paragraphs now, in the aforesaid backdrop, if the decisions relied upon by the learned Senior Counsel for the appellant are considered, it would indicate that in the case of **Balraj Deo (supra)**, the issue before the Division Bench was that the contemner was convicted by the Court and he filed a recall application instead of filing an appeal in terms of Section 19 of the Contempts of Court Act. It is in the aforesaid backdrop that the said recall application was rejected and thus on the face of it, the said decision does not come to the rescue of the appellant and is clearly distinguishable.

40. **Durga Nagpal's case (supra)** was a case where after the contempt proceedings were dropped and the application for modification of the final judgment was moved and in the aforesaid backdrop, it was held that the contempt Judge did not have the power to revive its own order, however, the facts of the said case are also at variance to the case at hand, hence, the said decision also does not help the appellant especially when in the present case the element of fraud and misrepresentation is involved which in turn activates the maxim "Actus Curiae neminem gravabit".

41. In **Mahavir Prasad's case (Supra)**, it would indicate that in the said case, an application for review/recall was moved which was rejected by the Central Administrative Tribunal in default. This order was assailed before the High Court in writ jurisdiction which was quashed and the contempt petition was restored to its original number directing the Tribunal to decide the same after bringing the successors in the office on record, thus, the facts of the case are quite different to the facts of the case, consequently, the said decision does not apply to the instant case.

42. In light of the aforesaid detailed discussions, this Court has no hesitation to hold that the impugned order dated 02.12.2021 does not suffer from any error which may persuade this Court to interfere, accordingly, the Special Appeal is dismissed.

43. In the facts and circumstances, there shall be no order as to costs.

(2022)04ILR A363
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.03.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Special Appeal No. 153 of 2022

Vimal Kumar ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Mr. Dhirendra Kumar Singh Rathor

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 – Compassionate appointment – Appointment on Class III post – Failure in typing test – Effect – Service dispensed with due to failure in test – Validity challenged – Held, the object is to provide support to the family of the deceased employee who dies during service. In case, service of an employee appointed on compassionate basis is dispensed with only because he had not been able to pass the typing test and if there are posts available in the lower category, his case should be examined for appointment to that category. (Para 5 and 6)

B. Interpretation of statute – Purposive construction – The provision of Rules have to be given a purposive meaning which has nexus with the object sought to be achieved. (Para 6)

Special Appeal allowed. (E-1)

(Delivered by Hon'ble Rajesh Bindal, C.J.
&
Hon'ble J.J. Munir, J.)

1. The order dated October 7, 2021 passed by the learned Single Judge has been impugned by the writ petitioner by filing the present intra-Court appeal. On account of death of his father, who was a government servant and expired during service on August 24, 2016, the petitioner-appellant, being eligible for Class-III post having qualifications prescribed therefor, was appointed as Junior Clerk vide order dated June 14, 2018. The appointment was in terms of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as "1974 Rules"). In terms of the Rules and requirement for the post on which he was appointed on probation, the appellant was to clear the typing test with a speed of 25 words per minute within one year from the date of appointment. In case of failure, another chance was to be given. This fact is undisputed that the appellant appeared in the typing test twice, but failed. Considering the provisions of Rule 5 of 1974 Rules, the services of the petitioner were dispensed with vide order dated June 15, 2020, which was challenged by the appellant by filing the writ petition. The writ petition was dismissed.

2. The arguments raised by learned counsel for the appellant is that in case the appellant was not able to pass the typing test and was not eligible to continue on Class-III post, he should have been offered a Class-IV post. The object of providing compassionate appointment in terms of 1974 Rules is to take care of financial crisis of the family where the bread earner dies while in service. His father died only in the year 2016. There is no other earning member in the family even now.

3. On the other hand, learned counsel for the State submitted that the services of the appellant were dispensed with strictly keeping in view the provisions of Rule-5 of 1974 Rules, which clearly provides that on failure to pass the typing test after giving two opportunities, the services of the employee, who was appointed on compassionate basis, will be dispensed with. Hence, there is no error in the order passed by learned Single Judge.

4. Heard learned counsel for the parties and perused the paper-book.

5. The fact that father of the appellant was a government servant and expired on

August 24, 2016 is not in dispute. In terms of 1974 Rules, the appellant was offered the appointment on compassionate basis as Junior Clerk, a Class-III post. He was a Graduate and having C.C.C. certificate from DOEACC. In terms of the provisions applicable for Class-III post, a candidate is required to pass the typing test with speed of 25 words per minute. Rule 5 of 1974 Rules provides for concession to be given to the persons appointed on compassionate basis to enable them to pass the aforesaid typing test within one year and on failure, another chance is to be granted in the next year. The fact remains that the appellant failed to pass that test on account of which his services were dispensed with.

6. If we go strictly by the language of the Rules, it clearly provides that on failure to pass the typing test within the extended period, the services of the employee shall be dispensed with. However, the fact remains that it is a case in which the petitioner was offered appointment on compassionate basis on account of death of the bread earner in the family. If his services are dispensed with, the family may again suffer financial crisis. The provision of Rules have to be given a purposive meaning which has nexus with the object sought to be achieved. The object is to provide support to the family of the deceased employee who dies during service. In case, service of an employee appointed on compassionate basis is dispensed with only because he had not been able to pass the typing test and if there are posts available in the lower category, his case should be examined for appointment to that category. It will not be a case of reversion of an employee from the post on which he was appointed, as reversion to a post of lower category than the post on which an employee is appointed, is not permissible in law. In case, claim of such an applicant is found to be in terms of the Rules, he can be offered fresh appointment on the lower post for which he is eligible.

7. In the case in hand, the aforesaid exercise needs to be done by the competent authority within a period of four months from the date of receipt of copy of this order.

8. In view of the aforesaid discussion, in our opinion the judgment of learned Single Judge deserves to be set aside. The respondents are directed to consider the case of the appellant for appointment on a Class IV post on compassionate basis, within four months of receipt of copy of this order.

9. Ordered accordingly.

10. Before we part with the order, we need to notice two aspects. One, there is a need to re-visit the language of 1974 Rules. The competent authority in the government may consider its re-drafting. The appointment of a candidate, who is not eligible on the date of appointment, is bringing this kind of result and the issue of entitlement for appointment on compassionate basis.

11. Secondly, at the time of hearing of the present appeal, learned counsel for the appellant had referred to the amendment carried out in 1974 Rules vide Notification dated January 22, 2014. To have a look on the 1974 Rules, we have perused the U.P. Judicial Services Manual, 2016 Edn. published by Hind Publishing House, Allahabad, but unfortunately the aforesaid amendment is not printed. Such kind of publications are likely to lead to wrong

decision by the Court as the counsel and the Court may be misled.

12. Let notice be issued to the Hind Publishing House, 1, Mahatma Gandhi Marg, Allahabad- 211001 to show cause as to what action should be taken against it for wrong publication of the Rules as on date when the book was published.

13. The appeal is allowed.However, to deal with the notice issued, the matter shall be listed in Court on May 4, 2022. (J.J. Munir, J.) (Rajesh Bindal, C.J.) Allahabad 09.03.2022 Manish Himwan/P.Sri. Whether the order is speaking : Yes/No Whether the order is reportable : Yes/No

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(2022)04ILR A366
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.03.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ A No. 848 of 2014

Amarjeet Yadav ...Petitioner
Versus
State of U.P & Ors. ...Respondents

Counsel for the Petitioner:
B.N. Sirswal, Harish Chandra Yadav

Counsel for the Respondents:
C.S.C.

A. Service Law – Minimum Wages Act, 1948 – Part I, Sections 2(g) & 27 – Employment as the part-time sweeper in government hospital –Applicability of the Act of 1948 – Scheduled employment, described – Held, since sweeping as an employment finds mention under the list of scheduled employment, therefore, the employment as a sweeper falls under the purview of Scheduled Employment – Direction issued to pay minimum wages to the part-time sweepers. (Para 9 and 13)

B. Service law – Minimum Wages Act, 1948 – Ss. 2(e)(ii) and 26 – Government hospital, whether it is exempted from the application of the Act – No notification issued u/s 26 exempting government hospital from the application of the Act – Effect – Term 'employer' defined – Held, the respondents, who have engaged the petitioner in a scheduled employment for which minimum wages are fixed, are 'employer' for all purposes under the Act of 1948. (Para 11 and 12)

Writ petition allowed. (E-1)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Petitioner claims to be working on the post of Sweeper-cum-Chowkidar since 2012 as a part-time sweeper on payment of Rs.500/- per month. Since 2012 till the date the said payment being made to the petitioner is not revised, hence, petitioner has approached this court.

2. Learned counsel for petitioner submits that at this stage he is not pressing his prayer with regard to regularization of services as the case of petitioner is not yet covered under any regularization rules. Further, petitioner is also not entitled for minimum of pay scale of Sweeper-cum-Chowkidar as petitioner is working as a part time sweeper. However, it is submitted by learned counsel for petitioner that long hours of work is being taken from the petitioner in the garb of part-time work and the amount being paid to the petitioner is meager.

3. Learned counsel for petitioner places reliance upon the provisions of the

Minimum Wages Act, 1948 and submits that petitioner is also entitled for payment of the minimum wages.

4. Learned Standing Counsel Submits that the provisions of the Minimum Wages Act, 1948 (hereinafter referred to as "Act of 1948") are not applicable to the government hospital and also sweeping as an employment does not find any mention in the notification of the Scheduled Employment issued under the Act of 1948 by the Labour Department, State of U.P.

5. Submission of learned Standing Counsel does not hold any ground. The Part-I of The Schedule under the Act of 1948 contains a list of scheduled employments.

6. The State Government can only add to this list, it cannot remove any entry from the Part-I of the scheduled employment as is clear from a plain reading of Section 27 of the Act of 1948, which reads as follows:-

"Section 27: Power of State Government to add to Schedule. -The appropriate Government, after giving by notification in the Official Gazette not less than three months notice of its intention so to do, may, by like notification, add to either Part of the Schedule any employment in respect of which it is of opinion that minimum rates of wages should be fixed under this Act, and thereupon the Schedule shall in its application to the State be deemed to be amended accordingly."

7. Section 27, therefore obligates the State Government to abide by the Scheduled list as given in the Act of 1948 in addition to the Scheduled Employments, which it adds to the same.

8. Furthermore, ***Section 2(g) of the Act of 1948*** defines Scheduled Employment as:-

Scheduled employment" means an employment specified in the Schedule, or any process or branch of work forming part of such employment;"

Additionally, the ***Part I of The Schedule of the Act of 1948 was amended by S.O. 1573(E), dated 3rd November, 2005 (w.e.f. 7-11-2005) to add "Employment of Sweeping and Cleaning excluding activities prohibited under the Employment of Manual Scavangers and Costruction of Dry Latrines (Prohibition) Act, 1993."***

9. From the above it becomes abundantly clear that since sweeping as an employment finds mention under the list of scheduled employment, therefore, the employment of the petitioner engaged by respondent no.3 as a sweeper falls under the purview of Scheduled Employment.

10. Next issue is whether the respondents as an employer are exempted from the application of the Act of 1948. Section 2(e) when read with Section 26 of the Act of 1948 makes it clear that unless there is an express exemption by the appropriate Government, employers of the scheduled employment will always be under the purview of this Act. Section 2(e) (ii) reads:-

"(e) "employer" means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees in any scheduled

employment in respect of which minimum rates of wages have been fixed under this Act, and includes, except in subsection (3) of section 26,-

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(ii) in any scheduled employment under the control of any Government in India in respect of which minimum rates of wages have been fixed under this Act, the person or authority appointed by such Government for the supervision and control of employees or where no person or authority is so appointed, the head of the department;

""..."

11. Thus it is safe to say that the respondents, who have engaged the petitioner in a scheduled employment for which minimum wages are fixed, are "employer" for all purposes under the Act of 1948.

"Section 26: Exemptions and exceptions:-

(1) The appropriate Government may, subject to such conditions, if any, as it may think fit to impose, direct that the provisions of this Act shall not apply in relation to the wages payable to disabled employees.

"""""."

12. The Learned Standing Counsel has failed to place on record any notification issued under Section 26 of the Act of 1948 exempting the respondent department from the application of the Act of 1948. In view thereof, petitioner is entitled for the minimum wages under the Minimum Wages Act, 1948.

13. Therefore, respondent No. 3 Regional Ayurvedic/Unani Officer, Bahraich is directed to pay minimum wages to the petitioner as notified under the Minimum Wages Act, 1948 with regard to part-time sweepers within a period of two months from the date a certified copy of this order is placed before him.

14. With the aforesaid, the writ petition is ***allowed.***

(2022)04ILR A368
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ A No. 1984 of 2022

Alok Shukla & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Siddharth Khare, Sr. Advocate

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

A. Service Law – Post of Mining Officer – Qualification – Prescription of qualification and other conditions of service – Policy matter – Judicial review – Scope of interference – Possession of higher qualification – Permissibility – Held, prescription of qualifications and other conditions of service pertains to the field of policy and is within the exclusive discretion and jurisdiction of the St. – The policy decision has to be taken by the St. Government for changing the academic qualification for the post of Mining Officer as well as Mining Inspector, which cannot be judicially reviewed by this Court – High Court issued direction for making representation and taking decision on it. (Para 15, 17 and 23)

Writ petition disposed of. (E-1)

List of Cases cited :-

1. Dr. R.K. Goyal Vs St. of U.P. & ors.; (1996) 11 SCC 658

2. WritA No. 25238 of 2016; Km. Pratima Gupta Vs St. of U.P. & ors. decided on 09.01.2019

3. Writ A No. 24273 of 2018; Deepak Singh & ors. Vs St. of U.P. & ors. (FB)

4. P.U. Joshi & ors. Vs Accountant General,Ahmedabad & ors.; (2003) 2 SCC 632

5. Chandigarh Administration Vs Usha Kheterpal Waie andothers; (2011) 9 SCC 645

6. Vasavi Engineering CollegeParents Association . Vs St. ofTelangana & Ors.; (2019) 7 SCC 172

7. Fertilizer Corporation Kamgar Union (Regd.), Sindri Vs U.O.I.; (1981) 1 SCC 568

8. Directorate of Film Festivals & ors. Vs Gaurav AshwinJain & ors.; (2007) 4 SCC 737

9. Yogesh Kumar & ors. Vs Government Of NTC Delhi; (2003) 3 SCC 548.

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Siddharth Khare, learned counsel for the petitioner, the learned Standing Counsel for the State-respondent nos.1 &2 and Mr. Nisheeth Yadav, learned counsel for the respondent no.3.

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

"(a) a writ, order or direction in the nature of certiorari quashing the advertisement dated 19.01.2022 insofar as it excludes Post Graduate Degree in Geology as a permissible qualification for consideration for the post of Mines Officer.

Alternative, direct the respondents to consider the grievance of the petitioners for including Post Graduate Degree in Geology for consideration for the post of Mines Officer and B.Sc. in Geology as an essential qualification for consideration for the post of Mines Inspector within a short period.

(b) A writ, order or direction in the nature of mandamus commanding the respondent authorities to treat a Post Graduate Degree in Geology for consideration for the post of Mines Officer in Advertisement dated 19.01.2022.

(c) A writ, order or direction in the nature of mandamus commanding the respondent authorities to treat the qualification of B.Sc. in Geology as an essential qualification for consideration for the post of Mines Inspector.

(d) A writ, order or direction in the nature of mandamus commanding the respondent authorities to permit the petitioners to appear in the selection proceeding for the post of Mines Officer pursuance to the Advertisement dated 19.01.2022 after treating a Post Graduate Degree in Geology as one of the required qualification."

3. Brief facts of the case is that an advertisement dated 19.01.2022 has been issued by respondent no.3-UP PSC, Prayagraj inviting applications for 16 posts of Mining Officer. A requisition for 36 posts of Mining Inspector has also been forwarded by the State Government for selection and appointment. The service rule governing the post of Mining Officer and Mining Inspector is known as "the Uttar Pradesh Geology and Mining Service Rules, 1983 (for short "the Rules of 1983") has been amended from time to time.

4. The required qualification for the post of Mining Officer under the Rules of 1983 as well as in the advertisement as issued by the commission is Degree in Mining Engineering or Diploma in Mining

Engineering with one year experience. Similarly, the required qualification for the post of Mining Inspector as per the rules is Diploma in mining engineering.

5. Learned counsel for the petitioners submits that though the Rules of 1983 have been amended from time to time but the qualification required for the post of Mining Officer and Mining Inspector has remained unchanged. Despite the fact that the qualification of post graduate degree in Geology, which is possessed by the petitioners in the present case is much higher than one required under the Rules of 1983 as well as the advertisement. In such circumstances, the petitioners are not in a position to apply in pursuance to the impugned advertisement.

6. He further submits that the qualification required for the post of Mining Inspector, which is diploma in Mining Engineering while B.Sc. in Geology is higher qualification than diploma, has also not been taken into consideration.

7. Learned counsel for the petitioners has pointed out that advertisement issued by the different States wherein the essential qualification required for the appointment on the post of Mining Officer is post graduate in Geology whereas for the post of Mining Inspector is graduate degree in Geology. Hence a representation in this regard has been moved before the State Government to include the aforesaid degrees as essential qualification for the post of Mining Officer and Mining Inspector as such degree is higher than one required as per the advertisement and the Rules of 1983, but no decision has been taken yet.

8. After arguing the matter at length learned counsel for the petitioners has confined his prayer to the extent that the matter may be placed before the State Government so that appropriate decision may be taken in accordance with law.

9. On the other hand, Mr. Nisheeth Yadav, learned counsel for the respondent no.3-UPPSC as well as learned Additional Standing Counsel opposed the submission made by learned counsel for the petitioners and submits that the issue with respect to qualification for the said posts is a policy matter and it is within the domain of the State Government to take decision in this respect. He has relied upon the judgment of the Apex Court in the case of ***Dr. R.K. Goyal vs. State of U.P. and Ors. reported in (1996) 11 SCC 658.***

10. He further submits that regarding similar controversy, this Court in the case of ***Km. Pratima Gupta vs. State of U.P. & Ors. in Writ-A No.25238 of 2016 decided on 09.01.2019*** has held that undisputedly the advertisement as well as the Rules of 1983 specified a degree of Mining Engineering or Diploma in Mining Engineering with one year experience for the post of Mining Officer and similarly as per rule, qualification for the post of Mining Inspector is diploma in Mining Engineering. Nothing could be placed before the Court regarding any decision of the State Government holding the degree possessed by the petitioners to be equal to that as required as per the advertisement and the Rules of 1983.

11. Mr. Yadav, learned counsel for the Commission further submits that there is no statutory provision obligating either the State or the Commission to consider any degree equivalent to that possessed by the

petitioners, however, since the matter is a policy matter, therefore, the same may be placed before the State Government so that appropriate decision may be taken in accordance with law after calling for expert opinion from the Commission.

12. I have considered the submissions made by the parties as well as gone through the entire materials brought on record.

13. Before coming to the merits of the submissions made by the learned counsel for the parties, it would be relevant to refer that as per the Uttar Pradesh Geology and Mining Service Rules, 1983, the qualification for the post of Mining Officer is degree of Mining Engineering or Diploma in Mining Engineering with one year experience and for the post of Mining Inspector is diploma in Mining Engineering.

14. In the present case, it is no doubt that the petitioners possess higher qualification than that as required for the aforesaid posts as per the rule but there is no clarification/notification by the State Government providing for equivalence of any other qualification for the post of Mining Officer and Mining Inspector. It is the State Government which has the powers to prescribe the requisite qualification required for the efficient discharge of duties for the post for which the advertisement is issued. A Full Bench of this Court in the case of ***Deepak Singh and Others vs. State of U.P. and Others being Writ -A No. 24273 of 2018*** has rejected similar plea for grant of equivalence on the ground that petitioner therein possesses highter qualification.

15. Prescription of qualifications and other conditions of service pertains to the field of policy and is within the exclusive discretion and jurisdiction of the State. It is not open to the Courts to direct the Government to have a particular method of recruitment or eligibility criteria. The observation of the Supreme Court made in paragraph 10 of the judgment in ***P.U. Joshi and Others vs. Accountant General, Ahmedabad and others reported in (2003) 2 SCC 632,*** read thus:-

"10. ... Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate."

(Refer: V.K. Sood vs. Secretary, Civil Aviation AIR 1993 SC 2285)

16. In ***Chandigarh Administration vs. Usha Kheterpal Waie and others, (2011) 9 SCC 645***, the Supreme Court, in paragraph 22, observed:-

"22. It is now well settled that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. The courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the authority concerned so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provision of the Constitution, statute and rules. [See J. Rangaswamy vs. Govt. of A.P. (1990) 1 SCC 288 and P.U. Joshi vs. Accountant General (2003) 2 SCC 632]. In the absence of any rules, under Article 309 or statute, the appellant had the power to appoint under its general power of administration and prescribe such eligibility criteria as it is considered to be necessary and reasonable. Therefore, it cannot be said that the prescription of Ph.D. is unreasonable."

17. The policy decision has to be taken by the State Government for changing the academic qualification for the post of Mining Officer as well as Mining Inspector, which cannot be judicially reviewed by this Court. The Apex Court in the case of ***Vasavi Engineering College Parents Association ..... Vs State of Telangana & Ors.*** reported in ***(2019) 7 SCC 172,*** has held that the Court can neither act an appellate authority nor can usurp jurisdiction of decision maker and make the decision itself. Until and unless the same is arbitrary or in violation of any provision of law or is infringing the fundamental rights of any person.

18. In ***Fertilizer Corporation Kamgar Union (Regd.), Sindri vs Union of India,*** reported in ***(1981) 1 SCC 568***, it was also observed:-

"35. ....We certainly agree that judicial interference with the administration cannot be meticulous in our Montesquien system of separation of powers. ***The court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded.*** *If the directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration."*

19. Reference may also be made to the judgment of the Apex Court in the case of ***Directorate of Film Festivals & Ors. Vs. Gaurav Ashwin Jain & Ors.***, reported in ***(2007) 4 SCC 737,*** where the Apex Court held as follows:-

"16. The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy nor are courts Advisors to the executive on matters of policy which the executive is entitled to formulate."

20. The selection and appointment to any post should be made strictly in accordance with terms of the advertisement and the recruitment rules as has been held by the Apex Court in the case of ***Yogesh Kumar And Others vs Government Of NTC Delhi reported in (2003) 3 SCC 548.***

21. The issue regarding the fact that post graduate degree in Geology and graduate degree in Geology may be considered as essential qualification for appointment on the post of Mining Officer and Mining Inspector respectively, can be looked into by the State Government as the same is a policy matter and the policy decisions of the State are not to be disturbed/interfered with unless they are found to be grossly arbitrary or irrational.

22. Counsel for the parties agree that the writ petition may be disposed of finally at this stage without calling for further affidavits specifically in view of the order proposed to be passed today as well as to the relief pressed by learned counsel for the petitioners before this Court today.

23. Considering the facts and circumstances of the case and submissions made by the parties, this writ petition is disposed of with a direction to the petitioners to make a detailed representation along with the copy of writ petition, all the documents so advised as well as certified copy of this order before the respondent no.2, i.e. Director, Geology & Mining, U.P., Lucknow, who shall forward the same to the respondent no.1, i.e. Principal Secretary, Geology & Mining Department, Government of U.P., Lucknow. If any such representation is made, the respondent no.1 after obtaining expert opinion from Uttar Pradesh Public Service Commission, Prayagraj, U.P. shall make all endeavours to consider and decide the same, in accordance with law, preferably within a period of two months from the date of receipt of the said representation.

24. Accordingly, this writ petition is **disposed of.** No order as to costs.

(2022)04ILR A373
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.03.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ A No. 12236 of 2021
with
other connected cases

Manju Verma & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Lalta Prasad Misra, Prafulla Tiwari

Counsel for the Respondents:
C.S.C.

A. Service Law –Paramedical and non-paramedical staff – Appointment on contractual basis – Discharge – Refusal to renew the service – Validity challenged – No statutory service rules framed – Effect – Duty of the St. explained – Held, non-existence of statutory service rules does not make any difference as the St. has co-extensive executive power for the same. It is duty of the St. Government to forthwith frame the rules and make regular selection as per law. In the garb of not framing the rules St. Government cannot claim right to become arbitrary and hire and fire at its own sweet will in the garb of contractual appointment. The conduct of the St. has to be non-arbitrary – Held further, the petitioners are discharged in arbitrary manner. (Para 12 and 14)

B. Service jurisprudence – Adhoc employees – Discharge – Nature of work – It's being permanent in nature – Effect – Replacement of adhoc employee by another adhoc employee – Permissibility – Requirement of work is permanent in

nature as there is no decision taken by the St. Government till date for closure of the aforesaid homeopathic medical colleges and hospitals – Held, there is settled principal of service law that an adhoc employee cannot be replaced by another adhoc employee – Piara Singh' case relied upon. (Para 11 and 12)

C. Judicial review – Rule of law – Policy matter – Interference by the court, when warranted – Held, the Court can definitely look into a policy decision basis of which violates the rule of law. Where a policy decision is on the face of it arbitrary and violates settled principal of law, this Court has power to look into the same also – Brij Mohan Lal's case relied upon. (Para 13)

Writ petition allowed. (E-1)

List of Cases cited :-

1. St. of Haryana & ors.Vs Piara Singh & ors.; (1992) 4 SCC

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2. Brij Mohan Lal Vs U.O.I.; (2012) 6 SCC 502

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. This is a bunch of writ petitions whereby petitioners, who are paramedical and non paramedical staffs appointed on contractual basis in the government medical colleges and hospitals, have challenged their discharge orders issued on different dates from October, 2020 onwards and for a mandamus commanding the opposite parties to reinstate the petitioners on the posts on which they were working.

2. The facts of the case are that by government order dated 27.10.2017, the State Government took a decision for making selection and appointments on the posts of paramedical and non paramedical staff on contractual basis for government homeopathic medical colleges and hospitals. In furtherance of the aforesaid government order, an advertisement was issued on 15.12.2017 providing that contractual appointment as paramedical and non paramedical staff is to be made for a period of one year or till availability of regularly selected candidate from the UPSSSC or attaining the age of 65 years, which ever is earlier. It also provided that in the event of rendering satisfactory services the period of one year shall be extendable. The petitioners applied and were selected and appointed on different posts in terms of the advertisements issued in August, 2018 and thereafter The appointment letters also contained the conditions as mentioned in the advertisement. On the basis of the said appointment letters petitioners joined and started serving. On 26.03.2019, a video conference meeting took place under the chairmanship of Secretary, Department of Ayush, U.P., in which Regional Ayurvedic and Unani Officers, District Homeopathic Officers and Principals of Ayurvedic and Unani and Homeopathic Medical Colleges along with the Directors of the department were present. Number of decisions about the functioning of the department were taken and noted in the minutes of the said meeting, relevant for us, Clause-21 of the same notes, that, contractual appointment shall be made only for a period of 11 months and in no circumstance contractual employees shall be paid salary of 12 months. On the basis of the said noting in the minutes of the meeting, the Director, Homeopathy, U.P., by his letter dated 29.03.2019 asked the officials to initiate action. Again, Director, Homeopathy issued a letter dated 20.06.2019 instructing all the principals of the government homeopathic medical colleges and hospitals to discharge contractual employee on expiry of their

term of contract, till execution of any fresh contract. In furtherance of the same petitioners were discharged on different dates on completion of the period of one year from their respective appointments. On 06.07.2019, the Director, Homeopathy again issued a letter to the principals of all State homeopathic medical colleges and hospitals stating that the purpose for which the teaching and other staff were appointed on contract still exists, therefore, in the public interest/government functioning, even after completion of the contract period their renewal is necessary and expedient, and therefore, the contracts of teaching and other staff detailed in the annexed list should be renewed again, after creating a break of one week, for a further period of 11 months or till the regular selection is made for the said contract posts. Thus, the services of the petitioners were extended for a period of 11 months but, now after the period of 11 months petitioners are again discharged by the impugned orders by respective principals from 2019 onwards.

3. Learned counsels for petitioners submit that petitioners were appointed in terms of the government order dated 27.10.2017. The decision to remove the petitioners is contrary to the government order and could not be taken by the Secretary in a meeting of the department. He further submits that it is not in dispute that the nature and requirement of the said work is permanent, as there is no decision of the State Government to close the homeopathic medical colleges and hospitals and that the decision taken is in gross violation of the settled principal of law, that, an adhoc employee cannot be replaced by another adhoc employee. Admittedly, till date, the selection process for regular appointments is not even initiated. Emphasis is also laid by him on the fact that the government and principals of respective colleges have jointly signed duly notarized undertakings/affidavits and indemnity bond before the Central Council of Homeopathy, New Delhi, while seeking recognition for the Academic Session 2020-21 and 2021-22, specifying the existing teaching and non teaching staff of the colleges including the names of the petitioners. Thus, while seeking recognition for the Academic Session 2020-21 and 2021-22 they had given the impression that petitioners are working and they shall be maintained. He further submits that the teaching staff/doctors, similarly situated as petitioners, were also appointed in furtherance of similar government orders on similar terms and conditions and were also removed in similar manner. They filed Writ Petition No.14731 (S/S) of 2020; "Narendra Singh Sengar and Others Vs. State of U.P. and Others' and other writ petitions challenging their discharge. The said writ petitions were filed almost on the same grounds as the present writ petitions. The said writ petitions were allowed by this Court by its judgment and order dated 09.12.2020. The Court quashed the orders of discharge of the doctors in the said writ petitions and the government order dated 14.08.2020 which provided that their services shall not be renewed. Petitioners in the said writ petitions were further allowed to work on their respective posts in their respective colleges as per the government order dated 28.05.2015 and 27.10.2017. Thus, he draws strength from the said judgment also.

4. Some of the petitioners before this Court had filed a Writ-A No.2917 of 2021 "Devesh Shukla and 38 others Vs. State of U.P. and 7 Others' at Allahabad and the said writ petition was disposed of by this Court by order dated 22.06.2021 providing:-

"In view of the above, on consent and without expressing any opinion on the merits of the issue and considering the facts and circumstances of the case, this writ petition is disposed of finally asking the petitioners to move an appropriate representation before the competent authority ventilating their grievances within two weeks from today and in case any such representation is preferred the same would be looked into, examined and remedied in the light of the judgment in Dr. Narendra Singh Sengar(supra) within four weeks from the date of filing the representation. "

5. The representations of petitioners was rejected by order dated 29.07.2021 and the said order is challenged by the petitioners by way of a connected writ petition, being Writ Petition No.22562 (S/S) of 2021 "Abhishek Kumar and others Vs. State of U.P. and Others'. Reason for rejecting the representations by order dated 29.07.2021 are:-

(i) There are no statutory service rules for recruitment of Nursing Staff like the teaching staff, and

(ii) There was no cabinet approval in regard to the appointment on the posts of Store Superintendent, Swagati, Telephone Operator and Registration Clerk.

6. The petitioners of the said writ petition have also adopted the submissions of other petitioners before this Court. They further submit that both the grounds mentioned for rejecting the representation do not have any force; as mere absence of any statutory rules would not impact the submission of the petitioners that an ad-hoc appointee cannot be replaced by another ad-hoc appointee and further the ground that there is not approval of the Cabinet with regard to appointment on some of the posts only would not impact majority of posts and further that there is no necessity of Cabinets' approval for contractual appointment on the said Class-III posts.

7. Opposing the petitions, learned Additional Chief Standing Counsel places reliance upon government order dated 27.10.2017 and clause 21 of the minutes of meeting. He submits that contractual appointment could be made only for a period of 11 months and could also be renewed for a period of 11 months only, with a break of one week. The government letter dated 14.08.2020 specifically provides for non renewal of contract after expiry of the said term. He submits that there were large number of complaints filed before the Lok Ayukt, U.P., with regard to the said contractual appointments and during inquiry it was found that contractual appointments made were inappropriate and illegal and thus were cancelled. He further submits that there are no service rules promulgated for the said posts and, therefore, it is not possible to renew the contract period of the petitioners and it was decided to cancel the appointments by government order dated 14.08.2020 and proceed for re-selection on contract basis. Since re-selection on contract basis is again going to take place, it shall be open for the petitioners also to participate in the same. He lastly submits that the decision of the state government is a policy decision and is immune from judicial scrutiny as is held by the Supreme Court in:

(i) Ugar Sugar Works Ltd. Vs. Delhi Administration and Ors in Writ Petition (Civil) 321 of 2000;

(ii) Punjab Communications Ltd. Vs. Union of India & Others, (1999) 4 SCC 727;

(iii) Maharashtra State Board of Secondary and Higher Secondary Education Vs. Paritosh Bhupesh Kumar Sheth, (1984) AIR 1543;

(iv) State of Punjab & Ors. Vs. Ram Lubhaya Bagga, (1998) 4 SCC 117;

(v) Premium Granites Vs. State of Tamil Nadu, (1994) AIR 2233 paragraphs 53, 54 and 56;

(vi) Delhi Science Forum Vs. Union of India & Anr., 1996 AIR 1356 paragraph 52 and 59;

(vii) Krishnan Kakkanth Vs. Government of Kerala, (1997) 9 SCC 5069 paragraph 32 and 36;

(viii) Surjit Singh Vs. State of Punjab and Others, 1996 AIR 1388;

(ix) Bhavesh D. Parish Vs. Union of India, (2000) 5 SCC 471 paragraph 23 and 26;

(x) BALCO Employees Union Case (2002) 2 SCC 333;

(xi) Ashok Kumar Vs. Union Territory, (1995) SCC 1631;

(xii) Narmada Bachao Case, (2000) 10 SCC 664.

8. I have heard learned counsels for parties and perused the record with their assistance.

9. Before coming to the legal issues involved it is necessary to clear the facts. The State Government always treated the teaching and non-teaching staff as separate from each other. The teaching staff i.e. doctors were appointed in furtherance of separate government orders dated 28.05.2015 and 11.04.2018 while the non-teaching staff, i.e., petitioners, were appointed in furtherance of government order dated 27.10.2017. With regard to doctors/teaching staff a government order dated 14.08.2020 was issued providing that their contract period may not be extended any further and their services be dispensed with for making fresh appointment. With regard to non-teaching staff there is no such order passed by the State Government. It appears that the authorities in the department, without there being any order of the State Government requiring removal of the non-teaching staff, have under wrong impression proceeded and passed order with regard to non-teaching staff also. The government order dated 14.08.2020 refers to G.O. dated 28.05.2015 and 11.04.2018. Both the said government orders are only with regard to the teaching staff i.e. doctors. In absence of any decision of the State Government, the departmental officers including the director could not have passed any order removing or refusing to extend the contract period of the non-teaching staff. Thus, the entire exercise conducted by the respondents is in violation of the order of the State Government itself.

Clause-21 of the minutes of video conference meeting dated 26.03.2019 also only states that no further appointment on outsourcing shall be done unless budget is arranged. It nowhere says anything about the persons who were already working on contract basis. Admittedly, the petitioners were working on contract basis on 26.03.2019 and, therefore, since there case is not covered by Clause-21 of the video conference dated 26.03.2019, they cannot be removed in furtherance thereof. Admittedly, the contract period of petitioners was extended between July, 2019 to December, 2019, i.e. after the minutes of meeting dated 26.03.2019. Therefore, even the stand of the respondents remained that the petitioners were not covered by the decision taken in the video conference meeting dated 26.03.2019.

10. From the above facts and circumstance, I do not find any decision of the State Government taken for removal of the non-teaching staff which has completed its contract period and for which till date no direct selection is made. Clause-21 of the minutes of video conference meeting dated 26.03.2019 merely states that contractual employees shall be appointed for a period of 11 months and shall not be paid salary of 12 months. Even after the said letter was issued, the contractual employees were continued for an earlier period of contract of 12 months and on its expiry after giving artificial break of one week, their contracts were extended for a further period of 11 months. I do not find any direction to the Director, Homeopathy from the State Government requiring him to remove the non teaching staff appointed on contract basis and replace the same from fresh contractual employees.

11. So far as the legal position is concerned, there is settled principal of service law that an adhoc employee cannot be replaced by another adhoc employee. The same finds mention in large number of judgments including the judgment passed in case of ***''State of Haryana and Others Vs. Piara Singh and Others',*** *reported in* ***[(1992) 4 SCC 118],*** second condition of paragraph-46 of the judgment holds:-

"46. Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority."

12. Though the judgment of ***Piara Singh (supra)*** case is explained on certain other legal preposition in some later judgments of the Supreme Court but the aforesaid preposition of law holds good till date. It is not disputed in the present case that the requirement of work is permanent in nature as on instructions, the Standing Counsel had submitted before this Court that there is no decision taken by the State Government till date for closure of the aforesaid homeopathic medical colleges and hospitals. Once, the nature of work is permanent State Government is bound to make regular appointments on the same. Non-existence of statutory service rules does not make any difference as the State has co-extensive executive power for the same. It is duty of the State Government to forthwith frame the rules and make regular selection as per law. In the garb of not framing the rules State Government cannot claim right to become arbitrary and hire and fire at its own sweet will in the garb of contractual appointment. The conduct of the State has to be non arbitrary. Unless strong reasons are provided it cannot replace an ad-hoc employee with another ad-hoc employee. The only reason provided by the State Government for removing the petitioners during the course of argument is that there were large number of complaints before the Lok Ayukt and in an inquiry it was found that contractual appointments were inappropriate or not legal. No such inquiry report or other material is submitted before this Court. There is no declaration from any court that the appointments were inappropriate or not legal. The said ground also does not find mention in the discharge orders. Thus, in absence of any material, this Court does not find any force in the said submission of the State Government.

13. So far as the last submission made by learned Additional Chief Standing Counsel that the aforesaid decision of the State Government is a policy decision and

immune from the judicial scrutiny is concerned, suffice would be to say that the none of the judgment referred to by learned Additional Chief Standing Counsel relates to any service matter and all of them are with regard to economic or financial policy of the State. So far as the present case is concerned, learned Standing Counsel could not place any policy decision of the State Government whereby it require removal of the contractual employee, as is already held above. Even presuming there is such a policy decision, the Court can definitely look into a policy decision basis of which violates the rule of law. Where a policy decision is on the face of it arbitrary and violates settled principal of law, this Court has power to look into the same also. Suffice to refer to the judgment of the Supreme Court in case of ***''Brij Mohan Lal Vs. Union of India'*** reported in ***(2012) 6 SCC 502***. In paragraph 99, 100 and 134 the Court held that:-

"99. It is also a settled cannon of law that the Government has the authority and power to not only frame its policies, but also to change the same. The power of the Government, regarding how the policy should be shaped or implemented and what should be its scope, is very wide, subject to it not being arbitrary or unreasonable. In other words, the State may formulate or reformulate its policies to attain its obligations of governance or to achieve its objects, but the freedom so granted is subject to basic Constitutional limitations and is not so absolute in its terms that it would permit even arbitrary actions.

100. Certain tests, whether this Court should or not interfere in the policy decisions of the State, as stated in other judgments, can be summed up as:

(I) If the policy fails to satisfy the test of reasonableness, it would be unconstitutional.

(II) The change in policy must be made fairly and should not give impression that it was so done arbitrarily on any ulterior intention.

(III) The policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc.

(IV) If the policy is found to be against any statute or the Constitution or runs counter to the philosophy behind these provisions.

(V) It is dehors the provisions of the Act or Legislations.

(VI) If the delegate has acted beyond its power of delegation.

134. The policy decision of the State should be in public interest and taken objectively. Ad hocism or uncertainty in the State policy particularly relating to vital factors of governance, may not bring the requisite dividend. Reasons for taking a policy decision would squarely fall in the domain of the State, but it should be free from element of arbitrariness and mala fides."

14. In view of aforesaid, this Court does not find any force in the stand taken by learned Additional Chief Standing Counsel. It is apparent that the petitioners are discharged in arbitrary manner. Admittedly, till date no other person have been appointed on the said posts, therefore, all the writ petitions are **allowed** and all the impugned discharge orders of the petitioners are set aside. The petitioners are allowed to work on their respective posts in their respective colleges as per government orders dated 27.10.2017. However, in case, any complaint is made/received, the State Government shall be at liberty to examine/inquire the said complaint in respect of each candidate as per law and pass order on each case separately. The State or the respondent/authorities shall

also be at liberty to examine performance of each petitioner on their respective posts before renewing their services after expiry of their contract period and pass appropriate order in accordance with law.

(2022)04ILR A380
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ A No. 13866 of 2017

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

Counsel for the Petitioner:
Sri Hari Om, Sri A. Khare

Counsel for the Respondents:
C.S.C., Sri Abhishek Srivastava, Sri Ayank Mishra, Sri J.P. Pandey

A. Service Law – Post of Junior Engineer Electrical (Trainee) – Qualification – Variation therein – Judicial review – Scope of interference – Three years Diploma in Electrical Engineering was required, however the petitioner possesses three years Diploma in Electrical and Electronics Engineering – Candidature rejected – Validity challenged – There was lack of necessary pleading that contents and syllabus of three years in Diploma Electrical and Electronics Engineering are identical to three years Diploma in Electrical Engineering – Effect– Held, it is the domain of the employer to prescribe qualification as a condition of eligibility – The Court has no jurisdiction to expand upon the ambit of prescribed qualifications. (Para 12, 18 and 22)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Zahoor Ahmad Rather & ors. Vs Sheikh Imtiyaz Ahmad & ors.; 2019 (2) SCC 404

2. Writ-A No.1092 of 2015; Shailendra Kumar Rai & ors. Vs St. of U.P & ors.

3. W.C. (C) 6100/2012 & CM No. 16465/2012; Ms. Nisha Vs Union of India & ors.

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

1. Heard Sri Akash Khare, learned counsel for the petitioner, and Sri Abhishek Srivastava learned counsel for the respondents-Corporation.

2. The petitioner through the present writ petition has prayed for a direction upon respondents to consider the candidature of the petitioner for appointment on the post of Junior Engineer Electrical (Trainee) in U.P. Power Corporation Ltd.

3. During the pendency of the writ petition, the respondent has passed an order on 25.03.2017 rejecting the candidature of the petitioner which was challenged by the petitioner by way of amendment in the writ petition.

4. The case of the petitioner is that pursuant to an Advertisement No.9/V5A/2016/JE notified on 09.10.2016 inviting online application for the post of Junior Engineer Electrical (Trainee) under the Electrical Engineer category, Junior Engineer Civil (Trainee) under the category of Civil Engineering, he has submitted application for being considered on the said post.

5. According to the petitioner, he has three years diploma in Electrical and Electronics Engineering from Tamil Nadu Polytechnic College, Madurai recognized by U.G.C. Thus, he possesses the essential

qualification for appointment on the said post. The petitioner submitted the online application under the O.B.C. category. In response to his application, he was issued Admit Card allotting Roll No.1117201837 for CBT to be held on 11.11.2016. The petitioner appeared in an online examination. Thereafter, a final response sheet was uploaded by respondent no.2-Electricity Service Commission on its website. As per the final response sheet, the petitioner has obtained 117.25 marks out of a total of 200 marks. Respondent no.2 declared the result of shortlisted candidates on 07.12.2016 in which the name of the petitioner also figured in. Thereafter, the petitioner was called for documents verification by letter dated 07.12.2016 on 12.12.2016. The petitioner appeared before the authority concerned on 12.12.2016 and presented all his documents. Thereafter, the final select list was published on 03.01.2017 in which the name of the petitioner did not find a place.

6. According to the petitioner, the cut-off marks for the O.B.C. candidate were 117 marks whereas the petitioner had obtained 117.25 marks even then, he was not declared successful. The impugned order reveals that the candidature of the petitioner has been rejected on the ground that he does not possess the essential qualification for appointment on the post in question.

7. It is stated in the writ petition that the petitioner possesses a diploma in Electrical and Electronics Engineering which is equivalent to a diploma of Electrical Engineering, which is clear from the chart mentioned in paragraph 13 of the writ petition showing the subjects of the petitioner and subjects of one Jai Narain Chauhan and Amit Kumar, who have obtained three years diploma in Electrical Engineering. The petitioner in support of his aforesaid contention has also enclosed the mark sheet of Jai Narain Chauhan and Amit Kumar.

8. In the counter affidavit filed by the respondents, it is stated that the petitioner did not possess minimum qualifications as prescribed. It is also stated that power is with the Corporation to lay down the required qualification for appointment on the post in question. It is also stated that the diploma possessed by the petitioner is not equivalent to the diploma in Electrical Engineering as the syllabus of both the courses is at the variance of 20% to 30%.

9. The petitioner filed a rejoinder affidavit denying the averments made in the counter affidavit.

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

11. Before proceeding with the matter, it would be relevant to reproduce qualification No.4 (B) in the advertisement prescribed for recruitment for the post of Junior Engineer (Trainee)-Electrical:-

"4 Essential Eligibility Qualification:

(B) A candidate must have passed

(i) "Three years Diploma examination in Electrical Engineering awarded by Pravidhik Shiksha Parishad, Uttar Pradesh OR a Diploma, equivalent thereto, recognized by the State Government" OR

(ii) "Three years All India Diploma Examination in Electrical Engineering conducted by the All India

Council for Technical Education (AICTE), Govt. of India" OR

(iii) "Diploma Examination in Electrical Engineering conducted by any of the Universities in India incorporated by an Act of the Central/State Legislature."

Note: Diploma received through Distance Learning Education will not be eligible."

12. From a perusal of qualification no.4 (B) of the advertisement, extracted above, it is evident that for essential qualification, a candidate must possess three years Diploma in Electrical Engineering. The petitioner undisputedly possesses three years Diploma in Electrical and Electronics Engineering.

13. The petitioner in paragraph 13 of the writ petition has reproduced a chart to demonstrate that the course of petitioner and course of Jay Narayan Chauhan and Amit Kumar are identical and, therefore, the petitioner should be treated to have essential qualification as prescribed in the advertisement. For ready reference, the chart mentioned by the petitioner in paragraph 13 is reproduced herein below:-

Sl. No.	Petitioner Electrical & Electronics Engineering	Electrical Engineering of Jai Narain Chauhan	Electrical Engineering of Amit Kumar
1	<u>One Year Semester</u> English Basics of Computer Science. Mathematics-I, Mathematics-II, Applied Physics, Applied Chemistry, Technical Drawing, Applied Physics Practical, Applied Chemistry Practical, Work Shop, English Communication Practical.	<u>One Year Semester</u> Professional Communication, Applied Mathematics-I, Applied Physics, Applied Chemistry, Engineering Drawing, Basic Electrical Engineering, Electrical & Electronics Engineering Materials, Electronics-I **PRACTICALS** Applied Physics, Applied Chemistry, Basic Electrical Engg., Electronics-I, Workshop Practice, Professional Communication **<u>SESSIONAL</u>** Sessional, Games, Discipline	Year Semester English Basics of Computer Science. Mathematics-I, Mathematics-II, Applied Physics, Applied Chemistry, Technical Drawing, Applied Physics Practical, Applied Chemistry Practical, Work Shop, English Communication Practical.
2	Second Year i.e. IIIrd Semester & IVth Semester. Electrical Circuit Theory, Electrical Machines-1, Electronic Devices & Circuits, Electrical Machines Lab-1, Electronic Devices & Circuits Lab, MS-Office Lab <u>IVth Semester</u> Electrical Machines II, Measurement And Instrumentation, Basics of Mechanical Engineering, Electrical Machines Lab II Computer Aided Electrical Drawing Lab, Mechanical Engineering Lab.	<u>SECOND YEAR</u> <u>THEORY</u> Applied Mathematics II, Electrical Design Drawing & Estimating-I, Electrical Instruments & Measurements. Power Plant Engg., Transmission & Distribution of Electrical Power, Elementary Mech. & Engg., Electronics-II **<u>PRACTICALS</u>** Electrical Design Drawing & Estimating-I, Electrical Machines-I, Electrical Instruments & Measurement Elementary Mechanical & Civil Engg., Electronics-II, Computer Application	<u>SECOND YEAR</u> Applied Mathematics II, Electrical Design Drawing & Estimating-I, Electrical Machines-I, Electrical Instruments & Measurements. Power Plant Engineering Transmission & Distribution of Electrical Power, Ele. Mechanical & Civil Engg., Electronics-II Computer Application for Engineering Lab.

		SESSIONAL Sessional, Games, Discipline	
3	Third Year i.e. Vth Semester & VIth Semester. Vth Semester Generation Transmission And Switch Gear, Analog And Digital Electronics, Elective Theory I (Control of Electrical Machines). Wiring Winding And Estimation Lab., Elective Practical I (Control of Electrical Machines Lab). VIth Semester Distribution And Utilization, Micro Controllers, Elective Theory II (Power Electronics), Micro Controller Lab, Elective Practical II (Power Electronics), Project Work and Entrepreneurship	FINAL YEAR THEORY PAPERS Industrial Electronics & Control Elect. Design, Drawing & Estimating-II, Industrial Management & Entrepreneurship Development, Installation Maintenance & Repair of Electrical Machines, Switch Gear and Protection Utilization of Electrical Energy, Electrical Machines-II, Renewable Sources of Energy Practical Papers, Industrial Electronics & Control, Installation Maintenance & Repair of Electrical Machines, Electrical Machines-II, Project-I Problem, Project-II Field Exposure SESSIONAL MARKS Sessional, Games Discipline CARRY OVER MARKS Carry Over Ist Year (30%), Carry Over 2nd Year (70%)	FINAL YEAR THEORY Industrial Electronics & Control, Elect. Design Drawing & Estimating-II, Industrial Management & Entrepreneurship Development, Installation Maintenance & Repair of Electrical Machines, Switch Gear and Protection, Utilization of Electrical Energy, Electrical Machines-II, Electric Traction. PRACTICAL Industrial Electronics & Control, Installation Maintenance & Repair of Electrical Machines, Electrical Machines-II, Project-I Problem, Project-II Field Exposure SESSIONAL CARRY OVER Sessional Games, Discipline CARRY OVER MARKS Carry over of Ist Year (30%), Carry Over of 2nd Year (70%).

14. The petitioner has also enclosed his mark-sheet of three years as well as mark-sheet of Jai Narayan Chauhan and Amit Kumar. It would be appropriate to reproduce a chart indicating the subject of petitioner and Jai Narayan Chauhan and Amit Kumar, which they had studied in their first year:-

Ashish Kumar (Petitioner)	**Jai Narayan Chauhan**	**Amit Kumar**
Ist Year Semester (Departmental of Technical Education, Tamil Nadu Polytechnic College (Autonomous), Mudrai.) (Name of College)	**Ist Year Semester** Board of Technical Education (U.P.), Lucknow (Name of College)	**Ist Year Semester** Government Polytechnic, Jhansi (Name of College)
Subjects:- English, Basic of Computer Science, Mathematics-I, Mathematics-II, Applied Physics, Applied Chemistry, Technical Drawing, Applied Physics Practical, Applied Chemistry Practical, Workshop, English Communication Practical.	**Subjects:-** **THEORY** Professional Communication, Applied Mathematics-1, Applied Physics, Applied Chemistry, Engineering Drawing, Basic Electrical Engg., Electrical & Electronics Engg. Materials, Electronics-1 **PRACTICALS** Applied Physics, Applied Chemistry, Basic Electrical Engg., Electronics-1, Workshop Practice, Professional Communication **SESSIONAL** Sessional,	**Subjects:-** Professional Communication, Applied Mathematics-I, Applied Physics, Applied Chemistry, Engineering Drawing, Basic Electrical Engineering, Electrical & Electronics Engineering Materials, Electronics-I, Workshop Practice.

	Games, Discipline	

15. The perusal of the above chart shows that the course of the petitioner as well as Jai Narayan Chauhan and Amit Kumar, and also the subjects which they had studied in their first year are at variance and are not similar.

16. It is further pertinent to mention that petitioner in the writ petition has not made specific assertion comparing the courses which could demonstrate that the subject which the petitioner had studied in the first year contains the same syllabus and topics which Jai Narayan Chauhan and Amit Kumar had studied in the first year. Had the petitioner given specific assertion, the respondents could have replied the same, and only then this Court would have been in a position to assess or call for an expert opinion to consider as to whether the Diploma of the petitioner can be treated to be equivalent to the Diploma of Electrical Engineering.

17. The respondent in the counter affidavit has made the specific assertion that Diploma in Electrical and Electronics Engineering and Diploma in Electrical Engineering are at the variance of 20% to 30% in the syllabus.

18. At this stage, it would be apt to refer to the judgment of the Apex Court in the case of ***Zahoor Ahmad Rather and Others Vs. Sheikh Imtiyaz Ahmad and Others 2019 (2) SCC 404*** wherein the Apex Court has held that it is the domain of the employer to prescribe qualification as a condition of eligibility. The Court has no jurisdiction to expand upon the ambit of prescribed qualifications. Paragraphs 26 and 27 of the said judgment are reproduced herein below: -

"26. We are in respectful agreement with the interpretation which has been placed on the judgment in Jyoti K.K. Vs. Kerala Public Service Commission, (2010) 15 SCC 596 in the subsequent decision in State of Punjab Vs. Anita (2015) 2 SCC 170. The decision in Jyoti K.K. (supra) turned on the provisions of Rule 10(a)(ii). Absent such a rule, it would not be permissible to draw an inference that a higher qualification necessarily presupposes the acquisition of another, albeit lower, qualification. The prescription of qualifications for a post is a matter of recruitment policy. The state as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the state, as the recruiting authority, to determine. The decision in Jyoti K.K. (supra) turned on a specific statutory rule under which the holding of a higher qualification could presuppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome. In this view of the matter, the Division Bench of the High Court was justified in reversing the judgment of the learned Single Judge and in coming to the conclusion that the appellants did not meet the prescribed qualifications. We find no error in the decision of the Division Bench.

27. While prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several features including the nature of the job, the aptitudes requisite for the efficient

discharge of duties, the functionality of a qualification and the content of the course of studies which leads up to the acquisition of a qualification. The state is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision making. The state as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily. That is why the decision in Jyoti K.K. (supra) must be understood in the context of a specific statutory rule under which the holding of a higher qualification which presupposes the acquisition of a lower qualification was considered to be sufficient for the post. It was in the context of specific rule that the decision in Jyoti K.K. (supra) turned."

19. In the case of ***Shailendra Kumar Rai and Others Vs. State of U.P and Others*** in Writ-A No.1092 of 2015 this Court also held that the Court cannot issue direction to the employer to prescribe qualification for holding a particular post. Paragraphs 21 and 22 of the said judgment are reproduced herein below:-

"21. It is settled law that only the statutory authority is entitled to frame statutory rules, terms and conditions of the services and also the qualifications essential for holding a particular post. It is only and only the concerned authority, which can take an ultimate decision in this regard. No direction can be issued to the employer to prescribe a qualification for holding a particular post as also held by Hon'ble Supreme Court in case of Sanjay Kumar Manjul Vs. Chairman, UPSC and Others (2006) 8 SCC 42 (paras-25, 26 and 27) as under:-

"25. The statutory authority is entitled to frame statutory rules laying down terms and conditions of service as also the qualifications essential for holding a particular post. It is only the authority concerned who can take ultimate decision therefor.

26. The jurisdiction of the superior courts, it is a trite law, would be to interpret the rule and not to supplant or supplement the same.

27. It is well-settled that the superior courts while exercising their jurisdiction under Articles 226 or 32 of the Constitution of India ordinarily do not direct an employer to prescribe a qualification for holding a particular post."

22. Similar view has also been taken by this Court in the case of Manoj Kumar Singh and Others Vs. State of U.P. and Others, 2014 (9) ADJ 659 (DB) (LB) (vide paragraphs-36, 37, 38, 40, 47 and 48). The Division Bench in the case of Manoj Kumar Singh (supra) while coming to the aforesaid conclusion also relied upon the judgment of Hon'ble Supreme Court in the case of District Collector and Chairman, Vizianagaram Social Welfare Residential School Society and another Vs. M. Tripura Sundari Devi, (1990) 3 SCC 655), P.M. Latha and Another Vs. State of Kerla and Others (2003) 3 SCC 541 and Mohd. Shohrab Khan Vs. Aligarh Muslim University (2009) 4 SCC 555."

20. In the instant case, as noticed above, the petitioner has failed to demonstrate that the course and syllabus which he had studied in three years Diploma in Electrical and Electronics Engineering is identical to the syllabus of Diploma in Electrical Engineering.

21. The reliance placed by the petitioner upon the judgment of Delhi High Court in the case of ***Ms. Nisha Vs. Union of India and Others*** in W.C. (C) 6100/2012 & CM No.16465/2012 is misplaced inasmuch as in the said case the Court has obtained a report from two members committee and thereafter proceeded to consider that the syllabus and course contents in the degree of B.Tech. Electrical and Electronics are equivalent to the degree of B.Tech. Electrical.

22. The judgment of ***Ms. Nisha (supra)*** has been rendered in different factual backdrops inasmuch as in the case in hand, necessary pleading that contents and syllabus of three years in Diploma Electrical and Electronics Engineering are identical to three years Diploma in Electrical Engineering are lacking.

23. In this view of the fact the judgment of ***Ms. Nisha (supra*)** is of no help to the petitioner.

24. It is relevant to note that merely because the petitioner had appeared in the examination and was called for document verification does not mean that he has the vested right to be appointed till he satisfies all eligibility criteria including essential qualification.

25. As in the instant case, the petitioner admittedly possesses three years Diploma in Electrical and Electronics Engineering and does not have three years Diploma in Electrical Engineering, therefore, this Court does not find merit in the writ petition.

26. Accordingly, the writ petition lacks merit and is ***dismissed*** with no order as to costs.

(2022)04ILR A386
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ A No. 18664 of 2021

Anoop Kumar Dubey ...Petitioner
Versus
State of U.P & Ors. ...Respondents

Counsel for the Petitioner:
Smt. Savita Dubey, Sri R.S. Dubey

Counsel for the Respondents:
C.S.C.

A. Service Law – Transfer – Violation of transfer policy – Scope of interference by the court – Transfer, when can be interfered with – Principle laid down – Held, the Court cannot interfere with the transfer matter as the Government servant has no vested right to continue at a place of his choice. The Government can transfer the officer/employee in the administrative exigency and in public interest – However, if a transfer is made against the executive instructions or transfer policy, the competent authority must record brief reason in the file for deviating from the transfer policy or executive instructions and the transfer must be necessary in the public interest or administrative exigency. (Para 12)

Writ petition dismissed .(E-1)

List of Cases cited :-

1. B. Varadha Rao Vs St. of Karn. & ors.; (1986) 4 SCC 131

2. Shilpi Bose (Mrs) & ors. Vs St. of Bihar & ors.; 1991 Supp (2) SCC 659

3.U.O.I. & ors. Vs S.L. Abbas; (1993) 4 SCC 357

4. N.K. Singh Vs U.O.I. & ors.; (1994) 6 SCC 98

5. Dharmendra Kumar Saxena Vs St. of U.P. & ors.;2013 (7) ADJ 53

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. R S Dubey, learned counsel for the petitioner and the learned Standing Counsel for the State-respondents.

2. This writ petition has been filed interalia for the following relief:-

"a. Issue a writ, order or direction in the nature of certiorari quashing the order dated 30.10.2021 passed by respondent no.2 (Annexure no.8) as well as order dated 25.11.2021 (Annexure no.9), passed by respondent no.4 and further directed to respondents to not transfer the petitioner from district Deoria to District Banda."

3. Learned counsel for the petitioner submits that initially, the petitioner, who was posted as Junior Assistant at C.H.C. Mahen, District-Deoria, was transferred to C.M.O. Banda and on the same date by another order dated 15.07.2021, the petitioner was transferred from C.M.O., Mahen, Deoria to the office of C.M.O., Deoria. However, vide order dated 05.08.2021, the Chief Medical Officer, Deoria has required the petitioner to join as Senior Assistant at his office at District-Deoria, pursuant to which the petitioner has joined at the office of respondent no.4-Additioanl Chief Medical Officer, Transport Protocol, Deoria, District-Deoria on 10.08.2021. Subsequently, due to some confusion, two orders have been passed wherein the petitioner has shown absconding as one of the orders dated 15.07.2021 required the petitioner to join at Banda. He further submits that by impugned order dated 30.10.2021, the petitioner, who is working as Senior Assistant has been transferred from District-Deoria to Banda on the ground that he remained there nearly since 20 years, which is against the Government Policy. The petitioner vide order dated 25.11.2021 has been relieved from the office of respondent no.4, however, he could not join at the place of posting as he had met with an accident and is on medical leave. He further submits that transfer of the petitioner is in violation of the transfer policy of the State Government as the petitioner has been transferred second time within three months, therefore, the aforesaid impugned orders are not sustainable in the eye of law.

4. Per contra, learned Standing Counsel for the State-respondents submits that there is no illegality in the transfer order as the petitioner has been transferred on the ground that he has remained at Deoria since last 20 years. Even otherwise, he was transferred from Deoria where he was working as Junior Assistant and has now been posted as Senior Assistant at Banda.

5. The law on the transfer is too settled to reiterate that if the transfer is made contrary to transfer policy or executive order, it does not confer any vested right upon an employee to challenge it.

6. The reference may be made to the judgement of the Apex Court in the Case of ***B. Varadha Rao v. State of Karnataka and others,*** reported in ***(1986) 4 SCC 131***, wherein it has been held that the occasion to consider a short point whether an order of transfer is appealable under Rule 19 of

the Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957, and the Supreme Court held in paragraphs- 4 and 6 as under: -

"4. ..... It is well understood that transfer of a government servant who is appointed to a particular cadre of transferable posts from one place to another is an ordinary incident of service and therefore does not result in any alteration of any of the conditions of service to his disadvantage. That a government servant is liable to be transferred to a similar post in the same cadre is a normal feature and incident of government service and no government servant can claim to remain in a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post. ....."

"6. .....But, at the same time, it cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the government is not conducive to good administration. It creates vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. We wish to add that the position of class III and class IV employees stand on a different footing. We trust that the government will keep these considerations in view while making an order of transfer"

7. The Supreme Court in the case of ***Shilpi Bose (Mrs) and others v. State of Bihar and others,*** reported in ***1991 Supp (2) SCC 659***, was dealing with the case of transfer of some lady teachers in Primary Schools in the State of Bihar. They were transferred, on their own request, to places where their husbands were posted. The transfer orders were made by the District Education Establishment Committee. The teachers, who were displaced, challenged the transfer order before the Patna High Court on the ground that District Education Establishment Committee had no jurisdiction. Patna High Court allowed the petition, set aside the transfer order and directed for re-posting of the respondents. Ultimately, the matter was carried to the Supreme Court and the Supreme Court set aside the judgment of the Patna High Court and held as under:

"4. In our opinion, the courts should not interfere with a transfer order which is made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department. If the courts continue to interfere with day-to-day transfer orders issued by the government and its subordinate authorities, there will be complete chaos in the administration which would not be conducive to public interest. The High Court overlooked these aspects in interfering with the transfer orders."

8. The law laid down in ***Shilpi Bose (supra)*** was again reiterated by the Supreme Court in the case of ***Union of India and others v. S.L. Abbas, reported in (1993) 4 SCC 357,*** and observed as under:

"6. An order of transfer is an incident of Government service. Fundamental Rule 11 says that "the whole time of a Government servant is at the disposal of the Government which pays him and he may be employed in any manner required by proper authority". Fundamental Rule 15 says that "the President may transfer a Government servant from one post to another". That the respondent is liable to transfer anywhere in India is not in dispute. .."

9. In the case of ***N.K. Singh v. Union of India and others,*** reported in ***(1994) 6 SCC 98***, the appellant Sri N.K.Singh was an I.P.S. Officer. He was allocated to State cadre of Orissa. He was I.G., C.I.D. in Orissa. His services were placed on deputation to Ministry of Home Affairs and was posted as Joint Director in Central Bureau of Investigation (C.B.I.). He was In-charge of a Special Investigation Group conducting some sensitive investigation. He was abruptly transferred to Border Security Force (B.S.F.) in an equivalent post of I.G.P.. He challenged his transfer order on the ground of malafide against the then Prime Minister Shri Chandrashekhar and the then Union Law Minister Dr. Subramanyam Swami. The grievance of the appellant therein was that he was In-charge of a Special Investigation Group investigating into St. Kitts affair. Therefore, he was eased out from the C.B.I. to scuttle the fair investigation. Against this background, the Supreme Court ruled as under: -

"6. ....., learned counsel for the appellant did not dispute that the scope of judicial review in matters of transfer of a government servant to an equivalent post without any adverse consequence on the service or career prospects is very limited being confined only to the grounds of mala fides and violation of any specific provision or guideline regulating such transfers amounting to arbitrariness. In reply, the learned Additional Solicitor General and the learned counsel for Respondent 2 did not dispute the above principle, but they urged that no such ground is made out; and there is no foundation to indicate any prejudice to public interest."

"24. ...Challenge in courts of a transfer when the career prospects remain unaffected and there is no detriment to the government servant must be eschewed and interference by courts should be rare, only when a judicially manageable and permissible ground is made out. This litigation was ill-advised."

10. This Court in the case of ***Dharmendra Kumar Saxena v. State of U.P. and others*** reported in ***2013 (7) ADJ 53*** has held that it is true that violation of transfer policy or executive order does not confer any vested right on an employee to challenge it, but the Government is bound by executive orders/ policies, and the guidelines are made to follow it and not to breach it without any justifiable reason. The Court also held that in case a transfer is made contrary to transfer policy or executive order, the officer concerned should record reasons for defying the transfer policy or executive order. Recording of reasons are necessary in view of the fact that in case any representation is made to the higher authority, he may be apprised of the reasons for violation of the transfer policy or the Government order. The Court also followed the view consistently taken by the Supreme Court. Relevant paragraph of the order read as under: -

"24...the Government is bound by executive orders/policies. The guidelines are made to follow it and not to breach it

without any justifiable reasons. Whenever the Government deviates from its policies/guidelines/ executive instructions, there must be cogent and strong reasons to justify the order; when transfer order is challenged by way of representation, there must be material on record to establish that the decision was in public interest and it does not violate any statutory provision, otherwise the order may be struck down as being arbitrary and violative of Article 14 of the Constitution. The authorities cannot justify their orders that breach of executive orders do not give legally enforceable right to aggrieved person. As observed by Justice Frankfurter "An executive agency must be rigorously held to the standards by which it professes its action to be judged".

11. The petitioner in the present case has been transferred on the ground that he has stayed at the said place for more than twenty years and hence, the same is not in violation of any transfer policy or Government Order.

12. After considering the submission made by the parties as well as careful consideration of the law laid down by the Supreme Court, I am of the view that this Court cannot interfere with the transfer matter as the Government servant has no vested right to continue at a place of his choice. The Government can transfer the officer/employee in the administrative exigency and in public interest. However, if a transfer is made against the executive instructions or transfer policy, the competent authority must record brief reason in the file for deviating from the transfer policy or executive instructions and the transfer must be necessary in the public interest or administrative exigency.

13. This writ petition is, accordingly, dismissed. There shall be no order as to costs.

(2022)04ILR A390
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ A No. 18950 of 2021

Prasidh Narayan Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Pandey

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Sushil Kumar Mishra

Constitution of India,1950 - Article 226 - Writ of Mandamus - Laches & Delay - Unexplained & inordinate delay - Held - person, who is not vigilant and dormant about his right, cannot be allowed to agitate his right - time-barred cases should not be entertained by Courts & Court should dismiss the writ petition on the ground of unexplained inordinate delay as the rights, which have accrued to others by reason of delay in approaching the Court, cannot be allowed to be disturbed unless there is a reasonable explanation for the delay - there must be satisfactory explanation by the petitioner as how he could not come to the Court well in time

A show cause notice issued to petitioner on 06.02.2010 - petitioner submitted his reply to the show cause notice on 07.02.2010 – After about 12 years in the year 2021 writ petition filed with a prayer to decide representation dated 07.02.2010 - not even a single word mentioned in the writ petition with regard to delay in filing same – Held - writ petition hopelessly barred by limitation as such dismissed on the ground of inordinate delay (Para 3, 4, 11)

Dismissed. (E-5)

List of Cases cited :-

1. Central Coalfields Ltd. through its Chairman & Managing Director & ors. Vs Smt. Parden Oraon reported in 2021 SCC OnLine SC 299

2. General Fire & Life Assurance Corporation Ltd. Vs Janmahomed Abdul Rahim, AIR 1941 PC 6

3. Northern Indian Glass Industries Vs Jaswant Singh & ors., reported in AIR 2003 SC 234

4. Printers (Mysore) Ltd. Vs M.A. Rasheed & anr. reported in (2004) 4 SCC 460

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Sanjay Kumar Pandey, learned counsel for the petitioner, Mr. Pranab Ojha, learned Standing Counsel for the State-respondent and Shushil Kumar Mirshra, learned counsel for the respondent nos.2&3, who will file his vakalatnama in the Registry today itself.

2. This writ petition has been filed interalia for the following relief:-

"A. Issue a writ, order or direction in the nature of mandamus directing and commanding the respondent no.3 to decide the representation dated 07.02.2010 within the stipulated period."

3. Learned counsel for the petitioner submits that the petitioner was appointed on the post of Driver on 22.01.2009. A show cause notice dated 06.02.2010 was given by the respondent no.3 to him with respect to the fact that as to why his services be not terminated on the ground that he has concealed the fact regarding pendency of the criminal case against him. He further submits that the petitioner has submitted his reply to the show cause notice on 07.02.2010 but nothing has been done.

4. Learned Standing Counsel as well as learned counsel for the respondent nos.2&3 submits that the present writ petition is hopelessly barred by limitation, as pursuant to the show cause notice issued on 06.02.2010, the petitioner has slept over his rights for more than twelve years. He further submits that not even a single word has been mentioned in the present writ petition with regard to delay in filing same.

5. Learned counsel for the petitioner also could not dispute the aforesaid submissions made by the learned Standing Counsel for the State respondents.

6. It is settled law that the person, who is not vigilant and dormant about his right, cannot be allowed to agitate his right as has been held by the Apex Court in the case of ***Central Coalfields Limited through its Chairman and Managing Director & Ors. Vs. Smt. Parden Oraon*** reported in ***2021 SCC OnLine SC 299.***

7. The time-barred cases should not be entertained by Courts as the rights, which have accrued to others by reason of delay in approaching the Court, cannot be allowed to be disturbed unless there is a reasonable explanation for the delay. The vested rights of the parties should not be disrupted at the instance of a person, who is a guilty of culpable negligence. ***The Privy Council in General Fire and Life Assurance Corporation Ltd. Vs. Janmahomed Abdul Rahim, AIR 1941 PC 6***, relied upon the writings of Mr. Mitra in Tagore Law Lectures 1932, wherein it has been said that *"a law of limitation and prescription may appear to operate harshly*

and unjustly in a particular case, but if the law provides for a limitation, it is to be enforced even at the risk of hardship to a particular party as the Judge cannot, on applicable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by law."

8. In ***N. Balakrishnan Vs. M. Krishnamurthy, reported in (1998) 7 SCC 133,*** the Apex Court explained the scope of limitation and condonation of delay, observing as under:-

"The primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy for the redress of the legal injury so suffered. The law of limitation is thus founded on public policy."

9. In the case of ***Northern Indian Glass Industries Vs. Jaswant Singh & ors., reported in AIR 2003 SC 234***, the Apex Court has held that the High Court cannot ignore the delay and laches in approaching the writ court and there must be satisfactory explanation by the petitioner as how he could not come to the Court well in time.

10. Further in the the case of ***Printers (Mysore) Ltd. Vs. M.A. Rasheed & Anr. reported in (2004) 4 SCC 460,*** the Apex Court has held that the High Court should dismiss the writ petition on the ground of unexplained inordinate delay.

11. In view of the aforesaid, this Court finds no good ground to entertain the present writ petition. It is, accordingly, dismissed on the ground of inordinate delay.

(2022)04ILR A392
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ A No. 19015 of 2021

Sant Kumar ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohammad Umar Khan

Counsel for the Respondents:
A.S.G.I., Ms. Suman Jaiswal

Constitution of India,1950 - Article 226 - Territorial jurisdiction - Cause of action - Petitioner, resident of Gorakhpur, U.P., was posted at the Office of Commandant, 149 Btn, Shib Sagar, Assam at the time when his wife suffered from Covid-19 - representation/application for medical claim has been made before the DGP, CRPF, New Delhi - Held - merely because petitioner is resident of this State, no cause of action would arise within the territorial limits of Allahabad High Court - it is open to the petitioner to move an application/representation before the appropriate authority having jurisdiction - Dismissed as not maintainable (Para 11)

Dismissed. (E-5)

List of Cases cited :-

1. Rajendra Kumar Mishra Vs U.O.I. & ors. reported in (2005) 5 AWC 4542 All,

2. U.P. Rashtriya Chini Mill Adhikari Parishad Vs St.of U.P. reported in (1995) 4 SCC 738

3. Navinchandra N. Majithia Vs S. of Mah. reported in (2000) 7 SCC 640

4. Ambrish Kumar Saxena Vs S. Of U.P. Thru. Prin.Secy.(Karmik) U.P. Sectt. Lko. & Ors. Writ Petition No. 10001 (SS) of 2018 decided on 11.4.2018.

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Instructions passed on to the Court today is kept on record.

2. Heard Mr. Mohammad Umar Khan, learned counsel for the petitioner, Ms. Suman Jaiswal, learned counsel for the respondents.

3. This writ petition has been filed interalia for the following relief:-

"A. Issue a writ order or direction in the nature of mandamus, directing the respondents to release the amount of Rs. 4,88,570/- in favour of the petitioner after considering his claim regarding treatment of his wife from 09.05.2021 till the date of her death within a short stipulated period which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

B. Issue a writ order or direction in the nature of mandamus directing the respondents to pass a reasoned and speaking order on the application of the petitioner dated 21.06.2021 within a short stipulated period."

4. Learned counsel for the petitioner submits that while the petitioner was posted as Sub-Inspector at Shiv Sagar situated in the State of Assam, his wife suffered from Covid-19, therefore, treatment was given to her at Gorakhpur, which is permanent place of resident of the petitioner. He further submitted that certain expenses were incurred during the treatment of the petitioner's wife for which claim/representation has been moved before the respondent no.2, i.e. Director General of Police, Central Reserve Police Force (CRPF), C.G.O. Complex, New Delhi. However, the respondent no.4 has sent a letter dated 24.08.2021 to the respondent no.5 to proceed in accordance with law with respect to the medical claim made by the petitioner as the petitioner was posted at the Office within the jurisdiction of respondent no.5 at the time when the petitioner's wife suffered from Covid-19., therefore, it was within the jurisdiction of respondent no.5, who shall take decision in accordance with law.

5. Learned counsel for the respondents, on the basis of instructions received by her, submits that regarding similar issue, several writ petitions, one being Writ-A No.6850 of 2021, have been dismissed. She further submits that the medical reimbursement claim of the petitioner has been returned by the DIG, Group Centre, CRPF, Bhuvneshwar, Odisha to the Commandant-149 Bn, CRPF located in Jay Sagar, Shiv Sagar, Assam, vide letter dated 24.08.2021 with a direction that after looking into the objections, the file may be placed before the DIG, Range Hqr, CRPF, Bhuvneshwar. Therefore, neither the cause of action nor even part of cause of action arises under the territorial jurisdiction of this Court, as such, the present writ petition is not

maintainable. However, it is always open to the petitioner to move an application/representation before the appropriate authority having jurisdiction.

6. I have considered the submissions made by learned counsel for the parties as well as gone through the entire materials brought on record.

7. The petitioner, who is resident of Gorakhpur, U.P., was posted at the Office of respondent no.5, i.e. Commandant, 149 Btn, Shib Sagar, Assam at the time when his wife suffered from Covid-19 whereas the representation/application for medical claim has been made before the respondent no.2, DGP, CRPF, New Delhi. Therefore, merely because petitioner is resident of this State, no cause of action would arise within the territorial limits of this Court. Law in that regard has already been settled by a larger bench of this Court in ***Rajendra Kumar Mishra Vs. Union of India and others reported in (2005) 5 AWC 4542 All,*** wherein this Court in paras-39, 40 and 41 has observed as under:-

"39. Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law.

40. For the reasons given above we are of the opinion that the Chief of Army Staff can only be sued either at Delhi where he is located or at a place where the cause of action, wholly or in part, arises.

41. We may mention that a "cause of action" is the bundle of facts which, taken with the law applicable., gives the plaintiff a right to relief against the defendant. However, it must include some act done by the defendant, since in the absence of an act, no cause of action can possibly occur."

8. In case of ***U.P. Rashtriya Chini Mill Adhikari Parishad vs. State of U.P. reported in (1995) 4 SCC 738***, the Apex Court in para-14 has held as under:-

"14. .....The territorial jurisdiction of a Court and the "cause of action" are interlinked. To decide the question of territorial jurisdiction it is necessary to find out the place where the "cause of action" arose. We, with respect, reiterate that the law laid down by a four-Judge Bench of this Court in Nasiruddin case holds good even today despite the incorporation of an Explanation to Section 141 to the Code of Civil Procedure."

9. In case of ***Navinchandra N. Majithia vs. State of Maharashtra reported in (2000) 7 SCC 640,*** the Apex Court in para-38 has held as under:-

"38. "Cause of action" is a phenomenon well understood in legal parlance. Mohapatra, J. has well delineated the import of the said expression by referring to the celebrated lexicographies. The collocation of the words "cause of action, wholly or in part, arises" seems to have been lifted from Section 20 of the Code of Civil Procedure, which section also deals with the jurisdictional aspect of the courts. As per that section the suit could be instituted in a court within the legal limits of whose jurisdiction the "cause of action wholly or part arises....?"

10. This Court has also decided the same controversy in ***Writ Petition No. 10001 (SS) of 2018 (Ambrish Kumar Saxena vs. State Of U.P. Thru. Prin.Secy.(Karmik) U.P. Sectt. Lko. & Ors.) decided on 11.4.2018.***

11. In view of the above, this Court under special circumstances can not direct the respondents, which is not within the territorial jurisdiction of this Court to pass any positive orders in favour of the petitioner regarding medical claim. However, it is always open to the petitioner to move an application/representation before the appropriate authority having jurisdiction.

12. Accordingly, the present writ petition is **dismissed** as not maintainable.

(2022)04ILR A395
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Writ A No. 20751 of 2019
along with
other connected cases

C/M Adarsh Gramin Vidyalaya Sonakpur, Dist. Moradabad & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Arun Kumar Rana, Sri Sujeet Kumar, Sri Ashok Khare (Sr. Adv.)

Counsel for the Respondents:
C.S.C., Sri Seemant Singh

A. Civil Law - Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 - U.P. Basic Education (Amendment) Act' 2017 (U.P. Act No.2 of 2018) - U.P. Junior High School (Payment of Salaries of Teachers and other Employees) (Amendment) Act 2017 (U.P. Act No.3 of 2018) - Amendment in Section 2, insertion of clause (ee) in Section 2 of the definition clause - "Junior High School" means an institution in which education is impart from class sixth to class eight - petitioners institutions denied grant on the ground that the grant-in-aid cannot be accorded to a primary institution after introduction of the amendments - as per the stand of the State, Junior Basic School (primary institutions) imparting education upto Class V are outside the purview of 1978' Act - *Held* - primary sections which are integral part of Junior High Schools, whether established prior or later to the establishment of recognized and aided Junior High Schools shall have to be brought within the purview of the Payment of Salaries Act' 1978 as amended by the U.P. Act No.3 of 2018. (Amendment Act' 2017) - primary sections (class I to V) of a junior high school being its integral part or part of 'One school' cannot be discriminated by excluding it from the purview of the Act' 1978 - excluding primary sections of a recognized and aided Junior High School is not found based on an intelligible differentia which distinguishes the teachers of Classes VI to VIII from the teachers of Classes I to V of 'one institution' which are grouped together in a homogeneous class and cannot be differentiated - petitioners institutions falling in Group 'B' (Primary Sections recognized first and Junior High School) & Group 'C' (Junior High School recognized first and attached primary sections later) held to be covered under the provisions of the Payment of Salaries Act' 1978, as amended by 2017 Amendment namely U.P. Act No.3 of 2018 - State directed to reconsider their claims for providing grant-in-aid in light of the principle of 'composite integrality' or

"oneness of the institution" evolved in Jai Ram Singh [Para 200, 201 (ii)]

B. Civil Law - Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 - U.P. Basic Education (Amendment) Act' 2017 (U.P. Act No.2 of 2018) - U.P. Junior High School (Payment of Salaries of Teachers and other Employees) (Amendment) Act 2017 (U.P. Act No.3 of 2018) - *Held* - petitioners institutions falling in group 'D' (Recognized primary and junior High Schools receiving grant-in-aid by wrong orders) may lay their claim before the appropriate authority, if they incidentally fall in Group 'B' & 'C' - However, such institutions which do not fall in Group 'B' & 'C' would not be entitled to the benefit of this decision [Para 201 (iii)]

C. Civil Law - Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 - U.P. Basic Education (Amendment) Act' 2017 (U.P. Act No.2 of 2018) - U.P. Junior High School (Payment of Salaries of Teachers and other Employees) (Amendment) Act 2017 (U.P. Act No.3 of 2018) - petitioners' institutions falling in group 'A' (Unaided Junior High Schools) cannot sustain the challenge to the validity of the Amendment to the 1978' Act by U.P. Act No.3 of 2018, being unaided Junior High Schools [Para 201 (i)]

D. Constitution of India, Article 14, Article 226 - Maintainability - Prejudice - no prejudice needs to be proved in cases where breach of fundamental right is asserted/alleged - while challenging any action or order of the State or executive, all possible objections have to be raised in one action and separate writ petitions for the same cause of action cannot be entertained (Para 200)

Petitioners institutions applications seeking grant-in-aid rejected in view of - the Amendment Act' 2017 (U.P. Act No.3 of 2018) - Held - it was open for the petitioners institutions to challenge the constitutional validity of the Amendment Acts' 2017 while challenging the orders of rejection - Court rejected objection to the maintainability of the writ petitions raised on the ground that the petitioner's institutions cannot be said to be prejudiced by the amendments - writ petitioners cannot be non-suited on the grounds that the action before the Court has not been brought by the teachers employed by them; and that the management has no legal right much less a fundamental right to seek grant-in-aid [Para 200 (1)]

Allowed. (E-5)

List of Cases cited:-

1. Vinod Sharma & ors. Vs Director of Education (Basic) U.P. & ors. 1998 (3) SCC 404.

2. St. of U.P. & ors. Vs Pawan Kumar Divedi. 2006 (7) SCC 745.

3. St. of U.P. & ors. Vs Pawan Kumar Divedi 2014 (9) SCC 692.

4. Paripurna Nand Tripathi & anr. Vs St. Of U.P. & ors. 2015 (3) ADJ 567.

5. Society for Unaided Private Schools of Rajasthan Vs U.O.I. 2012 (6) SCC 1.

6. State of U.P. & ors. Vs Bhupendra Nath Tripathi & ors. 2010 (13) SCC 203.

7.Bhartiya Seva Samaj Trust & anr. Vs Yogeshbhai Ambalal Patel & anr. 2012 (9) SCC 310.

8. Jai Ram Singh & ors. Vs St. of U.P. & ors. 2019 (6) ADJ 255.

9. St. of T.N. & ors. Vs K. Shyam Sunder & ors. 2011 (8) 737.

10. Namit Sharma Vs U.O.I. 2013 1 SCC 745.

11. St. of Andhra Pradesh & ors. Vs Mcdowell & Co. & ors. 1996 3 SCC 709.

12.St. of U.P. Vs Principal Abhay Nandan and Inter College AIR 2021 SC 496.

13.Society for Unaided Private Schools of Rajasthan 2012 6 SCC I .

14.St. of U.P. & ors. Vs Bhupendra Nath Tripathi & ors. 2010 (13) SCC 203.

15.Unnikrishnan J.P. Vs St. of A.P 1993 1 SCC 645

16.St. of Punj. in Ghulam Qadir Vs Special Tribunal & ors. 2002 (1) SCC 33.

17.Dwarkadas Shrinivas Vs The Sholapur Spinning & Weaving Co. Ltd. & Ors. AIR 1954 SC 119.

18.Mahant Moti Das Vs S.P. Sahi, The Special Officer in charge of Hindu Religious Trust & ors. AIR 1959 SC 942.

19.Hamdard Dawakhana & anr. Vs U.O.I. & Ors AIR 1960 SC 554.

20.Ashwani Kumar Vs U.O.I. 2020 (13) SCC 585

21.Shri Prithvi Cotton Mills Ltd. & ors. Vs Broach Borough Municipality & ors AIR 1970 SC 192. 128

22.S.R. Bhagwat & ors. Vs St. of Mysore 1995 (6) SCC 16.

23.Cauvery Water Disputes Tribunal 1993 Supp. (1) SCC 96(II).

24.G.C. Kanungo Vs St.of Orissa 1995 (5) SCC 96

25. Madan Mohan Pathak & anr. Vs U.O.I. & ors. 1978 (2) SCC 50.

26. Manjula Bhashini & ors. Vs The Managing Director,A.P. Women's Cooperative Finance Corporation Ltd. & anr. 2009 (8) SCC 431.

27.Mahant Moti Das Vs S.P. Sahi, The Special Officer in charge of Hindu Religious Trust & Ors AIR 1959 SC 942.

28.Oriental Insurance Co.Ltd Vs Meena Variyal & ors. 2007 (5) SCC 428.

29.D.S. Nakara & ors. Vs U.O.I. 1983 (1) SCC 305.

30.Delhi Transport Corporation Vs DTC Mazdoor Congress 1991 Sup (1) SCC 600.

31.Pioneer Urban Land & Infrastructure Ltd. & anr. Vs U.O.I. & ors., 2019 (8) SCC 416.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard Sri Ashok Khare learned Senior Counsel assisted by Sri Sujeet Kumar and Sri Arun Kumar Rana, Sri Samir Sharma learned Senior Counsel, Sri Girjesh Tiwari, Sri Yogesh Kumar Saxena, Ms. Chhaya Gupta, Sri K. Shahi, Sri Anand Tripathi for the petitioners and all other counsels appearing in the connected writ petitions. Learned Advocate General assisted by Ms. Archana Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. The main relief sought in the petitions in this batch is:-

"Issue a writ, order or direction declaring the U.P. Basic Education (Amendment) Act' 2017 (U.P. Act No.2 of 2018) and the U.P. Junior High School (Payment of Salaries of Teachers and other Employees) (Amendment) Act 2017 (U.P. Act No.3 of 2018) as ultra vires to the Constitution".

I. Introduction:-

3. In the State of U.P., the education upto class XII is governed by two Acts mainly, (i) The U.P. Intermediate Education Act' 1921; (ii) The U.P. Basic Education Act' 1972. The institutions which are engaged in imparting elementary education,

secondary and higher secondary education in the State can be categorized as under:-

(a) A school established, owned or control-led by the appropriate government or a local authority;

(b) An aided school receiving aid or grants to meet whole or parts of its expenses from the appropriate government or the local authority;

(c) An unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate government or the local authority;

(d) The school pertaining to specified category such as Kendriya Vidyalaya, Navodaya Vidyalaya, Sainik School etc.

4. The Non-Governmental institutions which are receiving the grant-in-aid from the State government, in the matter of payment of salaries to its teachers and other employees, are governed by:-

(1) The Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act' 1971.

(2) The Uttar Pradesh Junior High School (Payment of Salaries of Teachers and other Employees) Act' 1978.

(a) The Challenge:-

5. The petitioners herein are recognized institutions imparting education from Classes I to VIII. They have been categorized in four categories in view of the submissions of the learned Advocate General:-

Category A- Unaided Junior High Schools

Category B- Primary Sections recognized first and Junior High School.

Category C- Junior High School recognized first and attached primary sections later.

Category D- Recognized primary and junior High Schools receiving grant-in-aid by wrong orders.

6. Some of the petitioners institutions had been receiving grant-in-aid and salary of the teachers of the primary sections/ school which had been withdrawn by individual orders passed by the Special Secretary, Basic Education and some of the petitioners institutions have been denied grant on the ground that the grant-in-aid cannot be accorded to a primary institution after introduction of the amendments by U.P. Act No.2 of 2018 and U.P. Act No.3 of 2018 in the Act' 1972 and the Act' 1978; respectively1.

7. We may note, at the outset, that the petitioners though assailed individual orders passed by the State Government denying the benefit of aid to the concerned institutions by seeking a writ of certiorari but the learned counsels for the petitioners have addressed us only with respect to the validity of the Amendment Acts. It was agreed by the Counsels for the petitioners that the correctness of the individual orders would depend upon the answer to the main question with respect to the constitutional validity of the Amendment Acts' 2017. The submission is that the only basis to reject the claim for bringing the institution in the grant-in-aid list is the Amendment Acts No.2 of 2018 & No.3 of 2018; the individual facts of each case, hence, need not to be examined. The outcome of the challenge would determine the rights and liability of the parties before us and as such we leave it open for the parties to draw

appropriate proceedings depending upon the outcome of this judgment.

8. All rights and contentions of the parties consequently in this respect are left open.

(b) The legislative scheme prior to the amendment:-

9. The Board of Basic Education came to be constituted by the U.P. Basic Education Act' 1972 (U.P. Act No.34 of 1972)2 promulgated on 19th August 1972. The Statement of Objects and Reasons stated thereof is as under:-

"Statement of Objects and Reasons-(1) The responsibility for primary education has so far rested with the Zila Parishads in rural areas and with Municipal Boards and Mahapalikas in urban areas. The administration of education at this level by the local bodies was not satisfactory, and it was deteriorating day by day. There was public demand for the Government to take immediate steps for improving the education at this level. Hence for reorganizing, reforming and expanding elementary education it became necessary for the State Government to take over its control into its own hands.

(2) Repeated demands had been made by all sections of the Legislature also for the take-over of the control of elementary education by the State Government from local bodies. Echoing this public demand, the Governor had also in his address to both the Houses of the Legislature on March 20, 1972, said that in order to strengthen the primary and junior high schools and to increase their usefulness Government was going to assume full responsibility for its control and management.

(3) With a view to taking effective steps for securing the object of Article 45 of the Constitution, and fulfilling the assurances given in the Governor's address and respecting the popular demand it was necessary to entrust the conduct and control of elementary education to a virile institution which may be expected to inject new life into it and to make it progressive. It was, therefore, decided by the Government to transfer the control of primary education from the local bodies to the Uttar Pradesh Board of Basic Education with effect from the educational session 1972-73.

(4) The educational session had commenced and the Legislative Council was not in session and if immediate action had not been taken, the matter would have had to be postponed till the educational session 1973-74, with the result that the desired object would not have been achieved. Therefore, in order to implement the said decision immediately, the Uttar Pradesh Basic Education Ordinance, 1972, was promulgated.

(5) The Uttar Pradesh Basic Education Bill, 1972, is being introduced to replace the said Ordinance."

The long title of the Act reads that:-

"An act to provide for the establishment of a Board of Basic Education and for matter connected therewith".

10. The expression "Basic Education" as defined in Section 2(b) of the original enactment means:-

"basic education" means education up to the eighth class imparted in schools other than high schools or intermediate colleges, and the expression

"basic schools" shall be construed accordingly;

11. Upon constitution of the Board in terms of Section 3 of the Act, the elementary educational institutions which were under the control of the Gram Panchayat, Zila Panchayat, Municipalities or other local bodies stood transferred under the control and management of the Board of Basic Education and supervision of the State Government. The Act' 1972, thus, had been enacted for reorganizing, reforming and expanding elementary education. The State Government had taken full responsibility for its control and management in order to strengthen the primary and junior high schools to achieve the object of Article 45 of the Constitution of India. The ultimate object and purpose of enactment of Act' 1972 was to improve the education at the elementary level.

12. In exercise of powers under sub-section (1) of Section 19 of the Act' 1972, two separate rules namely Uttar Pradesh Recognised Basic Schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules' 19753 and the Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules' 19784 were framed.

13. These Rules were framed to regulate the terms and conditions of recruitment and services of teachers of Junior Basic School and Junior High school; respectively. The expressions "Junior Basic School" and "Recognized School" defined in Rules' 1975 are as under:-

"Junior Basic School" means an institution other than High Schools or Intermediate Colleges imparting Education up to the V Class."

"Recognised School" means any Junior Basic School, not being an institution belonging to or wholly maintained by the Board or any local body, recognised by the Board before the commencement of these rules for imparting education from Classes I to V."

14. The expressions "Junior High School" and "Recognized School" defined in Rules' 1978 are as under:-

"Junior High School" means an Institution other than High School or Intermediate college imparting education to boys or girls or both from Classes VI to VIII (inclusive)."

"Recognised School" means any junior High School not being an institution belonging to or wholly maintained by the Board or any local body recognised by the Board as such."

15. Rules 4 & 5 of the Rules' 1975 oblige management of recognized school to provide adequate infrastructure in accordance with the standard and specification specified by the Board and read that:-

"4. Financial resources. - In every recognised school adequate financial resources shall be made available by the management of such school for its efficient working and adequate facilities shall be provided in accordance with such standard as may be specified by the Board for teaching the subjects in respect of which such school is recognised.

5. Buildings and equipment. - In every recognised school, arrangements shall be made for such buildings, lavatories, playgrounds and equipment as

are in accordance with the specifications specified by the Board and for the construction of well-ventilated and clean buildings in hygienic surroundings".

Rules 6 & 7 provide that :-

"6. **Tuition Fees** Subject to the provisions of Rule 7, tuition fee may be charged in any recognised school at a rate not exceeding Rs.15 per month and no other amount by whatever name called either as fee, donation or contribution, shall be charged from the students.

7. **Exemption from tuition fee-** Subject to the provisions of paras 106 to 114 of the Education Code, so far tray may be applicable, free education shall be provided in any recognised school to 25 per cent of the number of students on the rules of such school."

16. The expression "Board" as defined in 1978 Rules means:-

"Board means the Uttar Pradesh Board of Basic Education constituted under Section 3 of the Act."

17. The U.P. Junior High School (Payment of Salaries of Teachers and Other Employees) Act' 1978, (U.P. Act No.6 of 1979)5 came to be enacted by the U.P. Legislature to regulate the payment of salaries to teachers and other employees of Junior High Schools receiving aid out of the State funds and to provide for the matters connected therewith. The Act came into force w.e.f 01.05.1979.

The "institution" defined in 1978' Act means a recognized institution for the time being receiving maintenance grant from the State Government.

The expressions "teachers" and *"salary"* in Section 2(h) and 2(i) of the 1978 Act are defined as:-

"2(h) *"Teacher"* of an institution means a headmaster or other teacher in respect of whose employment maintenance grant is paid by the State Government to the institution."

"2 (i) *"Salary"* of a teacher or employee means the aggregate of the emoluments, including dearness or any other allowance, for the time being payable to him at the rate approved for the purpose of payment of maintenance grant."

Section 10 of the 1978' Act provides that:-

"10. Liability in respect of salary. - (1) The State Government shall be liable for payment of salaries of teachers and employees of every institution due in respect of any period after the appointed day.

(2) The State Government may recover any amount in respect of which any liability is incurred by it under sub-section (1) by attachment of the income from the property belonging to or vested in the institution as if that amount were an arrear of land revenue due from the institution.

(3) Nothing in this section shall be deemed to derogate from the liability of the institution for any such dues to the teacher or employee."

18. Section 13-A makes transitory provision in respect to such institution which is receiving maintenance grant from the State Government and in respect of such teachers and employees whose salary are paid from the maintenance grant and which is upgraded to High school and Intermediate standard. Sub section (2) of Section 13-A provides that:-

"13-A(2) For the purposes of this section the reference to the students wherever they occur in section 5, shall be construed as reference to the students of

classes up to junior High School level only."

(c) The Amendments of 2017/ 2018:-

19. By the *amendment Act*, U.P. Act No.2 of 2018 (hereinafter referred as U.P. Act No.2 of 2018), two clauses have been inserted in the definition clause under Section 2 of the Act' 1972.

20. For ready reference, the U.P. Act No.2 of 2018 is reproduced here-

1.(1) This Act may be called the Uttar Pradesh Basic Education (Amendment) Act, 2017.

(2) It shall be deemed to have come into force on August 19, 1972.

Provided that the provisions of this sub-section shall not affect anything done or any action taken before 26th October 2017 under the principal Act.

2. In section 2 of the Uttar Pradesh Basic Education Act 1972, after clause (d) the following clauses be inserted, namely:-

(d-1) "Junior Basic School" means a basic school in which education is imparted upto class fifth.

(d-2) Junior High School means a basic school in which education is imparted to boys or girls or to both from class sixth to class eight.

3. (1) The Uttar Pradesh Basic Education (Amendment) Ordinance 2017 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the provisions of the principal Act as amended by the Ordinance referred to in sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of the principal Act as amended by this Act as if the provisions of this Act were in force at all material times.

21. By the U.P. Act No.3 of 2018 (hereinafter referred as U.P. Act No.3 of 2018), amendments have been brought in 1978' Act with the insertion of clause (ee) in Section 2 of the definition clause.

22. For ready reference, the U.P. Act No.3 of 2018 is reproduced here:-

1 (1) This Act may be called the Uttar Pradesh Junior High School (Payment of Salaries of Teachers and other Employees) (Amendment) Act 2017.

(2) It shall be deemed to have come into force on January 22, 1979.

Provided that the provisions of this sub-section shall not be affect anything done or any action taken before 26the October 2017 under the principal Act.

3. In Section 2 of the Uttar Pradesh Junior High School (Payment of Salaries of Teachers and other Employees) Act 1978, after clause (e) the following clause shall be inserted, namely:-

(ee) "Junior High School" means an institution which is different High School or Intermediate College in which education is impart to boys or girls or to both from class sixth to class eight.

3(1) The Uttar Pradesh Junior High School (Payment of Salaries of Teachers and Other Employees) (Amendment) Ordinance 2017 is hereby repealed

(2) Notwithstanding such repeal, anything done or any action taken under the provisions of the principal Act as amended by the Ordinance referred to in sub-section (1) shall be deemed to have been done or taken under the co-responding provisions of the principal Act as if the provisions of this Act were in force at all material times."

(d) History of Litigation:-

23. A question arose in the year 1991 in Writ Petition No.24478 of 1988 with regard to the payment of salary to the teachers of the primary sections who were working in the institution which was Junior High School. They claimed salary from the State exchequer as was being accorded to the teachers of Junior High School. Their claims were decided by this Court in the following manner:-

"I have heard learned counsel for the petitioners as also the learned standing counsel. The petitioners may be teaching the Primary classes but they are working in the institution which is junior High School and they are teachers of the a junior High School which runs the classes from 1 to 8. All the classes which are being though in the school constitute one unit and they are not separated Unit. The respondents have also not said that they are separate unit. In fact Annexure 2 appended to the writ petition makes it abundantly clear that the school is one unit in which education is imparted to primary classes and junior classes by the teachers who are working under the one management and one Head Master. That being so that petitioners cannot be deprived of the benefit of payment of salary Act and they are entitled to be paid under the provision of the said Act. The petitioners are entitled to be paid their salary under the provisions of the Payment of Salary Act as they are teachers of the junior High School and the order contained in Annexure-2 lands support to their contention that they are also entitled to get salary in accordance with the provision of payment of Salary Act."

24. The stand of the State before this Court was that the teachers of primary sections were not entitled to payment of salary from the State exchequer or maintenance grant as the Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 (1978 Act) was not applicable to the primary sections, namely classes I to V, but covered only classes VI to VIII. This Court repelled the said argument and directed the State Government to bring the teachers working in the primary sections of the Junior High School within the purview of 1978' Act and pay their salary according to the said Act.

25. The challenge to the said decision by the State in the Special Leave to Appeal and Review Petition before the Apex Court was turned down. As there was no specific order to pay arrears of salary to the teachers, a dispute arose on account of non-payment of arrears of salary which the teachers were claiming from 01.07.1975, which had resulted in institution of another Writ Petition No.24284 of 1995 wherein specific direction was sought to pay the arrears of salary since 01.07.1975. The said writ petition was disposed of on 07.10.1996 with the direction to pay the arrears to the teachers w.e.f. 29.08.1991, the date of the order passed by this Court in the previous writ petition.

26. Aggrieved teachers went to the Apex Court against the order dated 07.10.1996 raising a grievance that the High Court had curtailed the relief from what was envisaged under the judgement and order dated 29.08.1991. It was asserted that they were entitled for the arrears w.e.f. 01.07.1975 and not from 29.08.1991. This matter was decided on 20.03.1998 by three judges bench of the Supreme Court in **Vinod Sharma and Ors. v. Director of Education (Basic) U.P. and Ors6.** The appeals were allowed and direction was issued to pay salary to the teachers under

the Act' 1978 (w.e.f. from the date the said Act had been made applicable in the institution concerned, i.e. from the date junior high school teachers of that institution were paid salary under the 1978' Act.

27. This decision has been referred as **Vinod Sharma-II** in all other subsequent decisions.

28. In another matter before the Apex Court, a question arose as to whether teachers of privately managed primary schools and primary sections of Junior High schools were eligible to receive their salary from the State Government. The two Judges Bench in the report **State of U.P. and others Vs. Pawan Kumar Divedi7**, felt that the three Judges Bench decision of the Apex Court in **Vinod Sharma II** required reconsideration.

29. The relevant portion of the reference order dated 08.09.2006 reads as follows:

"In the present appeals, submissions which were similar to those raised in the writ petitions filed by Vinod Sharma and others before the High Court and in the special leave petition in this Court have been repeated and reiterated. What has been highlighted is the fact that having regard to the various government orders, it would be quite evident that the State Government had never intended to bring the primary sections of the different junior basic schools, junior high schools and intermediate colleges within the scope of the Payment of Salary Act, 1978 and that a deliberate and conscientious decision was, therefore, made in treating the "junior basic schools" differently from "junior high schools". It is the latter category of schools that were brought within the scope of the Payment of Salary Act, 1978.

While noticing the fact that "junior basic schools" and "junior high schools" were treated differently, the High Court and, thereafter, this Court appear to have been swayed by the fact that certain schools provided education from Classes I to X as one single unit, although, the same were divided into different sections, such as, the primary section, the junior high school section, which were combined together to form the junior basic section from Classes I to VIII, and the high school section comprising Classes IX and X. In fact, in one of these appeals where a recognised Sanskrit institution is involved, the said institution is imparting education both for the primary section, the high school section, the intermediate section and the BA section. The Mahavidyalaya is thus imparting education from Class I up to graduate level in a recognised institution affiliated to the Sampurnanand Sanskrit University, Varanasi. It has been contended by Dr. Padia on behalf of the institution that the said institution is one unit having different sections and the teachers of the institution are teachers not of the different sections but of the institution itself and as a result no discrimination could be made amongst them. This was precisely one of the arguments advanced in Vinod Sharma1 which was accepted by this Court.

However, it appears to us that both the High Court and this Court appear to have lost sight of the fact that education at the primary level has been separated from the junior high school level and separately entrusted under the different enactments to a Board known as the Uttar Pradesh Board of Basic Education constituted under Section 3 of the Uttar Pradesh Basic Education Act, 1972 and the same Board was entrusted with the

authority to exercise control over "junior basic schools" referred to in the 1975 Rules as institutions imparting education up to the Vth class.

In our view, the legislature appears to have made a conscientious distinction between "junior basic schools" and "junior high schools" and treated them as two separate components comprising "junior basic education" in the State of Uttar Pradesh. Accordingly, in keeping with the [pic]earlier government orders, the Payment of Salary Act, 1978 did not include primary sections and/or separate primary schools within the ambit of the 1978 Act.

Of course, it has been conceded on behalf of the State Government that an exemption was made in respect of 393 schools which had been continuing to function from prior to 1973 and the teachers had been paid their salaries continuously by the State Government. In the case of the said schools, the State Government took a decision to continue to pay the salaries of the teachers of the primary section of such schools.

Apart from the above, it has also been submitted by Mr Dinesh Dwivedi, learned Senior Counsel appearing for the State of Uttar Pradesh that payment of salaries of teachers of recognised primary institutions must be commensurate with the State's financial condition and capacity to make such payment.

Having regard to the contentions of the respective parties, the issue decided in Vinod Sharma case that teachers of the primary sections of recognised junior basic schools, junior high schools and high schools were entitled to payment of their salaries under the Payment of Salary Act, 1978, merits reconsideration."

30. This reference was decided by the Apex Court in **State of U.P. and others Vs. Pawan Kumar Divedi8.**

31. In **Pawan Kumar Divedi8** it was argued by the State that the legislature made a conscientious distinction between "junior basic schools" and "junior high schools" and treated them as two separate components of "basic education" in the State of Uttar Pradesh. The education at the primary level had been separated from the Junior High School level and separately entrusted under different enactments to the Board known as the 'U.P. Board of Basic Education' constituted under Section 3 of the 1972 Act though the same Board was entrusted with the authority to exercise control over Junior basic schools referred to in 1975 Rules as "institutions" imparting education upto class V.

32. The Constitution Bench posed a question to itself for examining the correctness of the view in Vinod Sharma-II that necessary consideration had to be made of the aspect whether there was a separation of education at the primary level (Junior Basic level) from the Junior High School level with the constitution of Uttar Pradesh Board of Basic Education under the 1972 Act and entrustment of the Board with the authority to exercise control over Junior Basic Schools, referred to in the 1975 Rules as institutions imparting education upto class V and whether such an arrangement rendered the view taken by the Apex Court in Vinod Sharma-II bad in law. The State argued that the 1978' Act did not cover teachers of primary sections of the Junior High schools. The management was liable to pay salary of teachers according to the 1975 Rules. Under the 1978 Act, there was no provision for payment of salaries to

the teachers in Junior basic schools (primary schools) by the State Government.

33. On behalf of the teachers, it was submitted that there was an obligation on the State to provide aid to Classes I to VIII and exclusion of Junior basic school sections of the same Junior High School from Government aid was discriminatory and impermissible classification. Referring to *Article 21-A* of the Constitution, it was submitted that the State had an obligation to provide grant-in-aid to basic education or basic schools (Classes I to VIII), corresponding to the students of 6 to 14 years. The classification separating Classes I to V from Junior High School for the purpose of aid was discriminatory and without any reasonable objective or any rational nexus. It was also urged that the 1978 Act contemplated the Junior High School as including the Junior Basic School, i.e., Classes I to V wherever the components of Junior Basic Schools and Senior Basic Schools were together leading to Junior High School examination. The schools having the Junior Basic Schools and the Senior Basic Schools (Junior High Schools) either separately or together were being governed under the same Board, i.e., the Board of Basic Education as per the provisions of the 1972 Act. The aid granted to the schools having Classes VIII and below was brought under the statutory scheme of payment of salary from State Exchequer through the 1978' Act. Excluding Classes I to V which were part of the 'basic school' being in the same school or institution from the operation of the 1978' Act was irrational.

34. While answering the reference, the Constitution Bench noted that the expression "Junior High School" is not defined in 1978 Act and proceeded to determine the meaning of the expression for the purpose of 1978' Act. While doing so, it has deliberated on the State's obligation to grant aid to recognised educational institutions imparting basic education corresponding to students of 6 to 14 years. The relevant part of the Constitution Bench judgement in **Pawan Kumar Divedi8** on the aspect of constitutional philosophy in respect of the State's obligation needs to be noted as under:-

"33.....Before insertion of *Article 21-A* in the Constitution by 86th *Amendment Act,* 2002 which received the assent on 12.12.2002, this Court in Unnikrishnan3 observed that the children up to the age of 14 years have a fundamental right to free education.

34. Article 45 which was under consideration in Unnikrishnan3 reads that "the State shall endeavour to provide, within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years."

35. In paragraph 172 of the Report, the Constitution Bench in Unnikrishnan3 said:

"172. Right to free education for all children until they complete the age of fourteen years (Art. 45). It is noteworthy that among the several articles in Part IV, only Article 45 speaks of a time-limit; no other article does. Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the State flout the said direction even after 44 years on the ground that the article merely calls upon it to "endeavour to provide" the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44

years -- more than four times the period stipulated in Article 45 -- convert the obligation created by the article into an enforceable right? In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in Article 45. It is relevant [pic]to notice that Article 45 does not speak of the "limits of its economic capacity and development" as does Article 41, which inter alia speaks of right to education. What has actually happened is -- more money is spent and more attention is directed to higher education than to -- and at the cost of -- primary education. (By primary education, we mean the education, which a normal child receives by the time he completes 14 years of age.) Neglected more so are the rural sectors, and the weaker sections of the society referred to in Article 46. We clarify, we are not seeking to lay down the priorities for the Government -- we are only emphasising the constitutional policy as disclosed by Articles 45, 46 and 41. Surely the wisdom of these constitutional provisions is beyond question. This inversion of priorities has been commented upon adversely by both the educationists and economists." Then, in paragraph 175, the Court stated:

"175. Be that as it may, we must say that at least now the State should honour the command of Article 45. It must be made a reality -- at least now. Indeed, the National Education Policy 1986 says that the promise of Article 45 will be redeemed before the end of this century. Be that as it may, we hold that a child (citizen) has a fundamental right to free education up to the age of 14 years." In paragraph 176 in Unnikrishnan3, the Court said as follows:

"176. This does not however mean that this obligation can be performed only through the State Schools. It can also be done by permitting, recognising and aiding voluntary non-governmental organisations, who are prepared to impart free education to children. This does not also mean that unaided private schools cannot continue. They can, indeed, they too have a role to play. They meet the demand of that segment of population who may not wish to have their children educated in State-run schools. They have necessarily to charge fees from the students. In this judgment, however, we do not wish to say anything about such schools or for that matter other private educational institutions except "professional colleges'. This discussion is really necessitated on account of the principles enunciated in Mohini Jain v. State of Karnataka (1992) 3 SCC 666 and the challenge mounted against those principles in these writ petitions."

36. In TMA Pai Foundation2, the eleven-Judge Constitution Bench approved the view of Unnikrishnan3 to the extent it was held in that case that primary education is a fundamental right. Question 9 and its answer (Pg. 590 of the Report) read as under:

"Q. 9. Whether the decision of this Court in Unni Krishnan, J.P. v. State of A.P. (except where it holds that primary education is a fundamental right) and the scheme framed thereunder require reconsideration/modification and if yes, what?

The scheme framed by this Court in Unni Krishnan case and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or

profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering."

37. The statement by the five-Judge Constitution Bench in Unnikrishnan3 that primary education is fundamental right is echoed in HP State Recognised Higher Schools Managing Committee4 as well. The three-Judge Bench in paragraphs 16 and 17 (pgs. 514-515 of the Report) reiterated the constitutional mandate to the state to provide free education to the children up to the age of 14. The three-Judge Bench said:

"16. The constitutional mandate to the State, as upheld by this Court in Unni Krishnan case -- to provide free education to the children up to the [pic]age of fourteen -- cannot be permitted to be circumvented on the ground of lack of economic capacity or financial incapacity.

17. It is high time that the State must accept its responsibility to extend free education to the children up to the age of fourteen. Right to education is equally guaranteed to the children who are above the age of fourteen, but they cannot enforce the same unless the economic capacity and development of the State permits the enforcement of the same. The State must endeavour to review and increase the budget allocation under the head "Education'. The Union of India must also consider to increase the percentage of allocation of funds for "Education" out of the Gross National Product."

35. It was then observed:-

"As noticed, the constitutional *obligation of the state to provide for free and compulsory education of children till they complete the age of 14 years is beyond doubt now."*

36. On the issue of interpretation of the expression "Junior High School", the Constitution Bench in **Pawan Kumar Divedi8** has negatived the contention advanced on behalf of the State that the definition of "Junior High School" as contained in the 1978 Rules should be read and adopted while interpreting the provisions of the 1978 Act. Noticing Section 2(j) of the 1978 Act which says that the words and expressions defined in the 1972 Act and not defined in that Act shall have the meaning assigned to them in the 1972 Act, it was noted that neither the 1972 Act nor the 1978 Act had defined the expression "Junior High School" and it merely referred to it as examination.

37. It was argued by the State before the Constitution Bench that the expression "Junior High School" in the 1978 Rules must govern and influence the interpretation of the expression not defined in 1972 Act and 1978 Act. Repelling the same, it was held that the rules made under a different enactment for a different purpose could govern a separate enactment viz, the 1978 Act for payment of salaries. The definition of "Junior High School" in the 1978 Rules did not exhaust the scope of the expression "Junior High School". Moreover, a prior rule could be taken in aid to construe a subsequent enactment. It was, thus, held that:-

"We find merit in the argument of Dr. M.P. Raju that the schools having the Junior Basic Schools and the Senior Basic Schools either separately or together are under the same Board, i.e., the Board of Basic Education, as per the 1972 Act. Moreover, any other view may render the provisions of the 1978 Act unconstitutional on the ground of discrimination. In our considered view, any interpretation which

may lead to unconstitutionality of the provision must be avoided. We hold, as it must be, that Junior High School necessarily includes Classes I to V when they are opened in a Senior Basic School (Classes VI to VIII) after obtaining separate recognition and for which there may not be a separate order of grant-in-aid by the Government.

We accordingly affirm the view taken by the three-Judge Bench in Vinod Sharma. Our answer to the question is in the affirmative."

38. Subsequent to that, in **Paripurna Nand Tripathi & another Vs State Of U.P. & others9**, a Division Bench of this Court noticing the effect of insertion of *Article 21-A* in the Constitution and the Right of Children to Free and Compulsory Education Act' 2009 mandating the State to provide free and compulsory education to all children of the age six to fourteen years, has observed that the private institutions imparting education to children of the said age group are performing and sharing the obligations of the State. Consequently, a duty is cast upon the State Government not only to provide the grant-in-aid to such institutions but also make provisions for requisite infrastructure subject to reasonable restriction laid down by it. Further observing that the pitiable conditions in which teachers in private unaided institutions were working and need to provide quality education to the large majority of children of the said age group coming from the marginalized sections of the society, in rural and semi urban areas, it was time for the State Government to revisit its age old policy in the light of the constitutional amendment and the law laid down by the Apex Court in **Society for Unaided Private Schools of Rajasthan V. Union of India10, State of U.P. and others v. Bhupendra Nath Tripathi and others11, Bhartiya Seva Samaj Trust and another Vs. Yogeshbhai Ambalal Patel and another12 and Pawan Kumar Divedi8.**

39. Emphasis was laid that to provide quality education, it is necessary that trained and competent teachers are appointed and necessary infrastructure is also made available to such institutions so that the students will not be deprived of quality education.

40. In furtherance of the same, the learned Single Judge of this Court in Writ-C No.62182 of 2015 (Gram Vikash Sewa Samiti & Another Vs. Union Of India And 4 Others) on 05.11.2015 had issued the following direction:-

"8. In view of the above, this petition is disposed of with a direction to the second respondent to ensure compliance of the directions issued by this Court in the case of Paripurna Nand Tripathi (supra) and frame policy in relation to Grant-in-aid to unaided institutions in light of the Constitutional mandate and *Article 21-A* and the provisions of the Right of Children to Free and Compulsory Education Act, 2009 expeditiously, preferably within a period of three months from the date of production of certified copy of this order before the Principal Secretary (Basic Education U.P., Lucknow)."

41. Pursuant to the decision rendered in **Paripurna Nand Tripathi9**, the State formulated a policy with respect to maintenance grant (aid) to primary educational institutions attached to non government aided secondary institutions with the issuance of the government order dated

27.10.2016, which provided that various steps have been taken by the State Government under Sarva Shiksha Abhiyan to achieve the objectives of RTE Act and the State has formulated the norms of establishing primary school within one kilometer from the residence of the child in a locality having population of not less than 3000 people. It was stated therein that bearing in mind the aforesaid standard, the State had opened 26,459l new primary institutions under the aegis of Sarva Shiksha Abhiyan. In total, approximately 1,13,000 primary institutions were being run in the entire state under the management of the Board of Basic Education. It was noted that as per the provisions of RTE Act and the 2011 Rules framed by the State thereunder, only 2055 localities had been left where primary institutions were to be established. It was further recorded that in the annual working plan and budgetary allocation for 2016-17, the State had earmarked 1652 localities in which the primary institutions were to be established. A proposal for establishment of primary institutions in these localities were forwarded to the Union Government but it was not sanctioned by the Project Approval Board. On overall assessment of the aforesaid situation, the State had proceeded to formulate the following principles for extending the benefit of grant-in-aid to private unaided primary sections:-

"a) At the outset the issue of grant in aid would only be considered with respect to 2055 identified localities in which no primary education institution is established by the Board;

b) Private and unaided primary education institutions which are present in these 2055 localities and which had been established prior to 21 June 1973 alone would be considered for being taken under the grant in aid scheme;

c) The primary school must be one whose permanent recognition for Classes 1 to 8 had been granted simultaneously and by a composite order;

d) The primary institution must be such in respect of whom an order of attachment had been passed by the District Inspector of Schools prior to 21 June 1973;

e) The attached primary section must be one which is under the management and control of one Head Master;

f) The primary section must be operating from common premises along with the Junior High School/High School or Intermediate College to which it is attached and should be under the control of a common management;

g) It must be found that upon passing Class V, the child migrates to Class VI without the issuance of a Transfer Certificate;

h) The primary section must be an integral part of the higher secondary school or intermediate college."

42. It was further noted the failure on the part of the Union Government to release required budget for establishment of new school or for the augmentation of the infrastructure of the primary school in the financial year 2012-13, 2015-16 and 2016-17 had resulted in causing additional burden of Rs.6103.55 crores on the State exchequer. It was also noted that in the last five years, the enrollment in institutions established and administered by the Board had fallen by 23.62 lacs, as a consequence of it, the teacher student ratio at the primary level had fallen to 1:29 and upper primary level to 1:21 against the norms of 1:30 and 1:35 as mandated under the RTE Act. The Government order also referred that the number of students enrolled in non-government and government aided primary

and upper schools also reduced to 3:64 crores in 2015-16 than 3:71 crores in the previous years. Thus, a drop of 18.6% in enrollment in the private aided and unaided primary and upper primary schools was noted. It was, thus, concluded therein that upon consideration of the aforesaid facts, the State Government came to the conclusion that it was not expedient to either establish any new primary institution or to extend the facility of financial aid to any such existing institution. It was, however, decided that the said decision and the policy statement would be reviewed after five years.

43. This policy embodied in the Government order dated 27.10.2016 came to be challenged in a bunch of writ petitions leading being **Jai Ram Singh & others Vs State of U.P. & others13,** the petitioners being the societies running the institution, management and teachers.

44. The learned Single Judge in a erudite judgement on considering the essence of **Vinod Sharma I & II and Pawan Kumar Divedi8** as also the scheme of 1971 Act (Payment of Salaries to Teacher of Aided High School and Intermediate) held that in view of definition of expression "institution" and "recognition" under Section 2(b) of 1971 Act, a primary institution which is homogeneous part of a recognized and aided high school or intermediate institution would fall within the ambit of the 1971 Act, as a primary section cannot be understood to be a separate or distinct component. It would, irrespective of the fact that it may not be in receipt of a maintenance grant, remain an integral component of that institution. The teachers of such a primary section cannot, therefore, be denied the protection of the 1971 Act.

45. For the right of teachers employed in recognised primary sections either attached to junior high schools or stand alone recognised primary institutions, it was observed that by virtue of the 2017 amendments in the 1972 and 1978 Act, the meaning of the expression "institution" has undergone a transformative change and no longer left to judicial interpretation. As there was no challenge to the said amendment before that Court nor the validity of a statutory provision could have been examined by the Court by virtue of the determination of that Bench, relief to the said class of teachers was refused leaving it open to initiate appropriate proceedings to question the validity of the amendments.

46. Thus, under the Grant-in-aid policy formulated by the State in the year 2016-17, two classes of primary institutions (Junior Basic Schools) institutions came to be created, one which are attached to recognised and aided high school or intermediate institutions; and another which are either attached to Junior High Schools or stand alone recognized primary institutions (junior basic schools).

47. It appears that two sets of special appeals were filed challenging the aforesaid judgement and order dated 23.05.2009 of the learned Single Judge, one by the State and another by those teachers and non-teaching staff whose challenge was turned down. The special appeals filed by the second set had been decided noticing that liberty was with the appellants to challenge the 2017 Amendments. The first set of special appeals were, however, dismissed on the submission of the State that it has come out with the new policy by amendments in the rules and now the

parties would be governed by said policy and the rules.

(e) **The object of the amendments under challenge:-**

48. The two legislative amendments which have been introduced by the State post the Constitution Bench decision in **Pawan Kumar Divedi8** after the directions issued by the Division bench of this court in **Paripurna Nand Tripathi9**, subject matter of challenge in the present batch of writ petitions have been reproduced in the foregoing part of this judgment. At this stage, we find it appropriate to note the Statement of objects and reasons of the Amendment Acts' 2017, so as to have a ready reference of the object of bringing the amendments in the 1972 Act & 1978 Act.

49. With the U.P. Act No.2 of 2018 which was published in the official gazette on January 5, 2018, the State introduced amendments in the UP Basic Education Act' 1972 (UP Act No. 34 of 1972) by introducing clauses (d-1) and (d-2) in Section 2 to define the expressions "Junior Basic School" and "Junior High School". The Statement of objects and reasons of U.P. Act No. 2 of 1972, U.P. Basic Education (Amendment) Act' 2017 is extracted hereunder:-

STATEMENT OF OBJECTS AND REASONS

"The Uttar Pradesh Basic Education Act, 1972 (UP A. no. 34 of 1972) has been enacted to provide for the establishment of a Board of Basic Education in the Sate of Uttar Pradesh In clause (b) of section 2 of the said Act, the expression basic education has been defined in this way that "basic education means education upto the eighth class imparted in schools other than high schools or intermediate colleges, and the expression "basic schools shall be construed accordingly. The expressions "junior basic school" and "junior high school were not defined therein due to which odd situations were being created before the State Government and the cases instituted in various courts were often being disposed off in favour of the plaintiffs. In view of the above, it has been decided to amend the said Act to define the expressions "junior basic school" and "junior high school"

Since the State Legislature was not in session and immediate legislative action was necessary to implement the aforesaid decision, the Uttar Pradesh Basic Education (Amendment) Ordinance, 2017 (U.P. ordinance no. 3 of 2017) was promulgated by the Governor on October 26, 2017.

This Bill is introduced to replace the aforesaid Ordinance."

50. By U.P. Act No.3 of 2018 published in the official gazette on January 5, 2018, the amendment has been brought in Section 2 of the Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 by insertion of Clause (ee) giving meaning to the expression "Junior High School". The statement of objects and reasons of U.P. Act No. 3 of 2018 reads as under:-

STATEMENT OF OBJECTS AND REASONS

"The Uttar Pradesh Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978 has been enacted to provide for regulating the payment of salaries to teachers and other

employees of Junior High Schools receiving aid out of the State Funds. In section 2 of the said Act, the word "institution" was defined as "Junior High School" but the expression "Junior High School" was not defined therein due to which odd situations were being created before the State Government and the cases instituted in various courts were often being disposed off in favour of the plaintiffs. In view of the above, it has been decided to amend the said Act to define the expressions "Junior High School".

Since the State Legislature was not in session and immediate legislative action was necessary to implement the aforesaid decision, the Uttar Pradesh Junior High School (Payment of Salaries of Teachers and other Employees) (Amendment) Ordinance, 2017 (U.P. Ordinance no. 2 of 2017) was promulgated by the Governor on October 26, 2017."

This Bill is introduced to replace the aforesaid Ordinance."

51. Both the Amending Acts of 2017 have been applied retrospectively. The U.P Act No. 2 of 2018 introduced amendment in the 1972 Act w.e.f August 19, 1972 when the the Original Act was published in the official gazette. Similarly, U.P. Act No. 3 of 1978 has been introduced w.e.f. January 22, 1979, the date when Junior High School (Payment of Salaries of Teachers and Other Employees) Act, 1978, the Original Act came into force. The two Amending Acts are in the nature of Validation Acts and as per the stand of the State, with the introduction of definite expression given to "Junior Basic School" and "Junior High School" in the 1972' Act and 1978' Act, the Junior Basic School (primary institutions) imparting education upto Class V are outside the purview of 1978' Act. The basis of the Constitution Bench judgement in **Pawan Kumar Divedi8** that the expression "Junior High School" in 1978' Act would include the primary institutions attached to it, has been effaced with the Amendment Act' 2017. The primary institutions though recognized, cannot seek benefit of State grant by virtue of 1978' Act after 2017 Amendment by U.P. Act No. 3 of 2018.

Submissions of the petitioners:-

52. On behalf of the petitioners, it is urged that the impugned amendments are in teeth of the direction issued by the Division Bench in **Paripurna Nand Tripathi9** and clearly contrary to the spirit underline the decision in **Pawan Kumar Divedi8**.

53. It was contended that the essence of the decision in **Pawan Kumar Divedi8** is that the State cannot discriminate between two sets of schools, which are "Junior Basic School" and "Junior High School" established either separately or together, controlled and managed by the same Board, i.e. the Board of Basic Education as per the 1972 Act. It is contended that the Constitution Bench in paragraph No.'44' of the report has held that since both the primary and junior sections are controlled and managed by the same Board, denial of protection of the 1978 Act by any other interpretation of the provision would render it unconstitutional on the ground of discrimination. It was, thus, concluded by the Apex Court that the Junior High School necessarily includes Classes I to V when they are opened in a Senior Basic School (Classes VI to VIII) after obtaining separate recognition and for which there may not be a separate order of grant-in-aid by the Government. In paragraph '42.2' of the report, the Constitution Bench has held that if a Junior Basic School (Classes I to V) is added after

obtaining necessary recognition to a recognized and aided Senior Basic School (Classes VI to VIII), then surely such Junior Basic School becomes integral part of one school, i.e. Basic School having Classes I to VIII.

54. It is, thus, submitted that the attached primary sections of a Junior High School has been treated to be an integral part of the institution concerned. The State cannot discriminate the teachers of primary sections who are teaching students from Classes I to V. The right to education of children from the age 6 to 14 years is constitutionally recognised. The State is under obligation to provide free and compulsory quality education to children of this age group.

55. It is argued by Shri Ashok Khare learned Senior Counsel appearing for the petitioners that the State Government though can remove the basis of a judgement by legislative amendments, but the basis of decision of the Constitution Bench in **Pawan Kumar Divedi8** cannot be said to have been effaced by the Amendment Acts' 2017 for the above reasons.

56. It is contended that the essence of the decision in **Pawan Kumar Divedi8** is that the State cannot discriminate between two sets of school, one which are Junior Basic School and another Junior High School, controlled and managed by the same Board, i.e. Board of Basic Education as per the 1972' Act on the principles of equality enshrined in Article 14 of the Constitution of India. The Constitution Bench disagreed with the referral order that the Payment of Salaries Act' 1978 did not include primary sections as the "Junior Basic School" and "Junior High School" have been treated as two separate components comprising Basic Education in the State of UP and held that the features noted in the reference order do not render the view taken in **Vinod Sharma6** bad. The reference was, thus, answered in the above terms. While taking the above view, the Constitution Bench has also considered the expression "Junior High School" from the angle of the constitutional mandate embodied in Article 45 and *Article 21-A* and the Right to Education Act.

57. It is urged by the learned Senior Counsel that the view taken in Vinod Sharma I and II that Classes I to VIII taught in one institution are one unit and, therefore, teachers of the primary classes cannot be deprived of the benefit of the 1978' Act, has been held to be in accord and conformity with the Constitutional scheme relating to free education to the children up to 14 years by the Constitution Bench. It was held that the schools having the Junior Basic Schools and the Senior Basic Schools either separately or together are under the same Board, i.e. the Board of Basic Education, as per the 1972' Act and, therefore, any other view treating them as separate components of Basic Education may render the provisions of the 1978' Act unconstitutional on the ground of discrimination. The Constitution Bench has further observed that any interpretation which may lead to unconstitutionality of the provision must be avoided.

58. It has, thus, been vehemently urged that the Validation Acts (Amendment Acts of 2017) may have filled the gap by introducing new meaning to "Junior High School" and "Junior Basic School", but the ratio of the Constitution Bench judgement in **Pawan Kumar Divedi8** that the State cannot discriminate the teachers of the

attached primary sections of an aided Junior High School and any such action would be violation of principle of equality as enshrined in Article 14 of the Constitution, cannot be said to have been effaced. The contention is that the State has introduced amendments of the character which was emphatically disapproved by the Constitution Bench. The Division Bench of this Court in **Paripurna Nand Tripathi9** has observed that it is the State's responsibility to provide free and compulsory education to children of the age of 6 to 14 years. Private institutions which are imparting education to children of the said age group, in fact, are performing and sharing the obligation of the State. Therefore, an obligation is cast upon the State Government not only to provide the grant-in-aid to such institutions but to provide infrastructure also subject to reasonable conditions laid down by it. Providing education to children of the age 6 to 14 fourteen years shall be a mirage unless qualitative education is provided to them.

59. Viewed from that angle, the Division Bench had observed that after the enactment of the R.T.E. Act' 2009 and the law laid down by the Apex Court in **Pawan Kumar Divedi8**, the State of U.P. may revisit its old age policy in light of the constitutional amendment and the law laid down by the Supreme Court on the enactment of Right to Education Act. The contention, thus, is that the exclusion of teachers of the primary school attached to aided Junior High School being in violation of the equality clause enshrined in Article 14 of the Constitution makes the amendments invalid, ultra virus to the Constitution.

60. It was lastly contended by the learned Senior Advocate that the primary institutions of the writ petitioners represented by him were initially brought in grant-in-aid under the 1978' Act, however, subsequent to the amendments, notices have been issued indicating withdrawal of the orders of providing grant-in-aid. Though the State has not passed any official order after reply to the notices by the petitioner but it is not releasing salary of the primary teachers of the institutions concerned.

61. It is further argued that the principle of integrality of the primary schools (Classes I to V) added after obtaining necessary recognition to a recognised and aided Senior Basic School (Classes VI to VIII), as noted in **Pawan Kumar Divedi8**, has been discussed elaborately by the learned Single Judge in **Jai Ram Singh13** to hold that if the institution has the attributes as evolved in Vinod Sharma I, it would be entitled to be considered and viewed as "one unit". While deliberating on the question of composite integrality it was held that the issue would have to be answered upon a conjoint consideration of the various factors such as common campus, functioning under the control of the same management, a singular Headmaster administering the institution and a seamless integration between different sections. Singular factor of the common campus may have lessened in its relevance because of the sea change which has been seen in the field of education over the period of years since Vinod Sharma-I came to be decided. The principles as evolved by the learned Single Judge to determine the issue of composite integrality of an institution is that it would have to be examined and evaluated taking into consideration a combination of the attributes and factors enumerated above. (emphasis added).

62. It is, thus, submitted that to decide as to whether a primary school (Classes I to V) is an integral part of recognized and aided Junior Basic School (Classes VI to VIII) various factors enumerated above of a particular institution will have to be looked into. It is submitted that the view of the learned Single Judge in **Jai Ram Singh13** has not been upturned, modified or varied by a higher Court and, therefore, is binding on the State. The denial of grant-in-aid to the petitioners institutions based on the Amendment Acts' 2017 simply by exclusion of the primary institutions from the purview of 1978' Act is nothing but violation of Article 14 of the Constitution.

63. Adding to the above, Sri Girjesh Tiwari learned Advocate for the petitioners submits that the Right to Education Act' 2009 defines "elementary education" in Section 2 (f) to mean "the education from 1st class to 8th class". There is no classification of Junior Basic School or Junior High School in the Right to Education Act which is a Central Act. The Act of the State excluding the institutions imparting education in Classes I to V from the purview of 1978' Act is thus, against the Right to Education Act' 2009 which has been enacted to meet the constitutional mandate envisaged in *Article 21-A* of the Constitution.

64. Sri Samir Sharma learned Senior Advocate assisted by Ajay Kumar Srivastava for the petitioners further submits that there cannot be any doubt to the constitutional scheme of the obligation of the State to provide free and compulsory education to all children of the age of 6 to 14 years. The Statement of objects and reasons of the Right to Education Act shows that the said enactment has been brought to achieve the objectives of *Article 21-A*, as inserted by the Constitution 86th Amendment Act' 2002. Rule 6 and 7 of the Right of Children to Free and Compulsory Education Rules' 2010 enacted in exercise of the powers conferred by Section 38 of the Right to Education Act 2009 cast obligation on the State to provide compulsory education to children in Classes I to V in neighbourhood school within a walking distance of 1 km. The financial responsibility to carry out the provisions of the Act has been imposed on the Central Government.

65. The data given by the State in the counter affidavit is referable to a Government Order dated 14.07. 2020 which enumerates the steps taken by the State Government to achieve the objectives of Right to Education Act' 2009 and the Rules' 2011 framed thereunder. Paragraph 7(1) of the said Government Order records that under the umbrella of Sarva Shiksha Abhiyan, after the enactment of Right to Education Act' 2009, 1,13,289 primary schools and 45,625 upper primary schools have been established which are being administered by the Board. It then refers to the fact that the State bears the financial burden of providing salary to 5,63,2 75 teachers employed in the school (primary and upper primary) administered by the Board. As a result of the steps taken by the State, the objective of providing free and compulsory education to children of the State between the age of 16 to 14 years has been met and there is a saturation point in the infrastructure in the field of Basic Education (primary and upper primary). The Government Order further refers to the fact that in the financial year 2015-16 and 2016-17, the Union Government had not provided funds of its share in salary/other than salary head, as a consequence of which the State had to bear an additional burden of Rs. 6103.55 crores.

66. The attention of the Court has then been drawn to the Government Order dated 27.10.2016 wherein it was stated by the State Government that there were 2055 localities where primary institutions as per the mandate of the Right to Education Act 2009, could not be established under Sarva Shiksha Abhiyan in the State of U.P., as per the criteria of a primary institution within one k.m. of residential locality of 3000 residents. The State Government, therefore, provided that the applications for providing grant-in-aid would be considered only with respect to those 2055 localities wherein primary institutions have been established prior to 21.06.1973 by the private players, subject to other conditions mentioned therein.

67. On comparison of the two Government orders dated 27.10.2016 and 14.07.2020, it is submitted by the learned Advocate Sri Samir Sharma that as per the data given by the State itself, it is evident that within a span of four years, i.e. between 2016 and 2020, the State had added only 77 (42 primary and 35 upper primary schools) institutions both at the primary and upper primary level in the State of U.P. It is also evident from the data of the State that there is no addition in the number of teachers employed in the institutions administered by the Board of Basic Education. The figures given by the State Government in its own affidavit shows the failure on its part to achieve the objectives of the Right to Education Act' 2009. The statement in paragraph 7 (2) of the Government Order dated 14.07.2020 that the State has met the objectives of providing free and compulsory education to children of age 6 to 14 years and the field is now saturated, is clearly misleading. The figures given in the Government Order dated 14.07.2020 clearly show that the State has failed to open sufficient number of schools as per the mandate of the Right to Education Act to cater to the children of primary Classes I to V. There is still a huge shortfall and as per own admission of the State atleast 2013 localities are left where primary institutions are not existing within a distance of 1 k.m. as per the norms fixed by the State Government under Sarva Shiksha Abhiyan of the Basic Education Department.

68. It is vehemently urged that the figures given by the State in the counter affidavit show the pitiable condition in which the basic educational institution run by it are being managed. It is evident that though 77 new institutions have been added but there is no addition in the strength of the teachers. The quality education in a Government institution, thus, remains a dream in the State of U.P. The Division Bench in **Paripurna Nand Tripathi9** has considered this state of affairs to observe that in absence of good quality teachers in primary and basic education situated in rural and semi urban areas, the students are deprived of quality education. Due to non-availability of trained teachers, the State has appointed untrained teachers as Shiksha Mitra in the institutions managed by the Board. To provide quality education, it is necessary that trained and competent teachers are appointed and necessary infrastructure is also made available to such institutions. It is, thus, duty of the State to provide trained and competent teachers and necessary infrastructure so that majority of the children of the said age group who come from the marginalized section of the society are not deprived of quality education.

69. It is urged that the denial of grant-in-aid to the primary institutions attached to

Junior High Schools being run by the private management, which are sharing the obligation of the State to provide free and quality education, thus, is a clear contravention of the constitutional mandate in *Article 21-A*, Article 14 and the Right to Education Act' 2009. The stand of the State that enrollment in the basic institutions have been declined in the year 2017 is without any basis, in as much as, the population ratio as per the official website of the Ministry concerned has increased to the extent of 19% in 8 years between 2011 and 2019. Atleast 45 lacs children have been added in the population of the State in the last eight years. It is high time for the State to introspect to find out the reasons for declining enrollment in the institutions managed by the Board. The issuance of the Government Order dated 14.7.2020 with the statement that neither there is requirement of new primary institution nor it is feasible for the State to provide aid to the new institutions or the previously recognized institutions as it would cause financial burden upon the State, is nothing but indicative of the fact that the State is not ready to fulfill its obligation under the Right to Education Act. There is no substantial improvement in the field of education in the last four years between 2016 and 2020 as per own data of the State; the decision of the State to exclude the recognized primary institutions attached to the Junior High School from Government aid scheme, therefore, is unjustified and violative of the constitutional mandate and the scheme of the Right to Education Act. The Government Order dated 14.07.2020 which has been heavily relied by the State in its counter affidavit filed on 18.03.2021 has evidently been issued in a slipshod manner.

70. In any case, financial burden on the State cannot be a reason to deny aid to primary institutions. The effect of judgement of the Constitutional Bench in **Pawan Kumar Divedi8** read with the decision of the Division Bench in **Paripurna Nand Tripathi9**, was to enlarge the scope of financial aid to private institutions which are sharing the responsibility of the State to meet the constitutional objectives to provide education to the children of the required age group in the State of U.P. The curtailment of financial aid by bringing legislation with retrospective effect is unreasonable and nothing but an attempt to circumvent the protection of Right to Education Act and Article 14 of the Constitution of India. Anything done indirectly to circumvent the constitutional obligations cannot be approved by the Court.

71. The issuance of the Government Order dated 14.07.2020 after the decision of the learned Single Judge in **Jai Ram Singh13** is irrational and without any proper exercise conducted by the State which shows anxiety on the part of the State to nullify the directions of this High Court.

72. Reliance is placed on the decision of the Apex Court in **State of Tamil Nadu and others Vs. K. Shyam Sunder and others14** to submit that the Statement of objects and reasons of the Amendment Acts' 2017, the history of litigation undertaken by the teachers and management of primary institutions and the surrounding circumstances and the conditions of the case clearly indicate that the Amending Acts 2017 have not been brought to cure the gap in the legislative scheme, but the mischief, which the State intended to suppress by bringing the amendments is to deny the protection of 1978' Act to teachers of primary institutions and a consequent denial of Right to

Education Act to the children of the particular age group who have right to receive free, compulsory and quality education at the primary level. The Amendment Acts' 2017 are, consequently, hit by Part III of the Constitution and are liable to be struck down being ultra virus to the Constitution.

Submissions of the State:-

73. In rebuttal, learned Advocate General vehemently submits that the petitioners have no locus to maintain the writ petitions. Different category of institutions have joined together to seek enforcement of the 1978' Act which actually does not cast any obligation on the State to provide grant-in-aid to private institutions. The 1978' Act to the contrary, has been enacted for enforcement of the duty on the private management of the institutions which are receiving grants from the State fund. It is contended that the petitioners before us may be categorized in four categories:-

74. Category-'A' is of the institutions which are unaided recognised Junior High Schools.

75. Category-'B' is a group of institutions where the recognition of the primary institutions is later to the recognition of Junior High Schools recognized and aided by the State.

76. Category-'C' is of the primary institutions which have been recognized prior to the establishment of the Junior High School but only the Junior High School has been granted aid from the State fund.

77. Category-'D' is the list of Junior High Schools which have been granted aid by issuance of wrong orders, which have been revoked or cancelled by the competent authority.

78. The submission is that none of the petitioners- institutions falling in Category 'A','B','C' or 'D' meet the criteria of being "aggrieved persons". The petitioners are the Committee of management which have no right to seek grant-in-aid or protection of the 1978' Act. The pleading in the writ petitions are mainly about protection of *Article 21-A* and Right to Education Act which essentially is the right of children of the required age group. The discrimination by denial of protection of the Payment of Salaries Act' 1978 to the teachers of primary institutions (Classes I to V) cannot be ventilated by the petitioners-management. Unless and until the petitioners satisfy the test of being "aggrieved persons" by placing specific pleading in the writ petitions they cannot maintain the challenge.

79. The stress is that the petitioners cannot plead violation of any legal right as they have no right to receive aid and moreover, they cannot ask the State to provide aid from the State fund, to manage their own affairs, i.e. the institutions established by them on their own volition. The counter affidavit filed by the State not only elaborates the number of schools established by it and the students studying therein but also narrates the policy of the State framed from time to time for compliance of the provisions of Right to Education Act' 2009. There is neither any allegation in the writ petitions that sufficient Basic schools are not available in the State of U.P. nor any person 'aggrieved' has come forward to assert that the State has failed to meet its obligation under the R.T.E. Act which has resulted in denial of right guaranteed to him. The State has no

liability towards the management of the private institutions. Conferment of right to children of free and compulsory education cannot be ventilated as a ground by the private management to seek financial aid from the State. Since the inception of the scheme framed by the State formulating conditions for recognition of private institutions, the management is required to have sufficient infrastructure; it has to be self sufficient and ensure availability of finances from its own resources. The recognition of private institutions is granted in the scheme namely the U.P. Education Code' 1958 which provides the conditions of recognition to schools at three stages:-

(1) Pre-basic stage or Nursery stage

(2) Junior basic (primary) stage (classes I to V)

(3) Senior Basic (Junior High School) stage (Classes VI to VIII).

80. It provides that while granting recognition to Senior Basic School (Junior High School), the authority concerned is to be satisfied as to whether financial resources available are adequate for the efficient working of the proposed institution apart from the adequate facilities for teaching the subject in which recognition is applied for and the infrastructure in terms of building and other recreational facilities for outdoor activity for the students. The contention, thus, is that a private management before seeking recognition of the State to run a school (whether primary or Junior High School) has to ensure availability of adequate financial resources for running the institution.

81. The preconditions for recognition enumerated in the Education Code' 1958 themselves show that the management cannot be dependent upon or ask for aid from the State to provide salary to the teachers employed in the institutions run by it. The plea of discrimination of the teachers employed in the primary institutions run by the private management on account of denial of aid by the State thus, is wholly misconceived.

82. Further, the Scheme of 1975' Rules regulating recruitment and conditions of services of teachers of a recognized Basic School (Classes I to V) has been placed before us to assert that Rule 10 puts an obligation on the management of a recognized Basic School to pay the same scale of pay and allowances to every teacher and employee as are paid to teachers and employees of the Board possessing similar qualifications. Rule 13 of 1975' Rules cast an obligation on the management to comply with conditions of recognition, failing which the Board has been given power to withdraw recognition under Rule 14 of the 1975' Rules. The preamble of the 1978' Act (Payment of Salaries Act) has been placed before us to assert that the purpose of the enactment is to regulate the payment of salaries to teachers and employees of Junior High schools which are receiving aid out of the State fund.

83. Section 3 and 4 of the 1978' Act contain provisions to ensure regular and timely payment of salary of teachers and other employees of the institutions getting grant from the State fund. It is contended that section 10 of 1978' Act cannot be read to impose liability on the State to pay salary of teachers and employees of private institutions. This interpretation of Section 10 would be a result of misreading of 1978' Act which

only lay stress upon the responsibility of the private management to make regular payment of salary to the teachers and employees engaged by it. In any case, the private institutions/management do not have any legal right to seek aid from the State fund.

84. It is submitted that the age old policy of the State is not to provide funds to private primary institutions. The rationale behind this classification is that a large number of institutions providing primary education from Classes I to V have been established and are being run by the State or its instrumentalities in discharge of its Constitutional obligation under Article 45 as it stood before the Eighty Sixth Amendment in the Constitution and *Article 21-A* thereafter. With the passage of time, as a policy matter, the State Government provided aid to institutions where there was need. Junior High Schools established by the State have been found in lesser number and, therefore, it was decided to give grant to private institutions according to the need and availability of fund of the State. No legal right much less fundamental right has been conferred on any individual person or management to seek aid from the State fund to run an educational institution. The policy decision of the State to exclude primary institutions from the purview of the 1978' Act has been challenged in the present matter on the touchstone of *Article 21-A*, violation of which cannot be agitated by institutions or its management.

85. To elaborate, it is urged that the constitutionality of a Statutory provision can be challenged only on two main principles; firstly, the competence of the legislature to make a law and secondly, the validity of the provisions in light of the Constitutional mandate.

86. In the instant case, both the above grounds are not available to the petitioners, in as much as, they have no right as enumerated in Part-III of the Constitution of India and there is no challenge to the competence of the legislature to enact. The plea of violation of Article-14 of the Constitution, i.e. discrimination cannot be successfully raised, in as much as, the legislature has make out a classification in two different categories of institutions, which has a reasonable nexus with the object sought to be achieved by the State, which is to utilize State fund to upgrade the institutions run and managed by the Board of Basic Education so as to provide free, and compulsory quality education to the children of marginal sections of the society in rural, semi urban and urban areas. Even otherwise, exclusion of institutions which were not getting grant from the State fund from the purview of 1978' Act cannot be said to be discrimination or creation of an artificial class by way of Amendment Acts' 2017. There is no discrimination at all as primary institutions have always formed a separate class.

87. It was argued that the parameters in determining the question of constitutionality of statutory provisions which have to be looked by the Court, has been laid down in **Namit Sharma Vs. Union of India15** wherein it is stated that the wisdom of the legislature cannot be questioned by the Court as it think a restriction as unreasonable, unnecessary or unwarranted. The best judges who know and be aware of the needs of the people are the Parliament and the Legislature. They being representatives of the people are supposed to know what is good and bad for them. Reliance is further placed upon the decision of the Apex Court in **State Of Andhra Pradesh & others vs Mcdowell**

& Co. & others16 to assert that apart from the legislative incompetence and violation of constitutional provisions, no third ground is available to challenge the validity of the statutory provisions.

88. It is submitted that even the Right to Education Act' 2009 talks of responsibility of unaided schools to provide for free and compulsory education to the children of age 7 to 14 years. Sub-section (2) of Section 12 clarifies the position that an unaided school which is benefited from the largesse of the State by receiving infrastructure in terms of land and other facilities etc. either free of cost or at a concessional rate, shall not be entitled for reimbursement, for admission of children belonging to weaker sections and disadvantaged group in the neighborhood to provide free and compulsory elementary education to them, 25% of financial obligation for which, otherwise has to be shared by the State. The argument is that the Right to Education Act cast an obligation even on unaided institutions to share the responsibility of the State to provide free education to 25% of such students.

89. Coming to the ratio of the decision in **Vinod Sharma6** as upheld by the Constitution Bench in **Pawan Kumar Divedi8**, it is stated that **Vinod Sharma6** is the judgment in personam and not in rem. The view taken in **Vinod Sharma6** cannot be said to be a ratio applicable in general. In **Pawan Kumar Divedi8**, the Constitutional Bench was answering the reference as to whether the view of three Judges Bench in **Vinod Sharma6** was a correct view.

90. While answering the reference, the Constitution Bench interpreted the expression "Junior High School" for the purpose of 1978' Act as the said expression had not been defined in the 1978' Act to hold that it is intended to refer to the schools imparting basic education, i.e., education up to VIII class.

91. This anomaly has been removed with the Amendment Acts' 2017 by defining "Junior High School" in the 1978' Act and inserting definition of "Junior Basic School" and "Junior High School" separately in the Basic Education Act' 1972 with retrospective effect. The Amendments of 2017, thus, nullify the effect of the judgment of the Apex Court in **Pawan Kumar Divedi8**. It is contended that the retrospective Amendments do not disturb the earlier position with regard to the grant-in-aid being given to private institutions prior to its enforcement. As a consequence of the amendments, no other primary institutions except those which are already in the grant-in-aid list of the State, would further be entitled to seek aid from the State fund. The submission of the petitioners that such a classification has been disapproved by the Constitution Bench in **Pawan Kumar Divedi8** is a result of misreading and misconception. A careful reading of the Constitution Bench decision indicates that only reference was answered by interpretation of the expression "Junior High School" as was considered in **Vinod Sharma6**, since the Constitution Bench was required to examine the correctness of the ratio of the said decision. Rest of the observations made by the Constitution Bench on the issue of discrimination are *Obiter Dicta* and it would be wrong to read them as ratio having binding effect. The plea of the petitioners that the amendments are in teeth of the decision of the Apex Court in **Pawan Kumar Divedi8**, therefore, is liable to be rejected outrightly.

92. Page No. '33' of the counter affidavit of the State, containing paragraph 7 (1) and (2) of the Government Order 14.07.2020 has been pressed into service to assert that the obligation of the State under the Right to Education Act' 2009 are already fulfilled. The data given therein demonstrates the efforts of the State to meet its obligation and that it has been resolved by the State that it shall continue to make an endeavor in achieving the objectives of *Article 21-A* of the Constitution but this obligation or responsibility of the State cannot be used as a tool by private management to seek aid from the State fund. The policy adopted by the State to utilize its finances for up-gradation of standards of the institutions already established by it and managed by the Board of Basic Education rather than providing aid to new primary institutions run by private management cannot be said to be discriminatory.

93. It is vehemently argued that no one can dictate the State as to how it will utilize its financial resources. In a matter where policy is under scrutiny and economic measures are subject in issue, the Apex Court in **State of U.P. vs Principal Abhay Nandan and Inter College17** has held that the State is the best judge. While formulating such a policy, the government is not only concerned with the interest of institutions but its ability to undertake such an exercise. These are the factors which the government is expected to consider before taking such a decision. Financial constraints and deficiencies are the factors which are considered relevant in taking any decision qua aid, including both the decision to grant aid and the manner of disbursement of an aid. A decision to grant aid is by way of policy. The right to get an aid is not a fundamental right, the challenge to a decision made in implementing it, shall only be on restricted grounds.

94. It is lastly urged that a policy decision which has been applied uniformly all across the State cannot be challenged on the ground of discrimination that too by private management which has no right much less a fundamental right to get financial aid from the State. The law under scrutiny is part of economic measures of the State and it is not part of a Court's function to enquire into what it considers to be more wise or a better way to deal with a problem. It is, thus, submitted that applying the test of examining the constitutional validity of a legislative enactment, the challenge to the Amendment Acts' 2017 cannot be sustained.

Rejoinder Statement:-

95. In rejoinder, it was submitted by the learned Senior Counsel for the petitioners that the objections regarding locus of the petitioners is unsustainable, in as much as, only right to apply seeking grant-in-aid is of the management. It is not the case of the petitioners that the management has a fundamental or legal right to seek aid but it certainly has a right of consideration in the matter of grant-in-aid from the State fund. It is the management which is entitled to apply for grant-in-aid and then to provide salary to the teachers and employees employed by it from the State fund and provide necessary infrastructure for the students. Inherent in the right to apply for grant-in-aid is the right to consideration for it. Exclusion of private primary sections from seeking grant-in-aid by bringing Amendment Acts of 2017 has resulted in rejection of their applications without consideration of merit of their claim. Show-cause notices were

issued to the management of petitioners institutions to explain as to why grant given to them be not revoked and in some cases it has been withdrawn as a consequence of the amendments. Without challenge to the retrospective Amendments, the petitioners could not have sustained the challenge to the show cause notices issued to them or the order of withdrawal of benefits already granted to some of the petitioners institutions. Only reason given for rejection of the application seeking grant-in-aid or withdrawal of grant is the exclusion by enactment of Amendment Acts' 2017. The plea of implication of the Right to Education Act' 2009 and the resultant obligation of the State has been taken by the petitioners in order to elaborate their arguments in support of the challenge to the decision of the State and the same cannot be understood to be the submission of the management to seek grant-in-aid as a fundamental right. The Constitution Bench in **Pawan Kumar Divedi8** has categorically held that any exclusion of primary institutions from the purview of 1978' Act would be violative of Article 14 of the Constitution of India. Exclusion of institutions that too with retrospective effect after the said decision of the Apex Court is per se discriminatory.

96. As regards the ratio of the judgement in **Principal Abhay Nandan and Inter College17**, it is contended that the principles laid down therein have no application in the present dispute, in as much as, in the said matter the challenge was to certain conditions put by the State while providing grant-in-aid to certain institutions. The question there was as to whether the policy decision of the State to ask the management of the aided schools to Outsource Class IV staff was amenable to challenge on the plea of violation of constitutional provisions. In that context, it was held that the institutions being the recipient of aid are bound by the conditions attached as they have neither a fundamental right to receive aid nor a vested one.

Discussion and Conclusion:-

(I). Preliminary Issue of Locus:-

97. The education is an activity which involves several participants. The stakeholders in the field of education are the management, teachers, students and their parents.

(a) Right to Education vis a vis Right To Education Act' 2009:-

98. In so far as the submissions of the learned counsels appearing for the petitioners that children of age 6 to 14 years have a right to free education as a fundamental right, there cannot be any dispute that the right to education which flows from Article 21 of the Constitution has been recognized as a fundamental right to free and compulsory education by insertion of *Article 21-A* in the Constitution with the Constitution 86th Amendment Act' 2002. *Article 21-A* of the Constitution reads that:-

"21-A **Right to Education-** *The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."*

99. The Right of Children to Free and Compulsory Education Act' 2009 has been enacted to achieve the objectives of *Article 21-A* of the Constitution. The Statement of objects and reasons of 2019' Act contains

the proposal for enactment of the Right of Children to Free and Compulsory Education Bill' 2008 which seeks to provide that every child has a right to be provided full elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards; compulsory education casts an obligation on the government to provide and ensure admission, attendance and completion of elementary education; free education means that no child, other than a child who has been admitted by his/her parents to a school which is not supported by the government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. The duties and responsibilities of the appropriate government, parents, schools and teachers in providing free and compulsory education to children has been enumerated in the Right to Education Act' 2009 as also the Constitution.

100. Article 21-A was enacted to give effect to Article 45 of the Constitution (as it stood before the Constitution 86th Amendment Act' 2005). Article 51-A(k) enumerates fundamental duty of a parent or guardian of the child between the age of 6 and 14 years to provide opportunities for education to his children. Chapter IV of the 2009' Act deals with the responsibility of schools and teachers. Section 12(1)(c) read with section 2(n),(iii),(iv) mandates that every recognized school imparting elementary education even if it is an unaided school, not receiving any kind of aid or grant to meet its expenses from the appropriate government or the local authority, is obliged to admit in Class-I to the extent of atleast 25% of the strength of that class, children belonging to weaker section and disadvantaged group in the neighborhood and provide free and compulsory elementary education till its completion. Proviso to Section 12(1)(c) states that if the school is imparting pre-school education, the same principle would apply.

101. By virtue of Section 12(2), the unaided school which has not received any largees of the State (in terms of the land, building, equipment or other facilities either free of cost or at the concessional rate) would be entitled for reimbursement of the expenditure incurred by it to the extent of per child expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed.

102. The Constitutional validity of the Act' 2009 and in particular, Section 12(1)(c) came to be considered by the Apex Court in **Society for Unaided Private Schools of Rajasthan18.** The question before the Apex Court therein was as to whether Section 12 (1)(c) of the 2009' Act places restrictions on the right of a person to establish and administer educational institutions (including schools) guaranteed under Article 19(1)(g) of the Constitution.

103. It was observed therein:-

"To provide for right to access education, Article 21A was enacted to give effect to Article 45 of the Constitution. Under Article 21A, right is given to the State to provide by law "free and compulsory education". Article 21A contemplates making of a law by the State. Thus, Article 21A contemplates right to education flowing from the law to be made which is the 2009 Act, which is child centric and not institution centric. Thus, as

stated, Article 21A provides that the State shall provide free and compulsory education to all children of the specified age in such manner as the State may, by law, determine. The manner in which this obligation will be discharged by the State has been left to the State to determine by law. The 2009 Act is, thus, enacted in terms of Article 21A. It has been enacted primarily to remove all barriers (including financial barriers) which impede access to education."(emphasis supplied).

104. The consideration was that the manner in which this obligation will be discharged by the State has been left to the State to determine by law. It was observed that the 2009' Act has been enacted in terms of *Article 21-A*, primarily to remove all barriers including financial barriers. Section 12(1)(c) of 2009' Act specifically seeks to remove all those barriers including financial, psychological barriers which a child belonging to a weaker section and disadvantaged group has faced while seeking admission. The object, thus, is not to restrict the freedom under Article 19(1)(g) but to remove the barriers faced by a child who seeks admission to Class-I. The right to education places a burden not only on the State, but also on the parent/ guardian of every child [Article 51-A(k)].

105. The relevant paragraph Nos. 36.1 & 36.2 enumerating the above principles are to be quoted hereunder:-

"36.1 Firstly, it must be noted that the expansive provisions of the 2009 Act are intended not only to guarantee the right to free and compulsory education to children, but to set up an intrinsic regime of providing right to education to all children by providing the required infrastructure and compliance of norms and standards.

36.2 Secondly, unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent/ guardian of every child [Article 51A(k)]. The Constitution directs both burdens to achieve one end: the compulsory education of children free from the barriers of cost, parental obstruction or State inaction. Thus, Articles 21A and 51A(k) balance the relative burdens on the parents and the State. Thus, the right to education envisages a reciprocal agreement between the State and the parents and it places an affirmative burden on all stakeholders in our civil society."

106. It was, thus, held that the Right to Education Act places an affirmative burden on all stakeholders in our civil society. The measures provided by virtue of Section 12(2) readwith Section 2(n)(iv) address two aspects, viz., upholding the fundamental right of private management to establish an unaided educational institution of their choice and, at the same time, securing the interests of the children in the locality, in particular, those who may not be able to pursue education due to inability to pay fees or charges of the private unaided schools. Section 12(1)(c) provides for level playing field in the matter of right to education to children who are prevented from accessing education because they do not have the means or their parents do not have the means to pay for their fees.

107. While upholding the constitutional validity of Right to Education Act' 2009, it was observed that it shall apply to the following.

"(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local

authority;

(iii) a school belonging to specified category; and

(iv) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority."

108. In the **State of U.P. and others Vs Bhupendra Nath Tripathi & others19** the Apex Court held that in view of the insertion of Article 21-A in the Constitution, the State is bound to create necessary infrastructure and effective machinery for providing universal quality education. Right to Education guaranteed by Article 21A would remain illusory in the absence of the State taking adequate steps to have required number of schools manned by efficient and qualified teachers. It was held that education and particularly the elementary/basic school has to be qualitative and for that trained teachers are required as the education does not mean only learning to read and write but to acquire knowledge and wisdom so that one may lead better life and become the citizen to serve the nation in a better way.

109. Noticing the above decisions as also in the **Society for Unaided Private Schools of Rajasthan10, Bhartiya Seva Samaj Trust12** and **Pawan Kumar Divedi8**, it was observed by the Division Bench in **Paripurna Nand Tripathi9** that the policy/norms for providing grant-in-aid to unaided institutions in the age old policy of the State required a revisit.

110. It was observed therein that:-

"20. Undoubtedly, now it is the State's responsibility to provide free and compulsory education to the children of the age of six to fourteen years. Private institutions, which are imparting education to children of the said age group, in fact, are performing and sharing the obligations of the State. Therefore, an obligation is cast upon the State Government not only to provide the grant-in-aid to such institutions but to provide infrastructure also subject to reasonable conditions laid down by it. Providing education to the children of the age of six to fourteen years shall be a mirage unless qualitative education is provided to them.

21. In the State of Uttar Pradesh, the large majority of children of the said age group come from the marginalized sections of the society. Most of the institutions providing primary and basic education are situated in rural and semi-urban areas. To provide quality education it is necessary that trained and competent teachers are appointed and necessary infrastructure is also made available to such institutions. The teachers in private unaided institutions are working in pitiable conditions. No good teacher would like to work in such institutions. Thus, the students will be deprived of quality education."

(b) Interlink between Grant-in-aid & Protection of 1978' Act:-

111. The interconnection between grant-in-aid and protection of 1978' Act has been considered by the learned Single Judge of this Court in **Jai Ram Singh13** while dealing with the challenge to the

denial of the protection of 1971' Act to the teachers of primary sections attached to High School and Intermediate colleges, which are governed by the The U.P. High Schools And Intermediate Colleges (Payment Of Salaries Of Teachers And Other Employees) Act, 1971. It was noted therein that there is a vicious connection and link between the issue of grant in aid and protection under the 1971 and 1978 Acts. These two statutes ostensibly create an ineffaceable link between the grant of maintenance aid and coverage under these enactments.

112. Taking judicial notice of the working conditions of teachers in private unaided institutions, it was noted in **Paripurna Nand Tripathi9** that in absence of trained and competent teachers and necessary infrastructure in the institutions providing primary and basic education particularly situated in rural and semi-urban areas, the students will be deprived of quality education. The interconnect between the right of teachers to receive protection under the 1978' Act and the students of marginalized section of the society to receive quality education has been well recognized by the Division Bench while expressing its view that the State needed to revisit the policy laying down the standard/norms for providing grant-in-aid to unaided institutions.

113. The power of the State to frame policy or lay down reasonable conditions while providing grant-in-aid to privately managed institutions is unquestionable. It is settled that no citizen, persons or institutions has a right much less a fundamental right to affiliation or recognition or to grant-in-aid from the State (Reference **Unnikrishnan J.P. Vs. State of A.P.20**

114. In the policy of the State relating to grant-in-aid, the expression "institution" has been defined to mean one which is recognized and receiving maintenance grants. A recognized institution which receives grant-in-aid from the State is under scanner by regulatory measures in the 1978 Act. The teachers of a recognized aided institutions may bring an action seeking protection of the 1978' Act and in case of any inaction or default on the part of the management, action can be taken against the management under sub-section (2) of Section 6 by superseding it. Punishment for non-compliance of directions under Section 4 or with the provisions of Section 3 or Section 5 is fine or imprisonment; penal action can also be taken against the manager or any other person vested with the authority to manage and conduct the affairs of the institution.

115. In the present batch though the petitioners are private management who are raising challenge to the orders of rejection of their applications to obtain grant-in-aid but we are not considering the right of private management to seek monetary aid from the State. The challenge to the validity of the Amendment Acts on the ground of the policy of the State to exclude primary institutions (Class I to V) from the regime of grant-in-aid being unconstitutional cannot be narrowed down to that question. We have made it clear at the outset that we are not dealing with the individual orders passed by the State rejecting the claims of the petitioners institution to obtain grant-in-aid, rather we are called upon to examine the validity of the statutory amendments in the policy of the State with the constitutional perspective.

116. The claims made by the petitioners to seek maintenance grant from the State have been held legally

unenforceable in view of the Amendment Acts' 2017, the validity of which is subject matter of challenge before us.

117. The objection of learned Advocate General is that the teachers or those students whose rights are being ventilated by the petitioners have not joined in this batch. The issue in **Vinod Sharma6** and **Pawan Kumar Divedi8** was examined in a different context where the teachers working in the primary sections of a recognized and aided Junior High School had claimed salary under the provisions of the Payment of Salaries Act' 1978. The background in which those cases had been decided by the Apex Court was completely different.

118. To answer the issue of locus of the petitioners, it is expedient to consider that the Payment of Salaries Act' 1978 came into force w.e.f. 01.05.1979 by virtue of the notification issued under Section 1(3) by the State Government, with the objective to remove frequent complaints that salaries of teachers and non-teaching employees of aided non-government Junior High Schools were not being disbursed in time, resulting in hardship to their employees. The long title speaks that the Act 1978 has been enacted to regulate the payment of salaries to teachers and other employees of Junior High School receiving aid out of the State fund.

119. Looking to the object and purpose of the 1978 Act, when we consider the grievances raised by the petitioners management from the angle of their own interest, we could clearly see that the petitioners being the institutions/ management would themselves come under the scanner/control of the State authorities as soon as they are brought within the purview of the Act. The Act' 1978 casts obligation on the management for disbursement of salaries to its teachers and employees within the time indicated by the State Government and in case of default on its part, not only civil but criminal action may also be taken against it. By virtue of the Amendment Acts 2017, the teachers of the primary institution have been denied this protection with the exclusion of primary institution from the purview of the Payment of Salaries Act. Further, while seeking grant, the management not only puts itself under scanner of the State machinery but also shares the constitutional obligation of the State to provide free and compulsory education to the children of the State. The interplay between the right of teachers to seek protection of the 1978 Act and the students to get free quality education cannot be overlooked. The interests of the stakeholders namely management, teachers and students are not competing. Rejection of the plea of the management to provide grant-in-aid has a direct effect on the protection to teachers under the 1978' Act, to stand against the management in case of their harassment.

120. Furthermore, as the application seeking grant can be filed only by the management and not by the teachers, the petitioners cannot be said to be mere strangers having no right whatsoever so as to non-suit them on the ground of not having the locus standi. The legal proposition in the matter of locus has been discussed by the Apex Court in **State of Punjab in Ghulam Qadir vs. Special Tribunal and others21** to state that :

"38.....orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea-change with the

development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dis-lodging the claim of a litigant merely on hyper-technical grounds. If a person approaching the court can satisfy that the impugned action is likely to adversely affect his right which is shown to be having source in some statutory provision, the petition filed by such a person cannot be rejected on the ground of his having not the locus standi. In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi."

121. The objection as to the locus of the petitioners institutions/management to maintain the challenge to the validity of the Amendment Acts' 2017 is, accordingly, turned down.

II. **Testing the constitutionality of a statutory provision, legal principles:-**

122. On this first issue now before proceeding further, it would be apposite to discern the legal position to test the validity of a statutory provision.

(I). In **Namit Sharma15,** the Apex Court had noted that the Constitutionality or validity of an enacted law can be challenged on very limited grounds:-

(i) legislative incompetence; (ii) violation of Part III of the Constitution; (iii) reasonableness of the law.

It was held that the scope of first two grounds are definite. With the passage of time, the law developed and the grounds for unconstitutionality also widened but the situation in the cases falling in the third category remained in a state of uncertainty.

It was observed that a law may be held unconstitutional on a number of grounds such as :-

"i. contravention of any fundamental right, specified in Part III of the Constitution.

ii. legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by the 7th Sch., read with the connected Articles.

iii. contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a Legislature, e.g., Art. 301

iv. in the case of a State law, it will be invalid in so far as it seeks to operate beyond the boundaries of the State.

v. that the Legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body."

It was further noted that a law cannot be invalidated on the following grounds:-

a) that in making the law (including an Ordinance), the law- making body did not apply its mind (even though it may be a valid ground for challenging an executive act) or was prompted by some improper motive.

b) that the law contravenes some constitutional limitation which did not exist at the time of enactment of the law in question.

c) that the law contravened any of the Directives contained in Part IV of the Constitution.

It was stated that a law which violates the fundamental right of a person is void but the wisdom or motive of the legislature in making it is not a relative

consideration. The Court should examine the provisions of the Statute in light of the provisions of the Constitution Part III. A Statute which violates the Constitution cannot be pronounced valid merely because it is being administered in a manner which might not conflict with the constitutional requirements. However, the possibility of abuse of a statute does not impart to it any element of invalidity. When the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the "direct and inevitable effect' of such law. There is presumption in favour of constitutionality of legislative enactment. The law Courts can declare the legislative enactment to be an invalid piece of legislation only in the event of gross violation of constitutional sanctions.**(emphasis added).**

It was noted that it is a settled canon of constitutional jurisprudence that the doctrine of classification is a subsidiary rule evolved by Courts to give practical content to the doctrine of equality. Over emphasis of the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptly erode the profound potency of the glorious content of equality enshrined in Article 14 of the Constitution. It is not necessary that classification in order to be valid, must be fully carried out by the Statute itself. The Statute itself may indicate the persons or things to whom its provisions are intended to apply.

Instead of making the classification itself, the State may lay down the principle or policy for selecting or classifying the persons or objects to whom its provisions are to apply and leave it to the discretion of the Government or administrative authority to select such persons or things, having regard to the principle or policy laid down by the Legislature.

On the principle of equality, it was elaborated that Article 14 forbids class legislation but does not forbid reasonable classification which:

i) must be based on reasonable and intelligible differentia; and

ii) Such differentia must be on a rational basis.

iii) It must have nexus to the object of the Act.

Referring to the earlier decisions of the Apex Court, the principles for adjudicating the constitutionality of a provision which have to be borne in mind by the Courts as culled out therein are:-

(i) a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(ii) it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discrimination are based on adequate grounds.

(iii) The legislation is free to recognize degree of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.;

(iv) In order to sustain the presumption of constitutionality, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation;

(v) While good faith and knowledge of the existing conditions on the

part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or Corporations to hostile or discriminating legislation. (Reference para 18).

(vi) Whether it is the Constitution that is expounded or the constitutional validity of a Statute that is considered, a Cardinal rule is to look to the Preamble of the Constitution as the guiding light and to the Directive Principles of State Policy as the Book of Interpretation. The Constitution being sui generis, these are the factors of distant vision that help in the determination of the constitutional issues. (reference para 19).

(vii) The Court should exercise judicial restraint while judging the constitutional validity of the Statute or even that of a delegated legislation and it is only when there is clear violation of a constitutional provision beyond reasonable doubt that the Court should declare a provision to be unconstitutional. Even if two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must prevail and the Court must make efforts to uphold the constitutional validity of a statute, unlike a policy decision, where the executive decision could be rendered invalid on the ground of malafides, unreasonableness and arbitrariness alone. (Para 20).

(viii) In determining the constitutionality or validity of a constitutional provision, the Court must weigh the real impact and effect thereof, on the fundamental rights. The Court would not allow the legislature to overlook a constitutional provision by employing indirect methods. (Para 10)

(ix) As a guidance to the Courts to examine the constitutionality or otherwise of a statute or any of its provisions, it is stated in paragraph no.'21' of the report that one of the most relevant consideration is the object and reasons as well as the legislative history of the Statute as it would help the Court in arriving at a more objective and just approach. It would be necessary for the Court to examine the reasons of enactment of a particular provision so as to find out its ultimate impact vis-a-vis the constitutional provisions.

(II). In **State Of Andhra Pradesh & others Vs. Mcdowell & Co. & others16,** it is observed that the Parliament and the Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the Court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted.

(III) In a recent decision in the **State of Tamil Nadu and others Vs. K. Shyam Sunder and others14,** the Apex Court has noted the doctrine of lifting the veil propounded in its earlier decision in **Dwarkadas Shrinivas v. The Sholapur Spinning & Weaving Co. Ltd. & Ors22, Mahant Moti Das v. S.P. Sahi, The Special Officer in charge of Hindu Religious Trust & others23. and**

Hamdard Dawakhana & Anr. v. Union of India & Ors AIR24 to observe as under:-

"However, in order to test the constitutional validity of the Act, where it is alleged that the statute violates the fundamental rights, it is necessary to ascertain its true nature and character and the impact of the Act. Thus, courts may examine with some strictness the substance of the legislation and for that purpose, the court has to look behind the form and appearance thereof to discover the true character and nature of the legislation. Its purport and intent have to be determined. In order to do so it is permissible in law to take into consideration all factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy." (emphasis added).

The principle of reading of the Statement of objects and reasons while interpreting the statutory provisions has been noted to state that:-

"The Statement of Objects and Reasons appended to the Bill is not admissible as an aid to the construction of the Act to be passed, but it can be used for limited purpose for ascertaining the conditions which prevailed at that time which necessitated the making of the law, and the extent and urgency of the evil, which it sought to remedy. The Statement of Objects and Reasons may be relevant to find out what is the objective of any given statute passed by the legislature. It may provide for the reasons which induced the legislature to enact the statute. "For the purpose of deciphering the objects and purport of the Act, the court can look to the Statement of Objects and Reasons thereof" **(emphasis supplied).**

(IV) While considering the theory of separation of power in **Ashwani Kumar Vs Union of India25,** it was noted that the modern theory of separation of powers does not accept that the three branches perform mutually isolated roles and functions and accepts a need for coordinated institutional effort for good governance, albeit emphasises on benefits of division of power and labour by accepting the three wings do have separate and distinct roles and functions that are defined by the Constitution. All the institutions must act within their own jurisdiction and not trespass into the jurisdiction of the other. By segregating the powers and functions of the institutions, the Constitution ensures a structure where the institutions function as per their institutional strengths.

It was observed that the legislature as an elected and representative body enacts laws to give effect to and fulfill democratic aspirations of the people. The judges perform the constitutional function of safeguarding the supremacy of the Constitution while exercising the power of judicial review in a fair and even-handed manner. As an interpreter, guardian and protector of the Constitution, the judiciary checks and curbs violation of the Constitution by the Government when they overstep their constitutional limits, violate the basic structure of the Constitution, infringe fundamental rights or act contrary to law. Power of judicial review has expanded taking within its ambit the concept of social and economic justice. Yet, while exercising this power of judicial review, the courts do not encroach upon the field marked by the Constitution for the legislature and the executive, as the courts examine legality and validity of the legislation or the governmental action, and not the wisdom behind the legislative

measure or relative merits or demerits of the governmental action. It is the self-imposed discipline of self-restraint. Independence and adherence to constitutional accountability and limits while exercising the power of judicial review gives constitutional legitimacy to the court decisions. This is essence of the power and function of judicial review that strengthens and promotes the rule of law.

III. The Effect of Validation Act-the legal principles:-

123. A Constitution Bench in **Shri Prithvi Cotton Mills Ltd. & others vs Broach Borough Municipality & Ors26** has held that :-

".....granted legislative competence it is not sufficient to declare merely that the decision of the court shall not bind, for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.....

.....The validity of a Validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in Validating law"

124. The validity of a Validating law, therefore, depends upon whether the legislature possess the competence which it claims over the subject matter and whether in making the Validation it removes the defect which the Court had found in the existing law and make adequate provisions in the validating law.

125. Similar issue came up for consideration before the Apex Court in **S.R. Bhagwat & others Vs. State of Mysore27** wherein it was observed that:-

"12. It is now well settled by a catena of decisions of this Court that a binding judicial pronouncement between the parties cannot be made ineffective with the aid of any legislative power by enacting a provision which in substance overrules such judgment and is not in the realm of a legislative enactment which displaces the basis or foundation of the judgment and uniformly applies to a class of persons concerned with the entire subject sought to be covered by such an enactment having retrospective effect."

While holding so, the Constitution Bench judgements in **Cauvery Water Disputes Tribunal28** and decision in **G.C. Kanungo Vs. State of Orissa29** have been noted therein to reiterate the above principles laid down by the Constitution Bench in **Cauvery Water Disputes Tribunal28** that the legislature could change the basis on which a decision was given by the Court and, thus, change the law in general, which would affect a class of persons and events at large. However, it cannot set aside an individual decision inter parties and affect their right and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and functioning as an appellate court or Tribunal.

126. In **G.C. Kanungo29**, similar view was reiterated to hold that the legislature by bringing Amendment Act

could not be permitted to undo such arbitral awards which have gone against it; by having recourse to its legislative power as it tantamounts to nothing else, but "the abuse of its power of legislation.

127. Considering the above decisions in **State Of Tamilnadu & Ors14** it was observed that the law on the issue can be summarised to the effect that a judicial pronouncement of a competent court cannot be annulled by the legislature in exercise of its legislative powers for any reason whatsoever. The legislature, in order to revalidate the law, can re-frame the conditions existing prior to the judgment on the basis of which certain statutory provisions had been declared ultra vires and unconstitutional.

It was noted that bringing a legislation in order to nullify the judgment of a competent court would amount to trenching upon the judicial power and no legislation is permissible which is meant to set aside the result of the mandamus issued by a court even though, the amending statute may not mention such an objection. The rights embodied in a judgment could not be taken away by the legislature indirectly. Reference also to **Madan Mohan Pathak & another Vs. Union of India & others30.**

128. It was observed in **A. Manjula Bhashini & others Vs. The Managing Director, A.P. Women's Cooperative Finance Corporation Ltd. and another31** that in exercise of the plenary powers conferred upon the legislature by Articles 245 and 246 of the Constitution, it can render a judicial decision ineffective by enacting a valid law fundamentally altering or changing the conditions on which such a decision is based.

129. In light of the above noted settled legal position, let us see how far the impugned provisions of the Amendment Acts' 2017 bear scrutiny.

(IV) Analysis:-

130. Before proceeding further, it is relevant to note at this juncture that in this batch of writ petitions filed by the management of private recognized institutions, a group of institutions which are though recognized Junior High Schools but unaided have also joined. In other words, the Junior High Schools which though are recognized but have not been brought within the purview of 1978' Act, (the institutions falling in category 'A') have also joined to challenge the Amendment Acts' 2017 whereby primary institutions have been excluded from the purview of 1978' Act by bringing retrospective amendments.

131. The challenge to the validity of the Amendment Acts' 2017 by such institutions has been raised though in a feeble manner, with the plea that the State had failed to discharge its constitutional obligation to provide free and compulsory education to children from age 6 to 14 years and primary institutions established by private management are catering to the need of the society by providing education of satisfactory quality to children from disadvantaged and weaker sections. The obligation of the State with the introduction of Article 21-A by Eighty Sixth Amendment in the Constitution has been well recognized by enactment of the Right to Education Act' 2009. The 2009' Act made provisions in Section 12(c) fixing responsibility on the private institutions to admit, to the extent of 25% of the strength of class I children belonging to weaker

sections of disadvantaged group, in the neighbourhood to provide free and compulsory elementary education till its completion. The expenditure incurred by the private institutions in doing so is to be reimbursed to the extent of per child expenditure incurred by the State or the actual amount charged from the child, whichever is less.

132. The method adopted by the Parliament by making such a provision is to meet the ultimate objectives of providing quality education at the cost of the State to children who or whose parents are not in a position to pay fees or bear the cost of education. The purpose of 2009' Act, thus, is to remove both financial as well as psychological barriers, by providing a level playing field in the matter of right to education of children. The private management which have established primary institutions as also Junior High Schools are infact sharing the obligation of the State and, therefore, an obligation is cast upon the State not only to provide the grant in aid to such institutions but also the infrastructure subject to reasonable conditions laid down by it. This view has been expressed by the Division Bench of this Court in **Paripurna Nand Tripathi9** while observing that the State has to revisit its old age policy laying standard/norms for providing grant-in aid to unaided institutions in light of the constitutional amendment and the law laid down by the Apex Court on the subject.

133. It is contended that exclusion of primary institutions from the purview of 1978' Act by bringing Amendments of 2017, thus, is hit by the Constitutional mandate in *Article 21-A* and is against the spirit of the Right to Education Act'2009.

134. To deal with the said arguments, suffice it to note that the Constitution Bench in **Unni Krishnan, J.P. v. State of A.P.20** while dealing with the aspect of the Right to Education Act from the angle of Article 21 and the right to establish educational institutions guaranteed under Article 19(1)(g) of the Constitution has held that a citizen of the Country may have a right to establish educational institution but no citizen, persons or institutions has a right much less a fundamental right, to affiliation or recognition, or to grant-in-aid from the State. The receipt of grant or aid shall be subject to all such terms and conditions, as the aid giving authority may impose in the interest of general public.

135. In a recent decision, the Apex Court in the **Principal Abhay Nandan and Inter College17** has reiterated almost the same principle to hold that a decision to grant aid is by way of policy. While doing so, the government is not only concerned with the interest of the institutions but its ability to undertake such an exercise. There are factors which the government is expected to consider before taking such a decision. Financial constraints and deficiencies are the factors which are considered relevant in taking any decision qua aid, including both the decision to grant aid and the manner of disbursement of an aid. It was, thus, reiterated that the right to get an aid is not a fundamental right and <u>where a policy decision is made to withdraw the aid, an institutions cannot question it as a matter of right. Such a challenge, however, may be still available to an institution when a grant is given to one institution as against the other institution which is similarly placed.</u>

136. To elaborate their arguments, some of the aspects of the State's inability

to fulfill its obligation to provide free and compulsory education to children in neighborhood, as mandated by Right to Education Act' 2009 have been placed before us by the learned counsels for the petitioners to assert that as per the data given by the State itself, it is evident that it has not opened sufficient number of institutions (specifically primary institutions) in neighbourhood to provide access to education to children of the particular area. As the State has failed to meet its obligations, it cannot deny aid to private institutions. A comparison of data disclosed in two government orders of the State issued in the year 2016 and 2020 has been placed before us, as noted above, to substantiate the above submissions.

137. To deal with the issue, suffice it to note that neither children nor parents of children of the concerned age group, who are allegedly deprived of elementary education by inaction of the State in opening primary institutions in neighborhood, are before us to demonstrate that they are being deprived of compulsory elementary education in a quality school run by the State through the Basic Education Board or private aided institutions. The right to education is a right of child of the stated age group. This right cannot be impressed upon the State by mandating that it has obligation to give grant/aid or provide finances for infrastructure to private institutions. Looking to the data placed before us though it could be demonstrated by the learned counsels for the petitioners that a proper exercise is to be conducted by the State to find out the reasons for 'drop outs' from Government institutions but that issue is not before us.

138. Providing aid has financial implications and being policy matter, it is not possible for the Court to inquire the wisdom of the legislation in bringing enactment to deny aid to primary institutions established by private management in general.

139. Moreover, the challenge to the policy is based on the plea of right of children to free and compulsory education recognized by the Constitution. It cannot be said that in order to meet its constitutional obligation under *Article 21-A* and Right to Education Act 2009, the State is obliged to provide grant to privately managed institutions. No such direction can be issued in an action brought by private management to challenge the policy pertaining to grant-in-aid. It would have been another aspect of the dispute, had the children of the stated age or their parents challenged the policy of the State by asserting their right to get free and compulsory education in a neighbourhood school. As the said issue cannot be looked into within the scope of the present dispute before us, we are afraid to entertain the challenge to the Amendment Acts' 2017 at the instance of private institutions which are recognized unaided Junior High Schools, the institutions falling in category 'A'.

140. In so far as the institutions falling in the third category 'D', the challenge to the orders for withdrawal of grant-in-aid, initially provided to them terming them as wrong orders, we may recapitulate that we have been called upon only to answer the question of validity of the Amendments Acts' 2017 and as we are not examining the validity of the individual orders passed by the State Government denying benefits of aid to the concerned institutions or withdrawal of the benefits accorded to them, we are not considering the claim of the category 'D' on the merits

of the orders passed against them. We may, however, clarify that if any of the institutions falling in category 'D', incidentally fall in category 'A', its case would have the same fate as that of the institutions falling in Category 'A'.

141. We are, thus, left with two categories of institutions. Category 'B' & 'C' are those institutions where Junior High Schools have both been recognized and provided aid by the State.

142. As we are considering the cases of category 'B' & 'C' separately, the conclusion drawn by us hereinafter would cover the institutions falling in category-'D', if they also incidentally fall in category 'B' or 'C'.

143. The concise issue now left before us is the validity of the Amendment Acts' 2017 from the angle of the institutions which are recognized and aided Junior High Schools wherein primary recognized institutions are also existing. The moot question for consideration for both the categories 'B' & 'C' of the institutions in this bunch of petitions is: whether teachers of primary sections of privately managed Junior High Schools receiving aid out of the State fund, can be excluded from the purview of the Payment of Salaries Act' 1978?

Brief Background of the Controversy:-

144. To recapitulate, the Amendment Acts' 2017 specifically the one bringing amendment in the Payment of Salaries Act' 1978 have been challenged on the ground that the primary sections (class I to V) of a junior high school being its integral part or part of 'One school' cannot be discriminated by excluding it from the purview of the Act' 1978 by virtue of the Amendment Acts' 2017. It is argued by the learned Senior Counsel for the petitioners that the issue with regard to the integrality of the primary sections and Junior High School had been considered by the Apex Court in **Pawan Kumar Divedi8** and considering the said issue from the aspect of the constitutional obligation of the State to provide free and compulsory education to children till they complete the age of 14 years as also the aspect of hostile discrimination as against the mandate of Article 14 of the Constitution, it was held therein that the expression "Junior High School" in the 1978' Act is intended to refer to the school imparting basic education, i.e. education upto VIII class. The observations in **Pawan Kumar Divedi8** from paragraph No.'42' onwards have been pressed into service to assert that the Constitution Bench while upholding the correctness of three Judges Bench decision in **Vinod Sharma6** had considered the abovenoted two aspects apart from the interpretation of statutory provisions of the un-amended 1978' Act. The findings on the two aspects namely the integrality of the institutions and hostile discrimination in case of exclusion of primary institutions an integral part of Junior High Schools from the purview of 1978' Act cannot be said to have been effaced by Amendment Acts' 2017. The decision of the Apex Court on the aforesaid aspects still binds the State as it cannot be said that the Amendment Acts' 2017 have fundamentally altered the said legal position. The validity of the Amendment Acts' 2017, being in teeth of the decision of the Apex Court in **Pawan Kumar Divedi8**, has been challenged with the above perspective.

145. The learned Advocate General, on the other hand, argued that primary institutions were always treated as a separate class in the State of U.P. and,

therefore, under the scheme of the legislative enactments governing basic education in the State, the primary institutions have never been accorded aid from the State fund. The decisions in **Vinod Sharma6** were inter parties and in **Pawan Kumar Divedi8** the Constitution Bench had answered the reference only which was on the question of the correctness of the decision in Vinod Sharma. The observations of the Constitution Bench on the issue of integrality or hostile discrimination, as heavily relied by the learned counsel for the petitioners, is nothing but Obitor Dicta and is not binding as a ratio decidendi. The reliance placed on the above noted observations to challenge the validity of the Amendment Acts' 2017, therefore, is misconceived.

146. To deal with the above arguments, we are required to consider the following aspects:-

(a). Essence of Vinod Sharma and Pawan Kumar Divedi:-

147. In the above background, the need is to discern the fundamental principles upon which **Vinod Sharma6** and **Pawan Kumar Divedi8** were decided. The essence of these judgments has been noted by the learned Single Judge in **Jai Ram Singh13** with precision. The relevant observation of the said judgement is to be noted hereunder:-

"It is, therefore, manifest that the core of these decisions was not built upon a construction of the provisions of the statutory enactments applicable but principally upon the premise of teachers of the primary section constituting an integral and composite component of the institution as a whole. These decisions held in favour of the teachers of primary sections tracing their right of protection under the 1978 Act to Article 14 of the Constitution."

148. We find no reason to deviate or disagree with the above observations. To add, it may be noted that in **Vinod Sharma6**, the writ proceeding was initiated by the teachers of primary institutions attached to a Junior High School. In **Pawan Kumar Divedi8**, the Apex Court while dealing with the issue of correctness of **Vinod Sharma6** had framed the question for consideration:-

"The common question for consideration in this group of seven appeals is whether teachers of privately managed primary schools and primary sections of privately managed high schools are eligible to receive their salaries from the State Government?"

149. Further noticing that the recognized Junior High School with no Junior Basic School (Classes I to V) being part of the said school from the beginning had been facing difficulty with regard to the applicability of Section 10 of 1978' Act and considering the controversy being centered around with this category of school with classes I to V which were added after obtaining recognition to the recognized and aided junior high school (Classes VI to VIII), the Constitution Bench noted that whether teachers of primary section Classes I to V in such schools were entitled to the benefit of Section 10 of the 1978 Act was the moot question.

150. This question was answered from three angles:-

(i) Firstly, the constitutional obligation of the State under *Article 21-A*

as well as provisions of Right to Education Act;

(ii) Secondly, from the angle of composite integrality of two sections of one institution, i.e. primary sections from classes I to V and Senior Basic School (classes VI to VIII). On the above two aspects, it was held that if primary sections are added after obtaining necessary recognition to a recognized and aided Senior Basic School, then such primary sections become integral part of Senior Basic School, which was termed as 'Single School with classes I to VIII' in the Note appended to clause (xxvi), Para 1 in Chapter I (Definition and Classification) of the Educational Code, Revised Edition 1958.

In that context, the reasoning in the referral order that the legislature had made a conscientious distinction between Junior Basic Schools and Junior High Schools had been rejected by the Constitution Bench. Not only this, it was further observed that any such distinction would be discriminatory and may render the provisions of the Statute itself unconstitutional.

(iii) The third angle, from which reference was answered was that the expression "Junior High School" had neither been defined under the U.P. Basic Education Act' 1972 nor in the Act' 1978. The arguments of the State therein that the definition of "Junior High School" contained in the 1978' Rules framed under Section 19(1) of 1972' Act could control the same expression occurring in the 1978' Act had been rejected. The Constitution Bench had rejected the said arguments on the principle of interpretation of statute that the definition of an expression in the 1978' Rules made under a different and distinct statute cannot be treated for the purpose of construction of the expression being part of another enactment. It was observed that the State legislature has made separate enactment for payment of salaries to the teachers of aided basic school which is 1978' Act and the expression "Junior High School" in the 1978' Rules (prior rule) cannot be taken in aid to construe a subsequent enactment.

This was the lacuna which is sought to be removed by the legislature by insertion of the definition of "Junior High School" in the Payment of Salaries Act' 1978 by adding clause (ee) in Section 2 and the definition of "Junior Basic School" and "Junior High School" with the addition of the clauses (d-1) and (d-2) in Section 2 of the U.P. Basic Education Act' 1972 by Amendment Acts 2017 (U.P. Act No.2 of 2018 and U.P. Act No.3 of 2018) notified on 15.01.2018 with retrospective effect, i.e. the date of enactment of the original Acts, namely 1972' Act and 1978' Act.

The question as to whether these amendments had fundamentally altered or changed the conditions on which the Constitution Bench decision was based, to render it ineffective, is to be answered in the above context.

(b) Effect of the Amendment Acts' 2017 termed as Validation Act:-

151. To answer the question as to whether the basis of decisions in **Vinod Sharma6** as well as **Pawan Kumar Divedi8** has been effaced by virtue of the retrospective amendments, it is imperative to consider whether the issues of integrality and discrimination, the basis of the opinion drawn by the Apex Court to interpret the expression "Junior High School" in the 1978' Act have also been effaced with the said amendments.

152. For entering into the debate on the said question, thus, the discussion on

the issues of "integrality" and "plea of discrimination", the first two issues considered by the Constitution Bench in negating the plea of the State challenging the correctness of the decision in **Vinod Sharma6** in the reference, is to be made by us.

(i) Issue of Integrality:-

153. The discussion on this aspect again takes us to the decision of the learned Single Judge in **Jai Ram Singh13**. The concept of attachment, formal orders recognizing primary sections attached to Junior High School, High School and Intermediate colleges and the aspect of composite integrality, i.e. attributes and characteristics which would enable an institution to be recognized in law as one unit have been analyzed by the learned Single Judge in the following manner:-

"J. THE CONCEPT OF ATTACHMENT

Before we proceed to deal with the primary questions of law which arise, it would be appropriate to briefly deal with the issue of attachment of primary sections as understood by the State and the orders that were passed in connection therewith.

The State prior to the passing of the 1972 Act [and in some cases even thereafter] passed formal orders recognising primary sections attached to junior high schools, high schools and intermediate colleges. These orders appear to have been passed taking note of the fact that these primary sections were operating from a common campus, under the control of a common management, administered by one Headmaster and a seamless progression of students from classes I to V to class VI and onwards.

On 21 June 1973, a Government Order was issued mandating that henceforth no orders of attachment would be passed. This order was essentially issued since by that time the Board had come to be established and various primary schools and institutions functioning till then under the control of local bodies came to be transferred and vested in the Board in accordance with the provisions of the 1972 Act.

While various orders of attachment evidently came to be passed even after the issuance of the 21 June 1973 order, we are really not concerned with the validity of those orders. The fundamental issue which needs to be considered is the character and the legal imperative of these orders existing in respect of an institution for it to claim the benefits of coverage under the 1971 and 1978 Acts.

At the very outset it needs to be stated that no statutory provision was referred to by the respondents to which these orders of attachment were traceable. The respondents also do not rely upon any provision, statutory or otherwise, in terms of which an order of attachment was liable to be made before the primary section could be accorded legal recognition of being an integral part of a larger institution.

Whether the various sections of an institution imparting education to different tiers of classes are integrated, fundamentally and on first principles, is an issue of fact. A primary section which is an integral part of an institution, be it a junior high school, high school or intermediate college, would remain and be entitled to be recognised in law as such irrespective of an order of attachment made by the respondents. An institution would be entitled in law to be treated and viewed as one unit if its various components satisfy the tests propounded in Vinod Sharma I.

This would not and cannot depend upon an order of attachment existing in this respect. An issue of whether an institution is "one unit" would have to be considered bearing in mind the determinative factors which were formulated in Vinod Sharma I and whether that institution has the requisite attributes of integrality. This would, as noted above, be an issue which would have to be tested on the anvil of the factors that were formulated in Vinod Sharma I in respect of each individual institution and in any case would not be dependent upon the existence or absence of an order of attachment.

In view of the above discussion, this Court is of the firm view that an order of attachment, whether made before or after the 21 June 1973 Government Order, cannot be determinative of the oneness of an institution. If the institution otherwise has the attributes as evolved in Vinod Sharma I it would be entitled to be considered and viewed as "one unit".

K. COMPOSITE INTEGRALITY

The next aspect which needs some elaboration is with regard to the attributes and characteristics which would enable an institution to be recognised in law as one unit. In Vinod Sharma I, the Court bore in mind factors such as a common campus and management, one Headmaster and the facility of progression of students from Class V to higher classes functioning under the umbrella of that institution as being evidence of the institution being "one unit".

In the considered view of this Court, the fundamental aspect which would merit recognition and elucidation is of "composite integrality". An institution may be made up of various sections or compartments. This would depend upon the various tiers in the educational hierarchy that it serves. Be it a primary school, junior high school, high school or intermediate college, if it has the attributes of commonality as judicially evolved and recognised it would be deemed to be one institution. Its various components must be found to exist as an amalgam, indelibly fused together to constitute a singular institution. The factors of a common campus, functioning under the control of the same management, a singular Headmaster administering the institution and a seamless integration between different sections, would cumulatively establish its composite integrality. In the considered view of this Court, the question of composite integrality would have to be answered upon a conjoint consideration of the various factors noticed above.

However there is one aspect that needs to be elaborated upon before this Court proceeds further. Education has undergone a sea change since Vinod Sharma I came to be decided. The sheer number of students seeking admission in the system, the number of students in each class, the range of subjects which are taught, the student teacher ratio liable to be maintained, the infrastructural norms laid down by statute in respect of different levels of the education system, the allied facilities which are mandated to be established, may not leave it feasible for all sections to function out of a common campus. At least that cannot be viewed as the determinative norm or a sin qua non in today's times. There may in fact be situations where it may be expedient to segregate, insulate and shield a primary section from the higher classes. The nature of the environment which is required to be created and maintained in a primary institution, may itself mandate its insulation and be desirable and prudent. Judicial

notice can also be taken of even Universities today functioning out of separate and yet integrated study centers and campuses. All that the Court seeks to emphasise is that the attribute of a common campus may have lessened in its relevance. At least it may no longer be liable to be viewed as the determinative norm in all situations.

In the ultimate analysis, the composite integrality of an institution would have to be examined and evaluated taking into consideration a combination of the attributes and factors enumerated above."

154. The learned Single Judge has rightly observed that the judiciary evolved principle of commonality of primary School and Junior High School bearing in mind factors such as a common campus may not be of much relevance and may not be the determining norms in all situation, but the question of composite integrality be it a primary school, Junior High School, High School or Intermediate college would have to be considered upon a conjoint consideration of various factors such as common campus, functioning under the control of the same management, a singular Headmaster administering the institution and a seamless integration between different sections etc.

155. These factors must be found to exists as an amalgam of various components indelibly fused together to constitute a singular institution. In the ultimate analysis, it was held that the composite integrality of an institution would have to be examined and evaluated taking into consideration a combination of the attributes and factors enumerated above. It was held that in light of the principle of integrality as propounded therein and in light of construction of word "institution" in Section 2(b) of the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act' 1971, a primary institution which is homogeneous part of a recognised and aided High School or Intermediate institution would fall within the ambit of the 1971' Act and cannot be understood to be a separate or distinct component. It was held that such a primary section, would irrespective of the fact that it may not be in receipt of a maintenance grant, remains an integral component of that institution. The teachers of such a primary section cannot, therefore, be denied the protection of the 1971 Act.

156. The issue of integrality of the primary and Junior High School, i.e. they being one institution which was the basis of decision in Vinod Sharma got affirmation in "Pawan Kumar Divedi" wherein the said issue had been examined from different angles. The question of oneness of such institutions has been discussed in paragraph No.42, 42.1 & 42.2 of the judgement as under:-

"42. It is important to notice here that recognised Junior High Schools can be of three kinds: (one) having Classes I to VIII, i.e., Classes I to V (Junior Basic School) and so also Classes VI to VIII (Senior Basic School), (two) a school as above and upgraded to High School or intermediate standard and (three) Classes VI to VIII (Senior Basic School) initially with no Junior Basic School (Classes I to V) being part of the said school.

42.1 As regards the first two categories of Junior High Schools, the applicability of Section 10 of the 1978 Act does not create any difficulty. The debate which has centered round in this group of

appeals is in respect of third category of the schools where Classes I to V are added after obtaining recognition to the schools which are recognized and aided for imparting education in Classes VI to VIII. Whether teachers of primary section Classes I to V in such schools are entitled to the benefit of Section 10 of the 1978 Act is the moot question.

42.2 As noticed, the constitutional obligation of the State to provide for free and compulsory education of children till they complete the age of 14 years is beyond doubt now. The note appended to clause (xxvi), para 1 of the Educational Code (revised edition, 1958), inter alia, provides that Basic Schools include single schools with Classes I to VIII. In our view, if a Junior Basic School (Classes I to V) is added after obtaining necessary recognition to a recognized and aided Senior Basic School (Classes VI to VIII), then surely such Junior Basic School becomes integral part of one school, i.e., Basic School having Classes I to VIII. The expression "Junior High School" in the 1978 Act is intended to refer to the schools imparting basic education, i.e., education up to VIII class. We do not think it is appropriate to give narrow meaning to the expression "Junior High School" as contended by the learned senior counsel for the state. The Legislature used the expression Junior High School and not the Basic School as used and defined in the 1972 Act, in our view, is insignificant. The view, which we have taken, is fortified by the fact that in Section 2(j) of the 1978 Act, the expressions defined in the 1972 Act are incorporated."

157. In paragraph No.'43', it was observed that :-

"43. The submission of Mr. P.P. Rao, learned senior counsel for the State of U.P. with reference to the subject School, namely, Riyaz Junior High School (Classes VI to VIII), that the said school was initially a private recognized and aided school and the primary section (Classes I to V) was opened by the management later on after obtaining separate recognition, which was un-aided, the teachers of such primary section, in terms of definition in Rule 2(b) and Rule 4 of the 1975 Rules are not entitled to the benefits of Section 10 of the 1978 Act does not appeal to us for what we have already said above. The view taken by the High Court in the first round in Vinod Sharma that Classes I to VIII taught in the institution are one unit, the teachers work under one management and one Head Master and, therefore, teachers of the primary classes cannot be deprived of the benefit of the 1978 Act, cannot be said to be a wrong view. Rather, it is in accord and conformity with the Constitutional scheme relating to free education to the children up to 14 years."

158. With the above discussion, in paragraph No.'44' of the report while rejecting the view taken by two Judges Bench in the referral order that the legislation has made a conscientious distinction between two sets of school to treat them two separate components by entrusting education at the primary level and Junior High School level under the different enactments to the Board was rejected, with the further observation that any such view may render the provisions of the 1978' Act unconstitutional on the ground of discrimination.

159. It is pertinent to note, at the cost of repetition, that all the above observations were pertaining to one category of institution as noted in paragraph No.'42' of the report, namely Junior High School

(Senior Basic School) (Classes VI to VIII) initially with no Junior Basic School (Classes I to V) being part of the said school.

160. It is also pertinent to note that the issue of integrality of the aforesaid two schools (sections) has been decided considering the Note appended to Clause (xxvi) Para 1 of the Educational Code (Revised Edition 1958). The Education Code of U.P. as per Note (2) applies to all other institutions except schools for Anglo-Indians, in any way under the control of the Education Department. Chapter I "Definition and Classification", further reveals that it covers all categories of institutions in the State of U.P. except the one noted above.

161. Chapter I (xxvi), defines "School" means a recognized institution which follows the curriculum prescribed by the Department or the Intermediate Board. The classification or types of schools stated therein is as follows:-

(a) Nursery School means a school where children of pre-basic stage, i.e. from about three to six years of age are taught,

(b) Junior Basic School means a school teaching children generally between 6 and 11 years of age in Classes I to V (i.e. primary section),

(c) Senior Basic School or Junior High School mean either a school preparing students for the Junior High School Examination of the Department or a school teaching Classes 1 to VIII or VI to VIII (middle section),

NOTE - Basic Schools include both Senior or Junior Basic Schools as well as single schools with classes I to VIII.

(d) Higher Secondary School means a school with or without lower classes maintains Classes IX and X and/or XI and XII and prepares students for the High School and/or Intermediate Examinations of the Intermediate Board or a University"

162. Further the Note added after clause (c) clarifies that the term "Basic schools" include both Senior or Junior basic schools as well as single schools with classes I to VIII. Noticing this scheme of the Education Code, the Constitution Bench in **Pawan Kumar Divedi8** had observed in paragraph '42.1', as extracted above, that the Junior Basic School (classes I to V) if added after obtaining necessary recognition to a recognized and aided Senior Basic School (Classes VI to VIII), then surely such Junior Basic School becomes integral part of one school (single unit) which is Basic school having Classes I to VIII. The statutory concept of oneness of a Basic school having classes I to VIII in the Education Code' 1958, (covering all categories of institutions in the State of U.P.), as interpreted in **Pawan Kumar Divedi8** cannot be said to have been effaced with the insertion of definition of 'Junior Basic School' and 'Senior Basic School' in the 1972' Act, which is the same as provided in the clauses (xxvi) (b) & (c) of the Education Code as extracted above.

163. The observation that any other interpretation of the provision would be hit by Article 14 of the Constitution on the ground of discrimination has also been made by the Constitution Bench keeping in view of the above perspective that the teachers working in the primary sections (Classes I to V) of a Junior High School (Classes VI to VIII), which is a homogeneous part of one unit of a Basic

school, cannot be discriminated and denied protection which is available to the teachers teaching Classes VI to VIII of the same school.

164. In light of the above discussion, the only conclusion that can be drawn is that though the Validation Acts/Amendment Acts 2017 by introduction of the definition/meaning of the expressions "Junior High School" and "Junior Basic School" have removed the scope of interpretation of the said expressions by the Court but the amendments cannot be said to have effaced the basis of decisions of **Vinod Sharma6** and the Constitution Bench in **Pawan Kumar Divedi8**. The Constitution Bench judgment in **Pawan Kumar Divedi8** on the issues of integrality (oneness of the institution) and hostile discrimination still holds good having a binding force, as any other interpretation to the effect of the Validation Act' 2017 (the U.P. Act No.3 of 2018) (Amendment in the Payment of Salaries Act' 1978) would make it an invalid legislation being beyond the plenary powers of the legislature. It is settled that the legislature while fundamentally altering or changing the conditions on which a decision is based in exercise of the plenary power conferred upon it by Article 245 & 246 of the Constitution cannot review a judgment of the Court on the legal principles as it amounts to exercising the judicial power and thereby transgressing its power.

(c) Discrimination:-

165. Coming to the issue of discrimination, the constitutionality of Amendment Acts' 2017 has been challenged before us on the plea that the Act promotes hostile discrimination against one set of institutions which cannot be classified as a separate class namely the primary institutions established as an integral part of Junior High Schools. In other words, a primary institution which cannot be alienated from a Junior High School having all components of composite integrality, being "one unit", a homogeneous part of one institution.

166. The fundamental question, therefore, arises is whether the petitioners institutions in category 'B' & 'C' can be said to have been discriminated by the Amendment Acts' 2017, by insertion of clause (ee) in Section 2 of 1978' Act, i.e. by their exclusion from the purview of the 1978' Act.

167. Keeping the above aspects in mind, we have to see whether the challenge to the validity of two amending Acts' 2017, bringing amendments in the 1972' Act & 1978' Act, can be sustained by the petitioners.

(d) Testing the Constitutionality of the Amendment Acts' 2017:-

(i). Applying the doctrine of lifting the veil:-

168. In order to test the constitutional validity of the Act, where it is alleged that the statute violates the fundamental right, it is necessary to ascertain true nature and character and the impact of the Act itself. The doctrine of lifting the veil as propounded by the Apex Court in **Dwarkadas Shrinivas22; Mahant Moti Das v. S.P. Sahi, The Special Officer in charge of Hindu Religious Trust & Ors32; and Hamdard Dawakhana24** as noted in **State of Tamilnadu14.** is that the Court may examine with some strictness the substance of the legislation and for that purpose, the Court has to look behind the

form and appearance thereof to discover the true character and nature of the legislation. Its purport and intent would have to be determined.

In order to do so it is permissible in law to take into consideration all factors such as (i) history of the legislation; (ii) the purpose thereof; (iii) the surrounding circumstances and conditions; (iv) the mischief which it intended to suppress; (v) the remedy for the disease which the legislature resolved to cure; (vi) and the true reason for the remedy. This enquiry to find out the true character of the Statute to determine its purport and intent is based on the Doctrine of lifting the veil.

169. While making such enquiry, the Court can look at the Statement of objects and reasons appended to the Act, not as an aid to the construction, but for the purpose of deciphering the object and purport of the Act. In the **State of Tamil Nadu14**, it was noted that the Statement of objects and reasons may be relevant to find out what is the objective of any given statute passed by the legislature. It may provide for the reasons which induced the legislature to enact the Statute, for the purpose of deciphering the object and purport of the Act.

170. Keeping in mind the above principles of enquiry into the validity of the Statute we may have to look to the Statement of objects and reasons of Amendment Acts' 2017 (U.P. Act No.3 of 2018) for making amendment in 1978' Act which provides that the U.P. Payment of Salaries Act' 1978 had been enacted to provide for regulating the payment of salaries for teachers and other employees of Junior High School receiving aid out of the State fund. It further proceeds to note that since the expression "Junior High School" was not defined therein, odd situations were being created before the State Government and the cases instituted in various Courts were often being disposed off in favour of the plaintiff. The legislature, therefore, has decided to amend the Act to define the expression "Junior High School".

171. A careful reading of the above part of the Amendment Act shows that the true intent of bringing the Statute was to remove any difficulty in interpretation of the expression "Junior High School" occurring in the 1978' Act to clarify that the 1978' Act had been enacted to protect the interest of the teachers and employees of Junior High Schools, who are receiving aid out of the State fund. This amendment has been given retrospective effect as it has been deemed to have come into force on January 22, 1979, i.e. the date of enactment of the Payment of Salaries Act' 1978. The Junior Basic School (primary institution) as a separate class, thus, has been excluded from the purview of 1978' Act by a definite meaning assigned to the expression occurring in the said Act.

172. Simultaneous amendment has also been brought in the U.P. Basic Education Act 2017 with the insertion of definitions of "Junior Basic School" and "Junior High School"; separately in the Section 2 of the Act 1972 by the U.P. Act No. 2 of 2018 notified on the same day. The result is that a Basic School which does not fall within the meaning of "Junior High School" (classes VI to VIII) established and recognized on or after 22.01.1979 shall be out of the purview of the 1978' Act.

173. This amendment obviously does not affect such Junior Basic School (classes

I to V) and also the Senior Basic Schools (classes VI to VIII) which have been upgraded to High School or Intermediate standard and are integral part of High School or Intermediate institutions as they are covered by the Payment of Salaries Act' 1971 which regulates the payment of salaries to teachers of High School and Intermediate institution. The teachers teaching primary sections of such institutions are entitled for the salary from the State exchequer, consequential protection of the 1971' Act.

174. In the present matter, we are examining the validity of the retrospective amendments only for two categories of institutions which are essentially Junior High Schools having primary sections, established and recognized either prior to later to the establishment of the Junior High Schools and where the Junior High Schools have been granted aid out of the State funds after getting necessary recognition.

175. The dispute revolving around the plea of discrimination is to be examined only from the point of consideration for such primary institutions as they claim to be homogeneous part of one unit, i.e. integral part of Junior High Schools which are receiving aid out of the State fund.

176. From the above perspective, the validity of the Amendment Acts' 2017 is to be judged by us for the petitioners institutions falling in the two categories 'B' & 'C'.

177. To deal with this class of institution, taking note of the issue of the integrality discussed above, the principles evolved by the learned Single Judge in **Jai Ram Singh13** as also the Constitution Bench judgement in **Pawan Kumar Divedi8**, we find that the exclusion of the said class of institutions by virtue of the retrospective amendment in the 1978' Act is nothing but hostile discrimination. There is a strong link between the issue of integrality and protection against discrimination under Article 14 of the Constitution. The teachers who are working in the primary sections of a Junior High School, being run as 'one unit', belonging to a homogeneous class, stand discriminated by virtue of the retrospective amendments. The statute of this character which was hypothetically disapproved by the Constitution Bench in **Pawan Kumar Divedi8** as potentially discriminatory, cannot be approved as the State could not substantiate the said classification being reasonable one. Article 14 permits class legislation on the principle that it must be based on reasonable and intelligible differentia, i.e. the differentia must be on some rational basis, having nexus with the object sought to be achieved. The teachers who are working in primary sections of 'one unit' cannot be discriminated by bringing a legislation in the shape of retrospective amendment to exclude them that too in contravention of the decision of the Constitution Bench of the Apex Court (**Pawan Kumar Divedi8**).

178. There is another aspect of the matter. Noticeable is the fact that where there is a 'Single basic school' imparting education from classes I to VIII as classified in the Note appended to Clause (xxvi) (c) of the U.P. Education Code, it would not be possible for the Government to say that the part of the institution from classes VI to VIII would be considered for entitlement to Grant-in-aid and the other part from classes I to V would not. The teachers of such an institution teaching classes I to VIII form a homogeneous class

and treating them as a separate class by an artificial classification cannot be said to be founded on some rational principle which must have nexus to the object sought to be achieved, which is obviously regulating the non-Government institutions which are receiving aid from the State fund.

179. The object of Original 1978' Act was to remove frequent complaints of non-disbursement of salary of teachers and non-teaching employees of aided Non-government Junior High School. The Amendment Acts' 2017 only clarify that the "Junior High Schools" which are covered under the 1978' Act are such institution which are different from High School or Intermediate colleges wherein education is imparted from Classes VI to VIII.

180. As rightly pointed out by the learned Advocate General, the object of 1978' Act is not to provide grant from the State fund or confer any right on the management, rather this is a provision which regulates the activity of the management and casts obligation on it to disburse salary of teachers and staff employed by it on time. Any default on the part of the management would be a cause of adverse action against it under the 1978' Act. We are conscious that the management has no right to seek aid but the issue is about discrimination in the matter of protection accorded to teachers of the institutions receiving grant-in-aid out of the State fund. We are of the considered view that the teachers of Classes I to V of a 'Single basic school' or "integral part of the Junior High School imparting education from classes I to VIII" forming a homogeneous class, cannot be discriminated by denying the protection of the 1978' Act. It would be violation of the equal treatment guaranteed in Article 14 of the Constitution if the State deny protection to some teachers of one institution, ('Single Basic School' or 'one unit' from classes I to VIII) solely on the premise that they are teaching primary classes (I to V). To hold that in case of non-disbursement of salary to the teachers of the primary institutions of a Junior High School receiving grant-in-aid, the management would not be liable to penal action under the 1978' Act, would be a glaring instance of hostile discrimination, denial of equal protection by creating an artificial classification.

181. The above illustration would equally apply to the teachers of a recognized primary sections of a Junior High School which is receiving grant-in-aid from the State fund and where the primary section is an integral part of the Junior High School as they form a homogeneous class with the teachers of classes VI to VIII being employed in 'one school'. There is no rationale to treat teachers of the primary sections as a separate class irrespective of the fact that the primary sections are established prior to or later to the establishment of the Junior High School. Such a classification could not be justified on any rational principle based on intelligible differentia.

182. Only argument of the learned Advocate General is that grant-in-aid cannot be claimed as a matter of right and hence the issue of violation of fundamental right of teachers for equal protection under Article 14 of the Constitution cannot be raised and further that the primary institutions have always been treated as a separate class in the State of U.P. as since the inception of policy of the Government, providing aid to primary institutions was never contemplated.

Furthermore, as per the policy of the State, since the beginning the primary institutions were being run by the Municipal Board and local bodies and after the establishment of the Board of Basic Education, the State Government has added a large number of primary institutions almost in every locality whether rural or urban. The policy to provide grant-in-aid to Junior High Schools, High Schools and Intermediate colleges had been formulated as such State institutions were lesser in number.

183. It is vehemently urged that the State is free to give grant or refuse or change its policy according to availability of funds of the State. The 1978' Act cannot be treated as a provision imposing responsibility on the State to pay salary to the teachers of non-Government institutions out of the public fund. It was always the choice of the institutions to apply for grant-in-aid and the State to reject or grant aid in accordance with the policy formulated by it. The object of the 1978' Act to regulate the payment of salary to the teachers and staff of aided non-Government institutions has to be considered in the above perspective. According to the learned Advocate General the nexus with the object of the Amendment Act' 2017 is that the State has created a class of only those institutions who were not getting grant-in-aid, i.e. it has excluded only those who have not been receiving grant-in-aid since the inception of the policy and such a classification cannot be said to be discriminatory.

184. The above argument of the learned Advocate General about the choice of the State to exclude one class of institutions from the purview of 1978' Act has to be considered as it is. There cannot be any dispute that it is always the choice of the State to provide aid from the State fund or to deny to one or other class of institutions. However, treating one homogeneous class separated by creating an artificial division or artificial classification with the aid of the statutory provisions is impermissible. It would be one thing to say that the State did not find it fit to grant aid for legally justifiable considerations but exclusion of primary institutions which are integral part of recognized and aided Junior High Schools on the plea of financial implications or constraints is absolutely impermissible. Such a classification would render the provision of the statute itself discriminatory.

185. We do not find a single acceptable or persuasive reason for the division. No argument could be placed to demolish the issue of integrality and inextricably linked issue of violation of equality guaranteed under Article 14 in case of exclusion of the primary institutions of Categories 'B' & 'C' from the grant-in-aid scheme, as pressed by the learned Counsels for the petitioners.

186. All the abovenoted arguments of the learned Advocate General do not impress the Court to turn down the challenge broughtforth by the institutions falling in the category 'B' & 'C' in the present bunch.

187. The classification made by the State does not stand the test of scrutiny on the touchstone of Article 14 as the Statute cannot accord differential and discriminatory treatment to equals in the matter of payment of salary from the State fund or the protection of the 1978' Act, which empowers the State to initiate action

against the management in case of non-payment of salary to teaching and non-teaching staff of aided institution in time on the action brought by the aggrieved teachers or employees.

188.

(e) Before proceeding further, we find it pertinent to deal with one last argument of the State with regard to the binding effect of the observations of the Constitution Bench on the above noted two issues; namely, the issue of integrality and discrimination.

189. It is vehemently submitted by the learned Advocate General that the arguments of the petitioners that the Amendment Acts' 2017 (U.P. Act No.3 of 2018) is discriminatory, is mainly based on the observations of the Constitution Bench in **Pawan Kumar Divedi8** which cannot be sustained, for another reason that in the said matter, the Apex Court was dealing with the reference before it. The observations of the Apex Court therein while answering the reference though are binding between the parties but the observations particularly pertaining to the unconstitutionality of a hypothetical provision in the 1978' Act is based on assumptions. As the said issue was not under consideration, those observations can be only said to be Obitor Dicta and not binding on the High Court as a ratio decidendi. The submission, thus, is that since the very basis of the judgement of the Apex Court on the interpretation of the expression "Junior High School" in the 1978' Act has been taken away with the Validation Act' 2017 (U.P. Act No.3 of 2018), none of the other observations of the Apex Court in **Pawan Kumar Divedi8** on any issue, whether of integrality or discrimination, are having any binding force as of now. The reliance placed on the decision of the Constitution Bench to substantiate the challenge is wholly misplaced.

190. As discussed above, the question as to whether teachers of primary sections (Classes I to V) added after obtaining recognition in a recognized and aided Junior High Schools are entitled to the benefit of 1978' Act was answered from three angles by the Constitution Bench. At the cost of repetition, it is noted that the issue of integrality of primary institutions added in a Junior High School after obtaining necessary recognition was one of the issues which was answered against the State. The observations in this regard made in paragraph No.'42.2' of the judgement cannot be said to be 'Obitor' rather they are the 'ratio decidendi' of the case being the reasoning given by the Apex Court while answering the question framed to answer the reference.

191. As regards the observations pertaining to the discrimination in paragraph No.'44', suffice it to say that the Apex Court had considered a hypothetical statutory provision therein while rejecting the contention of the State that the legislature has made conscientious distinction between two sets of schools to treat them as two separate components, the view taken in the referral order. It was observed by the Constitution Bench that any such view may render the provisions of 1978' Act unconstitutional on the ground of discrimination. The said observation is a guiding light in the matter of examining the validity of the Statute on constitutional principles. We may clarify that the aforesaid observations cannot either be said to be 'Obitor Dicta' or ratio decidendi of the

judgement as the Constitution Bench was considering a hypothetical provision, but it cannot be said that the said observation should be completely ignored. It is settled that even an 'Obiter dictum' of the Apex Court is binding on the High Courts in the absence of a direct pronouncement on that question elsewhere by the Apex Court. In **Oriental Insurance Co.Ltd v. Meena Variyal & others33** the Apex Court has gone a step further to state that an Obiter dictum of the Apex Court in an earlier case, may not be binding on it but it does have clear persuasive authority.

192. We may make it further clear that we may not be understood to mean that the observations of the Apex Court in **Pawan Kumar Divedi8** on consideration of a hypothetical statutory provision which was not on the statute book at the relevant point of time, the Apex Court had laid down any legal principles on the issue of perceived discrimination. But we may say that the said observation has been found to be having a persuasive value when we examined the validity of the statutory provisions, the definition of "Junior High School" in Section 2 (ee) added/inserted in the 1978' Act by way of the Amendment Act 2017 (U.P. Act No.3 of 2017), from different angles including the aspect of discrimination.

Relief:-

193. The next question is what is the way out? Whether the entire Amendment Act' 2017 can be said to be invalid for the above reasons.

194. That takes us to the principle of severance propounded in **D.S. Nakara & others Vs. Union of India34.** It was held therein that there is nothing which inhibits the Court from striking down an unconstitutional part of a legislative action which may have the tendency to enlarge the width and coverage of the measure. Whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be of enlarging the class. In such a situation, the Court can strike down the words of limitation in an enactment. That is what is called reading down the measure. Taking note of its previous decisions it was observed therein that the principle of 'severance' for taking out the unconstitutional provision from an otherwise constitutional measure has been well recognised.

195. In **Delhi Transport Corporation Vs. DTC Mazdoor Congress35,** it was held that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made.

196. It was further observed that, however, it is not possible for the Court to remake the statute when the provision is cast in a definite and unambiguous

language and its intention is clear. It is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. Only option for the Court in such a situation is to strike it down and leave it to the legislature if it so desires, to amend it.

197. Another situation is that if the remaking of the statute by the Courts is to lead to its distortion, that course is to be scrupulously avoided. One of the situations further where the doctrine of reading down can never be called into play is where the statute requires extensive additions and deletions. The reasons being that it is no part of the Court's duty to undertake such exercise and rather it is beyond its jurisdiction to do so.

198. In **Pioneer Urban Land & Infrastructure Limited & another Vs. Union of India & others36,** it was noted that the doctrine of reading down would apply only when general words used in a statute or regulation can be confined in a particular manner so as not to infringe a constitutional right.

199. Having examined the matter on the principle of integrality of primary sections (Classes I to V) of an aided Junior High School and hostile discrimination on exclusion of teachers of primary sections of such an institution, who jointly form a homogeneous class alongwith the teachers of Classes VI to VIII, we are of the view that by reading the words *"including a Basic School having both Junior and Senior basic school established or being run as a 'single unit' from classes I to VIII"* into the definition of "Junior High School" in Clause (ee) of Section 2 of the U.P. Junior High School (Payment of Salaries of Teachers and other Employees) Act' 1978, as amended by the Amendment Act' 2017 (U.P. Act No.3 of 2018), will save the Amendment Act' 2017 (U.P. Act No.3 of 2018) from being rendered unconstitutional. With this approach, the object and purpose of the Act' 1978 as amended upto date, can be achieved as per the intention of the legislature, i.e. to regulate the payment of salaries to teachers and staff of the institutions receiving grant-in-aid out of the State fund. Severance of the unconstitutional portion of the Amendments Act' 2017 by reading into the definition of "Junior High School" in Section 2 (ee) in the above manner will enlarge the width and coverage of the provision by including a class (such primary sections) within its purview. This inclusion is also in line with the spirit of the Constitution Bench judgement in "**Pawan Kumar Divedi8**" and will save the provisions of 1978' Act from being rendered unconstitutional on the ground of discrimination. The mischief which the retrospective Amendment Acts' 2017 (U.P. Act No.2 of 2018 and U.P. Act No.3 of 2018) intended to suppress, i.e. to exclude the primary teachers (Classes I to V) forming homogeneous Class of one Junior High School, will also be remedied with the aforesaid.

Conclusion:-

200. In view of the above discussion, our conclusions are:-

1. Since we find that the U.P. Act No.3 of 2018, bringing amendment to the Payment of Salaries Act' 1978 has been challenged to be discriminatory being in violation of fundamental right of equality enshrined in Article 14 of the Constitution and has been found to be so in the context of the teachers of the petitioners institutions

falling in category 'B' & 'C', the objection as to the maintainability of the writ petitions on the ground that the petitioner's institutions cannot be said to be prejudiced by the amendments is unsustainable, in as much as, it is settled law that no prejudice needs to be proved in cases where breach of fundamental right is asserted/alleged.

In our conclusion, the writ petitioners cannot be non-suited on the grounds that the action before the Court has not been brought by the teachers employed by them; and that the management has no legal right much less a fundamental right to seek grant-in-aid. The plea of the petitioners that the teachers of the attached primary sections of a recognized and aided Junior High School, whether established and recognized prior to or later to the establishment of the Junior High School stood discriminated, itself makes the Amendment Act' 2017 (U.P. Act No.3 of 2018) vulnerable of being unconstitutional.

Further, it was open for the petitioners institutions to challenge the constitutional validity of the Amendment Acts' 2017 while challenging the orders of rejection of their applications seeking grant-in-aid as the sole basis of rejection of their claim is the amendments under challenge. It is settled that while challenging any action or order of the State or executive, all possible objections have to be raised in one action and separate writ petitions for the same cause of action cannot be entertained. In other words, the petitioners management have no option but to challenge the constitutional validity of the Amendment Acts' 2017 in order to sustain their challenge to the correctness of the decisions rejecting their representations, as the only basis of rejection of their claims is exclusion by way of Amendment Acts' 2017.

The writ petitions in this batch, thus, cannot be rejected, at the threshold, on the objection of the State as to the locus of the writ petitioners.

(2) The U.P. Act No.3 of 2018 bringing amendment in the Payment of Salaries Act 1978, which has been termed as the Validation Act does not have the effect to efface the whole basis of the Constitutional Bench judgement in **Pawan Kumar Divedi8**, which in-turn had upheld the decision in **Vinod Sharma6**. The issue of integrality or oneness of such institutions which have both primary sections (Junior Basic School) (classes I to V) and Senior Basic School (Junior High School) (classes VI to VIII), as propounded by the Constitution Bench, taking note of Clause (xxvi) Part-1 in Chapter I of the Education Code of U.P. (Revision Edition 1958) cannot be said to have been obliterated by virtue of the U.P. Act No.3 of 2018 (Amendment Act' 2017).

(3) The introduction of definition of "Junior High School" in Section 2(ee) of the Payment of Salaries Act' 1978 with retrospective effect, i.e. the date of coming into force of the original enactment, i.e. 22.01.1979 has resulted in hostile discrimination to the teachers of institutions imparting education in the primary sections (Classes I to V) of a Junior High School getting grant from the State fund. Such a classification negates equality as it could not satisfy the twin test of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together or those that are left out of the group and that differentia having a rational nexus to the

The State could not bring before us the rationale on which classification is founded and which co-relate it to the object sought to be achieved.

4. The intention of the legislature in bringing the Original enactment namely the Payment of Salaries Act' 1978 on 22.01.1979 was to remedy complaints of teachers and non-teaching employees of aided non-government Junior High Schools about non disbursement of their salary in time resulting in hardship to them by taking action against the management under the Act in case of such a complaint is found true. The purpose of bringing Amendment Acts' 2017 for insertion of the definition of "Junior High School" in the 1978' Act, is to clarify that the original enactment regulates the matter of payment of salary to teachers and other employees of a Junior High School, (imparting education from classes VI to VIII) receiving aid out of State fund.

Gathering the intention of the legislature for enactment of the 1978' Act the context in which the regulation provision occurred in the Act and the purpose for which the original enactment was made, the "limitation" to which the expression "Junior High School" has been restricted in the Amendment Act' 2017 (U.P. Act No.3 of 1978), by excluding primary sections of a recognized and aided Junior High School is not found based on an intelligible differentia which distinguishes the teachers of Classes VI to VIII from the teachers of Classes I to V of 'one institution' which are grouped together in a homogeneous class and cannot be differentiated. The differentia sought to be created cannot be said to have a rationale relation to the object sought to be achieved by the Original Act' 1978 or the Amendment Act' 2017.

5. As the challenge has been entertained by us only for one class of institutions, namely recognized and aided Junior High Schools having primary sections as integral part of the Schools, the whole Amendment Act' 2017 cannot be rendered unconstitutional.

By reading the words "including a Basic School having both Junior and Senior Basic School established or being run as a 'single unit' from Classes I to VIII" into Section 2(ee) of 1978' Act inserted by U.P. Act No.3 of 2018, the object and purpose for which the Original enactment namely the Payment of Salaries Act' 1978 was enacted can very well be achieved. Applying the doctrine of reading down or reading into the statute, the words of limitation in the statute read in such a manner save the statute from being declared unconstitutional. It is, thus, declared that primary sections which are integral part of Junior High Schools, whether established prior or later to the establishment of recognized and aided Junior High Schools shall have to be brought within the purview of the Payment of Salaries Act' 1978 as amended by the U.P. Act No.3 of 2018. (Amendment Act' 2017).

It is, however, clarified that the issue of integrality or oneness of such an institution would have to be examined in relation to that particular institution in each case depending upon the facts and circumstance of that case. Meaning thereby, whether a particular institution fulfills the test formulated in **Vinod Sharma6** approved in **Pawan Kumar Divedi8** by the Constitution Bench of the Apex Court, would be an issue of fact to be determined in respect of each individual institution. The test of 'oneness of an institution' on the principle of 'composite integrality' as evolved by the learned Single Judge in **Jai Ram Singh13** as approved by us has to be applied while evaluating as to when an institution may be made up of various sections or compartments to make it "one unit". As held in **Jai Ram Singh13**, in

order to meet the test of 'composite integrality', it must be established that the institution exists as an amalgam of various components indelibly fused together to constitute a singular whole (unit). The requirement of a common campus solely as formulated in **Vinod Sharma6**, cannot be recognised as a determinative factor. The issue of "composite integrality" would have to be answered upon a cumulative consideration of all relevant factors, which are necessary to be brought by the institutions before the competent authority at the time of taking decision.

6. The 2017' Amendment to the Payment of Salaries Act' 1978 only partially removes the basis of the decision of the Apex Court in **Vinod Sharma6** and the Constitution Bench in **Pawan Kumar Divedi8** as the expression "Junior High School" no longer is open for interpretation by the Court.

7. We may also clarify that in view of the reading of the above noted words into the definition of the "Junior High School" occurring in the U.P. Act No.3 of 2018 enacted for insertion of Clause (ee) in Section 2 of the U.P. Junior High School (Payment of Salaries of Teachers and Other Employees) Act 1978, the Validity of the U.P. Act No.2 of 2018 bringing amendment in the U.P. Basic Education Act' 1972 is not to be looked into, in as much as, the meaning of the expression "Junior High School" in Section 2 (ee) of the 1978' Act as amended upto date, would control the provisions of the 1978 Act. The meaning of the said expression in Section 2 (d-2) of the 1972 Act inserted by the U.P. Act No.2 of 2018, would not be relevant for the purpose of 1978' Act. The separation of Basic school into two categories in the U.P. Basic Education Act 1972 by the insertion of definition clauses by U.P. Act No.3 of 2018 would not impact the meaning of the expression "Junior High School" in Section 2 (ee) of 1978' Act as amended by U.P. Act No.3 of 2018, in as much as, Section 2(j) of 1978 Act takes care of any possible conflict. It clarifies that the words of expression defined in the U.P. Basic Education Act' 1972 and not defined in the 1978 Act shall be given the meaning assigned to them in the 1972' Act. It is clarified that since we have read into Section 2 (ee) of the Payment of Salaries Act' 1978, (as amended upto date) considering the object and purpose of the said enactment, we do not find that the meaning of the expression "Junior High School" in Section 2 (d-2) of 1972' Act would come in the way of the meaning assigned to the said expression in the 1978' Act provided by the Amendment Act No.3 of 2018, as read down by us herein above.

Relief:-

201. For the reasoning as aforesaid, we **dispose of** the present bunch of writ petitions in the following manner:-

(i). The petitioners' institutions falling in group 'A' cannot sustain the challenge to the validity of the Amendment to the 1978' Act by U.P. Act No.3 of 2018, being unaided Junior High Schools.

(ii). The petitioners institutions falling in Group 'B' & 'C' are held to be covered under the provisions of the Payment of Salaries Act' 1978, as amended by 2017 Amendment namely the U.P. Act No.3 of 2018.

Consequently, the State shall reconsider their claims for providing grant-in-aid in light of the principle of 'composite integrality' or "oneness of the institution" evolved in Jai Ram Singh (Supra) as approved above.

(iii). The petitioners institutions falling in group 'D' may lay their claim before the appropriate authority, if they incidentally fall in Group 'B' & 'C'. However, such institutions which do not fall in Group 'B' & 'C' would not be entitled to the benefit of this decision.

(iv). As we have not examined the validity of the individual orders for rejection of the claim of each petitioner, the petitioners in Group 'D' which do not fall in Group 'B' or 'C' may draw proceeding before the appropriate authority to sustain their challenge.

(v) All rights and contentions of the parties on the validity of the individual findings recorded by the State in respect of each institution are left open.

202. No order as to cost.

1. In short Amendment Acts 2017.

2. In short 1972 Act.

3. Uttar Pradesh Recognised Basic Schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules' 1975 (In short Rules' 1975).

4. Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules' 1978 (In short Rules 1978).

5. U.P. Junior High School (Payment of Salaries of Teachers and Other Employees) Act 1978, (U.P. Act No.6 of 1979) (in short 1978' Act).

6. Vinod Sharma and Ors. v. Director of Education (Basic) U.P. and Ors. 1998 (3) SCC 404.

7. State of U.P. and others Vs. Pawan Kumar Divedi. 2006 (7) SCC 745.

8. State of U.P. and others Vs. Pawan Kumar Divedi 2014 (9) SCC 692.

9. Paripurna Nand Tripathi & another Vs State Of U.P. & others. 2015 (3) ADJ 567.

10. Society for Unaided Private Schools of Rajasthan V. Union of India. 2012 (6) SCC 1.

11. State of U.P. and others v. Bhupendra Nath Tripathi and others 2010 (13) SCC 203.

12. Bhartiya Seva Samaj Trust and another Vs. Yogeshbhai Ambalal Patel and another 2012 (9) SCC 310.

13. Jai Ram Singh & others Vs State of U.P. & others 2019 (6) ADJ 255.

14. State of Tamil Nadu and others Vs. K. Shyam Sunder and others 2011 (8) 737.

15. Namit Sharma Vs. Union of India 2013 1 SCC 745.

16. State Of Andhra Pradesh & others vs Mcdowell & Co. & others 1996 3 SCC 709.

17. State of U.P. vs Principal Abhay Nandan and Inter College AIR 2021 SC 496.

18. Society for Unaided Private Schools of Rajasthan 2012 6 SCC I .

19. State of U.P. and others Vs Bhupendra Nath Tripathi & others 2010 (13) SCC 203.

20. Unnikrishnan J.P. Vs. State of A.P 1993 1 SCC 645

21. State of Punjab in Ghulam Qadir vs. Special Tribunal and others 2002 (1) SCC 33.

22. Dwarkadas Shrinivas v. The Sholapur Spinning & Weaving Co. Ltd. & Ors. AIR 1954 SC 119.

23. Mahant Moti Das v. S.P. Sahi, The Special Officer in charge of Hindu Religious Trust & others AIR 1959 SC 942.

24. Hamdard Dawakhana & Anr. v. Union of India & Ors AIR 1960 SC 554.

25. Ashwani Kumar Vs Union of India 2020 (13) SCC 585

26. Shri Prithvi Cotton Mills Ltd. & others vs Broach Borough Municipality & Ors AIR 1970 SC 192.

27. S.R. Bhagwat & others Vs. State of Mysore 1995 (6) SCC 16.

28. Cauvery Water Disputes Tribunal 1993 Supp. (1) SCC 96(II).

29. G.C. Kanungo Vs. State of Orissa 1995 (5) SCC 96

30. Madan Mohan Pathak & another Vs. Union of India & others 1978 (2) SCC 50.

31. A. Manjula Bhashini & others Vs. The Managing Director,A.P. Women's Cooperative Finance Corporation Ltd. and another 2009 (8) SCC 431.

32. Mahant Moti Das v. S.P. Sahi, The Special Officer in charge of Hindu Religious Trust & Ors AIR 1959 SC 942.

33. Oriental Insurance Co.Ltd v. Meena Variyal & others 2007 (5) SCC 428.

34. D.S. Nakara & others Vs. Union of India 1983 (1) SCC 305.

35. Delhi Transport Corporation Vs. DTC Mazdoor Congress 1991 Sup (1) SCC 600.

36. Pioneer Urban Land & Infrastructure Limited & another Vs. Union of India & others, 2019 (8) SCC 416.

(2022)04ILR A458

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.02.2022

BEFORE

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

Writ C No. 2121 of 2022

Bhikari & Ors. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Navin Kumar

Counsel for the Respondents:
C.S.C., Sri Kaushalendra Nath Singh

Civil Law – Constitution of India, 1950 - Article 226, - Land Acquisition Act, 1894 - Section – 4(1)/17(4) - Sections 6/17(1) & 12 - writ petition seeking direction - to grant benefit of payment of additional compensation or allotment of 5% developed land in terms of Full Bench decision of '*Gajraj Singh Judgement*' – admittedly, petitioners were neither the parties in the writ petitions which were decided along with '*Gajraj Singh & other Cases*' nor their land been acquired under

the notification which were subject matter before the said Full Bench - in view of settled law laydown in case of '*Anand Prakash & others'* **& in terms of** *Full bench judgment* **– no mandamus can be claimed legally for grant of such benefit as enforceable right.**(Para – 4, 11, 12, 17, 18)

Writ Petition Dismissed. (E-11)

List of Cases cited: -

1. Gajraj Singh & ors.Vs St. of UP & ors.(2011 vol. 11 ADJ 1 Full Bench),

2. Savitri Devi Vs St. of UP & ors.(2015 Vol. 7 SCC 21),

3. Mange @ Mange Ram Vs St. of UP & ors.(2016 (8) ADJ 79 DB),

4. Khatoon & ors.Vs St. of UP & ors.(2018 Vol. 18 SCC 346),

5. Smt. Rameshwari & ors.Vs St. of UP & ors.(Writ-C No. 18948 of 2017 decided on Dt. 03.05.2017),

6. Ramesh & ors.Vs St. of UP & ors.(2019 Vol. 4 ADJ 225 DB),

7. Ravnidra Kumar Vs District Magistrate, Agra & ors.(2005 Vol.1 UPLBEC 118),

8. Anand Prakash & anr. Vs St. of UP & ors.(2019 vol. 12 ADJ 171 DB)

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

1. Heard Sri Navin Kumar, learned counsel for the petitioners, Sri Kaushalendra Nath Singh, learned counsel for the respondent no.3 and learned Standing Counsel for the State.

2. The present writ petition has been filed seeking a direction to the respondents to allot 5% developed land in terms of the Full Bench decision of this Court in **Gajraj Singh and others Vs. State of U.P. and others1.**

3. The petitioners claim to be owners of khata no. 45 khasra no. 328 area 0.158 hectares situate in Village Sorkha Zahidabad, Pargana and Tehsil Dadri, District Gautam Budh Nagar which were subject matter of acquisition proceedings in terms of notification dated 12.04.2005 issued under Section 4 (1)/17(4), and the notification dated 27.07.2006 issued under Section 6/17 (1) of the Land Acquisition Act, 1894. The petitioners admit to have accepted the compensation amount.

4. The petitioners have specifically stated that they did not challenge the land acquisition proceedings. The writ petition is also silent as to whether the notifications under which the land of the petitioners was acquired, were under challenge in the bunch of writ petitions which were decided along with the case of **Gajraj Singh and others**.

5. Learned counsel appearing for the State respondents and also the learned counsel for the Noida Authority have submitted that the benefit granted by the Full Bench in the case of **Gajraj Singh and others** would not be applicable to the case of the petitioners for the reason that the petitioners were neither parties in the writ petitions which had been decided along with the case of **Gajraj Singh and others** nor there is any assertion by the petitioners that the notifications under which their land had been acquired were subject matter of challenge in the case of **Gajraj Singh and others**. Further more, it has been submitted that in terms of the direction contained in the Full Bench judgment, the Noida Authority had taken a

decision not to allot the abadi plot to the extent of 10% to those land owners who had not approached the writ court and had not challenged the acquisition proceedings.

6. It may be noticed that in the case of **Gajraj Singh and others**, the writ petitions challenging the notifications in respect of land acquisition proceedings with respect to tracts of land situate in different villages of Greater Noida and Noida were decided and the writ petitions were disposed of in terms of the following directions :-

"481. As noticed above, the land has been acquired of large number of villagers in different villages of Greater Noida and Noida. Some of the petitioners had earlier come to this Court and their writ petitions have been dismissed as noticed above upholding the notifications which judgments have become final between them. Some of the petitioners may not have come to the Court and have left themselves in the hand of the Authority and State under belief that the State and Authority shall do the best for them as per law. We cannot loose sight of the fact that the above farmers and agricultures/owners whose land has been acquired are equally affected by taking of their land. As far as consequence and effect of the acquisition it equally affects on all land losers. Thus land owners whose writ petitions have earlier been dismissed upholding the notifications may have grievances that the additional compensation which was a subsequent event granted by the Authority may also be extended to them and for the aforesaid, further spate of litigation may start in so far as payment of additional compensation is concerned. In the circumstances, we leave it to the Authority to take a decision as to whether the benefit of additional compensation shall also be extended to those with regard to whom the notifications of acquisition have been upheld or those who have not filed any writ petitions. We leave this in the discretion of the Authority/State which may be exercised keeping in view the principles enshrined under Article 14 of the Constitution of India.

482. In view of the foregoing conclusions we order as follows:

1. The Writ Petition No. 45933 of 2011, Writ Petition No. 47545 of 2011 relating to village Nithari, Writ Petition No. 47522 of 2011 relating to village Sadarpur, Writ Petition No. 45196 of 2011, Writ Petition No. 45208 of 2011, Writ Petition No. 45211 of 2011, Writ Petition No. 45213 of 2011, Writ Petition No. 45216 of 2011, Writ Petition No. 45223 of 2011, Writ Petition No. 45224 of 2011, Writ Petition No. 45226 of 2011, Writ Petition No. 45229 of 2011, Writ Petition No. 45230 of 2011, Writ Petition No. 45235 of 2011, Writ Petition No. 45238 of 2011, Writ Petition No. 45283 of 2011 relating to village Khoda, Writ Petition No. 46764 of 2011, Writ Petition No. 46785 of 2011 relating to village Sultanpur, Writ Petition No. 46407 of 2011 relating to village Chaura Sadatpur and Writ Petition No. 46470 of 2011 relating to village Alaverdipur which have been filed with inordinate delay and laches are dismissed.

2. (i) The writ petitions of Group 40 (Village Devla) being Writ Petition No. 31126 of 2011, Writ Petition No. 59131 of 2009, Writ Petition No. 22800 of 2010, Writ Petition No. 37118 of 2011, Writ Petition No. 42812 of 2009, Writ Petition No. 50417 of 2009, Writ Petition No. 54424 of 2009, Writ Petition No. 54652 of 2009, Writ Petition No. 55650 of 2009, Writ Petition No. 57032 of 2009, Writ Petition No. 58318 of 2009, Writ Petition

No. 22798 of 2010, Writ Petition No. 37784 of 2010, Writ Petition No. 37787 of 2010, Writ Petition No. 31124 of 2011, Writ Petition No. 31125 of 2011, Writ Petition No. 32234 of 2011, Writ Petition No. 32987 of 2011, Writ Petition No. 35648 of 2011, Writ Petition No. 38059 of 2011, Writ Petition No. 41339 of 2011, Writ Petition No. 47427 of 2011 and Writ Petition No. 47412 of 2011 are allowed and the notifications dated 26.5.2009 and 22.6.2009 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to deposit of compensation which they had received under agreement/award before the authority/Collector.

2 (ii) Writ petition No. 17725 of 2010 Omveer and others Vs. State of U.P. (Group 38) relating to village Yusufpur Chak Sahberi is allowed. Notifications dated 10.4.2006 and 6.9.2007 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to return of compensation received by them under agreement/award to the Collector.

2(iii) Writ Petition No.47486 of 2011 (Rajee and others vs. State of U.P. and others) of Group-42 relating to village Asdullapur is allowed. The notification dated 27.1.2010 and 4.2.2010 as well as all subsequent proceedings are quashed. The petitioners shall be entitled to restoration of their land.

3. All other writ petitions except as mentioned above at (1) and (2) are disposed of with following directions:

(a) The petitioners shall be entitled for payment of additional compensation to the extent of same ratio (i.e. 64.70%) as paid for village Patwari in addition to the compensation received by them under 1997 Rules/award which payment shall be ensured by the Authority at an early date. It may be open for Authority to take a decision as to what proportion of additional compensation be asked to be paid by allottees. Those petitioners who have not yet been paid compensation may be paid the compensation as well as additional compensation as ordered above. The payment of additional compensation shall be without any prejudice to rights of land owners under section 18 of the Act, if any.

(b) All the petitioners shall be entitled for allotment of developed Abadi plot to the extent of 10% of their acquired land subject to maximum of 2500 square meters. We however, leave it open to the Authority in cases where allotment of abadi plot to the extent of 6% or 8% have already been made either to make allotment of the balance of the area or may compensate the land owners by payment of the amount equivalent to balance area as per average rate of allotment made of developed residential plots.

4.The Authority may also take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% be also given to;

(a) those land holders whose earlier writ petition challenging the notifications have been dismissed upholding the notifications; and

(b) those land holders who have not come to the Court, relating to the notifications which are subject matter of challenge in writ petitions mentioned at direction No.3.

5. The Greater NOIDA and its allottees are directed not to carry on development and not to implement the Master Plan 2021 till the observations and directions of the National Capital Regional Planning Board are incorporated in Master Plan 2021 to the satisfaction of the National Capital Regional Planning Board. We make

it clear that this direction shall not be applicable in those cases where the development is being carried on in accordance with the earlier Master Plan of the Greater NOIDA duly approved by the National Capital Regional Planning Board.

6. We direct the Chief Secretary of the State to appoint officers not below the level of Principal Secretary (except the officers of Industrial Development Department who have dealt with the relevant files) to conduct a thorough inquiry regarding the acts of Greater Noida (a) in proceeding to implement Master Plan 2021 without approval of N.C.R.P. Board, (b) decisions taken to change the land use, (c) allotment made to the builders and (d) indiscriminate proposals for acquisition of land, and thereafter the State Government shall take appropriate action in the matter."

7. Pursuant to the directions issued under paragraph 482 (4) of the judgment in the case of **Gajraj Singh and others** the respondent authority took a decision in its Board meeting for paying additional compensation to the extent of 64.70% to all land owners whether they had challenged the notifications or not. A decision was also taken not to allot abadi plot to the extent of 10% to those land owners who had not approached the writ court and had not questioned the acquisition proceedings. This decision of the authority was based on the fact that such huge area of developed abadi land was not available so as to allot it to all such persons who did not approach the Court.

8. The contention of the petitioners that irrespective of the fact whether the notifications issued in respect of land acquisition proceedings were under challenge along with the bunch of cases decided by the Full Bench they should be granted the same benefit regarding developed abadi plot as was granted by the Full Bench is liable to be rejected, for the reason that in the case of **Gajraj Singh and others** the Full Bench granted relief to the petitioners and to such persons whose earlier writ petitions challenging the notifications had been dismissed or who had not come to the Court challenging the notifications which were subject matter of challenge in the writ petitions, in view of the peculiar facts of the case having regard to the extensive development which had taken place subsequent to the acquisition proceedings, and also that the Supreme Court in the case of **Savitri Devi vs. State of U.P. and others2** had made it clear that the directions issued by the Full Bench shall not be treated as a precedent in future cases.

9. We may also refer to the case of **Mange @ Mange Ram Vs. State of U.P. and others3**, where in a similar set of facts, certain petitioners, whose lands had been acquired under notifications, which were challenged not by the petitioners but by other similarly situate landowners, filed writ petitions in the year 2016 praying that they being similarly situate with those landowners, who had filed writ petitions and challenged the acquisition proceedings, were also entitled to claim the same relief, which had been granted to the writ petitioners in terms of the judgment in the case of **Gajraj Singh and others** and upheld in the case of **Savitri Devi**. The claim raised by the petitioners therein was turned down by this Court after recording a conclusion that the benefit granted by the Full Bench in the case of **Gajraj Singh and others** cannot be extended to the petitioners even though they may be similarly situate and the action of the respondents in not giving additional

developed abadi land was neither arbitrary nor discriminatory. The observations made in the judgment are as follows :-

"11. Having heard the learned counsel for the parties and having perused the direction given by the Full Bench in Gajraj's case (supra) as well as the decision of the Supreme Court in **Savitri Devi** (supra), we find that the judgment of the Full Bench was affirmed by the Supreme Court in **Savitri Devi** (supra). While affirming the decision, the direction of the Full Bench in paragraph 484(4) to the authority to consider the case for payment of additional compensation and allotment of developed abadi plot to those land owners, who had not challenged the acquisition proceedings or whose writ petitions were dismissed earlier was also affirmed by the Supreme Court. Based on such direction, the authority took a decision to pay additional compensation to all the land owners irrespective of the fact as to whether they had challenged the acquisition proceedings or not. But with regard to allotment of developed abadi land, the authority took a decision not to allot to those land owners, who had not approached the writ Court on the ground that they have no developed land to allot to these land owners. The fact that the authority does not have any developed land for allotment has not been disputed as no rejoinder affidavit has been filed nor any evidence has been brought on record. We also find that such decision taken by the Board is neither arbitrary nor discriminatory.

12. The Full Bench in order to save the acquisition proceedings had issued the direction for payment of additional compensation and for allotment of developed abadi plots in the extenuating facts and circumstances of the case. The Supreme Court acceded to the said consideration holding that the Full Bench was justified in issuing such directions in the peculiar facts and circumstances of the case and in order to save the acquisition proceedings from the vice of arbitrariness. The Supreme Court while affirming the decision of the Full Bench categorically held that the said decision would not be treated to form a precedent for future cases. The Supreme Court held:

"50. Keeping in view all these peculiar circumstances, we are of the opinion that these are not the cases where this Court should interfere under Article 136 of the Constitution. However, we make it clear that directions of the High Court are given in the aforesaid unique and peculiar/specific background and, therefore, it would not form precedent for future cases."

13. Thus, we are of the opinion that the ratio decendi of the Full Bench cannot be applied to similarly situated persons. The said benefit given by the Full Bench cannot be extended to the petitioners, even though they may be similarly situated and their land had been acquired under the same notification.

14. We are of the view that the action of the respondents in not giving additional developed abadi land to the petitioners is neither arbitrary nor discriminatory, especially when there is no evidence to dispute the fact that the respondents have no developed land with them for allotment."

10. The aforementioned judgment in the case of **Mange @ Mange Ram Vs. State of U.P. and others** decided along with other connected matters was subjected to challenge before the Supreme Court and came to be decided in terms of the judgment in **Khatoon and others Vs. State of U.P. and others4**.

11. The question as to whether the landowners were entitled to claim benefit of the judgment passed by the Full Bench in the case of **Gajraj Singh and others**, which had been upheld in the case of **Savitri Devi**, insofar as it related to allotment of additional abadi plot was considered by the Supreme Court in aforementioned case of **Khatoon and others** and the contention sought to be raised on the basis of the principles underlying Article 14 of the Constitution was repelled after taking notice of the fact that insofar as allotment of abadi plot is concerned the High Court in the case of **Gajraj Singh and others** had confined the relief only to the petitioners therein and for other landowners the matter was left to discretion of the authority concerned which had declined to extend the said relief. It was held that the appellants had neither any legal right nor any factual foundation to claim the relief of allotment of additional developed abadi plot. Furthermore, it was taken note of that the relief in the case of Gajraj Singh was granted by the High Court in exercise of its extraordinary jurisdiction under Article 226 and was confined to the petitioners therein, and even the Supreme Court in **Savitri Devi** case held that said directions were not to be treated as precedent and were limited only to the facts obtaining in that case. The relevant observations made in the judgment in the case of **Khatoon and others** are being extracted below :-

"16. In other words, the case of the appellant writ petitioners before the High Court was that the reliefs, which were granted to the landowners by the Full Bench in Gajraj case and affirmed by this Court in **Savitri Devi** case be also granted to the appellants because their lands were also acquired in the same acquisition proceedings in which the lands of the writ petitioners of Gujraj case was acquired. In effect, the relief was prayed on the principles of parity between the two landowners qua State.

17. It is, however, pertinent to mention that so far as the direction of the High Court to award additional compensation payable @ 64.70% was concerned, the same was already implemented by the State by paying the compensation to all the landowners including the appellants without any contest.

18. In this view of the matter, the only question before the High Court in the appellants' writ petitions that remained for decision was as to whether the appellants are also entitled to claim the relief of allotment of developed abadi plot to the extent of 10% of their acquired land subject to maximum of 2500 Sq.M.in terms of the judgment in Gajraj case and **Savitri Devi** case.

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36. Therefore, the only question that now survives for consideration in these appeals is whether the appellants are entitled to get the benefit of second direction issued by the High Court in Gajraj, namely, allotment of developed abadi plot to the appellants.

37. In our considered opinion, the appellants are not entitled to get the benefit of the aforementioned second direction and this we say for the following reasons.

38. First, the High Court in Gajraj had, in express terms, granted the relief of allotment of developed abadi plot confining it only to the landowners, who had filed the writ petitions. In other words, the High Court while issuing the aforesaid direction made it clear that the grant of this relief is confined only to the writ petitioners [see conditions 3(a) and (b)].

39. Second, so far as the cases relating to second category of landowners, who had not challenged the acquisition proceedings (like the appellants herein) were concerned, the High Court dealt with their cases separately and accordingly issued directions which are contained in conditions 4(a) and (b) of the order.

40. In conditions 4(a) and (b), the High Court, in express terms, directed the Authority to take a decision on the question as to whether the Authority is willing to extend the benefit of the directions contained in conditions 3(a) and (b) also to second category of landowners or not.

41. In other words, the High Court, in express terms, declined to extend the grant of any relief to the landowners, who had not filed the writ petitions and instead directed the Authority to decide at their end as to whether they are willing to extend the same benefit to other similarly situated landowners or not.

42. It is, therefore, clear that it was left to the discretion of the Authority to decide the question as to whether they are willing to extend the aforesaid benefits to second category of landowners or not.

43. Third, as mentioned supra, the Authority, in compliance with the directions, decided to extend the benefit in relation to payment of an additional compensation @ 64.70% and accordingly it was paid also. On the other hand, the Authority declined to extend the benefit in relation to allotment of developed abadi plot to such landowners.

44. Fourth, it is not in dispute, being a matter of record, that when the Authority failed to extend the benefit regarding allotment of additional abadi plot to even those landowners in whose favour the directions were issued by the High Court in Gajraj and by this Court in **Savitri Devi**, the landowners filed the contempt petition against the Authority complaining of non-compliance with the directions of this Court but this Court dismissed the contempt petition holding therein that no case of non-compliance was made out.

45. In our view, the appellants have neither any legal right and nor any factual foundation to claim the relief of allotment of additional developed abadi plot. In order to claim any mandamus against the State for claiming such relief, it is necessary for the writ petitioners to plead and prove their legal right, which should be founded on undisputed facts against the State. It is only then the mandamus can be issued against the State for the benefit of writ petitioners. Such is not the case here.

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47. One cannot dispute that the Act does not provide for grant of such reliefs to the landowners under the Act. Similarly, there is no dispute that the State paid all statutory compensation, which is payable under the Act, to every landowner. Not only that every landowner also got additional compensation @ 64.70% over and above what was payable to them under the Act.

48. The reliefs in Gajraj were granted by the High Court by exercising extraordinary jurisdiction under Article 226 of the Constitution and keeping in view the peculiar facts and circumstances arising in the case at hand. They were confined only to the landowners, who had filed the writ petitions. Even this Court in **Savitri Devi** case held that the directions given be not treated as precedent for being adopted to other cases in future and they be treated as confined to that case only.

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51. In our opinion, therefore, there is no case made out by the appellants for grant of any relief much less the relief of allotment of additional developed abadi

plot. If we entertain the appellants' plea for granting them the relief then it would amount to passing an order contrary to this Court's directions contained in para 50 of the order passed in **Savitri Devi** case."

12. The question as to whether the benefit of the directions issued by the Full Bench in the case of **Gajraj Singh and others** for providing additional compensation to the extent of 64.70% and developed abadi plot to the extent of 10% of the land acquired was liable to be extended to such tenure holders also whose lands were not acquired in terms of the notifications which were under challenge in the case of **Gajraj Singh and others**, has also been considered by a coordinate Division Bench of this Court in the case of **Smt. Rameshwari and 3 others Vs. State of U.P. and 2 others5** and in terms of judgment dated 3.5.2017, it has been held as follows :-

"A perusal of the Full Bench judgement in the case of Gajraj Singh (Supra) goes to show that in order to save the acquisition proceedings, direction for payment of additional compensation and allotment of developed abadi plot was issued in peculiar facts and circumstances, particularly, the fact that extensive development had taken place even though the Full Bench found that opportunity to file objection under Section 5A Act had been wrongly denied to the tenure holders. However, the benefit extended to the land owners in lieu of saving the acquisition proceedings, even though the same were found to be illegal and liable to be quashed, was restricted to the acquisition proceedings challenged before it.

However, the question of extending the benefits of additional compensation and allotment of developed abadi plot to such land holders whose challenge to the land acquisition notification already stood dismissed or such land holders who did not approach this Court challenging the land acquisition notification though the said notifications were subject matter of challenge before the Full Bench, was left open to be decided by the authority. As already noticed above, in pursuance of the aforesaid directions, the authority took a decision in its Board meeting for making payment of additional compensation to the extent of 64.7% to all land holders whether they had put challenge to the land acquisition notifications or not. However, in respect of allotment of abadi plot to the extent of 10%, the authority took a decision not to extend the benefit to such land holders who had not approached the writ court and had not questioned the acquisition proceedings.

In the case in hand, the petitioners' land was acquired by means of notification dated 09.09.1997. Equally admitted fact is that the petitioners accepted the award and did not come forward to challenge the land acquisition proceedings. Not only that, notification dated 9.9.2017 whereunder an area 1275-18-18 including Gata no. 582 area 6-5-13, 538 area 0-15-6, 609 area 1-2-12 and 615 area 9-10-10 of the petitioners situate at village Tugalpur was acquired was not subject of matter of challenge before the Full Bench.

In view of above facts and discussions, it is clear that the relief which was granted by the Full Bench in the case of Gajraj Singh (Supra) affirmed by the Hon'ble Apex Court in the case of **Savitri Devi** (Supra) cannot be made applicable to the acquisition proceedings which were not assailed and were not subject matter of adjudication before the Full Bench in the case of Gajraj Singh (Supra). Thus, we are

of the considered opinion that the ratio dicendi of the Full Bench does not stand attracted in the case of the petitioners and they cannot claim parity with those tenure holders who were before the Full Bench in the case of Gajraj Singh (Supra). The petitioners are thus not entitled to the relief claimed in this petition. The impugned order therefore, does not suffer from any infirmity requiring any interference by this Court under Article 226 of the Constitution of India.

Writ petition fails and accordingly stands dismissed."

13. A similar view has been taken in a recent judgment of this Court in **Ramesh and others Vs. State of U.P. and others6**, wherein it was stated as follows:-

"14.Moreover, the directions issued by the Full Bench in the case of **Gajraj Singh and others** under para 482 (4) in terms of which the Authority was to take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% was to be given, was confined to those land holders whose writ petitions challenging the notifications had been dismissed earlier and to those who had not approached the court to challenge the notifications which were subject matter of challenge in the writ petitions decided along with the case of **Gajraj Singh and others**. The directions under para 482 (4) were not in respect of those persons such as the petitioners in the present case whose land had been acquired in terms of notifications which were not subject matter of challenge in the case of **Gajraj Singh and others** and connected matters."

14. The question as to whether claim for any additional benefit can be raised as a matter of right in lieu of acquisition of land was subject matter of consideration before a Full Bench of this Court in **Ravindra Kumar Vs. District Magistrate, Agra and others7**, wherein the claim sought to be raised for appointment in service in lieu of acquisition of land was repelled and it was held that the Land Acquisition Act is a self-contained Code providing the procedure to be followed for acquisition as well as for assessment of the valuation and payment of fair and just compensation to the persons whose land were acquired and in the absence of any statutory provision no other claim can be raised as a matter of right. The observations made in the judgment in this regard are as follows:-

"21. The Land Acquisition Act is a self-contained Code and provides the procedure to be followed for acquisition as well as for assessment of the valuation and payment of fair and just compensation as per market value of the person whose land is acquired. In addition to that market value of the land interest @ 12% is also given from the date of publication of the Notification vide Section 23 (1-A). Besides that, a sum of 30% on such market value is also paid as solatium for distress and for inconvenience or difficulties caused to the person on account of compulsory acquisition of the land vide Section 23 (2) of the Act. Therefore, a person whose land is acquired not only gets adequate compensation as per market value of the land but also gets interest on the amount of compensation (@) 12% from the date of notification under Section 4 of the Act as well as an amount of solatium, which is 30% of the amount of compensation. Neither the Land Acquisition Act nor the regulations provides that in the event of acquisition of the land one of the family members of the landholder shall be given

employment in addition to the amount of compensation. Therefore, in the absence of any statutory provision or any promise, the petitioner respondent cannot claim appointment as a matter of right nor can the respondent make such appointment."

15. The aforementioned position has been considered in a recent decision of this Court in **Anand Prakash and Another vs. State of U.P. and others8**, wherein the question which was considered was as to whether as per the directions in the case of **Gajraj Singh and others**, the petitioners, who were neither parties in the writ petitions which had been decided along with the case of **Gajraj Singh and others** nor had their land been acquired under the notifications which were subject matter of challenge in the writ petitions decided by the Full Bench in the case of **Gajraj Singh and others** and connected matters, could claim entitlement to allotment of abadi plot to the extent of 10% of their acquired land. The Division Bench after a detailed discussion of the factual and the legal position observed as follows:-

"22. In view of the foregoing discussion it follows that the directions issued by the Full Bench in the case of **Gajraj Singh and others** for payment of additional compensation and developed abadi plot were in respect of the petitioners in the bunch of writ petitions which were decided by the Full Bench. The question of extending the benefit of additional compensation and allotment of developed abadi plot to such landholders whose writ petitions challenging the notifications had been dismissed earlier and also those landholders who had not approached the Court challenging the notifications which were subject matter of challenge before the Full Bench, was left open to be decided by the authority.

23. It was in pursuance of the aforesaid directions that the authority took a decision at its board meeting for payment of additional compensation to the extent of 64.70% to all landholders whether they had chosen to challenge the land acquisition notifications or not; however, insofar as allotment of developed abadi plot to the extent of 10% of the acquired land is concerned the authority took a decision not to extend the said benefit to such landholders who had not approached the writ court and had not raised any challenge to the acquisition proceedings."

16. In the case at hand, the land of the petitioners was acquired in terms of proceedings initiated by means of the notification dated 12.04.2005 issued under Section 4(1)/17(4), and the notification dated 27.07.2006 issued under Section 6/17 (1) of the Act 1894. Admittedly the petitioners did not choose to challenge the land acquisition proceedings and it is also not the case of the petitioners that the notifications in terms of which the land of the petitioners was acquired were subject matter of challenge in the writ petitions which were decided by the Full Bench in the case of **Gajraj Singh and others**.

17. It may be noticed that there was no direction in the judgment of the Full Bench for grant of payment of additional compensation or allotment of abadi land or for consideration of the said benefits by the authority in respect of those persons whose land had been acquired in terms of the notifications which were not subject matter of challenge in the case of **Gajraj Singh and Others** and connected bunch of writ petitions.

18. The petitioners have admitted to having accepted the compensation in respect of their land which was subject matter of acquisition. The additional benefit by way of allotment of developed abadi plot which is sought by the petitioners not being founded on any legally enforceable right no mandamus can be claimed for grant of such benefit.

19. In view of the foregoing discussion, the petitioners are not entitled to reliefs which have been sought.

20. The writ petition thus fails and is, accordingly, **dismissed**.

(2022)04ILR A469
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.04.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 26269 of 2020

Amita Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mukul Kumar Sharma, Rakesh Kumar Srivastava

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India, 1950 - Article 226, Essential Commodities Act, 1955 - Section 3 - U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 - Clause 2(I), 8(6), 12: - Validity of Cancellation Order of Fair Price Shop License & dismissal of statutory Appeal - an inspection carried out by a 'Minority Welfare Officer' – Show cause notice – reply submitted – not considered - Petitioner's License of Fair Price Shop was cancelled relying upon the inspection in question – statutory Appeal dismissed – writ petition - inspection in question carried out without there being such authority/ delegated power as per Clause 2 (I) under 'Designated Authority' – '*delegatus non potest delegare*' – hence, impugned orders are set aside. (Para – 4, 11, 12, 18)

Writ Petition Allowed. (E-11)

List of Cases cited: -

1. St. of Bombay Vs Shiva Balak (AIR 1965 SC 661),

2. NGEF vS Chandra (2005 Vol. 8 SCC 219),

3. Writ C No. 12696 of 2009 (Mohd. Suaif & anr. Vs St. of UP & ors.Decided on 07.05.2019.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard learned counsel for the petitioner and the learned Additional Chief Standing Counsel.

2. The present petition has been filed challenging the order dated 14.11.2018 whereby the fair price shop license of the petitioner has been cancelled as well as the order dated 14.02.2020 whereby the appeal preferred against the cancellation order was rejected.

3. The facts, in brief, are that the petitioner was a fair price shop license holder having a shop situate at Tahsil Mahmoodabad District Sitapur. It is stated that on the basis of an inspection carried out by the 'Minority Welfare Officer', Sitapur on 06.04.2017, an opinion was formed that the petitioner was not running the shop properly and certain discrepancies were found in the said inspection carried

out by the Minority Welfare Officer, Sitapur. Based upon the said, the petitioner was issued with a show cause notice calling upon the petitioner to show cause as to why the steps may not be taken for cancellation of the license. The petitioner submitted his defense on 15.09.2017 and subsequently thereto, an order came to be passed on 29.01.2018 cancelling the fair price shop license of the petitioner. The said order was challenged in an appeal which resulted in the remand order and the matter was remanded for decision afresh. After the remand, a fresh order was passed on 14.11.2018 cancelling the fair price shop license and an appeal preferred against the said order came to be dismissed on 14.02.2020. The said orders are under challenge in the present writ petition.

4. The counsel for the petitioner argues that the supply, sale and distribution of the essential commodities in the State of U.P. is governed under the provisions of the various Control Orders and in the present case, the same would be governed by the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order 2016 issued by the State Government in exercise of the power under section 3 of the Essential Commodities Act read with notification of the Government of India. He argues that under the said Control Order of 2016, 'Designated Authority' is defined under section 2(l) and reads as under:

"2(l) 'Designated Authority' means any officer not below the rank of Supply Inspector of the Food and Civil Supplies Department in the State but for rural Areas it also includes Assistant Development Officer (Panchayat) or any officer authorized by the State Government."

5. He argues that in terms of the Control Order various obligations have been cast upon the license holder in respect of distribution and sale of the essential commodities. It also empowers the State Government to prescribe for the procedure to be followed by the 'designated authority' in the event of default by the licensing authority, for that he places reliance on Clause No.8(6) of the Control Order. He also placed reliance on Clause 12 of the Control Order 2016 to argue that the power of search and seizure is conferred upon the Commissioner, the food officer, the competent authority and designated officer within the jurisdiction on which they exercise their powers. Clause 12 of the Control Order is quoted as under :

12. Power of search and seizure -*(1) The Commissioner, the food officer, the competent authority and designated officer may within his jurisdiction with such assistance if any, as he thinks fit -*

6. In the backdrop of the said, he argues that the very initiation of the proceedings against the petitioner is contrary to the mandate of Clause 12 of the Control Order 2016 inasmuch as the inspection was carried out by the 'Minority Welfare Officer' who is not a designated officer as defined under Clause 2(l) of the Control Order 2016. He further argues that the Minority Welfare Officer is neither a designated officer nor he has been delegated any powers traceable to Clause 12 of the Control Order as also that there is no power of sub-delegation available upon the designated officer under the scheme of the Control Order or the Essential Commodities Act. He argues that it is well settled that the powers conferred upon a particular authority can be exercised only by the said authority and can be delegated

only if there is specific power of sub-delegation conferred upon the said authority (Delegatees non protest delegare). He places reliance on the judgment in the cases of **State of Bombay vs. Shiva Balak; AIR 1965 SC 661, NGEF vs. Chandra (2005) 8 SCC 219 and the judgement dated 07.05.2019 of this court in Writ -C No. 12696 of 2009 (Mohammad Suaif and another vs. State of U.P. and others).**

7. He further argues that even otherwise the order passed against the petitioner is bad in law inasmuch as in the defense the petitioner had relied upon various affidavits given in support of the petitioner which have been disbelieved on the grounds which are wholly arbitrary. To buttress his submissions, he argues that in the order, it is recorded that the affidavits filed in support of the defense of the petitioner are not worthy of credence because they are not affixed with photographs. He further argues that in respect of the some of the affidavits, the prescribed authority has formed an opinion that the same appear to have been obtained by misrepresentation from the deponents, which has neither any legal basis nor any factual basis. Thus, the said order is clearly a result of an arbitrary exercise of the power and deserves to be set aside. He lastly argues that in terms of the Government Order issued, it is specified that after a reply is submitted, the same should be got inquired into by an officer who is higher in rank than the officer who issued show cause notice, which has not been done in the present case. In the light of the said submissions, he argues that the writ petition deserves to be allowed.

8. The Additional Chief Standing Counsel, on the other hand, justifies the orders on the ground that various allegations were levelled against the petitioner, which after due process have been found to be correct and thus no interference is called for. He further argues that the argument with regard to non-availability of the authority/jurisdiction were neither raised in the defense nor in the appeal, as such, the petitioner cannot be permitted to raise the said argument at this stage. To conclude his submissions, he argues that the writ petition deserves to be dismissed.

9. I have considered the arguments raised at the bar and perused the records.

10. Considering the objection of the learned Additional Chief Standing Counsel that the plea/defense regarding lack of jurisdiction was neither raised before the prescribed authority nor before the appellate authority and has been raised for the first time before this court. It is well settled that the plea which goes to the root of lack of substantive jurisdiction can be raised at any stage of the proceedings, thus, I reject the preliminary objection raised by the Additional Chief Standing Counsel.

11. As regards the first argument, a specific averment has been made in the writ petition in para no. 9 with regard to lack of jurisdiction by the inspecting authority to which no reply has been given in the counter affidavit. A perusal of the Control Order specifically Clause 12 clearly provides that the power of search and seizure can be exercised only by the officer specified therein namely the Commissioner, food officer, the competent authority and the designated officer within his jurisdiction. The power of search is an expropriatory power and has to be interpreted strictly inasmuch as it is an

exception to the fundamental right of carrying business and thus has to be interpreted strictly. A plain reading of Clause 12 read with section 2(l) makes it clear that the Minority Welfare Officer is neither a person specified in Clause 12 nor a designated officer and thus the inspection carried out by him was without any authority of law.

12. It has been argued by the State that the inspection was carried out under the oral direction of the District Magistrate, however, no provision exists either under the Act or the Control Order empowering the District Magistrate to delegate his powers. The law with regard to delegation of power is very well settled, a power can be delegated only if permissible and up to that extent and without there being such power, the powers conferred upon the authority cannot be delegated (Delegatees non protest delegare) as laid down in the cases of **State of Bombay vs. Shiva Balak; AIR 1965 SC 661, NGEF vs. Chandra (2005) 8 SCC 219 and the judgement dated 07.05.2019 of this court in Writ -C No. 12696 of 2009 (Mohammad Suaif and another vs. State of U.P. and others)**.Thus, on the first ground itself, I am inclined to hold that the proceedings initiated by an inspection of 'Minority Welfare Officer' which culminated in the impugned order are clearly unsustainable.

13. Considering the second submission that the prescribed authority has erred in disbelieving the affidavits, the counsel for the petitioner places reliance on the judgment of this Court in the case of Balram Das vs. State of U.P. decided on 11.04.2022 in Writ-C No.20446 of 2017, wherein this court has held that in the event the prescribed authority disbelieves any evidence given in support of the defense, he should call for a better evidence/explanation in that regard from the person concerned. In the present case, the reasons prescribed for disbelieving the affidavits that photographs were not affixed, clearly cannot be termed as a proper exercise of the power by the prescribed authority. In any event, if the prescribed authority had reasons to disbelieve the said affidavits, he ought to have called for better affidavits which has not been done, as is clear from the records. Thus, on that ground also, the orders are unsustainable and are liable to be set aside.

14. I am not going into the third question in view of the first two questions being decided in favour of the petitioner. For the reasons recorded above, the writ petition deserves to be allowed. The orders dated 14.11.2018 and 14.02.2020 are set aside.

15. The writ petition stands allowed.

(2022)04ILR A472
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ C No. 33469 of 2021

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

Counsel for the Petitioner:
Sri Ram Pratap Yadav, Sri Devbratt Yadav

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India, 1950 - Article 226 - U.P. Panchayat Raj Act, 1947- Sections 12-E(2), 12-(3)(A) & 12-(3)(D) - U.P. Panchayat Raj (Election of Member, Pradhan and UP-Pradhan) Rules, 1994 - Rule 60(2): - **Election of Gram Panchayat members were held twice comprises of 15 wards – only 2 elected members were subscribes oath as result of first election and 3 towards second bye-election – functioning of the petitioner as duly elected Gram Pradhan has obstructed due to non-constituted of Gram Panchayat, unless & until 2/3 elected members Panchayat subscribes to the oath – hence, writ petition allowed with direction to the authority concern - to take an appropriate steps so that rest of 10 members of Gram Panchayat would take oath within three months or issue a fresh order of bye-election by declaring deemed vacancy.** (Para – 16, 17, 18)

Writ Petition Allowed. (E-11)

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Counter affidavit filed on behalf of respondent nos.2, 3 and 4 today, is taken on record.

2. Heard Sri Ram Pratap Yadav, learned counsel for the petitioner and learned Standing Counsel for the State.

3. Present writ petition has been filed by the petitioner Anuj Kumar, claiming to be the duly elected Gram Pradhan of village Bhauli, Development Block Kurara, Tehsil-Hamirpur, District-Hamirpur. He claims relief in the nature of direction upon the District Magistrate-Hamirpur to assign financial and administrative powers to the petitioner to enable him to discharge all functions of Gram Pradhan.

4. Upon perusal of the pleadings made in the writ petition as confirmed by the counter affidavit filed by the District Panchayat Raj Officer, Hamirpur, it transpires, undisputedly the petitioner was elected as the Gram Pradhan, Gram Panchayat Bhauli, Development Block Kurara, District-Hamirpur on 02.05.2021. His term is five years. Almost one year has passed and the petitioner has yet not been able to function as the Gram Pradhan. Functioning of the petitioner has been obstructed on account of non-constitution of the Gram Panchayat Bhauli. In that regard, it has been clearly disclosed in the counter affidavit filed by the District Panchayat Raj Officer, Hamirpur that Gram Panchayat Bhauli comprises of 15 wards. Election to all 15 wards of the said Gram Panchayat first took place on 02.05.2021. Of the 15 ward members elected, only 2 could be administered oath. The remaining 13 did not present themselves for administration of oath as ward members of the Gram Panchayat Bhauli, despite reminders.

5. Acting in conformance to Section 12-E(2) of the Uttar Pradesh Panchayat Raj Act, 1947 (hereinafter referred to as the 'Act'), 13 elected members of the Gram Panchayat Bhauli who failed to subscribe to the oath of office, were deemed to have vacated office/seat vide order dated 10.11.2021.

6. The document filed as Annexure CA-3 to the counter affidavit further reveals, pursuant to the order of the State Election Commission dated 06.01.2021, the bye election to the aforesaid 13 vacant wards were held and 13 members were elected. This time only 3 of the members so elected could be administered oath. The remaining 10 have yet not subscribed to the

oath. The counter affidavit does not state as to whether the said 10 persons have been deemed to have vacated the office/seat of member of Gram Panchayat, Bhauli.

7. In such facts, it has been stated in the counter affidavit and has been vehemently urged by the learned Standing Counsel that the Gram Panchayat has yet not been constituted in accordance with Section 12(3) of the Act. Unless 2/3 elected members subscribe to the oath, the Gram Panchayat cannot be constituted. Since the strength of the Gram Panchayat, Bhauli is 15, necessarily, 10 members must subscribe to the oath before the petitioner may be allowed to function as a fullfledged Gram Pradhan.

8. Having heard learned counsel for the parties and having perused the record, there can be no denial that the Gram Panchayat may be constituted only upon 2/3 members of the total strength of the Gram Panchayat being elected. In the present case, that number would have to be 10. This position emerges from the plain reading of Section 12(3)(d) read with its proviso. It reads :

*"**12(3)(d)** The Constitution of a Gram Panchayat shall be notified in such manner as may be prescribed and thereupon the Gram Panchayat shall be deemed to have been duly constituted, any vacancy therein notwithstanding :*

Provided that the Constitution of a Gram Panchayat shall not be so notified till the Pradhan and at least two-thirds of the members of the Gram Panchayat have been elected."

9. Then, Section 12-E of the Act reads as below :

*"**12-E. Oath of office -**(1) [Every person] shall, before entering upon any office referred to in Sections 11-A, 12, 43 or 44, make and subscribe before such authority as may be prescribed on oath or affirmation in the form to be prescribed.*

(2) Any member who declines or otherwise refuses to make and subscribe such oath or affirmation as aforesaid shall be deemed to have vacated the office forthwith."

10. Thus, in the first place, the legislature has used the word 'elected'. There is no doubt that elections have been held to fill up all posts of the Gram Panchayat, twice. On both occasions, members were elected on all seats. However, only two persons subscribed to the oath as a result of the first election and only 3 persons subscribed to the oath as the result of the second/bye-election.The petitioner does not assert that the requirement of Section 12(3)(d) of the Act stood fulfilled upon conclusion of election. At the same time, it is equally true, by virtue of communication dated 10.11.2021 issued under Section 12-E of the Act, 13 posts on which the elected members did not subscribe to the oath, were declared deemed vacant. Consequently, bye-election took place. Still, 10 of the 13 persons thus elected (as a consequence of the bye-election), have not subscribed to the oath till date. Thus, in all only 5 (1/3rd) elected members of the Gram Panchayat Bhauli have made and subscribed to the oath. The quorum is short by 5.

11. In such facts, the respondent-authorities may now seek to enforce on the remaining 12 elected members of the Gram Panchayat to make and subscribe to the oath within a fixed time failing which the

declaration of deemed vacancy may be visited in terms of Section 12-E of the Act.

12. While that may be done first, the State Government and/or the Officer authorized is not helpless in this regard. The constitution of the Gram Panchayat and its functioning cannot be held hostage by elected members of that body who may refuse to make and subscribe to the oath and thereby, paralyse the functioning of the grass root level democratic institution. Section 12(3-A) of the Act offers the complete solution in that regard. It reads :

"[12(3-A) *Notwithstanding anything contained in any other provisions of this Act, where due to unavoidable circumstances or in public interest, it is not practicable to hold an election to constitute a Gram Panchayat before the expiry of its duration, the State Government or an officer authorized by it in this behalf may, by order, appoint an Administrative Committee consisting of such number of persons qualified to be elected as members of the Gram Panchayat, as it may consider proper or an Administrator and the members of the Administrative Committee or the Administrator shall hold office for such period not exceeding six months as may be specified in the said order and all powers, functions and duties of the Gram Panchayat, its Pradhan and Committees shall vest in and be exercised, performed and discharged by such Administrative Committee or the Administrator, as the case may be.]"*

13. In a given factual situation where either due to unavoidable circumstances or in public interest, it is not practicable to hold election, the State Government or the Officer authorised may appoint an Administrative Committee consisting of such number of qualified members to be elected as members of the Gram Panchayat, as it may consider proper.

14. Requisite number of ward members were also elected on both occasions. However, the majority of elected members refused to make and subscribe to the oath of office. It has prevented the constitution of the Gram Sabha Bhauli for almost a year. Correspondingly, it has, extra-constitutionally, injuncted the functioning of the petitioner as Gram Pradhan for nearly 1/5 of his term.

15. While, it may not be said that there are unavoidable circumstances due to which elections to constitute the Gram Panchayat may not be held, at the same time in light of the facts noted above, since 10 seats of Gram Panchayat members are lying practically vacant despite two elections held over a period of almost one year and in view of the further fact that such vacancies appear to exist only on account of the conduct of the erring elected members, exercise in public interest, as contemplated by Section 12(3A) of the Act has become imperative. At present, repeated/third successive elections/bye election held at the cost of public exchequer and time may not be in public interest. Rule 60(2) of the UP Panchayat Raj (Election of Member, Pradhan and UP-Pradhan Rules, 1994, also, appears to indicate two attempts to be made to elect a member of a Gram Panchayat. There is no doubt to the fact of two elections held.

16. The Constitution of the Gram Panchayat is the paramount objective to be achieved. Since the minimum quorum required to constitute the Gram Panchayat could not be met, despite two consecutive elections and passage of one year time, the

State Government or the Officer authorised by it, must ensure constitution of the Gram Panchayat or its Administrative Committee through other means, permitted by the statute.

17. Accordingly, the writ petition is allowed with a direction upon respondents to take cognizance of the matter and pass appropriate orders with respect to declaration of deemed vacancy on the post of 10 members of Gram Panchayat, Bhauli who may still refuse to subscribe to the oath despite further notice to be issued to them, now. For that purpose, the time limit of three weeks from today is fixed. Thus, either such oath would be made and subscribed by minimum five elected members so as to complete the quorum of 10 members, on or before 22 April, 2022 or a declaration of deemed vacancy under Section 12-E of the Act would be made with respect to the above, at the end of that time limit.

18. Further, in the event of such vacancy being declared, and quorum being still not met, keeping in mind the facts noted above, no fresh election may be called for the next six months. However the respondents may proceed directly, under Section 12(3-A) of the Act and appoint such eligible persons as members of the Administrative Committee of the Gram Panchayat, Bhauli as may be required to complete the minimum quorum, over and above the elected members who may have subscribed oath. Such exercise may be completed, within a period of one week therefrom, so that the Gram Panchayat, Bhauli may be constituted not later than 2nd May, 2022.

19. Upon, such event, the petitioner may be allowed to function as the full fledged Gram Pradhan for his remaining term, in accordance with law.

20. No order as to costs.

(2022)04ILR A476
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2021

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ C No. 37914 of 2013

State of U.P. & Ors. ...Petitioners
Versus
M/s Modern Medicos, Jhansi & Anr. ...Respondents

Counsel for the Petitioners:
Sri R.B. Pradhan, A.C.S.C.

Counsel for the Respondents:
Sri Pushkar Srivastava, Sri Arvind Srivastava

(A) Civil Law – Constitution of India, 1950 - Article 227 - Civil Procedure Code, 1908 - Section 102 - High Court Act, 1861 - Section 15 - Government of India Act, 1935 – Sections 107 & 224 (2) - Development of Law in respect of Judicial discharge of function of the High Court having inherent powers *qua* the Courts and Tribunals are subordinate to it – Powers under article 227 of Constitution are inherent and independent of the provisions contained in other central or St. Acts.(Para – 7, 8, 10, 11, 20**)**

(B) Civil Law – Constitution of India, 1950 - Article 227 - Civil Procedure Code, 1908 - Section 102- High Court Act, 1861 - Section 15 - Government of India Act, 1935 – Sections 107 & 224 (2) - Preliminary objection - merely power of revision or appeal barred or taken away under any Act – would not amount to an automatic abrogation of the powers of

High Court – held – petition u/a 227 to be maintainable even in the face of bar created u/s 102 of CPC – objection rejected.(Para – 21, 22**)**

(C) Civil Law – Constitution of India, 1950 - Article 227 - Civil Procedure Code, 1908 - Section 102 - High Court Act, 1861 - Section 15 - Government of India Act, 1935 – Sections 107 & 224 (2) - Partnership Firm - instituted a Suit for recovery for demand of money for supplied medicines – defendant raised objection that suit for recovery by an un-registered firm is not maintainable – as claim of money as set up in plaint is not shown by any partnership agreement or agreement with or as a third party and since suit for demand of money which was a pure contract – suit by an unregistered partnership firm is not hit section 69 – writ petition against decree - dismissed.(Para – 24, 33, 34, 37, 40)

Writ Petition Dismissed. (E-11)

List of Cases cited: -

1. Mahendra Singh Vs Haqimuddin 92008 Vol. 10 ADJ 182)

2. Chandrashekhar Singh & ors.Vs Siva Ram singh & ors.(1979 Vol. 3 SCC 118)

3. L Chandra Kumar Vs UOI & others

4. St. Thru. Sepecial Cell, New Delhi Vs Navjot Sandhu & ors.(2003 ACR Vol. 3 (SC) 2391)

5. Surya Devi Rai Vs Ram Chander Rai & ors.(AIR 2003 SC 3044)

6. Nagendra Nath Bora & Another Vs Commissioner of Hills & ors.(1958 Vol. 1 SCR 1240)

7. Bathutmal Raichand Oswal Vs Laxmibai R. Tarta (AIR 1975 SC 1297)

8. Sadhna Lodh Vs National Insurance Co. Ltd. (2003 Vol. 3 SCC 524)

9. Radhey Shyam & ors.Vs Chhabi Nath & ors.(2015 Vol.v3 ADJ 210)

10. Jagdish Chandra Gupta Vs Kajaria Traders (India) Ltd. (AIR 1964 SC 1882)

11. Krishna Motor Services Vs H B Vittala Kamath (1996 Vol. 10 SCC 88)

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

1. Heard learned counsel for the parties.

2. By means of this petition filed under Article 227 of the Constitution, the petitioner State of U.P. and two others seek to set aside the judgments and decrees passed by the trial court and court of appeal in O.S. No. 213 of 2008 and Civil Appeal No. 70 of 2010 respectively whereby present petitioners have been saddled with the liability to pay an amount of Rs. 15,841.18 paise to the opposite party alongwith interest @ 18 per cent.

3. Learned Standing Counsel submits that since valuation of money recovery suit is less than Rs. 25000/- therefore, second appeal is barred in such matters under Section 102 of the Code of Civil Procedure, 1908 and hence this petition has been filed under Article 227 of the Constitution.

4. A preliminary objection has been raised by learned Advocate appearing for the respondents that since second appeal under Section 102 is barred in the matters of valuation of the original money recovery suit being less than 25,000/- under Section 102 of Code of Civil Procedure, 1908, a petition under Article 227 of the Constitution to circumvent such a bar, would equally not be maintainable. He has placed reliance upon the judgment of a coordinate bench of this Court in the case

of **Mahendra Singh v. Haqimuddin decided on 27.11.2008 and reported in 2008 (10) ADJ 182.**

5. Meeting aforesaid preliminary objection, learned Standing Counsel has submitted that powers under Article 227 of the Constitution of India are the inherent powers of superintendence of the High Court upon the Courts and Tribunals subordinate to it through out territorial jurisdiction of the High Court and this power cannot be curtailed or limited by any Act of legislature. He submits that power of superintendence conferred upon the High Court is one of the basic features of our Constitution, and therefore, either by any Act of legislature or any amendment to the constitution, this power cannot be taken away. He submits that second appeal is though barred under Section 102 of the CPC but a petition under Article 227 of the Constitution at the same time would be maintainable. He has placed reliance upon a number of the authorities of the High Court and the Supreme Court.

6. In view of the above rival submissions regarding maintainability of this petition, before I proceed to consider the present petition filed under Article 227 of the Constitution on its merit, I consider it appropriate to deal with preliminary objection raised by learned counsel appearing for the contesting respondents first in the light of various authorities on this issue.

7. In case of Mahendra Singh (supra) a coordinate bench of this Court in its judgment running in one and half page, in the third paragraph of it has quoted Section 102 which bars second appeal against the judgment and decree of the trial Court and the court of appeal where valuation of suit for recovery of money is not exceeding Rs. 25,000/- and considering this bar the court observed that holding a petition under Article 227 in such cases to be maintainable would frustrate the very purpose for which Section 102 has been incorporated under Code of Civil Procedure. Vide paragraph 5, the ratio as laid down in the said judgment for holding petition not maintainable under Article 227 of the Constitution, it has been held thus:

" Learned counsel for the plaintiff appellate requests for return of the certified copies of the judgments and orders of the courts below and the decree appealed against to enable him to file a writ petition challenging the said judgments and orders. There is no difficulty in accepting the above request of the counsel simplicitor but a writ petition under Article 227 against the judgments and orders of the courts below would not be maintainable as it would amount to frustrating the very purpose of the amendment made under Section 102 Civil Procedure Code. The jurisdiction of the High Court under Article 227 of the Constitution of India is very limited and it cannot be permitted to be used to circumvent the provisions of the Civil Procedure ode and to invoke writ jurisdiction where the second appeal has been specifically barred particularly when the judgment and order of the Court of first instance had already been scrutinised once in appeal before the lower appellate court."

8. After going through the aforesaid paragraph , I find that his Lordship has held a petition under Article 227 of the Constitution to be not maintainable only on the ground that since Section 102 of the CPC bars second appeal, a petition under Article 227 of the Constitution would frustrate the very purpose of the

amendment. If this analogy is accepted in toto to hold a petition under Article 227 of the Constitution to be not maintainable would amount to taking a view quite contrary to the view taken by the Supreme Court in the past regarding scope of Article 227 of the Constitution of India.

9. One must not forget that power conferred upon the High Courts under Article 226 and 227 of the Constitution are inherent powers under the constitution and tracing history prior to the constitution of India coming into force, one would find that these powers always existed there under Section 15 of the High Courts Act, 1861 and Government of India Act, 1915 and 1935.

10. So tracing out the development of law in respect of judicial discharge of function of the High Courts having inherent powers qua the Courts and Tribunals subordinate to it, relevant provisions as contained in Section 15 of the High Courts Act, 1861, Section 107 of the Government of India 1915, Section 224 of the Government of India, 1935 and Article 227 of the Constitution of India as incorporated under the Indian Constitution, 1950, are reproduced hereunder:

" THE HIGH COURTS ACT, 1861

15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or Superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Court for which it shall think necessary that a form be provided, and also for keeping all books, entries and accounts to be kept by the officers and also to settle tables of fees to be allowed to the Sheriff Attorneys, and all clerks and officers of Courts and from time to time to alter any such rule or form or table: and the rules so made the forms so famed, and the tables so settled, shall be used and observed in the said Courts: provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall before they are issued, have received the sanction, in the Presidency of Fort William of the Governor-General in council, and in Madras or Bombay of the Governor in Council of the respective Presidencies.

GOVERNMENT OF INDIA ACT, 1915

*"**(Section 107)** - Section 15:- Each of the high courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say:--*

(a) call for returns;

(b) direct the transfer of any suit or appeal from any such court any other court of equal or superior jurisdiction;

(c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts;

(d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; and

(e) settle tables of fees to be allowed to the sheriff, attorneys and all clerks and officers of courts:

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any 1 [law] for the time being in force, and shall require the previous approval, in the case of the high court at

Calcutta, of the Governor-General in Council, and in other cases of the local government.

GOVERNMENT OF INDIA ACT, 1935

224 *(1)Every High Court shall have superintendence over all courts in India for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,'--*

(a)call for returns;

(b)make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts;

(c)prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; and .

(d)settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts :

Provided that such rules, forms and tables shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(2)Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.

ARTICLE 227 OF THE CONSTITUTION OF INDIA

"(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction

(2) Without prejudice to the generality of the foregoing provisions, the High Court may

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

11. Upon bare reading of the aforesaid quoted provisions as enacted/incorporated from time to time, it is clear that this power of superintendence under High Courts Act, 1861 was independent of the provisions of other laws that conferred power of appeal/ revision upon High Courts, though under Sub Section 2 of Section 224 of the Government of India, 1935 the power in relation to inferior courts were limited to the cases where appeals or revisions were not maintainable, but while incorporating such a provision under the Constitution even that restriction has been done away with.

12. Although powers conferred upon the High Court under Article 227 of the Constitution is taken to be very wide one but at the same time not wider enough to exercise as an alternative to the forum of appeal.

13. In **Chandrasekhar Singh & Ors. Vs. Siva Ram Singh & Ors., (1979) 3**

SCC 118 summing up the position of law in relation to exercise of power under Article 227 of the Constitution, the Court has held thus:

"On a review of earlier decisions, the three-Judges Bench summed up the position of law as under :-

(i) that the powers conferred on the High Court under Article 227 of the Constitution cannot, in any way, be curtailed by the provisions of the Code of Criminal procedure;

(ii) the scope of interference by the High Court under Article 227 is restricted. The power of superintendence conferred by Article 227 is to be exercised sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors;

(iii) that the power of judicial interference under Article 227 of the Constitution is not greater than the power under Article 226 of the Constitution;

(iv) that the power of superintendence under Article 227 of the Constitution cannot be invoked to correct an error of fact which only a superior Court can do in exercise of its statutory power as the Court of Appeal; the High Court cannot, in exercise of its jurisdiction under Article 227, convert itself into a Court of Appeal. "

14. In the case of **L. Chandra Kumar v. Union of India and Others,** Supreme Court has very categorically held that power conferred upon the Supreme Court and High Courts under Articles 32 and 226 and 227 of the Constitution respectively is a part of basic structure of our Constitution, forming its integral and essential feature, which cannot be tempered with much less be taken away even by a constitutional amendment, not to speak of a parliamentary legislation. However, courts have repeatedly cautioned that power of judicial review though is an integral part of basic structure of the Constitution, but exercise of it has to have self imposed limitations because such a power has to be exercised sparingly only to ensure that courts subordinate to the High Court obey the law, procedure and authority prescribed for. The power, it has been held, is not exercisable to correct mere errors nor, to be exercised as a cloak of appeal in disguise.

15. In the case case of **State, through special Cell, New Delhi v. Navjot Sandhu and Others, 2003 (3)ACR 2391 (SC)** it has been held thus:

"Thus the law is that Article 227 of the Constitution of India gives the High Court the power of superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate Tribunal's within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However the power under Article 227 is a discretionary power and it is difficult to attribute to an order of the High Court, such a source of power, when the High Court itself does not in terms purport to exercise any such discretionary power. It is settled law that this power of judicial superintendence, under Article 227 , must be exercised sparingly and only to keep subordinate Courts and Tribunal's within the bounds of their authority and not to correct mere

errors. Further where the statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 of the Constitution of India since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Article 227 could not be exercised "as the cloak of an appeal in disguise"

16. Relying upon the aforesaid authorities, Supreme Court in the case of **Surya Devi Rai v. Ram Chander Rai and Others, AIR 2003 SC 3044,** vide paragraph 38 has held thus:

"38. Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. ***But there may be cases where 'a stitch in time would save nine'. At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge."***

(emphasis added)

17. In case of **Nagendra Nath Bora and Another v. Commissioner of Hills Division and Appeals, Assam and Others, (1958) 1 SCR 1240,** Supreme Court had much early observed thus:

the parameters for the exercise of jurisdiction, calling upon the issuance of writ of certiorari where so set out by the Constitution Bench : - "The Common law writ, now called the order of certiorari, which has also been adopted by our Constitution, is not meant to take the place of an appeal where the Statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even though of law, will not be sufficient to attract this extra-ordinary jurisdiction. Where the errors cannot be said to be errors of law apparent on the face of the record, but they are merely errors in appreciation of documentary evidence or affidavits, errors in drawing inferences or omission to draw inference or in other words errors which a court sitting as a court of appeal only, could have examined and, if necessary, corrected and the appellate authority under a statute in question has unlimited jurisdiction to examine and appreciate the evidence in the exercise of its appellate or revisional jurisdiction and it has not been shown that in exercising its powers the appellate authority disregarded any mandatory provisions of the law but what can be said

at the most was that it had disregarded certain executive instructions not having the force of law, there is not case for the exercise of the jurisdiction under Article 226.

18. So also again in the ***Bathutmal Raichand Oswal v. Laxmibai R.Tarta, AIR 1975 SC 1297,*** Supreme Court *had very categorically held that power under Article 227 of the Constitution cannot be exercised "as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issues raised in the proceedings."*

19. In case of **Sadhna Lodh v. National Insurance Co. Ltd. 2003(3) SCC 524** while dealing with the scope of Article 227 of the Constitution the Supreme Court observed that a petition filed under Article 227 of the Constitution by the ensurer was wholly misconceived as statutory right to file an appeal was provided for under the statute. The Court observed, in such situation it was not open for the High Court to entertain a petition under Article 227 of the Constitution. The Court further observed that even where remedy by way of appeal has not been provided for against the order and judgment of District Judge, the remedy available to the aggrieved person is to file revision before the High Court but where revision against such order is barred under Section 115 of the Code of Civil Procedure then petition under Article 227 of the Constitution would lie. This above judgment has been further relied upon in the case of **Radhey Shyam and Others v. Chhabi Nath and Others, 2015 (3) ADJ 210,** the Supreme Court has very categorically held that power under Article 227 of the Constitution can not be whistled down by any legislative Act vide paragraph 21 of the judgment, it held thus:

"21. It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all other courts having limited jurisdiction subject to supervision of King's Court. Courts are set up under the Constitution or the laws. All courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227, Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of Tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by statutes, power of superintendence under Article 227 is constitutional...."

20. Thus from the above discussion, I may safely conclude that powers under Article 227 of the Constitution are inherent and independent of the provisions contained in other central or State Acts and merely because power of revision or appeal is either barred or taken away under any Act of parliament or State legislature that would not amount to an automatic abrogation of the power or putting feters upon powers of the High Court, otherwise

exercisable under Article 227 of the Constitution.

21. In my considered view since judgments as referred to above have not been considered in the case of Mahendra Singh *(supra)*, with great respect to the coordinate bench, I am more bound by the judgments of the Supreme court under Article 141 of the Constitution and, accordingly, I hold that merely because second appeal is not maintainable under Section 102 of the Code of Civil Procedure, against the judgment arising from the money recovery suit having valuation not more than 25,000/, a petition under Article 227 of the Constitution would be absolutely maintainable. However, I may hasten to add that power is to be exercised very sparingly not to correct any mere error of facts but to ensure that Civil Courts have exercised power within bounds of law and following propriety.

22. Thus, I hold that this petition under Article 227 of the Constitution to be maintainable even in the face of bar created under Section 102 of Code of Civil Procedure,1908

23. Now, I proceed to consider the petition on merits.

24. Briefly stated facts of the case are that petitioners who claim to be a partnership firm running a medical agency, instituted a suit for recovery of money of Rs. 15,814.18 paise @ 18 per ent interest. As many as five issues were framed by the trial court in the suit and all the issues were answered in favour of the plaintiffs and the suit was decreed. The present petitioners preferred a civil appeal against the judgment of the trial court dated 29th July, 2010 raising specific ground that suit for money recovery by a partnership firm which was not registered, was not maintainable in view of bar created under Section 69 of the Indian Partnership Act, 1932. The Court of appeal, however, rejected the arguments of petitioner and dismissed the appeal confirming the order of trial court vide order dated 15th March, 2011.

25. Assailing the two orders passed by the court of first instance in O.S. No. 213 of 2008 and that of appeal in civil appeal no. 70 of 2010, learned Standing Counsel has placed heavy reliance upon judgment of the Supreme Court in the case of **Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd, AIR 1964 SC 1882** and judgment in the case of **Krishna Motor Services by its Partners v. H.B. Vittala Kamath (1996)10 SCC 88** and submitted that since plaintiffs claimed to be a partnership firm and claimed money recovery from the petitioners to whom plaintiffs claimed to have executed an agreement for supply of medicines, could not have maintained the suit as suit would clearly stand barred under Section 69 of the Indian Partnership Act. 1932 (hereinafter referred to as Partnership Act), the plaintiff being an unregistered firm.

26. *Per contra*, learned counsel appearing for the respondent has submitted that suit in question would not be barred under Section 69 of the Partnership Act because plaintiffs were not seeking enforcement of any right arising out of any partnership agreement, inasmuch as, respondents-defendants being not partners of the firm, any enforcement of right of contract against such a third person would not be hit by Section 69 of the Partnership Act.

27. In order to appreciate the above arguments, it is first necessary to go through the bare facts pleaded by respective parties in the suit and further as

to whether plaintiffs' firm in the suit in any manner ever entered the contract or agreement with the respondents for supply of medicines.

28. Upon bare reading of the plaint case, brought on record as annexure 1 to this petition, it clearly transpires that respondents claimed to be a partnership firm running a medical agency and that the defendants petitioners had placed some order for supply of the medicines and bill for Rs. 15,598.92 paise was signed and sent to the defendants for payment . It was claimed that outstanding amount of Rs. 15,841.18 paise/- remained unpaid despite repeated requests. Hence notice was issued under Section 80 of the Code of Civil Procedure after service, 1908 and even after service of notice when the payment was not made, the suit was instituted as O.S. No. 213 of 2008.

29. Written statement was filed in the case by the defendants, in which they absolutely denied to have purchased any medicine from the medical agency of the firm standing in the name of M/s Modern Medicos. They also claimed in the written statement that defendant no. 2 had died, and therefore, there existed no partnership in law, and hence, suit was not maintainable. It was also claimed that no order placing the supply of medicines was ever executed in the name of firm as claimed to be dated 19.10.1985 and 09.03.1987 .It was also claimed that those orders claimed by the plaintiffs were found to be forged inasmuch as suit was time barred.

30. Upon perusal of both the plaint and written statement as brought on record, I do not find any averment either coming in the plaint or in the written statement that ever any partnership agreement or any sort of agreement worth its name was entered between the parties for supply of medicines.

31. It was a simple case where order was placed to the petitioners plaintiffs as claimed by the plaintiffs in the suit and that they supplied the medicines but payments were not made.

32. Amongst the issues framed by the trial court issue no. 1 was to the effect whether plaintiffs were entitled for recovery of money as claimed in the suit and dealing with this issue, the Court returned a finding of fact to the effect that as per P.W. 1 witness account two supplies were made on 19.10.1985 and 09.03.1987 in response to which medicines were supplied to the store of the defendants and bills were sent for payment, copies of which were available on record. The defence witness no. 1 when was examined he would claim to have joined Government Ayurvedic College in the year 2006 but he failed to bring stock and dispatch register of that time in question and rather claimed that there was no entry in the register of 1987. However, looking to the seal on the bill he claimed that though there was seal, but name of K.P. Pandey was hand written and there was no order number that was necessary to ensure supply of medicines. He accepted that on the receipt, there was a signature and seal of Principal but he could not recognize the signature. The Court, therefore, having appreciated and analysed that the statements of respective witnesses finally held that when the letters were written to the higher authority to ensure payments as such documents had been brought on record as paper no. 108-C and 109-C and then 110-C, it satisfactorily demonstrated that there was a bill pending,

otherwise though letters would not have been written. Having come to answer this issue in favour of the plaintiffs, the court decreed the suit returning further findings that all issues favour the plaintiffs.

33. Thus, I do not find any statement of fact coming up either in the witness account of plaintiffs or defendants nor, do I find any plaint case or defence case that there was any agreement entered into between the partnership firm and defendants for supply of medicines. It was a mere case of demand raised to the firm for supply of medicines that was claimed to have been made and findings of facts if have come to be recorded in that respect by the trial court, the Court sitting in civil appeal held that the argument regarding bar of Section 69 of Partnership Act, was not attracted to the facts of the case and so also the authorities cited were not applicable.

34. Having carefully gone through the pleadings raised, I also do not find any enforcement of right claimed in the suit having its source in the partnership agreement. It was a simple case of demand and supply and no agreement was reached between the parties. The suit was not filed for enforcement of any rights nor, a third party, namely, defendants against whom suit was instituted, it was ever claimed that such third persons, namely, defendants were parties to any agreement at any point of time. However, further in order to deal with this legal aspect as argued by the learned counsel for the petitioner, it would be appropriate to reproduce Section 69 of the Partnership Act, in its entirety:

"69. Effect of non-registration.--(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect,--

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.

(4) This section shall not apply,--

(a) to firms or to partners in firms which have no place of business in 8 [the territories to which this Act extends], or whose places of business in 9 [the said territories], are situated in areas to which, by notification under 10 [section 56], this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882 (5 of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small

Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim. State Amendments."

35. Upon bare reading of the aforesaid provisions, it becomes explicit that legislature intended to non suit an unregistered partnership firm in case if a suit is instituted for enforcement of a right arising from a contract under this Act, i.e. Indian Partnership Act, otherwise, instituted by a partners or on behalf of a person suing as partner in a firm or any other person who is claimed to have been partner in the firm.

36. Thus subsection 1 of Section 69 of the Partnership Act is not attracted. Sub Section 2 of Section 69 also states that no suit would be maintainable to enforce the right arising from a contract by a firm or in its behalf against any third party unless the firm is registered and persons suing have been shown in the register of firm as partners in the firm. Sub Section 3 also bars proceedings to enforce a right arising from such a contract.

37. In the present case no enforcement of right arising out of any contract under Partnership Act is sought to be enforced inasmuch the claim for recovery of money as set up in the plaint is not shown by way of any partnership agreement or agreement entered with a partnership firm as a third party. It was a pure contract where demand for medicine was raised was accepted and so supply was made. Such contract cannot be claimed to be arising out of any partnership agreement or contract. Thus, suit by a partnership firm may be an unregistered firm, is not hit by Section 69 of Partnership Act. It is hit only when contract emanates from partnership agreement and enforcement of any right arising out of such agreement is involved in the suit.

38. In the case of **Jagdish Chandra Gupta (supra)** while dealing with scope of Section 69 vide paragraph 5 and 6 the Court has held thus:

"(5) The first question to decide is whether the present proceeding is one to enforce a right arising from the contract of the parties. The proceeding under the eighth section of the Arbitration Act has its genesis in the arbitration clause, because without an agreement to refer the matter to arbitration that section cannot possibly be invoked. Since the arbitration clause is a part of the agreement constituting the partnership it is obvious that the proceeding which is before the court is to enforce a right which arises from a contract. Whether we view the contract between the parties as a whole or view only the clause about arbitration, it is impossible to think that the right to proceed to arbitration is not one of the rights which are founded on the agreement of the parties. The words of S. 69 93), "a right arising from a contract" are in either sense sufficient to cover the present matter.

(6) It remains, however, to consider whether by reason of the fact that the words "other proceeding" stand opposed to the words "a claim of set-off" any limitation in their meaning was contemplated. It is on this aspect of the case that the learned Judges have seriously differed. When in a statute particular classes are mentioned by name and then are followed by general words, the general words are sometimes construed ejusdem generis, i.e. limited to the same category or genus comprehended by the particular words but it is not necessary that this rule

must always apply. The nature of the special words and the general words must be considered before the rule is applied. In Allen v. Emerson (1994) 1 KB 362. Asquith J. gave interesting examples of particular words followed by general words where the Principle of ejusdem generis might or might not apply. We think that the following illustration will clear any difficulty. In the expression "books, pamphlets, newspapers and other documents" private letters may not be held included, if 'other documents' be interpreted ejusdem generis with what goes before. But in a provision which reads "newspapers or other document likely to convey secrets to the enemy", the, words 'other document' would include document of any kind and would not take their colour from 'newspapers'. It follows, therefore, that interpretation ejusdem generis or noscitur a sociis need not always be made when words showing particular classes are followed by general words. Before the general words can be so interpreted there must be a genus constituted or a category disclosed with reference to which the general words can and are intended to be restricted. Here the expression "claim of set-off" does not disclose a category or a genus. Set-offs are of two kinds-- legal and equitable-and both are already comprehended and it is difficult to think of any right "arising from a contract" which is of the same nature as a claim of set-off and can be raised by a defendant in a suit. Mr. B. C. Misra, whom we invited to give us examples, admitted frankly that it was impossible for him to think of any proceeding of the nature of a claim of set off other than a claim of set-off which could be raised in a suit such as is described in the second sub-section. In respect of the first sub-secton he could give only two examples. They are (i) a claim by a pledger of goods with an unregistered firm whose goods are attached and who has to make an objection under O 21 R 58 of the Code of Civil Procedure and (ii) proving a debt before a liquidator. The latter is not raised as a defence and cannot belong to the same genus as a "claim of set-off". The former can be made to fit but by a stretch of some considerable imagination. It is difficult for us to accept that the Legislature was thinking of such far-fetched things when it spoke of "other proceeding" ejusdem generis with a claim of set-off."

39. This above judgment has come to be further considered by the Supreme Court in the case of **Krishna Motor Service *(supra)*** whereby Supreme Court vide paragraph 8 has held thus:

"In Jagdish Chandra Gupta's case (supra), the facts were that right to dissolution of the partnership firm was itself in dispute and the suit was filed for that purpose. Therefore, when the application under Section 8 (1) of the Act was filed, this Court had held that since the partnership firm was not registered as enjoined under sub- section (1) of Section 69, the main part of sub-section (3) excluded the application for enforcement of the right to reference in other proceedings including enforcement under Section 8 of the Act. In Prem Lata's case (supra), the facts were that by a deed of partnership was executed but the firm was not registered under Section 65 of the partnership Act, On the demise of one of the partners, the legal representatives called upon other partners to render accounts of the dissolved firm. It is settled law that on the demise of one of the members of the firm, the partnership stands dissolved. Therefore, the claim had arisen under the exception engrafted under Section 69(3). In the backdrop of those

facts and considering the effect of the provisions in the light of the ration in Jagdish Chandra Gupta's case, another Bench of this Court to which one of us (K.Ramaswamy, J.) was a member had held in Smt Prem Lata's case that Section 20 stands attracted to make an application for reference. Later, ratio clearly applies to the facts in this case."

40. Thus it comes out absolutely clear that suit in the present case was not hit by Section 69 of Indian Partnership Act, 1932. So far as the argument regarding merit of the claim raised in the suit as decreed by the courts below is concerned, I do not find any substantial issue to be involved in the concurrent findings of fact that have come to be returned by the courts below, and which, in my considered view, require any further interference in exercise of power under Article 227 of the Constitution of India.

41. This petition accordingly fails and is dismissed with no order as to cost.

(2022)04ILR A489
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ C No. 46272 of 2017

Harbhajan Singh ...Petitioner
Versus
The Commissioner Moradabad Division, Moradabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Sinha, Sri Ajay Kumar Singh Yadav, Sri Divyansh

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India,1950 - Article 226 - Indian Stamp Act, - Sections 33, 33(1), 33(4), 33(5), 35, 47, 47(a), 48 & 56(1), Registration Act, Section - 69 – An agreement to sell - complaint with a photocopy of document only – report submitted & issue notices by the Assistant Collector (Stamp) – Petitioner raised written objection – whether a photocopy of an instrument could be impounded without seen original & notices beyond limitation period - not considered - relying only on a photo copy - authority determined deficiency of stamp duty with interest & penalty - Revision dismissed - writ petition partly allowed - impugned order impounding the photocopy of the instrument is quashed. (Para – 9, 36, 37, 40, 42)

Writ Petition is partly allowed. (E-11)

List of Cases cited: -

1. Hariom Agrawal Vs Prakash Chandra Malviya - (2007 vol - 8 SCC - 514)

2. Som Dutt Builders Ltd. Vs St. of U.P.- (AIR 2005 All. 234)

3. Smt. Prabha Juglani Vs St. of U.P. through Secretary (Stamps and Registration) & ors.- (2019 vol- 2 ADJ 860)

4. Jupudi Kesava Rao Vs Pulavarthi Venkata Subbarao – (AIR 1971 SC 1070)

5. Girjesh Kumar Srivastava & anr. Vs St. of U.P. & ors.–(AIR 1998 All. 237)

6. Kanhaiya Prasad Vs Asst. Collector, First Class/S.D.M. Banda & Another, (1999 vol. 90 RD 107)

7. Tata Teleservices Ltd. Vs St. of U.P. & ors., (2008 vol. 6 All. L.J. 748)

8. Aegis BPO Service Ltd. Vs St. of U.P. & ors., (2010 vol. 9 ADJ 237)

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Shri Pramod Kumar Sinha, learned counsel for the petitioner and Shri Sanjay Goswami, learned Additional Chief Standing Counsel along with Shri Dinesh Kumar Gupta, learned Additional Chief Standing Counsel, for the revenue.

2. Present writ petition has been filed to challenge the order dated 27.7.2017 passed by Commissioner, Moradabad Division, Moradabad, in Revision No.C 20171300423 filed by the petitioner, under Section 56(1) of the Indian Stamp Act 1899 (hereinafter referred to as the Act), against the order of the Collector, Rampur, dated 30.12.2016 passed in proceedings under Section 33/47 of the Act (State vs. Harbhajan Singh). The Revision Authority has dismissed the aforesaid Revision and confirmed the deficiency of stamp duty determined together with interest and, penalty imposed by the Collector, Rampur, vide his order dated 30.12.2016. Thus, deficiency of stamp duty Rs. 12,36,800/- and interest liability @ 1.5% per month together with registration fee Rs. 100/- and penalty Rs. 12,36,700/- has been confirmed, on a photocopy of the document dated 12.11.2013, described as agreement to sell.

3. The undisputed facts of the case are, the aforesaid proceedings under Section 33/47 of the Act arose against the petitioner on a complaint received by the Collector, Rampur, from one Khalid Hussain Khan and Sohail Khan, dated 28.5.2014. Therein, it was alleged, the complainants had executed an agreement to sell dated 12.11.2013 in favour of the present petitioner, for Arazi Nos. 352, 354, admeasuring 2.1450 Hectare and 0.575 Hectare respectively, for a sum of Rs. 6,17,40,000/-.

4. Acting on that complaint and a photocopy of the document dated 12.11.2013, a report dated 05.7.2014 was submitted by the Assistant Collector Stamp. On that, the Collector, Rampur issued notice (to the petitioner), dated 15.5.2015 requiring him to produce the original of the document/instrument dated 12.11.2013 before the said authority, on or before 3.6.2015. The petitioner did not produce the document but raised written objection dated 18.2.2015. Copy of the same is annexed as Annexure no.1 to the writ petition.

5. By means of that objection, the petitioner objected - the proceedings initiated by the Collector, Rampur, were without jurisdiction. He relied on the provisions of Section 33(1) of the Act and stated that the photocopy of the alleged agreement to sell dated 12.11.2013, had not been received in evidence by any Court or authority. Also, the same had not been produced and it had not come into possession of any government authority, in performance of its function.

6. By means of paragraph 6 of those objections, the petitioner further objected, the alleged photocopy of the document dated 12.11.2013 bore photocopies of signatures of only two persons out of five who may have executed/signed the original deed, if any. Therefore, there was neither any agreement to sell nor any agreement had been executed. In paragraph 6 of the objection, the petitioner further disputed that the agreement to sell had not been executed nor proven in evidence nor presented for registration. Photocopy of such incomplete document was not an

instrument. Therefore, the proceedings be dropped.

7. At the same time, in paragraph 8 of the objections, the petitioner further stated, he was a victim of fraud. He had lodged a FIR against the complainants who had misled the government authorities to issue the impugned notice to the petitioner, based on a photocopy of the document allegedly dated 12.11.2013. In that, the petitioner further submitted that the complainants had been paid Rs. 30,00,000/- by the petitioner, though no transfer of property took place.

8. The Collector, Rampur, rejected the objections and determined deficiency of stamp duty (together with interest), registration fee and imposed penalty, as noted above. That order has been confirmed in Revision.

9. Learned counsel for the petitioner would submit, undisputedly, no document had been filed by any party in any judicial proceedings. Such document had also not come to the hands of any competent authority in the performance of his functions. Therefore, under Section 33(1) of the Act, no jurisdiction ever arose to the Collector, Rampur, to determine deficiency of stamp duty against the petitioner. The proceedings were wholly without jurisdiction and *non est.*

10. He has placed reliance on a decision of the three-Judge bench decision of the Supreme Court in **Hariom Agrawal vs. Prakash Chandra Malviya, (2007) 8 SCC 514.** Reliance has also been placed on a single-Judge decision of this Court in **Som Dutt Builders Limited vs. State of Uttar Pradesh, AIR (2005) All 234** and, another decision of a learned single-Judge of this Court in **Smt. Prabha Juglani vs State of U.P. Thru' Secy. (Stamps & Registration) & Ors., (2019) 2 ADJ 860**. Last, reliance has been placed on another decision of the Supreme Court in **Jupudi Kesava Rao vs Pulavarthi Venkata Subbarao, AIR 1971 SC 1070.**

11. Second, it has been submitted, photocopy of a document could never be described as an instrument under Section 2(d) of the Act. For any document to qualify as an instrument, it must necessarily be the original - that creates any right or liability, or both. A photocopy of a document can never create or confer any right or liability and it may never be read as evidence in any judicial proceeding, to assert a right or to create a liability. The entire proceedings were a nullity.

12. Third, he has also placed reliance on Uttar Pradesh (Photostat Pratiyon Ke Saath Dastavejon Ka Registrikaran) Niyamavali, 1989 (hereinafter referred to as the Rules) to submit, the copies 'of any instrument' contemplated under Section 33(4) of the Act would be copies tendered with the original document for the purpose of obtaining registration and not any other photocopy. In that regard, he would further submit, unless interpreted in that manner, every person may be subjected to duty liability though the document may not be in existence.

13. Last, it has been submitted, no demand of penalty may have been raised in absence of any finding recorded by the Collector, Rampur, of any attempt to avoid payment of stamp duty.

14. The above submissions have been met by the learned Additional Chief Standing Counsel by placing heavy reliance on the provisions of Section 33(4) and (5)

of the Act. He would submit, the provisions of Section 33(1) of the Act are wholly distinct and different from Section 33(4) of the Act. Both operate in different fact situations. While one may lead to the impounding of a document and then impost of stamp duty, the second may or may not lead to impounding of the document but it may necessarily lead to recovery of stamp duty. As to the precedent relied by learned counsel for the petitioner, the same are stated to be distinguishable on facts. In **Hariom Agrawal Vs Prakash Chand Malviya (supra)**, the issue involved was formulated by the Supreme Court in paragraph no.6 of the report. It reads as below:

"Whether the court can impound the photocopy of the instrument (document) of improper description exercising its power under the provisions of the Stamp Act, 1899?"

15. Therefore, the binding ratio of that decision emerges as to whether a photocopy of an instrument could be impounded. That question was answered in the negative. However, with reference to the duty chargeability on such photocopy of a document, the learned Additional Chief Standing Counsel would refer to paragraph nos.14 and 15 of the report to submit, in the said case as well, the Supreme Court recognized the power of the State authorities to levy stamp duty based on a photocopy of a document/instrument. Parallel provision exists in the shape of Section 33(4) and (5) of the Act, as applicable in the State of U.P.

16. As to the decision of this Court in **Som Dutt Builders (supra)**, though specific question was framed as to whether the stamp authorities had jurisdiction to initiate proceedings on a photocopy of a document and that question was answered against the revenue, however, the said decision is based on a reading of Section 33(1) of the Act only. No plea was raised by the State, in that case, relying on the provision of Section 33(4) and (5) of the Act. That question was not examined or dealt with by the Court. Thus, the binding ratio emerging from the said decision is only to the effect that no deficiency of stamp duty may be determined beyond the period of limitation prescribed.

17. Then, to the other decision of another learned Single Judge of this Court in **Smt. Prabha Juglani (supra)**, it has been submitted, the provisions of Sections 33(4) and (5) of the Act were not raised and not considered in the said decision.

18. Insofar as the decision of the Supreme Court in **Jupudi Kesava Rao (supra)** is concerned, it has been submitted, in that case again, the issue dealt with and decided was whether a photo-copy of a document could be read as secondary evidence. The said issue was answered by the Supreme Court in the negative. While dealing with that issue, it was opined- Section 35 of the Stamp Act deals with only original instruments and not their copies as may allow such copies to be read as secondary evidence.

19. As to the reliance on the Rules, it has been submitted that they have no application to proceedings under the Act. Further, the transaction being concealed, penalty was validly imposed, upon its detection.

20. Having heard learned counsel for the parties and having perused the record, in the first place, reference may be made on

the provision of Section 33 of the Act. It reads as below:

"33. Examination and impounding of instruments.-- (1) Every person having by law or consent of parties, authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in [India] when such instrument was executed or first executed: Provided that-

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, the State Government may in cases of doubt, determine what offices shall be deemed to be public offices and who shall be deemed to be persons in charge of public offices.

(4) Where deficiency in stamp duty paid is noticed from the copy of any instrument, the Collector may suo motu or on a reference from any Court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorised by the Board of Revenue in that behalf, call for the original instrument for the purpose of satisfying himself as to the adequacy of the duty paid thereon, and the instrument so produced before the Collector shall be deemed to have been produced or come before him in the performance of his functions.

(5) In case the instrument is de produced with in the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty under section 40 on the copy of the instrument: Provided that no action under sub-section (4) or sub-section (5) shall be taken after a period of four years from the date of execution of the instrument:

[Provided that no action under sub-section (4) or sub-section (5) shall be taken after a period of four years from the date of execution of the instrument.

[Provided further that with the prior permission of the State Government an action under sub-section (4) or sub-section (5) may be taken after a period of four years but before a period of eight years from the date of execution of the instrument.]"

21. Plainly, the provisions of Section 33(1) of the Act and Section 33(4) of the Act contemplate different fact situations. Also, they provide for different consequences and procedure regarding determination of deficient stamp duty and impounding of a document. Under Section 33(1) of the Act the proceedings for determination of deficient stamp duty may arise only upon the document being received in evidence by a person in charge

of public office (except police officer), or which comes before such authority in performance of its functions, if it appears (to such authority), that the instrument is not duly stamped. In that event, he may impound the document. Only after such document is thus impounded, an authenticated copy of the same may be sent to the Collector for levy of stamp duty and penalty. Thus, unless the procedure to impound a document is undertaken first and till such document is produced and impounded, no proceeding may arise to determine deficiency of stamp duty or penalty etc.

22. On the other hand, under Section 33(4) of the Act, if it comes to the notice of the Collector from a copy of instrument either suo motu or on a reference from any Court or Commissioner of Stamp or Additional Commissioner of Stamp or Deputy Commissioner of Stamp or Assistant Commissioner of Stamp or any officer authorized by the Board on that behalf that the original of such copy is not adequately duty paid, the Collector may require the concerned to produce the original document before him. If the document is produced, the procedure of Section 33(1) would apply.

23. However, if the document is not produced, then by virtue of sub-section (5) of Section 33 of the Act, a further power is vested to the Collector to proceed to recover deficiency of stamp duty together with penalty on the copy of the instrument itself.

24. Second, under section 33(1) of the Act, the original document must first be impounded where after the deficiency of stamp duty may be determined on such document upon its authenticated copy, under Section 38 of the Act. However, no such action is required when the Collector proceeds under Section 33(4) read with Section 34(5) of the Act.

25. In that event, the pre-condition for recovery of deficient stamp duty and penalty is the notice requiring the person concerned to produce the original document. If the person produces the original document, the proceedings would arise on the authenticated copy of the original document. However, by virtue of Section 33(5) of the Act, the Collector is empowered to act on the photocopy of the instrument in his possession, in the event, the concerned refuses or fails to produce the original document.

26. The only other difference that exists in the powers vested under Section 33(1) of the Act and 33(4) of the Act is- while power under Section 33(4) of the Act, may be exercised both, upon reference or suo motu, by the Collector, upon coming into possession of a photocopy of an instrument, in contrast, under Section 33(1) of the Act, the Collector may act only upon the authenticated copy of the document impounded being sent to him by the competent authority (after impounding the original), and not in any other manner.

27. In **Girjesh Kumar Srivastava & Anr. vs. State of U.P. & Ors., AIR (1998) All 237,** a Special Bench of three Judges of this Court made the following discussion while dealing with cases of limitation and if penalty could be imposed in proceedings under Section 47-A of the Act, upon satisfaction of value of property being not truly set-forth:

"Section 40 gives power of the Collector-regarding the instrument which

have been impounded. It provides that if he is of the opinion that the instrument is duly stamped or is not chargeable with duty he shall certify the same by making an appropriate endorsement to that effect. However if he is of the opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of proper duty or the amount required to make up the same, together with a penalty of five rupees or if he thinks fit a amount not exceeding ten times of the amount of proper duty or of the deficient portion thereof, Sub-sections (4) and (5) of Section 33 lay down that if deficiency in stamp duty is noticed from the copy of any instrument, the Collector may suo motu or on a reference from any Court or from any one of the authorities mentioned in sub-section, call for the original instrument for the purposes of satisfying himself as to the adequacy of the duty paid thereon and if the instrument is not produced he may require payment of deficit stamp duty together with penalty under Section 40 on the copy of instrument. The sections referred to above would show that the Legislature has made a specific provision for payment of penalty in addition to deficiency in stamp duty wherever such a deficiency is noticed from the instrument itself or a copy thereof. "

(emphasis supplied)

28. Then, a division bench of this Court in **Kanhaiya Prasad vs. Assistant Collector, First Class/S.D.M. Banda & Anr., (1999) 90 RD 107** considered the Special Bench decision in **Girjesh Kumar Srivastava (supra)** and observed as below:

"Sub-sections (4) and (5) of Section 33 lay down that if deficiency in stamp duty is noticed from the copy of any instrument, the Collector may suo motu or on a reference from Court or from any one of the authorities mentioned in sub-section, call for the original instrument for the purpose of satisfying himself as to the adequacy of the duty paid thereon and if the instrument is not produced, he may require payment of deficit stamp duty together with penalty under Section 40 on the copy of the instrument. The sections referred to above would show that the Legislature has made a specific provision for payment of penalty in addition to deficiency in stamp duty where such a deficiency is noticed from the instrument itself or a copy thereof. Apparently the Assistant I.G. Registration informed the facts to the Collector which he came to know during his inspection of municipal records and thereafter the Collector issued notice to the petitioner."

(emphasis supplied)

29. In **Tata Teleservices Limited vs. State of Uttar Pradesh & Ors., (2008) 6 All LJ 748,** while dealing with the question of validity of Section 33(4) & (5) of the Act, a learned Single Judge of this Court made the following discussion as to the scope of power Section 33(4) and 33(5) of the Act:

"Sub-sections(4) and(5) of Section 33 of the Stamp Act introduced by the U.P. Amendment do not contain any such power as was contained in Section 73 of the Andhra Pradesh Act. The machinery of Sub-section and (5) of Section 33 is triggered of when the deficiency in stamp duty is noticed from a copy of the instrument. There is nothing in these provisions to indicate that the Collector can compel the production of the copy or of the original instrument. The situation in which the Collector can call for the production of the original instrument is specifically provided for under sub-section

(4). It is when the deficiency in stamp duty paid is noticed from the copy of an instrument. The power thus can be exercised only when the deficiency of stamp duty in the original instrument is noticed from its copy. The purpose for which the instrument is being called for has also been specifically provided for in Subsection (4) as satisfaction of the Collector as to the adequacy of the duty paid. It is evident from Sub-section (5) that the Collector has to provide time to the party concerned to produce the instrument and it is only on the non-production of the original instrument within the time granted by the Collector that he can take the copy of the instrument as the basis for determining the stamp duty and requiring its payment. The two provisos of Subsection also provide a time limit within which the action under Section 33(4) and 33(5) can be taken. Sub-sections (4) and (5) of Section 33 do not contain any such drastic power empowering the Collector to seize or search any document. The reasons given by the Apex Court for holding the amended Section 73 as applicable to Andhra Pradesh as ultra vires the Constitution do not apply to the U.P. Amendment contained in Sub-section (4) and (5) of Section 33. In District Registrar v. Canara Bank: ((2005) 1 SCC 496 : AIR 2005 SC 186) the Apex Court had found that the drasticity and stringency of the power under Section 73-A of the Andhra Amendment was not proportional to the purpose to be achieved. The Apex Court has specifically noticed this aspect in paragraphs 43, 55 and 58 of the Reports quoted above. The Apex Court also found that the production of documents envisaged in Sections 31 and 33 of the Indian Stamp Act is voluntary and unless the party concerned had itself produced the document in the case of Section 31 for obtaining opinion of the Collector as to chargeability of the instrument to duty and its quantum and in the case of Section 33 for the purpose of being tendered in evidence or its coming in the hands of the authority in the course of performance of his duty the Collector could not impose any duty by compelling the production of the document. The impact of the Andhra Amendment was noticed in contrast to these provisions and it was found that the power of inspection contained therein was drastic and such drasticity was not proportional to the purpose which it could be expected to achieve. Section 33 however has been amended in U.P. and it has been provided that if as a consequence of a direction by the Collector to produce the original instrument the instrument is so produced, the same shall be deemed to have come in the hands of the Collector in the performance of his duty. The U.P. Amendment introducing Sub-sections(4) and (5) of Section 33 does not give any power to compel the production of the copy of the instrument or the original instrument. Sub-sections(4) and (5) of Section 33 do not invade the right to privacy. Section 73 of the Indian Stamp Act has also been amended and the new provisions of Section 73-A introduced in the State of U.P. do not suffer from the vice of drasticity from which the Andhra Pradesh Amendment suffered. Indeed the petitioner has not challenged the validity of Section 73-A substituted in the State of U.P. The U.P. Amendment has provided safeguards against the arbitrary exercise of the powers of search and seizure and such power can be exercised only in a situation where the Collector has reason to believe that any instrument chargeable with duty has not been charged at all or has been incorrectly charged. It is, however, not necessary to examine the validity of Section 73-A as the same has not been challenged.

I have already held that sub-sections (4) and (5) of Section 33 relate to

the recovery of deficient stamp duty upon the original instrument and that stamp duty is merely paid upon the copy for the reason that the original not being available the copy is made the basis for calculation of duty. The cases cited above therefore have no application. I have already held that the provisions of sub-sections (4) and (5) of Section 33 are supplementary to the other provisions. There does not appear to be any merit in the petitioner's contention that Sections 33(4) and (5) are unworkable for the reason that these provisions do not determine the person who would be liable to pay stamp duty on the copy. The determination of person who is liable to pay duty is governed by Section 29 of the Act. The said provision would be applicable even where the provisions of Sections (4) and (5) of Section 33 are invoked because the duty which is being sought to be recovered under these provisions is the deficient duty on the original instrument."

(emphasis supplied)

30. Last, in **Aegis BPO Service Ltd. vs. State of U.P. & Ors., (2010) 9 ADJ 237,** another learned single-Judge of this Court made the following pertinent discussion as to the powers under Section 33(4) and 33(5) of the Act:

"The aforesaid provisions enable the Collector on noticing deficiency in stamp duty from the copy of the instrument to take suo-motu action or on a reference from any Court or from Commissioner, Additional Commissioner, Deputy Commissioner or any other officer authorized by the Board of Revenue and to call for the original instrument for the purposes of satisfying himself as to the adequacy of the stamp duty paid and in case the instrument is not produced to proceed to determine the deficiency together with penalty on the copy of the instrument.

In the case at hand, there is no dispute that the copy of the instrument was on record of the U.P. Trade Tax Department. It was examined by the Assistant Commissioner (Stamps) in exercise of powers under Section 73 of the Act and thereupon on being satisfied that proper stamp duty has not been paid on it, he had made a reference to the Collector under Section 33(4) whereupon Collector had called upon the petitioner to submit the original instrument. The petitioner having failed to produce the original, the Collector proceeded to determine the deficiency on the basis of the copy of the instrument as provided under Section 33(5) of the Act. In such a situation, no error of jurisdiction has been committed by the Collector in passing the impugned order."

(emphasis supplied)

31. Looked in that light, the decisions cited by learned counsel for the petitioner are of no help. In **Hariom Agrawal (supra)**, plainly, the issue was entirely different and confined to the power of the stamp authorities to impound a photocopy of an instrument. To the extent, the only submission that may find acceptance here is, the stamp authorities have erred in impounding the photocopy of the instrument, as no such power exists under the Act. Other than that, the said decision is of no help to the petitioner. Rather, the reasoning contained in paragraph nos.18 and 19 of the said report runs contrary to the case being set up by the petitioner. Relevant to our discussion, paragraph nos.18 and 19 of the said report are extracted below:

"18. Section 48-B is a provision applicable in the State of Madhya Pradesh which was inserted by the Stamp (M.P.

Amendment) Act, 1990 (24 of 1990) in Chapter IV under heading "Instrument not duly stamped" of the Act. This section reads as under:

"48-B. Original instrument to be produced before the Collector in case of deficiency.--Where the deficiency of stamp duty is noticed from a copy of any instrument, the Collector may, by order, require the production of original instrument from a person in possession or in custody of the original instrument for the purpose of satisfying himself as to the adequacy of amount of duty paid thereon. If the original instrument is not produced before him within the period specified in the order, it shall be presumed that the original document is not duly stamped and the Collector may proceed in the manner provided in this Chapter:

Provided that no action under this section shall be taken after a period of five years from the date of execution of such instrument."

19. On a plain reading of Section 48-B, we do not find that the submission of the learned counsel for the appellant that by virtue of this provision the Collector has been authorised to impound even copy of the instrument, is correct. Under this section where the deficiency of stamp duty is noticed from the copy of any instrument, the Collector may call for the original document for inspection, and on failure to produce the original instrument could presume that proper stamp duty was not paid on the original instrument and, thus, recover the same from the person concerned. Section 48-B does not relate to the instrument i.e. the original document to be presented before any person who is authorised to receive the document in evidence to be impounded on inadequacy of stamp duty found. The section uses the phraseology "where the deficiency of stamp duty is noticed from a copy of any instrument". Therefore, when the deficiency of stamp duty from a copy of the instrument is noticed by the Collector, the Collector is authorised to act under this section. On deficiency of stamp duty being noticed from the copy of the instrument, the Collector would order production of original instrument from a person in possession or in custody of the original instrument. Production is required by the Collector for the purpose of satisfying himself whether adequate stamp duty had been paid on the original instrument or not. In the notice given to person in possession or in custody of original instrument, the Collector shall provide for time within which the original document is required to be produced before him. If, in spite of the notice, the original is not produced before the Collector, the Collector would draw a presumption that original document is not duly stamped and thereafter may proceed in the manner provided in Chapter IV. By virtue of the proviso, the step for recovery of adequate stamp duty on the original instrument on insufficiency of the stamp duty paid being noticed from the copy of the instrument, can only be taken within five years from the date of execution of such instrument. The words "the Collector may proceed in the manner provided in this Chapter" have reference to Section 48 of the Act. Under this section, all duties, penalties and other sums required to be paid under Chapter IV, which includes stamp duty, would be recovered by the Collector by distress and sale of the movable property of the person who has been called upon to pay the adequate stamp duty or he can implement the method of recovery of arrears of land revenue for the dues of stamp duty. By virtue of proviso to Section 48-B, the Collector's power to adjudicate upon the adequacy of stamp duty on the original

instrument on the basis of copy of the instrument is restricted to the period of five years from the date of execution of the original instrument. This section only authorises the Collector to recover the adequate stamp duty which has been avoided at the time of execution of the original instrument. This section does not authorise the Collector to impound the copy of the instrument."

(emphasis supplied)

32. Insofar as two decisions, both of single-Judge bench strength - in the case of **Som Dutt Builders (supra)** and **Smt. Prabha Juglani (supra)** are concerned, their ratio are distinguishable. The issue involved was different. In **Som Dutt Builders (supra)**, the issue involved dealt with by a learned single- Judge bench of this Court were - whether proceeding under Section 33(1) of the Act could arise without impounding the original document and whether such proceeding initiated (in that case) were time barred. Those issues do not arise in this case.

33. The decision in the case of **Smt. Prabha Juglani (supra)** arose upon different facts. In that case, the petitioner was not visited with any prior notice under Section 33(4) of the Act, requiring her to produce the original of any particular document. Later, the stamp duty liability was imposed on the photocopy of a document purportedly executed by her. The later discussion in that judgement arises without reference to either **Girjesh Kumar Srivastava (supra) or Tata Teleservices Limited (supra)** or **Aegis BPO Service Ltd. (supra)** or **Som Dutt Builders (supra)**. Therefore, that decision would remain confined to the facts of that case.

34. Insofar as the **Jupudi Kesava Rao (supra)** is concerned, the said decision was with respect to admissibility of photocopy of an instrument as secondary evidence in a suit proceeding. Referring to provisions of Section 35 and 36 of the Act, the Supreme Court opined in the negative. That ratio is plainly inapplicable to the present case.

35. In face of the law that appears clearly laid down by the Supreme Court, Special Bench, Division Bench and as applied by another learned single-Judge bench, in **Aegis BPO Service Ltd. (supra),** I find myself bound to apply the same. No reference to a larger Bench is required as it is the law laid down by the Supreme Court and larger bench strength of this Court that are binding and not any inconsistent decision by a bench of lesser bench strength, of this Court.

36. As to the submission of learned counsel for the petitioner relying on the Rules, the same cannot be accepted. Undisputedly, the Rules have been framed under Section 69 of the Registration Act, 1908 and not under the Act. The Act is a complete code in itself to provide for levies, assessment and recoveries of stamp duty on various instruments. It choses to use the word 'copy' under Section 33(4) of the Act specifically for the purpose of recovery of deficient stamp duty if the original is not produced in compliance of notice issued under Section 33(4) of the Act.

37. To accept the contention of learned counsel for the petitioner by either relying on the Rules or the situations contemplated under Section 6A of the Act, to confine the recovery of stamp duty to cases pertaining to true copies of the original document submitted for the purpose of registration etc. only, would be to unreasonably restrict the area of

operation of Section 33(4) read with Section 33(5) of the Act. The recovery under those provisions arises upon adverse inference drawn due to non-production of the original. The Act allows the taxing authority to assume the existence of non-duty paid, original document (in face of refusal or failure on part of the assessee/person-chargeable-to-duty to produce original of such document) and realise the full duty and penalty imposable on the original instrument had it been produced. That being the plain import of deeming fiction of law, created solely for the purpose of recovering the deficient stamp duty and penalty, there is no warrant to curb or ignore it.

38. In the present case, the petitioner confined his objection (before the stamp authorities) to the provisions of Section 33(1) of the Act. However, on plain perusal, the proceedings arose under Section 33(4) read with Section 33(5) of the Act. Mere wrong section description may never be enough to annul the recovery. It is not a jurisdictional error. The procedure prescribed under the enabling/correct law is not shown to have been violated. The order of the Collector clearly recites - upon receipt of a report dated 5.7.2014 submitted by the Assistant Collector Stamp, a show cause notice was issued to the petitioner on 15.5.2015 to produce the original of the photocopy of the agreement dated 12.11.2013, by 03.6.2015. Undisputedly, the petitioner did not produce the same.

39. Therefore, there is no error in assumption of jurisdiction under Section 33(5) read with Section 40 of the Act. The petitioner was given an opportunity to reply to the show cause notice. That he did. However, in that reply, he confined his defence to the provisions of Section 33(1) of the Act. Insofar as the proceedings are not traceable to the provisions of Section 33(1) of the Act, the objection raised by the petitioner, to that extent, was of no avail.

40. To the other challenge, it is seen, the photocopy of the instrument, copy of which has been annexed to the affidavit of the State filed on 29.11.2018 refers to a transaction in the nature of an agreement to sell. It bears photocopy of the signatures of the persons described as vendors and vendee/petitioner. Also, photocopies of signatures of witnesses appear to exist on the same. In face of such facts, the defence set up by the petitioner making a bald denial of its execution, is unacceptable. That read together with the contents of paragraph-8 of the reply furnished by the petitioner, wherein he admitted having paid Rs. 30 Lacs to the complainant, to execute the sale with respect to the same property and the further allegation of FIR lodged by the petitioner, was enough to repel the objection as to non-execution of the original. Thus, the presumption created by the deeming fiction created by section 33(4) and 33(5) of the Act was not rebutted by the petitioner.

41. The fact that no such sale took place or the further fact that the entire consideration mentioned in the agreement to sell, may not have passed would not affect the charge and recovery of stamp duty that arose on the execution of the instrument and not on the validity/completeness of the transaction evidenced by such instrument.

42. Also, consequently, since the original was never produced, the recovery of penalty is also valid. However, as discussed above, there exists no power to

impound a photocopy of any document. To that extent, the impugned orders are without jurisdiction.

43. Consequently the writ petition is **party allowed.** The levy of deficient stamp duty, penalty and impost of interest is sustained. The order impounding the photocopy of the agreement to sell dated dated 12.11.2013, is quashed. No order as to costs.

(2022)04ILR A501
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.04.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 1000927 of 2005

U.P. Cooperative Federation Ltd. & Anr. ...Petitioners

Versus

E.S.I.C. & Ors. ...Respondents

Counsel for the Petitioners:
Shireesh Kumar

Counsel for the Respondents:
Shishir Pradhan

Civil Law – Constitution of India, 1950 - Article 226, - Employees St. Insurance Act, 1948 - Sections 1(5), 1(4), 2(12) & 2(14-AA) - U.P. Cooperative Societies Act, 1965 - Section 2(a-4) Clause 3 – Demand Notice & recovery certificates was issued by Authority under ESI Act, – for payment of contributions to ESI fund towards the employer's contribution for the employees working in PCF press - section of the petitioner's society – for a particular period during manufacturing process (between period of Jan. 1981 to May 1989) - Whether petitioners' establishment would be covered within the ambit of 'ESI Act' by virtue of mandate of Section 1(4) of ESI Act – definition of 'Manufacturing process' which was itself adopted by the ESIC w.e.f. 20.10.1989 – said amendment would apply prospectively – objection not considered - writ petition – impugned orders are set aside with direction to refund the deposited amount pursuance thereof to the petitioner accordingly. (Para – 11, 12, 18, 20)

Writ Petition stands allowed. (E-11)

List of Cases cited: -

1. M/s Srinivasa Rice Mill Vs Employees St. Insurance Corporation (2007 Vol. 1 SCC 705)

2. Bangalore Turf Club Ltd. Vs Regional Director, ESI Corp. (2009 Vol. 15 SCC 33)

3. Sindi Sehiti M.P. Transport Cooperative Society Ltd. Bhopal Vs Regional Director, ESI Corporation & ors.(1997 M.P.L.S.R. 335).

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Shireesh Kumar, Advocate assisted by Sri Mustafa Khan, the counsel for the petitioner and Sri Shishir Pradhan, the counsel for the respondents.

2. The present petition has been filed quashing the orders dated 24.06.2004, 30.07.2004 and the recovery certificate dated 14.02.2002 (Annexure nos. 5, 6 and 7 to the writ petition) whereby the demands have been quantified against the petitioners and they have been directed to pay the said amount in exercise of the powers conferred under the Employees State Insurance Act, 1948 ('ESI Act' for short).

3. The facts, in brief, are that the petitioner is an apex cooperative society created under section 2(a-4) Clause 3 of the U.P. Cooperative Societies Act, 1965. It is stated that the society is registered under

the Societies Registration Act and more than 90% paid up share capital is owned by the State Government. It is also on record that the rules, regulations and guidelines issued by the State Government are normally applicable to the employees of the petitioner's society and they also enjoy certain benefits which are admissible to the employees of the State Government. It is also on record that the petitioner's society runs and execute various schemes of the State Government such as purchase of wheat, paddy, sugar, fertilizer, coal etc. as and when the same were executed to the petitioner's society. It is stated that the petitioner is also running P.C.F. Press and the persons employed in the accounts section are enjoying the benefits of the State Government from time to time which according to the petitioner are far superior to the benefits flowing to the persons came under the 'ESI' Act. It is stated that the respondent no.1 issued a notice dated 18.11.2003 calling upon the petitioner to show cause as to why the petitioner's society should not be made liable for payment of the contribution to the ESI Fund, to which the petitioners raised their objections. However, an order came to be passed on 24.06.2004 wherein a demand of Rs.33,846/- was raised against the petitioners allegedly towards the employer's contribution for the employees working in the account section of PCF press for the period January 1981 to September 1986 and from January 1988 to May 1989 (Annexure 5).

4. It is stated that once again on 30.07.2004 a demand of Rs.1,39,262/- towards the employer's contribution was raised in respect of the employees working in the accounts section of the PCF Press. The petitioners once again stated that they had submitted their reply to the show cause notice dated 18.11.2003, however, the grounds taken in the show cause notice were not considered while raising the demand dated 24.06.2004. It is on record that subsequent thereto, a recovery certificate seeking to recover a sum of Rs.1,81,409/- was issued against the petitioners and the opposite party no.4 was directed to debit the said amount from the accounts of the petitioners. The said orders are under challenge before this Court.

5. The counsel for the petitioners argues that the petitioners would not be covered under the 'ESI Act' as the petitioner is not notified under section 1(5) of the 'ESI' Act. He further argues that the petitioners cannot be termed as a 'factory' as defined under section 2(12) of the 'ESI Act' so as to include the petitioners under the ambit and scope of the 'ESI Act' by virtue of section 1(4) of the 'ESI Act'. He further argues that in any event the petitioners are giving the benefits to their employees which are far superior to the ones that are given to the employees by virtue of applicability of 'ESI Act'. In the light of the said arguments, the counsel for the petitioners argues that the orders impugned in the present writ petition are liable to be quashed. The petitioners has placed reliance on the judgment of the Supreme Court in the case of **M/s Srinivasa Rice Mill vs. Employees State Insurance Corporation; 2007 (1) SCC 705** as well as the judgment in the case of **Bangalore Turf Club Ltd. vs. Regional Director, ESI Corporation; 2009 (15) SCC 33.**

6. The counsel for the respondent Sri Shishir Pradhan, on the other hand, tries to justify the order by arguing that although no notification under section 1(5) of the Act has been issued. However, the petitioners'

establishment would be covered under section 1(4) of the Act and by virtue of the said section 1(4) of the Act, all factories stand included within the ambit of the Act and thus no fault can be found with the orders passed against the petitioners and impugned in the present writ petition. He placed reliance on the judgment of the M.P. High Court in the case of **Sindi Sehiti M.P. Transport Cooperative Society Ltd. Bhopal vs. Regional Director, ESI Corporation and others; 1997 M.P.L.S.R. 335.**

7. In the light of the arguments raised, the point for determination that arises is whether the petitioners' establishment would be covered within the ambit of 'ESI Act' by virtue of the mandate of Section 1(4) of the ESI Act as the parties are not at issue that no notification has been issued under section 1(5) of the Act.

8. It is relevant to quote section 1(4) as well as section 2(12) of the 'ESI Act' which read as under :

Section 1(4) : *- It shall apply, in the first instance, to all the factories including factories belonging to the government other than seasonal factories.*

Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.

Section 2(12) *:- 'factory' means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952) or a railway running shed;*

9. 'ESI' Act was enacted to provide certain benefits to the employees in case of sickness, maternity and employment injury and for certain other matters in relation thereto. The intent and purpose of the Act was to provide benefits to the sections of the society who work within the factories and any other establishments [if notified under section 1(5) of the Act]. Clearly the intent of the Act is to provide socio economic benefits to a class of the society covered under the Act

10. A plain reading of section 1(4) of the Act clearly provides that the Act at the first instance was made applicable to all factories including the factories belonging to the government but excluding the seasonal factories. Proviso of sub-section 4 excludes factory or establishment belonging to or under the control of the government whose employees are otherwise in respect of benefits substantially similar or superior to the benefits provided under this Act.

11. A plain reading of the said sub-section leaves no room for doubt that it is applicable to the factories at the first instance. The term 'factory' has been defined under section 2(12) to mean any premises where ten or more persons are employed and in any part of which, a manufacturing process is being carried on. The word 'manufacturing process' itself finds definition under section 2(14-AA) and incorporates the meaning assigned to the term 'manufacturing process' under the Factories Act.

12. It is important to note that the definition of the word 'manufacturing process' as defined under section 2(14-AA)

was inserted under the ESI Act w.e.f. October 20, 1989 by virtue of ESI (Amendment) Act No.29 of 1989. Prior to the said amendment the meaning of 'manufacturing process' as specified under the Factories Act was not applicable to the 'ESI Act' and thus to that extent the amendment incorporated w.e.f. 20.10.1989 would apply prospectively and would not apply prior to the said amendment coming into force.

13. In the present case, the demand was raised for an amount of Rs.33,846/- for the employer's contribution for the employees working in the account section of PCF Press for the period January 1981 to September 1986 and from January 1988 to May 1989. Thus, the demand pertain to the period prior to 20.10.1989 when the definition of 'manufacturing process' under section 2(14-AA) was inserted under the ESI Act. In view of the amended Act No.29 of 1989 being prospective in nature, the definition of word 'manufacturing process' would not be the same as expansively assigned under the 'Factories Act' and would be governed by the normal defination of 'manufacturing process'. Word 'manufacturing process' has been expansively defined under the Factories Act even to include Printing Press activity as a manufacturing process where as in common parlance Printing Press cannot be termed as a 'manufacturing process'. In view of the same, the applicability of the provisions of 'ESI Act' on the petitioner would clearly not be covered by Section 1(4) of the 'ESI Act' for the period prior to 21.10.1989 and thus, the demand cannot be justified.

14. The judgment of the Supreme Court in the case of **Bangalore Turf Club Ltd. (supra)** would not be applicable to the facts of the present case as in the said case the Supreme Court considered the scope of notification of establishments under section 1(5) of the 'ESI Act'.

15. The second judgment in the case of **M/s Srinivasa Rice Mill (supra)** relied upon by the petitioner laid down in para 18 and 31 as under :

Para-18. Before an Act is made applicable, in the event, a dispute is raised, the authorities exercising statutory power must determine the jurisdictional fact. Applicability of the Act would be a jurisdictional question. The Employer is entitled to raise such a question before the appropriate authority. Such a question can also be raised for the first time before a court exercising the power of judicial review although ordinarily the same should be raised before the concerned authority as a preliminary issue.

Para 31. We, therefore, are of the opinion that having regard to the facts and circumstances of this case the interest of justice would be subserved if Appellants are given an opportunity of hearing. Keeping in view the fact that Appellants now know the allegations made against them, no fresh notice need be served. Appellants may file their returns and also all other books of accounts before the authorities under the Act within six weeks from date. The authorities shall give an opportunity of hearing to them and determine the question as to whether a jurisdictional fact existed for application of the provisions of the Act in cases of the respective employers. In the event, it is found, upon perusal of all the documents whereupon the employers may rely upon and on the basis of such information as may be sought for or directed to be furnished by the authority to the employer

and upon hearing them that the provisions of the Act apply, the authorities may proceed as against them as is permissible in law.

16. In the present case, no such exercise was ever carried out prior to imposing the recovery against the petitioner.

17. The third judgment in the case of **Sindi Sehiti M.P. Transport Cooperative Society Ltd. Bhopal (supra)** as cited by the counsel for the respondents would also not applied to the facts of the case inasmuch as there is no issue in between the parties that the petitioners' organization has not been notified under section 1(5) of the 'ESI Act'.

18. As the demand in the present case pertain to the period January 1981 to May 1989 and I have already held that the definition of manufacturing process as adopted w.e.f. 20.10.1989 would not be applicable for the period for which the demand has been raised, clearly the demand is unsustainable, as such the orders dated 24.06.2004, 30.07.2004 and 14.02.2002 contained as Annexures 5, 6 and 7 to the writ petition are set aside.

19. The writ petition stands allowed.

20. The amount deposited before this court shall be refunded to the petitioners on their moving an appropriate application.

(2022)04ILR A505

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 20.04.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ C No. 1004498 of 2005

Smt. Saroj Verma Objection Filed ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Vimal Kishore Verma

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India, 1950 - Article 226, Indian Stamp Act, - Sections 47A (3) & 56, - U.P. Stamp (Valuation of Property) Rules, 1997 - Rule 7 (3)(C) - A Registered sale deed executed – deficiency in stamp together with interest & penalty determined (by the authority) relying upon ex-parte reports without showing any details of property in it and also behind the back of petitioner - revision rejected - writ Petition - impugned orders are set aside with direction to refund the deposited amount pursuance thereof to the petitioner within four months. (Para -11, 12, 13)

Writ Petition is allowed. (E-11)

List of Cases referred: -

1. Ram Khelawan @ Bachcha Vs St. of U.P.- (2005 Vol. 98 RD 511)

2. Ram Gopal Vs St. of U.P. & ors. – (2009 Vol. 27 LCD 1335)

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

1. Heard learned counsel for the petitioner.

2. This petition has been filed challenging the order dated 20.08.2003 passed by the Collector, Sitapur in Stamp Case No. 15 under Section 47A (3) of the Indian Stamp Act and also the order dated

09.05.2005 passed by the Additional Commissioner(Judicial), Lucknow Division, Lucknow in Revision No. 114 of 2002-03 under Section 56 of the Stamp Act imposing recovery on the basis of deficiency in stamp duty and penalty upon the petitioner.

3. It is the case of the petitioner that the petitioner purchased a plot with area 1380 Square Feet which had two rooms, one Verandah, one kitchen and bathroom constructed on it with covered area of 435 Square Feet situated in Mohalla- Civil Lines, District- Sitapur through registered sale deed on 11.07.2002. Stamp duty was paid as per the Circle Rate List issued by the Collector at the time of the execution of the sale deed to the tune of Rs. 43,200/- upon total valuation of Rs. 4,31,737/-. The petitioner specifically mentioned in the sale deed the area which was covered by construction and the area which was lying open as plot appurtenant to it. Subsequently, on the basis of a report dated 04.12.2002 submitted by the Sub-Registrar, Sitapur proceeding under Section 47 A of the Stamp Act was initiated, the Collector issued notice to the petitioner on 07.03.2003, the petitioner having come to know filed an application before the Collector for an spot inspection of the property in question as the earlier inspection had been carried out *ex parte* and the report clearly stated that no one was found and the house was found locked at the time of inspection. Such application remained pending. The petitioner was not residing in the house, she had bought as she was residing with her parents in Mohalla Rani Kothi, Buts Ganj, Sitapur.

4. After the report submitted by the Sub-Registrar dated 04.12.2002, another report was submitted by the Naib Tehsildar, Sitapur on 05.05.2003 which was also *ex parte* as the house was found locked even at that time and measurement of covered area could not be carried out either by the Sub-Registrar or by the Naib Tehsildar. Based on such *ex parte* reports the Collector passed the order dated 02.08.2003 determining deficiency of stamp duty at Rs. 6,850/- and also imposing maximum penalty which was four times of such deficiency amounting to Rs. 27,400 plus interest @ 18% per annum. The petitioner being aggrieved filed a revision under Section 56 wherein a specific ground was taken that the inspection was carried out *ex parte* and behind her back, however, the Additional Commissioner passed the order on 03.09.2003 directing the petitioner to deposit at least one third of the amount. The petitioner deposited Rs.11,897/- on 10.09.2003. On 05.11.2003, the Additional Commissioner passed an interim order staying rest of the recovery till disposal of the revision. The Revision was disposed of on 09.05.2005 by observing that at least two inspections were carried out of the property in question, one by the Sub-Registrar and other by the Naib Tehsildar. It was however not appreciated that both the inspections were *ex parte* and it was specifically mentioned in such report that house was found locked, therefore, no measurement of covered area could be done by the officer inspecting the property in question. The report was based on conjectures and surmises and it ought to have been rejected, however, the Additional Commissioner based his order rejected the Revision only on such report.

5. Learned counsel for the petitioner has placed reliance upon Rule 7 (3)(C) of the U. P. Stamp (Valuation of Property) Rules, 1997, wherein the Collector is supposed to inspect the property after due

notice to the parties to the instrument and then determine the market value.

6. Learned counsel for the petitioner has placed reliance upon paragraph 6 of his petition, wherein he has mentioned this fact that no inspection was carried out in the presence of the petitioner.

7. Learned Standing Counsel for the State Respondents on the basis of averments made in the counter affidavit in paragraph 8 has stated that two inspections were carried out one by the Sub-Registrar on 04.12.2002 and the other by the Naib Tehsildar on 05.05.2003, but house was found locked and from inspection of its from the outside it appeared to the officers that the house was fully covered which was not mentioned in the sale deed. The petitioner having been issued notice in the stamp case and having filed her application should have also submitted documentary evidence including photographs to show that the entire plot was not covered by construction to substantiate her claim. This was not done by the petitioner.

8. This Court has perused the orders impugned. Both orders are based on spot inspection having been carried by the Sub-Registrar and the Naib Tehsildar, but such inspections had found the house to be locked therefore no measurement of covered area could be done. Just by making an estimate from looking at the house from the outside both the Sub-Registrar and the Naib Tehsildar had guessed that the plot may have been fully covered by construction which was not mentioned in the sale deed, and therefore, deficiency in stamp as well as penalty was imposed upon the petitioner.

9. This Court in the case of ***Ram Khelawan @ Bachcha vs. State of U.P. 2005 (98) RD 511*** has considered Section 47A of the Indian Stamp Act as well as the responsibility of the Collector as mentioned in the U. P. Stamp Rules, 1997. After considering Rule 4, 5 and 7 of the U.P. Stamp Rules, 1997, the Court observed that it was the responsibility of the Collector to issue notice to the affected party and he may admit oral and documentary evidence if produced by the party to the instrument, and after conducting inquiry which including on the spot inspection in the presence of the parties determine deficiency in stamp duty, if any. The Court observed on the basis of earlier judgements rendered by this Court that the entire basis of determination of market value for the purpose of stamp duty was an *ex parte* report of the Tehsildar. *Ex parte* inspection report may be relevant for initiating the proceedings under Section 47A of the Stamp Act, however, for deciding the case no reliance can be placed on such *ex parte* report. After initiation of the stamp case, inspection is to be made by the Collector or the Authority hearing the case after due notice to the parties to the instrument as provided under Rule 7 (3)(C) of the Rules, 1997. Moreover, in the said inspection report, if possible, a sketch map should also be included.

10. A Coordinate Bench of this Court in ***Ram Gopal vs. State of U.P. and Other 2009 (27) LCD 1335*** has observed, while placing reliance upon *Ram Khilawan* (Supra), in paragraph 13 as follows:-

"13. The Uttar Pradesh Stamp Valuation of Property Rules, 1997 particularly Rule 7 provides the procedure on receipt of a reference or when suo motu action is proposed under Section 47-A of the Stamp Act. The Rule 7(2) (c) provides that the Collector may inspect the property after due notice to parties to the

instrument. The complete reading of the aforesaid rule clearly indicates that while deciding the proceedings under Section 47-A of the Stamp Act the Collector or its authority are required to make an inspection after due notice to the parties to the instrument. The proceeding under Section 47-A of the Stamp Act shall not be decided merely placing reliance on the ex parte report of the Tehsildar or any authority for that purpose. In the present case the Tehsildar's report dated 03.05.2001 does not disclose as to whether any notice was given to the petitioner before inspection of the land in question by the Tehsildar. Rather it clearly shows that it was an ex parte report. Hence the order dated 26.07.2001 was passed in violation of Rule 7(2) (c) of the U.P. Stamp Valuation of Property Rule, 1997."

11. In view of the law settled by this Court, it is incumbent upon the Collector while conducting the inquiry on initiation of a stamp case under Section 47A, to inspect the property in question in the presence of the parties and to consider their representation, if any, and then pass appropriate, reasoned and speaking order.

12. In the case at hand, this Court has perused the orders impugned and finds that both the Collector and the Additional Commissioner had placed reliance upon *ex parte* reports, which *ex parte* reports also do not mention in detail anything about the property, they only said that the house was found locked and from looking at it from the outside, it seemed that it was fully constructed.

13. The orders impugned are ***set aside***. If any amount has been deposited by the petitioner in pursuance of the orders impugned, the same shall be refunded to her within a period of four months from the date a copy of this order is produced before the opposite party no.3.

14. Accordingly, the petition stands ***allowed.***

(2022)04ILR A508
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.03.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Contempt Application (Civil) No. 26 of 2022

Dinesh Kumar ...Applicant
Versus
Alok Kumar Rai & Anr. ...Respondents

Counsel for the Petitioners:
Kaushlendra Tewari, Santosh Kumar Yadav

Counsel for the Respondents:
Shashank Bhasin, Anurag Kumar Singh, Lalta Prasad Misra

A. Civil Law - Contempt of Courts Act, 1971: Section 10/12 - Determination of the lis between the parties is necessary prior to initiation of proceedings for contempt under the Contempt of Courts Act. Any attempt in taking cognizance of contempt relying upon the judgment passed in some other case would amount to stifling the respondents from distinguishing the applicability of the judgment from the facts of the case. (Para 15)

Contempt Application Dismissed. (E-10)

List of Cases cited:-

1. Sudhir Vasudeva, Chairman & MD Vs M. George Ravishekaran & ors. Civil Appeal No. 1816 of 2014

2. Niyaj Mohammad Vs St.of Har.1994 (6) SCC 332

3. Priya Gupta Vs Ministry of Health & Family Welfare (2013) 11 SCC 40

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

1. Heard Sri Kaushlendra Tewari, learned counsel for applicant as well as Sri Anurag Kumar Singh and Sri Shashank Bhasin, learned counsel for respondents.

2. Learned counsel for applicant submits that by means of judgment dated 12.07.2021 passed in Writ Petition No. 1432 (SB) of 2015, this Court had decided the controversy pertaining to the Lucknow University taking into consideration the various statutes and rules applicable therein and thereafter came to a conclusion that the Executive Council does not have any power of review of their earlier decisions and on the basis of the said pronouncement of law proceeded to allow the said writ petition and granted benefits to the petitioners therein directing them to be treated as being substantially appointed on the post of Assistant Professor/Lecturer.

3. Learned counsel for respondents have raised a preliminary objection with regard to maintainability of the present contempt petition stating that the applicant was neither a party to the writ petitions decided by this Court vide judgment dated 12.07.2021 passed in Writ Petition No. 1432 (SB) of 2015 nor is he aggrieved or concerned or even remotely connected with the lis decided by this Court by the said judgment. Opposing the petition, it has been submitted that there is no averment or assertions by the applicant that the judgment dated 12.07.2021 passed in Writ Petition No. 1432 (SB) of 2015 was ever brought to the knowledge of the Executive Council so as to allege willful disobedience of the said order.

4. It has been stated that the petitioner is a stranger to the said writ proceedings and hence he has no locus to maintain the present contempt alleging non-compliance/disobedience of the judgment dated 12.07.2021.

5. Learned counsel for applicant on the other hand has submitted that once a question of law has been settled by the writ court then the University is bound by the said pronouncements and submits that the Executive Council in their meeting dated 31.07.2021 had in fact reviewed its earlier decision dated 20.08.2007 which was impermissible as per the pronouncement of this Court in writ petition No. 1432 (SB) of 2015 and hence has committed contempt of courts. He further submits that the judgment dated 12.07.2021 passed in Writ Petition No. 1432 (SB) of 2015 was a judgment in rem and was applicable to all persons and even to the non-participants or petitioners in the said case and hence the respondents have committed contempt while reviewing their earlier decisions.

6. He further submits that there is no necessity of the applicant for approaching this Court in exercise of Article 226 of the Constitution of India to assail the order of the Executive Council dated 31.07.2021 which ex-facie amounts to contempt and hence proceeding under the Contempt of Courts Act, 1971 would be maintainable.

7. I have heard learned counsel for parties and perused the judgment dated 12.07.2021 passed in Writ Petition No. 1432 (SB) of 2015. A perusal of the said judgment discloses that the same was specifically with regard to the petitioners

therein who had assailed the orders of Executive Council specifically on the ground that Executive council does not have any power of reviewing its order. The Court after considering the provisions of U.P. State Universities Act, 1973 as well as statues of the University came to a conclusion that the Executive Council does not have any powers to review its decision and hence proceeded to quash the orders impeached therein and specific directions were issued to the petitioners therein granting benefits of the relief sought for in the petition. Before quashing the order of the executive council, the court had delved to the factual matrix of the case before the recording of finding that the executive council had in fact reviewed its earlier order.

8. The perusal of the judgment dated 12.07.2021 passed in Writ Petition No. 1432 (SB) of 2015 is very clear in terms and it is applicable to the persons who had invoked the writ jurisdiction of this Court. After reading entire judgment, it cannot be said that it was a judgment in rem considering that it was only the case of the petitioners which was considered in depth by the writ court while coming to the said conclusion. The applicant has urged that in the instant case ,subsequent decision taken by the Executive Council amounts to reviewing its earlier decisions which ex-facie amount to contempt.

9. The scope and ambit of the jurisdiction of this Court under the contempt of Court act can be culled from the judgment of the Hon'ble Supreme Court in the case of **Sudhir Vasudeva, Chairman & MD Vs. M. George Ravishekaran & others**, delivered on 4th February, 2014 in Civil Appeal No. 1816 of 2014 the Supreme Court held as follows:

*"The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act, 1971. It is a drastic power which, if misdirected, could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution. This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self determination of the sweep, meaning and effect of the order in respect of which disobedience is alleged. Courts must not, therefore, travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or willful violation of the same. Decided issues cannot be reopened; nor the plea of equities can be considered. Courts must also ensure that while considering a contempt plea the power available to the Court in other corrective jurisdictions like review or appeal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate in other jurisdictions vested in the Court, as noticed above. The above principles would appear to be the cumulative outcome of the precedents cited at the bar, namely, **Jhareswar prasad Paul and Another Vs. Tarak nath Ganguly and Others, V.M.Manohar Prasad vs. N.**

Ratnam Raju and Another, Bihar Finance Service House Construction Cooperative Society Ltd. Vs. Gautam Goswami and Others *and* ***Union of India and Others Vs. Subedar Devassy PV."***

10. Before a Court punishes a contemner for non-compliance of a direction, the court must be satisfied that disobedience of the judgment, decree, direction or writ was willful or intentional. In **Niyaj Mohammad Vs. State of Haryana**, reported in **1994 (6) SCC 332,** the Bench of three learned Judges held thus:

"Before a contemner is punished for non-compliance of the direction of a court, the court must not only be satisfied about the disobedience of any judgment, decree, direction or writ but should also be satisfied that such disobedience was willful and intentional. The civil court while executing a decree against the judgment debter is not concerned and bothered whether the disobedience to any judgment, or decree, was willful. Once a decree has been passed it is the duty of the court to execute the decree whatever may be consequence thereof. But while examining the grievance of the person who has invoked the jurisdiction of the court to initiate the proceeding for contempt for disobedience of its order, before any such contemner is held guilty and punished, the court has to record a finding that such disobedience was willful and intentional. If from the circumstances of a particular case, brought to the notice of the Court, the court is satisfied that although there has been a disobedience but such disobedience is the result of some compelling circumstances under which it was not possible for the contemner to comply with the order, the court may not punish the alleged contemner."

11. From the above discussion, this Court of the considered view that there is a clear distinction between a judgment laying down or settling any proposition of law which can be used as a precedent and a judgment which is passed inter parties which is binding between the parties to the dispute. In case we were accepted the contention of learned counsel for applicant and entertain contempt proceeding on the premise that the decision taken by the Executive council is in willful disobedience of the judgment of this Court then there would be flood of cases where any individual would be at liberty to approach this Court in exercise of its contempt jurisdiction alleging disobedience of some or the other order of this Court passed in relation to similarly situated persons in similar circumstances and facts.

12. The contempt jurisdiction is a discretionary remedy which can be invoked by a person who is obliged to demonstrate that there is willful disobedience of the order of this Court. The decision of the Executive Council if assailed before writ court, it would open for the applicant to place reliance on the law laid down by the Court where the Executive Council cannot be permitted to review its earlier order and in support of its submission it was open for him to rely on the precedent set by this Court in its judgment dated 12.07.2021 passed in Writ Petition No. 1432 (SB) of 2015 in support of his claim. Merely because the judgment has been pronounced inter parties qua one set of facts it cannot be said that subsequently if any other similar order is passed, it would amount to contempt of Courts Act. Needless to say that a precedent can be distinguished on facts and may loose its strength as a precedent if established that it was a consent order, obiter dicta per-incuriam or

sub-silentio. In case an order is passed contrary to the proposition of law enunciated by a Court then a person can assail the said order placing reliance on the previous order of the Court and only once the writ court after examining the order impugned therein is satisfied the same suffers from infirmity as alleged by the applicant can the said order be quashed. Without an authoritative pronouncement by the writ court, after examining the particular facts of the case resorting to proceeding under Contempt of Courts Act alleging willful disobedience amounting to contempt will generally not be accepted subject to same peculiar facts of a case where all the ingredients of Section 10/12 of Contempt of Courts Act are fulfilled.

13. From the discussion hereinabove, it is clear that to allege contempt it has to be demonstrated that there is a binding judgment between the parties that disobedience of which results in initiation of proceedings under the Contempt of Courts Act.

14. The apex court had considered this aspect of the matter in the case of ***Priya Gupta v. Ministry of Health & Family Welfare,*** **(2013) 11 SCC 40**, wherein it has been held as under:-

"It is true that Section 12 of the Act contemplates disobedience of the orders of the court to be wilful and further that such violation has to be of a specific order or direction of the court. To contend that there cannot be an initiation of contempt proceedings where directions are of a general nature as it would not only be impracticable, but even impossible to regulate such orders of the court, is an argument which does not impress the court. As already noticed, the Constitution has placed upon the judiciary, the responsibility to interpret the law and ensure proper administration of justice. In carrying out these constitutional functions, the courts have to ensure that dignity of the court, process of court and respect for administration of justice is maintained. Violations which are likely to impinge upon the faith of the public in administration of justice and the court system must be punished, to prevent repetition of such behaviour and the adverse impact on public faith. With the development of law, the courts have issued directions and even spelt out in their judgments, certain guidelines, which are to be operative till proper legislations are enacted. The directions of the court which are to provide transparency in action and adherence to basic law and fair play must be enforced and obeyed by all concerned. The law declared by this Court whether in the form of a substantive judgment inter se a party or are directions of a general nature which are intended to achieve the constitutional goals of equality and equal opportunity must be adhered to and there cannot be an artificial distinction drawn in between such class of cases. Whichever class they may belong to, a contemnor cannot build an argument to the effect that the disobedience is of a general direction and not of a specific order issued inter se parties. Such distinction, if permitted, shall be opposed to the basic rule of law."

15. Determination of the lis between the parties is necessary prior to initiation of proceedings for contempt under the Contempt of Courts Act. Any attempt in taking cognizance of contempt relying upon the judgment passed in some other case would amount to stifling the respondents from distinguishing the applicability of the judgment from the facts

of the case. At this stage we would hasten to add that all the authorities and courts are under a constitutional mandate to follow, abide and respect all the judicial decisions, and we do not, the least, mean that the authorities need not follow and abide by the judgments, but the issue at hand is as to whether merely not following a judgement of court passed on some other case, would amount to contempt of court.

16. In the present case, it has been alleged that the Executive Council had taken some decision on 20.08.2007 and they have re-appreciated the same facts in their meeting dated 31.07.2021. It may be possible that there may have been some change in circumstances, change in the rules and regulations or some other material consideration necessitating re-appreciating revisiting the earlier order, or the subsequent decision could be distinguishable from the previous decision or it may be now permissible under law are all questions of fact, the determination of which would be necessary before allegation of contempt can be levelled. Undoubtedly, the law having been down by this Court in the previous decision, that the executive Council would not have the power of the reviewing their decisions, would be a precedent and also liable be considered by the writ Court when examining the validity of the subsequent decision.

17. The peculiar fact of any case deserve to be appreciated by a writ court and only after determinative pronouncement that factual aspect in the case under consideration are similar, and hence applying the law laid down previously by the court would cover the case in the under consideration can result in setting aside of the impugned order.

18. The contempt proceeding by their very nature are summary proceedings. In case the argument of applicant is accepted then in exercise of contempt jurisdiction alleging disobedience of an order where the applicant is not party would necessary entail an in-depth determination of the dispute and also finding on the rights asserted by the applicant, which would be clearly beyond jurisdiction.

19. Considering the fact of the instant case ,it may be difficult to straightway conclude that the Executive Council had committed contempt of the earlier orders of the court without the fact being examined previously by any court. It has also not been stated that the order of the earlier writ court or ever brought to the knowledge of the Executive Council so as to substantiate the allegation that the Executive Council took the decision on 31.07.2021 in willful defiance of the earlier order of the writ court dated 12.07.2021.

20. Considering the aforesaid facts, this Court is of the considered view that the decision of the Executive Council may or may not be legal but does not amount to contempt as it does not fulfill condition set forth in Section 12 of the Contempt of Courts Act. To exercise the power under the Contempt of Courts Act specially with regard to civil contempt it has to be demonstrated that there exists a binding judgement of the court and even after service of the said judicial opinion on the respondents it has not been complied, pursuant to which this Court can initiate proceeding in exercise of power under Section 12 of the Contempt of Courts Act. Without there being binding decision in a matter between the parties, this Court cannot straightway proceed against respondents under the Contempt of Courts

Act. The present proceedings raised by the applicant are clearly misconceived and an abuse of process of the court. It was always open for the applicant to approach the writ court and assail validity of the decision of the Executive Council and restoring to the proceedings under the Contempt of Courts Act and is nothing but abuse of the said process.

21. In light of the above, the contempt petition is dismissed with a cost of Rs. 500/- which shall be deposited in the Library Funds of Awadh Bar Association, Lucknow within two months from today.

(2022)04ILR A514
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

FAFO No. 1245 of 2016

Smt. Beena Tyagi & Ors. ...Appellants
Versus
Mohamed Azmer & Ors. ...Respondents

Counsel for the Appellants:
Sri Bharat Bhushan Paul, Sri Swithin Subhashish Lawren

Counsel for the Respondents:
Sri Komal Mehrotra

(A) Torts Law - Motor vehicle Act,1988 - Section 173 - enhancement of compensation - The Income Tax Act, 1961- Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' - if the amount of interest does not exceeds Rs.50,000/- in any financial year - registry of Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income-Tax Authority.(Para - 15)

Marriage ceremony of son of deceased - deceased came out from mandap to see-off his friends - standing beside road - Bolero Car driven very rashly and negligently by its driver - dashed deceased - after coming on wrong-side - in front of gate of mandap - deceased sustained serious fatal injuries - died - deceased 43 years - serving in a private company - Claimants/appellants awarded Rs.6, 87,000/-, with 7% rate of interest as compensation - Tribunal not awarded any sum for future loss of income aggrieved - hence appeal.(Para - 2,5)

HELD:-Tribunal has committed error in discarding the documentary evidence and assessing the income as Rs.6,000/- per month only. Tribunal commited grave error in not adding any percentage of amount towards future loss of income. 30% added towardws future prospects.Total compensation payable to the appellants-claimants is Rs.30,12,000/-. Rate of interest fixed at 7.5%.(Para - 9,11,12)

Appeal partly allowed. (E-7)

List of Cases cited:-

1. Rahul Sharma & anr. Vs National Insurance Co., 2021 in Civil Appeal No.1769 of 2021

2. United India Insurance Co.Ltd. Vs Indiro Devi & ors., S. L. P. (Civil) Nos.7104-7105 of 2016

3. Rukmani Jethani & ors. Vs Gopal Singh & ors. , SLP (Civil) No.27802 of 2017

4. National Insurance Company Vs Pranay Sethi, 2014 (4) TAC 637 (SC)

5. Smt.Sarla Verma Vs Delhi Transport Corporation , 2009 (2) TAC 677 (SC)

6. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

7. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd., 2007(2) GLH 291

8. Smt. Sudesna & ors. Vs Hari Singh & anr., F.A.F.O. No.23 of 2001

9. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd., F.A.F.O. No.2871 of 2016

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Ajai Tyagi, J.)

1. This appeal is preferred by the claimants-appellants for enhancement of compensation awarded to appellant by Motor Accident Claims Tribunal/ Additional District Judge, Court No.5, Ghaziabad *('Tribunal', for short)*, vide order dated 7.1.2016 in M.A.C.P. No.143 of 2013 *(Smt.Beena Tyagi and others vs. Mohd.Azemer and others)* whereby claimants/appellants was awarded Rs.6,87,000/-, with 7% rate of interest as compensation.

2. Brief facts of the case are that in the intervening night of 28/29.1.2012, the marriage ceremony of son of the deceased Sanjeev Tyagi was going on. At about 00:10 a.m., the deceased came out from *mandap* to see-off his friends. When he was standing beside the road, a *Bolero* Car bearing No.UP34-N/7867 came from the side of Meerut, which was being driven very rashly and negligently by its driver dashed the deceased after coming on the wrong-side in front of the gate of the *mandap*. In this accident, the deceased sustained serious fatal injuries and died on the way to hospital. It is also averred that the age of deceased was 43 years and he was serving in a private company in Ghaziabad. The driver of the offending vehicle and its insurance company filed their respective written statements.

3. Heard Shri Bharat Bhushan Paul, learned counsel for the appellant and Shri Komal Mehrotra, learned counsel for the respondents.

4. The accident is not in dispute. The insurance company has not challenged the liability on it. The issue of negligence has attained finality. Now the only issue to be decided is the quantum of compensation awarded by the Tribunal. Entire factual scenario is not being narrated as the limited question in this appeal relates to the quantum only.

5. With regard to the quantum, learned counsel for the appellants submitted that the deceased was in service in S.K.Garg & Co.Ltd., Ghaziabad, wherefrom he was getting salary at Rs.22,000/- per month. It is further submitted that the deceased was income-tax payee. Appellants have filed the copies of the Income-tax Returns of the deceased for three preceding years of his death, but learned Tribunal wrongly declined to believe the Income-tax Returns. It has further been submitted by learned counsel for the appellants-claimants that apart from Income-tax Returns, appellants also filed a salary-certificate dated 1.2.2012 duly issued by S.K.Garg and Co.Ltd., where the deceased was employed. Learned counsel also submitted that the deceased was salaried person, but learned Tribunal has not awarded any sum for future loss of income. It is next submitted that learned Tribunal has awarded Rs.5,000/- for loss of consortium, Rs.5,000/- for love and affection and Rs.5,000/- for funeral expenses, which are on the lower-side.

Regarding rate of interest, counsel for the appellants submitted that Tribunal has awarded compensation @ 7% per annum, which is on lower side. Learned counsel for the appellants-claimants has heavily relied on the following judgments:

A. ***Rahul Sharma and another vs. National Insurance Company*** *dated 7th May, 2021 in Civil Appeal No.1769 of 2021*

B. ***United India Insurance Co.Ltd. vs. Indiro Devi and others*** *dated 3rd July, 2018 in Special Leave Petition (Civil) Nos.7104-7105 of 2016*

C. ***Rukmani Jethani and others vs. Gopal Singh and others*** *dated 23rd July, 2021 in SLP (Civil) No.27802 of 2017*

6. Shri Komal Mehrotra, learned counsel appearing for Insurance Company, submitted that income of the deceased was mentioned as Rs.22,000/- in the petition, but it could not be proved by the appellants. There is disparity between the income alleged by the appellants and income as shown in documents on record. Therefore, the Tribunal rightly disbelieved the income of deceased at Rs.22,000/-. There is no dispute regarding 1/3 deduction for personal expenses and multiplier of 14. Hence, there is no illegality or infirmity in the impugned judgment and it does not call any interference by this Court.

7. Perusal of record shows that as per the averment made in the petition, the deceased was employed in the aforesaid company at Ghaziabad from where he was getting salary of Rs.22,000/- per month. To show this fact, appellants have filed a salary-certificate issued by the S.K.Garg & Co.Ltd. Dated 1.2.2013 in which it is certified that the deceased was employed with this company on the post of office-coordinator during the F.Y. 2011-12 on a monthly salary of Rs.22,000/-. Apart from this salary-certificate, appellants have also filed Income-tax Returns of the deceased preceding three years of his death, which are on the record. These Income-tax Returns show that income-tax was also paid by the deceased, therefore, there is no doubt that he was Income-tax payee.

8. We are not convinced with the discussion made by the learned Tribunal regarding the Income-tax Returns. Learned Tribunal did not appreciate the aforesaid documentary evidence in right perspective as it goes to show that the last return, pertaining to the A.Y. 2010-11, exhibits gross total income of the deceased as Rs.3,65,617/- and tax payable to it was Rs.9,451/-.

9. We are of the considered opinion that learned Tribunal has committed error in discarding the documentary evidence and assessing the income as Rs.6,000/- per month only. If it would have been the fact, the deceased should have been completely exempted from payment of income-tax while he had paid income-tax nearly Rs.10,000/- per annum.

10. The Tribunal has not added any percentage of amount towards future loss of income, which is, in our opinion, grave error. Since, the deceased will fall within the category of self-employed and his age was 43 years at the time of accident, 30% shall be added towards future prospects as held by Hon'ble Apex Court in ***National Insurance Company vs. Pranay Sethi*** *[2014 (4) TAC 637 (SC)]*. The deceased left three dependants behind him, his wife and two children. Learned Tribunal has deducted 1/3 of the income towards personal expenses of the deceased.

Although, the learned Insurance Company has submitted that the deduction should have been 1/2, but we do not agree with this contention. We hold that the Tribunal has rightly deducted 1/3 of the income towards personal expenses of the deceased. The age of the deceased was 43 years, therefore, keeping in view the age of the deceased, multiplier of 14 will be applied in the light of the judgment of Hon'ble Apex Court in the case of ***Smt.Sarla Verma vs. Delhi Transport Corporation*** *[2009 (2) TAC 677 (SC)]*, which is rightly applied by the Tribunal. As far as non-pecuniary damages are concerned, the Tribunal has awarded only Rs.5,000/- towards funeral expenses, which are also on the lower-side. In the light of Judgment of ***Pranay Sethi*** *(supra)*, claimants shall be entitled to get Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses. Apart from it, the wife of the deceased shall also be entitled to get Rs.40,000/- for loss of consortium. Hence, the non-pecuniary damages are calculated at Rs.15,000/- + Rs.15,000/- + Rs.40,000/- = Rs.70,000/-, and as per the judgment of the ***Pranay Sethi*** *(supra)*, these would be revised 10% every three years. Hence, we fix total non-pecuniary damages at Rs.1,00,000/-.

11. Hence, the total compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

i.	Annual Income	Rs.20,000/- x 12	Rs.2,40,000/-
ii.	Percentage towards Future-Prospects (30%)	Rs.72,000/-	
iii.	Total Income	Rs.2,40,000/- + Rs.72000/-	Rs.3,12,000/-
iv.	Income after deduction of 1/3		Rs.2,08,000/-
v.	Multiplier applicable	14	
vi.	Loss of dependency	Rs.2,08,000/- x 14	Rs.29,12,000/-
vii.	Non-pecuniary Damages	Rs.1,00,000/-	
viii.	**Total Compensation**	Rs.29,12,000/- + Rs.1,00,000/-	**Rs.30,12,000/-**

12. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in ***National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)*** wherein the *Apex Court* has held as under:

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

13. Learned Tribunal has awarded rate of interest as 7% per annum, but we are fixing the rate of interest as 7.5% in the light of the above judgment.

14. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The Insurance Company shall deposit the amount within a period of 8 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. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd.,*** *[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 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.

(2022)04ILR A518
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.03.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Crl. Appeal No. 619 of 1986

Nathoo & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Keshav Sahai, Sri Indra Kumar Chaturvedi, Sri Shaurabh Chaturvedi, Sri Ram Milan Dwivedi

Counsel for the Respondents:
D.G.A.

Criminal Law- Indian Penal Code, 1860 - Sections 302 & 34- Possibility of false implication- There was strong rivalry in the village and the deceased belonged to a group which had strong rivalry with the group to which the accused party belonged, it is a case where the evidence would have to be scrutinised carefully to exclude not only the possibility of false implication but also over implication.

Where there are rival factions then the possibility of false or over implication cannot be ruled out and therefore it is the duty of the court to scrutinise the evidence with due care and caution.

Evidence Law - Indian Evidence Act, 1872- Sections 101 & 102 - The deceased was a history-sheeter and, importantly, at the time of spot inspection by the I.O., the deceased was found having a country made gun in his hand with an empty 12 bore cartridge in its chamber-No doubt, we are conscious that no cross version or self defence has been set up by the defence but the prosecution has to prove its case beyond reasonable doubt by

leading evidence that inspires confidence. Once, a doubt arises as to whether the prosecution is hiding the genesis of the incident or true facts, it is difficult for the court to accept the prosecution case unless the evidence led in support thereof is carefully tested on all material aspects, particularly, in a case involving rival factions of a village. It appears to be a case where the prosecution witnesses are guilty of suppressing true facts and not coming out with full disclosure about the incident.

Even though the defence may not have set up a cross case, but yet it is the duty of the prosecution to come with clean hands and also to prove its case beyond all reasonable doubt.

Criminal Trial- Contradiction between ocular and medical version-The incised wound found on the body of the deceased is not attributable to the use of Bhala or to any other weapon assigned to the accused persons in the ocular account of PW-4. Other than that, there is a material difference in the number of injuries found on the body of the deceased than alleged to have been inflicted with a Bhala, as per the ocular account.

Where the prosecution has suppressed material facts thereby hiding the genesis of the occurrence, the medical evidence contradicts the ocular version and the oral testimony fails to inspire the confidence of the court, then the accused deserve the benefit of doubt.(Para 22, 26, 27, 28)

Criminal Appeal accordingly allowed. (E-3)

Judgements/ Case law relied upon:-

1. Pandurang Chandrakant Mhatre & ors. Vs St. of Maha, (2009) 10 SCC 773 (vide paragraph 60)

2. Muthu Naicker & ors. Vs St. of T.N, (1978) 4 SCC 385

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Sameer Jain, J.)

1. This appeal has been filed by four appellants, namely, Nathoo, Dambar, Tilak and Kaloo alias Raja Ram against the judgment and order dated 18.02.1986, passed by 1st Additional District & Sessions Judge, Budaun in Sessions Trial No.353 of 1984 whereby, the appellants Nathoo and Tilak have been convicted under Section 302 IPC whereas, appellants Dambar and Kaloo alias Raja Ram have been convicted under Section 302 read with Section 34 IPC and all of them have been sentenced to imprisonment for life. The appeal of appellants Dambar and Tilak, consequent to their death, was abated vide order dated 28.11.2018 therefore, the appeal survives qua appellant no.1 (Nathoo) and appellant no.4 (Kaloo alias Raja Ram) only.

INTRODUCTORY FACTS

2. On a written report (Exb. Ka-3), dated 17.03.1984, submitted by Dharmpal Singh (PW-3), a first information report (FIR) was registered at police station (P.S.) Bilsi, district Budaun, as Case Crime No.57 of 1984, at 18.15 hours, of which Chik FIR (Exb. Ka-4) and GD entry (Exb. Ka-5) was prepared/ made by PW-7. The allegation in the FIR is that on 17.03.1984, at 3.00 p.m., the informant (PW-3) was informed by Pappu (PW-4) that informant's nephew Itwari (the deceased), on his way back home, after extending Holi greetings, near the shop of Liladhar Murao (not examined), was stopped by accused persons, namely, Nathoo (appellant no.1); Dambar (the appellant no.2); Tilak (the appellant no.3); and others, who requested Itwari (the deceased) to smoke a Beedi (a leaf rolled and filled with tobacco). But, when Itwari refused to accede to their request, Nathoo and Tilak (appellants 1 and 3) inflicted injury on Itwari with the help of Ballams,

thereafter, on exhortation of Dambar (appellant no.2), Tilak fetched his gun from his house and fired at Itwari (the deceased), which killed Itwari. It was alleged that Dambar's son Kaloo (appellant no.4) was also with the accused persons. In the FIR it was also alleged that at the spot Devendra (PW-6) and others were there and the informant including informant's brother Shivraj Singh (PW-5) also arrived and when they arrived, accused persons started pelting brickbat from roof top, in which, PW-5 received injuries. Making all these allegations and stating that the body of the deceased is lying at the spot, FIR was lodged.

3. The medical examination of Shivraj Singh (PW-5) was conducted on 17.03.1984 at 06.45 p.m. by PW-2. The medical examination report of PW-5 (Exb. Ka-2), prepared by PW-2, reveals:

(i) Traumatic swelling on the left clavicular region 8 cm x 2 cm in diameter. Kept under observation. Advised X-ray;

(ii) Bruise mark on the left clavicular region medially, 1 cm x 1 cm reddish.

(iii) Bruise mark on the left clavicular region laterally 2 cm x 1 cm reddish.

Opinion :- All the above injuries are caused by blunt object. No.(i) kept under observation. Nos.2 and 3 simple and fresh.

4. Though the police reached the spot in the evening but due to fading light, inquest was conducted next day morning, that is on 18.3.1984. Inquest report (Exb. Ka-6) was prepared by Jagdish Chandra Pathak (not examined) under the direction of the Investigating Officer (I.O.) (PW.-8). The inquest report notices that in the right hand palm of the deceased's body, there was a 12 bore country made pistol whose chamber had one empty cartridge.

5. On 18.03.1984, the I.O. (PW-8) lifted blood stained earth/plain earth from the spot of which memo (Exb. Ka-12) was prepared. The I. O. during spot inspection collected 25 pellets from the wall of Liladhar's shop, which were embedded therein, of which seizure memo (Exb. Ka-13) was prepared. In the site plan (Ex. Ka-14) prepared by the I. O. on 18.03.1984, the location of that spot from where pellets were recovered have been shown by letter X.

6. The autopsy of body of the deceased was conducted on 18.03.1984 at 4.00 p.m. of which, the autopsy report (Exb. Ka-1) was prepared by PW-1. The autopsy report, inter alia, reveals:

External Examination : Average built body, eye semi open, mouth semi open. Rigor mortis: passed upper limb, present lower limb.

Ante-mortem injury :

(1) one gunshot wound of entry 1 cm x 1 cm x cavity deep on the epigastric region, margins are burnt and black.

(2) one gunshot wound of exit 1 cm x 1 cm x cavity deep on the left of spleen region (upper part).

(3) Incised wound 7 cm x 3 cm x fracture of lower jaw left side and in central part with fracture of 5 lower jaw teeth.

(4) Abrasion 5 cm x 3 cm on the right clavicular region medial side.

(5) Abrasion 4 cm x 3 cm over the left side neck (sic), lower part.

(6) Abrasion 6 cm x 3 cm over the left wrist region (posterior).

Internal Examination : Spleen lacerated. Peritoneum punctured. Heart empty, blood found in the cavity and

stomach contained 6 ounce of digested food, small intestine had faecal matter and gases.

Opinion :- Death is due to shock and haemohrage as a result of described injuries.

Estimated time of death:- One day before.

7. After investigation, PW-8 submitted charge-sheet (Exb. Ka-15) on which, after taking cognisance, the case was committed to the court of session. The court of session, vide order dated 03.09.1985, framed two charges against appellants Nathoo and Tilak. The first was of committing murder of Itwari, punishable under Section 302 IPC, and the other was of voluntary causing hurt to Shivraj Singh (PW-5), punishable under Section 323 IPC. Similarly, vide order dated 03.09.1985, the appellants Dambar and Kaloo alias Raja Ram were charged under Section 302 read with Section 34 IPC for the murder of Itwari and under Section 323 IPC for voluntary causing hurt to Shivraj Singh. The accused pleaded not guilty and claimed to be tried. At this stage, it be noticed that in both sets of charges, murder was alleged to have been committed at 3.00 pm in front of the shop of Liladhar Morao on whose shop's wall gun shot pellets were found embedded by I.O. (PW-8) and of which recovery was also made vide Exb. Ka-13.

PROSECUTION EVIDENCE

8. During the course of trial, the prosecution examined eight witnesses, their testimony is as follows :

9. **PW-1 - Dr. M.K**. Maheshwari. He is the Doctor who conducted autopsy of the body of Itwari. He proved the autopsy report and accepted the possibility of death having occurred at 3.00 p.m. on 17.03.1984. He stated that injury nos.1 and 2 were sufficient to cause death. Injury no.3 could have been caused by a Ballam, if it had sharp edges and injury nos.4, 5 and 6 could be caused due to friction and could also be caused by falling on a hard object. **In his cross-examination**, the Doctor stated that the deceased may not have died instantaneously and might have survived for 10-15 minutes. In respect of injury no.1, PW-1 stated that that could have been caused if the shot had been fired from a distance of less than 4 feet. PW-1 also stated that the injury nos.1 and 2 must have been caused by a bullet and not by pellets though that bullet may be of brass or of steel. In respect of injury no.3, PW-1 stated that that injury could be caused by a Pharsa but not knife.

10. **PW-2 - Dr. R.C. Joshi**. The Doctor, who examined PW-4 for his injuries on 17.03.1984 at 6.45 p.m. PW-2 proved the injury report (Exb. Ka-2) and stated that all the injuries noticed could be from a hard blunt object and could also be a result of bricks thrown at the injured. He stated that injury nos.2 and 3 were simple and fresh which could have been sustained around 3.00 p.m. on 17.03.1984. **In his cross-examination**, PW-2 stated that those injuries could not be self-inflicted but if the injured on his own gets bricks thrown at him then those injuries could be sustained. He denied the suggestion that he did not notice the injuries and has prepared a false report. The Doctor also stated that at the time when he examined the victim there was no first information report before him.

10. **PW-3 - Dharampal Singh. (The informant)** - He stated that the deceased Itwari was his nephew and on the date and time of the incident, at about 3.00 p.m.,

Devendra (PW-6) and Pappu (PW-4) came running and informed PW-3 that Itwari has been killed by Nathoo, Tilak, Dambar and Kaloo alias Raja Ram; that on receipt of the information, PW-3 and Shivraj Singh (PW-5) rushed to the spot; there the accused Tilak, Nathoo, Kaloo alias Raja Ram and Dambar threw bricks at them from their roof top which struck Shivraj Singh (PW-5), causing injuries. PW-3 stated that by the time they arrived there, Itwari had already died and his body was lying near a Jamun tree in front of the shop of Liladhar. PW-3 stated that thereafter he got a report scribed from Jogendra Singh (not examined) who read the report to him, whereafter he put his signature on it and, thereafter, his injured brother Shivraj Singh (PW-5) was examined in the hospital. He stated that before the incident, Pradhan's elections had taken place in which Ulfat Singh and Dambar (appellant no.2) were candidates; the informant party was canvassing for Ulfat Singh, as a result, the accused party bore enmity with the informant party. PW-3 stated that where the body of the deceased was lying is a place where members belonging to the caste of the accused, including the accused, have their Abadi; that their (accused persons') houses were at a distance of 10-15 paces away from the spot; that the accused belong to Morao caste whereas the informant party belong to Thakur caste; and there is party-bandi in the village. That day, it was Holi and the deceased had gone to visit village Sahbajpur to extend Holi greetings to his friends and relatives and along with him, Pappu (PW-4) and Devendra (PW-6) were there. PW-3 stated that when Itwari had gone to visit people and extend Holi greetings, he had not taken any weapon.

In his cross-examination, PW-3 stated - that the I.O. recorded his statement next day of the incident; that though he is not aware about the number of cases pending against Itwari but Itwari was prosecuted for the murder of Bangali and prior to that he was also prosecuted for murder of a lady; and that he is not aware whether a case of dacoity was also instituted against Itwari. He claimed ignorance of there being 5-6 cases relating to offence punishable under Section 25 Arms Act against Itwari. PW-3, however, admitted that Itwari was a history-sheeter and police used to visit him. On further cross-examination, PW-3 stated that Devendra (PW-6) is Bhanja (sister's son) of Itwari and a resident of village Matiyari though, Devendra used to stay in the village where the incident took place. PW-3 claimed ignorance as to whether the father of Devendra was also a history-sheeter.

In respect of the spot location, PW-3 stated that the spot where the body of Itwari was lying was 400-500 paces away from PW-3's house. PW-3 denied the suggestion that at the time when Pradhan's elections were on, Itwari was in jail. PW-3 stated that Pradhan's elections took place 5-6 months before the incident. He stated that in the village, members of Thakur community, to which he belongs, and Morao community, to which accused belong, reside in separate areas. He stated that to the best of his knowledge, prior to the incident, Itwari had never visited Morao Basti (colony). PW-3 stated that the house of Itwari was at a distance of 30-35 paces away from his own house. PW-3 further stated that Itwari, Devendra and Pappu had gone together to extend Holi greetings at about 1.00 p.m. On being confronted that he did not mention in the FIR that Devendra and Pappu had gone together with Itwari to extend Holi greetings, and that he had not made any such statement to the Investigating Officer during

investigation, PW-3 stated that he had made a disclosure of that fact but if that was not written, he cannot tell the reason for the same. On being confronted that he had not mentioned in the report that along with Pappu, Devendra had also given information about the incident to him, PW-3 stated that he had mentioned this fact in his report but if that was left out, then he cannot tell the reason. He stated that when he and his brother Shivraj Singh had gone to the police station, village ladies were asked to guard the body. PW-3 admitted that the body of the deceased was lying in front of the shop of Liladhar. PW-3 stated that towards west of Dambar's house, there is house of Tilak and in between the two houses, there is Baithak of one Pranshu. He stated that when brickbats were thrown at them, the accused were on the roof top of the house of accused Dambar. At that time, apart from the accused persons, there were other members of Morao community also. PW-3, however, clarified that brickbats were thrown by the accused persons and not by others. He also clarified that the parapet of the roof was not high therefore all those who were throwing brickbats could be noticed.

On further cross-examination, PW-3 stated that the FIR was got scribed through Jogendra Singh while sitting near the body of the deceased and that it was delivered to the informant without delay. He stated that they reached the police station to lodge the report by about 6.00 p.m. and after leaving his brother (PW-5) at the hospital, he returned back to the village. PW-3 stated that he stayed over night near the body and when he arrived after lodging the report, ladies were not there. PW-3 stated that the Investigating Officer had arrived in the night of the incident. PW-3 denied the suggestion that Itwari was killed in darkness by some unknown persons on account of party-bandi and that the accused were falsely implicated. He also denied the suggestion that the report was lodged next day. He also denied the suggestion that Shivraj Singh (PW-5) self-inflicted injuries from bricks.

11. **PW-4 - Pappu (Eyewitness) Aged 15 years**. He stated that at the time of the incident he, Itwari and Devendra were returning after extending Holi greetings at village Sahbajpur and when they reached near Liladhar's shop, at about 3.00 p.m., Dambar, Tilak, Kaloo alias Raja Ram and Nathoo stopped Itwari. They asked Itwari to smoke Beedi to which Itwari refused by saying that he would not smoke with them as they are not persons with whom he has relations. On this, Nathoo and Tilak inflicted Bhala blows on Itwari. Whereafter, Kaloo alias Raja Ram and Dambar exhorted Tilak to fetch gun and shoot Itwari on which, Tilak went to his house to fetch his gun and thereafter, Tilak shot Itwari, as a result whereof, Itwari fell. As soon as Itwari fell, Pappu (PW-4) and Devendra (PW-6) effected their escape and, after reaching home, made a disclosure about the incident to PW-3 and PW-5.

In his cross-examination, PW-4 stated - that he went with Itwari to extend Holi greetings at about 1.00 p.m.; that Itwari and he belong to the same Mohalla and are of the same Khandaan (pedigree); that to give his statement in court he has been away from the village for the last three days; that the police had brought him and Devendra; that they had been staying at the police station. He stated that all the witnesses are staying at the police station voluntarily. He denied the suggestion that the police men had tutored him.

On further cross-examination, when confronted with his statement, recorded under Section 161 CrPC, that when he and

Itwari were returning after extending Holi greetings, at the spot, they had seen Devendra, etc., PW-4 stated that he had informed the Investigating Officer that Devendra had also been with them to extend Holi greetings but if that was not written, he cannot tell the reasons for the same. He stated that they had gone to village Sahbajpur without eating anything at their house but at village Sahbajpur, they had *Gujiya* at Dalvir's house. On being confronted with regard to the omission in his statement, under section 161 CrPC, that he along with Devendra had rushed to inform PW-3 about the incident, he stated that that information was given to the Investigating Officer but if it was not mentioned by the Investigating Officer, he cannot tell the reason for the same. He stated that when they were on their way back, in front of Liladhar's shop, they saw the accused standing there; that two were armed with Bhalas and two were empty handed. PW-4 stated that he was ahead, followed by Itwari, and, thereafter, Devendra. He stated that when Itwari saw the accused, Itwari neither ran nor, he or Itwari, raised an alarm. Only when Itwari was killed, he ran away. On further cross-examination, PW-4 stated that though the shop of Liladhar was open but there were no customers. However, Liladhar was sitting in his shop. PW-4 stated that near the shop, Dharampal, Ram Autar and Hori Lal Murao's houses are there but none of them were present. When the accused saw Itwari, they asked him to smoke a Beedi and when Itwari refused, they inflicted Bhala blows. PW-4 stated that three Bhala blows were inflicted. Bhalas were pointed. The top was pointed, having a length equal to an arm and width of about one and half finger. PW-4 stated that after Bhala injuries were inflicted on Itwari, Dambar and Kaloo alias Raja Ram exhorted Tilak to fetch his gun; on which, Tilak ran to fetch his gun. At that time, PW-4 did not run away. After being inflicted Bhala injury, Itwari had fallen. Tilak fetched his gun from his house, which was at a distance of about 50 paces. The gun brought by Tilak was of full size. Tilak fired at Itwari, pointing downwards, from a distance of about one yard. A single shot was fired by Tilak and no other shot was fired. When the shot was fired, Tilak was facing towards the house of Liladhar, which is south of Rasta and the distance of shop of Liladhar from the place of incident is 10 paces.

On further cross-examination, PW-4 stated that when shot was fired at Itwari, Itwari was lying on the ground. PW-4 also stated that till Tilak could fetch his gun all the other three accused remained there. He clarified this by stating that there must have been 15 minutes time-gap between infliction of Bhala blows and causing of gun shot injury. He stated that where Itwari fell, it was brick path (Khadanja).

On further cross-examination, PW-4 stated that Munni is Itwari's cousin brother. He stated that he is not aware that Itwari had killed Munni's mother and that Itwari had also stabbed Munni at the time of Baraat (marriage procession). PW-4 stated that after giving information about the incident he stayed at the house, whereas Dharmpal (PW-3) and Shivraj (PW-5) went to the spot. PW-4 stated that the accused, by that time, had run away. PW-4 stated that when the Investigating Officer had come, I.O. had called PW-4 to the spot, PW-4 had described the incident to I.O. PW-4 denied the suggestion that he did not witness the incident and that he is telling a lie on account of being part of that family.

12. **PW-5 - Shivraj Singh**. He stated that on the date of the incident, at about

3.00 p.m., Devendra and Pappu both came and gave information about the incident; at that time, he was with his brother Dharmpal (PW-3); thereafter, he and PW-3 rushed to the spot; there, Tilak, Dambar, Nathoo and Kaloo alias Raja Ram were noticed throwing brickbats at them from roof-top, which caused injuries; when, they raised an alarm, several other villagers arrived; by that time, Itwari had died; thereafter, report was lodged at police station Bilsi, from where he was sent for medical examination. He stated that prior to this incident he had no enmity with the accused except animosity on account of Pradhan's elections. As regards the relationship inter se accused persons, PW-5 stated that Kaloo is the son of Dambar; and Tilak is the nephew of Dambar. Nathoo though a relative, but not a close one.

In his cross-examination, PW-5 stated that the Investigating Officer had called him for recording his statement 15-16 days later. He admitted that against Itwari there was a case regarding murder of Bangali Thakur and also a case in respect of firing of gunshot at Munni's mother. He claimed ignorance about a dacoity case registered against Itwari.

On further cross-examination, he stated that the information about the incident was first received from Pappu whereas he met Devendra on the way. He stated that after receipt of information, PW-5 and PW-3 went to the spot but Pappu and Devendra did not accompany them though, on way, they met 10-15 other villagers, who went with them to the spot. He stated that when brickbats were hurled at them, they stopped, but, when other villagers arrived, they proceeded to the spot. At that time near the body there was nobody else, and when he received injury, except he and his brother there was nobody else. He stated that his brother (PW-3) was ahead and he stopped because of brickbats. He stated that brickbats were thrown from the roof over the *Baithak* adjoining the house of accused Tilak. He clarified by stating that the roof was over a joint Baithak of Tilak and Dambar. He stated that on the roof top, only accused persons were there. He stated that 5-10 bricks were thrown at him, out of which, one had hit him.

On further cross-examination, he stated that at the time when Pradhan's elections were held, Itwari was out of jail and after Pradhan's elections, he was not sent back to jail. He stated that Itwari was released from jail about 20-25 days before Pradhan's elections. He stated that in his presence there was never an altercation/fight between Itwari and the accused. He stated that though Ulfat Singh had won Pradhan's elections earlier, several times, but this time he lost to Dambar. He denied the suggestion that at the instance of Ulfat, he falsely implicated the accused.

13. **PW-6 - Devendra**. As Devendra was **aged 13-14** years only, the court examined him to test whether he could be considered competent to depose. After being satisfied in that regard, he was permitted to depose. PW-6 stated that the deceased Itwari was his maternal uncle, he was killed at about 3.00 p.m; when Itwari was killed, he was present there; that he, Pappu and Itwari had gone to village Sahbajpur to extend Holi greetings and on their way back, when they arrived in front of the shop of Liladhar, there, Nathoo, Dambar, Kaloo and Tilak asked Itwari to smoke Beedi; when Itwari refused, Nathoo and Tilak started assaulting Itwari with Bhala, Itwari received two Bhala blows; immediately thereafter, Dambar and Kaloo asked Tilak to get his gun to finish him off, thereafter, Tilak brought his gun from his house and fired at the deceased (Itwari); till

that shot was fired, he was present there, after that, he went back home, then, on way, he met Dharmpal (PW-3) and Shivraj (PW-5). PW-6 stated that prior to the death of Itwari, PW-6's mother had expired and after the death of his mother, he had been staying with his maternal grandfather Shivraj Singh (PW-5).

During cross-examination, when he was confronted with an omission in his statement recorded under Section 161 CrPC with regard to he, Pappu and Itwari having gone together to extend Holi greetings, he stated that that fact was disclosed to the Investigating Officer but if that was not written, he cannot tell the reason. PW-6 was again confronted with his previous statement made during the course of investigation wherein he had stated that while he was returning to his house after taking a round of the village, near the shop of Liladhar, he saw that Itwari was surrounded by Dambar, Kaloo, Tilak and Nathoo, to which he responded by stating that if that had been written by the Investigating Officer, he cannot tell the reason for the same. PW-6 was also confronted with an omission in his statement regarding the accused persons requesting Itwari to smoke Beedi, to which, he responded by stating that he had not disclosed the same to the Investigating Officer but that incident did happen in his presence. PW-6 also stated that he had not disclosed to the Investigating Officer that Tilak had also inflicted Ballam injury. PW-6 also stated that he did not disclose to the Investigating Officer that he met Shivraj and Dharmpal on way to his house. PW-6 also admitted that he had not told the Investigating Officer that Dambar and Kaloo had exhorted Tilak to get his gun to kill the deceased.

On further cross-examination, PW-6 stated that he only knows Harvir in village Shahbajpur and that he does not know the persons whom Itwari visited that day though, Itwari new them. PW-6 stated that he used to stay with his father but at the time of the incident he was staying at the village Behta Jabi (village where the incident took place) though, his younger brother and sister were staying with his father at village Gharchari (PW-6's father's village). PW-6 stated that this was the first Holi after the death of his mother and as per the custom, relatives visit the house where there is bereavement. He admitted that his maternal grandfather had carried *Gujiya* to his father's house. He stated that his maternal grandfather had returned next day morning and then he gave this information to him. He stated that the date of the incident was Holi day and people were moving around.

In respect of the incident, during cross-examination, PW-6 stated that on their way back, at the time of the incident, Pappu was ahead, followed by Itwari, who was followed by him. PW-3 stated that the accused held two Bhalas and they inflicted three Bhala blows, one was just above the stomach region, second was from back and the third was near shoulder joint. He stated that when Bhala blows were inflicted on Itwari, Itwari could not run because he was caught hold by the accused. He stated that when the shot was fired at Itwari, Itwari was standing but after the shot hit Itwari, he fell down. He stated that the shot must have been fired from a distance of 1 and ½ yards. After firing the shot, the accused ran towards the house of Liladhar. He denied the suggestion that he was not present at the spot and that what he is telling is a lie. He also denied the suggestion that Itwari had a gun with him.

14. **PW-7 - Lal Singh**. He proved the registration of the written report and

preparation of its GD entry as well as chik FIR, which were exhibited as Exb. Ka-4 and Exb. Ka-5, respectively. He denied the suggestion that the FIR was lodged after autopsy.

15. **PW-8 - D.P. Juwal**. The Investigating Officer of the case. PW-8 stated that after registration of the case he started investigation on the same day and recorded the statement of the informant Dharm Pal and Head Clerk who prepared GD entry of the FIR and, thereafter, visited the spot; that, by the time he arrived at the spot, it was night and as sufficient light could not be arranged to conduct the inquest, a constable was deputed to stay there near the body; that he recorded the statement of Pappu, but witness Devendra could not be found; that effort was made to trace out the accused but they could not be found. He stated that because of darkness of the night, the police team stayed there overnight and in the morning of 18.03.1984, inquest proceedings were started. It is stated that the inquest report was prepared under his direction by Sub-Inspector Jagdish Chandra Pathak. He proved various papers in connection with inquest, autopsy etc. He stated that at the spot, he noticed a single barrel country made pistol, with one empty cartridge in its chamber, on the right hand palm, just below the wrist, of the deceased, which was recovered and sealed of which seizure memo (Exb. Ka-11) was prepared. He also proved lifting of blood stained earth/plain earth from the spot. He stated that at the time of inspecting the spot, he could collect 25 pellets from the wall of Liladhar's shop of which a seizure memo was prepared, which was exhibited as Exb. Ka-13. He stated that on the basis of inspection, a site plan (Exb. Ka-14) was also prepared by him. He stated that on 04.04.1984 he recorded statement of Shivraj and Devendra but, prior to this, despite effort, they could not be found and, after completing the investigation, on 18.05.1984, he prepared and submitted charge-sheet, which was exhibited as Exb. Ka-15.

During cross-examination, PW-8 stated that the empty cartridge recovered from the chamber of that gun was of 12 bore. He stated that he had recorded the statement of Liladhar and other persons who were there. He stated that Itwari was a history-sheeter. He stated that he reached the spot at about 8.00 - 8.15 p.m. though he did not remember whether men or women were there near the body when he arrived. He denied the suggestion that first information report was lodged after autopsy. He stated that Dharampal did not give any such statement that Itwari had gone without carrying a weapon. Dharampal had also not given a statement that with Itwari, Devendra and Pappu had gone to extend Holi greetings. He also stated that Dharampal did not inform him that information about the incident was given to him by Devendra. He stated that near the body he could not notice any brickbat. He stated that the site plan was prepared by him with the help of witness Pappu and Suraj Pal Singh. He stated that Pappu in his statement had not informed that Devendra was also with them; and that Pappu had also not informed that the accused had dispersed in all four direction. He also stated that the witness Devendra had not informed him that he, Pappu and Itwari were on their way back when the incident occurred. Various other omissions in the statement of Devendra were put to the Investigating Officer, which he confirmed.

16. The incriminating circumstances emanating from the prosecution evidence were put to the accused. As this appeal

survives only in respect of appellant nos.1 and 4, namely, Nathoo and Kaloo, we propose to notice only the statement of Nathoo and Kaloo recorded under Section 313 CrPC. Appellants Nathoo and Kaloo denied their involvement in the incident and claimed that they have been falsely implicated on account of enmity generated during election of Pradhan.

TRIAL COURT FINDINGS

17. The trial court upon finding that on account of election of Pradhan there was enmity between two communities in the village; and the prosecution case was supported by an eye witness account of the incident, taking into account that the first information report was promptly lodged, convicted the appellants as above but, acquitted the appellants of the charge of offence punishable under Section 323 IPC.

18. We have heard Sri Indra Kumar Chaturvedi, learned senior counsel, assisted by Sri Shaurabh Chaturvedi, for the surviving appellant nos.1 and 4 (Nathoo and Kaloo alias Raja Ram); Sri H.M.B. Sinha, learned AGA, for the State; and have perused the record.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE APPELLANTS

19. Learned counsel for the appellants submitted that admittedly the village was divided on caste lines because of Pradhan's election. The deceased was a history sheeter and spot inspection confirmed that there was a gunshot mark on the wall of Liladhar's shop, in front of which deceased's body was lying. A country made pistol was noticed in the right hand palm of the deceased. There is no explanation rendered by the prosecution in what circumstances a country made pistol was noticed in the hand of the deceased and why there was a gunshot mark on the wall of the shop. The prosecution is thus guilty of suppressing the genesis of the incident therefore, an adverse inference ought to be drawn against the prosecution. Further, the ocular account does not inspire confidence, firstly, with regard to the presence of PW-4 and PW-6, and, secondly, with regard to the infliction of Bhala injuries on the deceased more so, because the injuries found are not referable to a Bhala and, otherwise also, two persons have been attributed the role of causing Bhala injury whereas no punctured wound was found. The incised wound found could be referable to a Ballam only, if it had sharp edges. But the same is not proved by the description given. Further, incised wound is solitary; whereas, witnesses say that multiple blows were inflicted, which suggests that either none witnessed the incident or the incident occurred in some other manner but the FIR was lodged by guess-work on account of enmity. It has been submitted that since causing of gunshot injury, which alone was fatal, has been attributed specifically to co-accused Tilak, who is no more alive, and the evidence in respect of participation of the surviving appellants in the crime is not confidence inspiring, it is a fit case where they be given the benefit of doubt.

SUBMISSIONS ON BEHALF OF THE STATE

20. **Per contra**, learned AGA, submits that this is a case where the incident occurred in broad daylight; it was Holi time therefore, if the witnesses were moving together with the deceased to extend Holi greetings, the presence of those witnesses cannot be doubted; that the FIR

was prompt; that during trial, the eyewitnesses have supported the prosecution case and have disclosed participation of the surviving appellants therefore, they have been rightly convicted. Non-explanation of the country made pistol in the hand of the deceased is not detrimental to the prosecution case as there is no explanation of the accused with respect to the incident occurring in any other manner. Further, incised wound can be caused by a Bhala or a Ballam, if it has sharp edges therefore, there is no such discrepancy between the ocular account and the medical evidence. Learned AGA, therefore, submits that this is a fit case where the appeal be dismissed and the judgment and order of the trial court be affirmed

ANALYSIS

21. Having considered the rival submissions and having noticed the entire evidence led by the prosecution, before proceeding further, it would be useful to notice few broad features appearing in the prosecution evidence with regard to which there is no issue. These are: (a) the deceased was a history sheeter; (b) that in the village, where the incident occurred, few months before the incident there had been an election of the village Pradhan; (c) that dew days before the elections, the deceased had been released from jail; (d) that there were two rival candidates, namely, Ulfat Singh and Dumbar (one of the co-accused) for the post of Pradhan; (e) the deceased and his family supported Ulfat Singh, who lost the election to Dumbar (co-accused); (f) that all the accused were part of a common family or related to each other; (g) that the concerned village was factionalised to such an extent that residential areas were divided on caste lines; (h) that the incident occurred in an area dominated by the caste to which the accused party belonged; (i) that the deceased belonged to the other caste; and (j) that the incident occurred on a Holi Day.

22. As we have noticed that there was strong rivalry in the village and the deceased belonged to a group which had strong rivalry with the group to which the accused party belonged, it is a case where the evidence would have to be scrutinised carefully to exclude not only the possibility of false implication but also over implication. In ***Pandurang Chandrakant Mhatre and others v. State of Maharashtra, (2009) 10 SCC 773 (vide paragraph 60),*** the Supreme Court observed: "in cases involving rival political factions or group enmities, it is not unusual to rope in persons other than those who were actually involved. In such a case, court should guard against the danger of convicting innocent persons and scrutinise evidence carefully and, if doubt arises, benefit should be given to the accused." Similar view was expressed earlier in ***Muthu Naicker and others v. State of Tamil Nadu, (1978) 4 SCC 385***. There, it was observed, that, in a faction-ridden society where occurrence takes place involving rival factions it is but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. Simultaneously, it is to be borne in mind that in a situation like this there is a tendency to involve as many persons of the opposite faction as possible therefore the evidence has to be examined with utmost care. In the light of the law noticed above

and the background facts, while keeping in mind that the deceased himself was a history sheeter in whose hand a country made pistol was noticed, we would have to be cautious in scrutinising the evidence to obviate the possibility of false implication as well as over implication. More so, when the case turns purely on ocular account, which is not corroborated by recovery of the murder weapon alleged to have been used by the accused to inflict injuries.

23. An overview of the prosecution evidence reflects that the entire incident is in two parts with two separate sets of ocular account. First is the ocular account rendered by PW-4 and PW-6 relating to the incident wherein the deceased was killed; and the other is the ocular account of what happened thereafter, rendered by PW-3 and PW-5. The first part of the incident was in front of Liladhar's house when the deceased was stopped, asked to smoke a Beedi and, on refusal to do so, assaulted and eventually killed by a gun shot. The second part relates to accused persons pelting stones on PW-3 and PW-5 from roof-top, which was away from the first spot. The site plan Ex- Ka-14 reflects that these two spots are separated from each other by quite a distance. Therefore, proof of participation at one spot is by no means a proof of participation at the other. We thus have to deal with the evidence separately in respect of the two parts. In so far as the latter part of the incident is concerned, the accused have been held not guilty, that is, they have been held not guilty in respect of the charge of pelting stones from roof-top of which PW-3 and PW-5 are witnesses. Interestingly, PW-4 and PW-6 who are witnesses of the murder are not witnesses of the second part of the incident of which PW-3 and PW-5 were witnesses. Thus, we have to carefully scrutinise the evidence of PW-4 and PW-6 to find out whether their testimony as against the surviving appellants with respect to their participation in the murder of the deceased is confidence inspiring or it is a case where the surviving appellants have been named because of they being part of the rival faction. While examining the above aspect, we will also examine the probability of the incident having occurred in some other manner than alleged by the prosecution.

24. In so far as the testimony of PW-4 is concerned, it be noticed that he is the one who, according to the FIR, gave information about the incident. This witness stated that he accompanied the deceased to village Shahbajpur to extend Holi greetings and while they were returning, near the shop of Liladhar, the deceased was stopped by the accused and requested to smoke Beedi. When the deceased refused to smoke Beedi he was inflicted Bhala blows by Tilak and Nathu (surviving appellant no.1). Interestingly, in the FIR, there is no mention that PW-4 had accompanied the deceased in his visit to village Sahbajpur for extending Holi greetings. In so far as PW-6 Devendra is concerned, there are various omissions in his statement recorded under Section 161 CrPC including the fact that he accompanied the deceased and PW-4 to village Sahbajpur to extend Holi greetings. In fact, PW-6 was confronted with these omissions to which he had no explanation. Even PW-4 had not disclosed in his statement under section 161 CrPC that PW-6 accompanied PW-4 and the deceased to Shabajpur. Further, the I.O. did not find PW-6 in the village on the date of the incident. Notably, PW-6, in his statement under section 161 CrPC, with which he was confronted during his deposition in court, had stated that while he was returning to

his house after taking a round of the village, he noticed the incident near the shop of Liladhar. In view of the above, the presence of PW-6 with the deceased and PW-4 at the time of the incident is highly doubtful. It could be possible that on hearing the gunshot he was driven to the spot as were others and met PW-3 and PW-5 while they were on their way to the spot as is also the version in the FIR. Thus, the star witness of the murder incident is PW-4.

25. On a careful reading of the entire deposition of PW-4, we find that there appeared no intention on the part of the four accused to assault the deceased initially, that is, till the deceased refused to smoke Beedi offered by the accused. Therefore how the intention to assault the deceased developed assumes importance because it is not a case where the accused attacked the deceased, after exhorting each other, as soon as they saw the deceased. Rather, it is a case where, initially, the accused extended a Beedi to the deceased, probably, to celebrate their election success, and when the deceased refused to smoke, two, out of the four accused, inflicted Bhala blows. And, thereafter, accused Tilak was requested to fetch his gun. An interesting feature noticed in the deposition of PW-4 is that while Tilak was fetching his gun, the accused, who had Bhalas, and had pin down the deceased, kept waiting for 15 minutes. This story is a bit unnatural to accept; because, if the accused wanted to finish off the deceased, why would they, having pinned down the deceased, wait, particularly, when they had pointed weapons, such as a Bhala, in their hand. This throws a serious possibility of the incident having occurred in a manner different from what has been alleged by the prosecution. In that scenario, we would have to be circumspect in accepting the ocular account unless it is thoroughly tested on all material aspects.

26. Before that, we may remind ourselves that the deceased was a history-sheeter and, importantly, at the time of spot inspection by the I.O., the deceased was found having a country made gun in his hand with an empty 12 bore cartridge in its chamber. More over, the I.O. had noticed gunshot marks and pellets embedded on the wall of the shop of Liladhar, in front of which the deceased was found lying dead. Notably, it is not a case of the prosecution that this weapon was planted by the accused party when the body was left behind to report the incident to the police. In fact, the informant (PW-3) by his deposition that ladies of the house stood near the body to guard it obviates the possibility of the weapon being planted. Further, the I.O. stated that, in the night, constables were deputed to guard the body. Under the circumstances, the possibility of someone planting a gun in the hand of the deceased appears remote. More so, when there appears no suggestion to that effect in the testimony of the prosecution witnesses. In that scenario, why that gun was there in the hand of the deceased and why there were gunshot marks on the wall of the shop are circumstances that assume importance of which we find no explanation in the prosecution evidence. That leaves us guessing whether the incident occurred in the manner alleged or the prosecution is contriving a story and hiding true facts. More so, when we notice from the testimony of PW-3 and PW-5 that from the roof-top, a bit away from the spot where the body of the deceased was lying, the accused persons were noticed pelting stones. No doubt, we are conscious that no cross version or self defence has been set

up by the defence but the prosecution has to prove its case beyond reasonable doubt by leading evidence that inspires confidence. Once, a doubt arises as to whether the prosecution is hiding the genesis of the incident or true facts, it is difficult for the court to accept the prosecution case unless the evidence led in support thereof is carefully tested on all material aspects, particularly, in a case involving rival factions of a village.

27. In the light of the discussion above, we now proceed to test the prosecution case on the following aspects: (a) motive for the crime; (b) role of each accused implicated; and (c) whether the prosecution story appears natural and probable. In so far as motive is concerned, once we admit that there existed political rivalry, an underlying motive for the crime stands proved though, the precipitating cause for the incident, that is, refusal of the deceased to smoke Beedi, despite request of the accused persons, appears flimsy. But it is well settled that in a case based on ocular account, existence or non existence of motive pales into insignificance. We therefore do not propose to dwell more on this issue. In respect of the role of each accused, all the prosecution witnesses are consistent in so far as ascribing the gunshot injury on the deceased to Tilak (the deceased appellant no.3). Notably, there is a single gunshot injury of entry with corresponding exit, which, according to the doctor, was fatal. Bhala injuries to the deceased are ascribed to both Tilak and Nathu (surviving appellant no.1). But, as per the autopsy report, there is just a solitary incised wound noticed on the jaw region with fracture of teeth. Further, the ocular account of PW-4 and PW-6 is in respect of infliction of three Bhala injuries to the deceased. But, here, only one incised wound (supra) is noticed and, interestingly, there is no punctured or penetrating wound noticed which may correspond to a pointed weapon such as a Bhala. Notably, PW-4 does not disclose the site of the injury though, PW-6 deposes that Bhala injuries were inflicted on stomach, back and shoulder joint. Interestingly, no such injuries are noticed in the autopsy report. No doubt, according to the doctor (PW-1), incised injury noticed could be from a Ballam, if it had sharp edges, or it be from a Pharsa. PW-1 does not speak of possibility of that injury from a Bhala. On this aspect, learned AGA submitted that in many areas, the term Ballam and Bhala are used interchangeably. Therefore, if the pointed part of the Ballam or Bhala has a sharp edge, it may cause an incised wound. Hence, according to learned AGA, there is no conflict in the ocular account with the medical evidence in so far it relates to absence of a punctured or a penetrating wound. The above submission, in our view, might be acceptable where the nature of the weapon used has not been described and the court is left guessing as to which type of Bhala or Ballam is being adverted to by the witnesses. But, here, in the instant case, PW-4's testimony is specific in describing the nature of the Bhala alleged to have been used. PW-4 describes the Bhala used, as one having a pointed metallic tip equal to length of an arm with thickness equal to one and half finger. There is no disclosure that it had sharp edges. In such view of the matter, the weapon described in the ocular account would in all probability cause a punctured or penetrating wound and not an incised wound. Thus, the incised wound found on the body of the deceased is not attributable to the use of Bhala or to any other weapon assigned to the accused persons in the ocular account of PW-4. Other than that, there is a material

difference in the number of injuries found on the body of the deceased than alleged to have been inflicted with a Bhala, as per the ocular account. In these circumstances, the court is left guessing whether PW-4 and PW-6 actually witnessed the infliction of Bhala blows or they had escaped from the spot as soon as the scuffle began. Once that is the position, we cannot rule out false implication or over implication on account of political rivalry. When all of this is noticed in conjunction with the fact that the deceased was a history sheeter and there appeared a country made pistol in his hand with a corresponding gun shot mark on the wall of the shop of Liladhar, in front of which the body of the deceased was found, it appears to be a case where the prosecution witnesses are guilty of suppressing true facts and not coming out with full disclosure about the incident. More over, the circumstances emerging from the entire prosecution evidence would give rise to multiple possibilities including of an incident where, on the occasion of Holi, on account of some altercation, a gunshot might have been fired by the deceased which was retaliated by an attack on the deceased by a group of persons of the rival faction. In this kind of a scenario, recording conviction for murder with the aid of section 34 IPC would not be safe, particularly, when it is not proved beyond reasonable doubt that any of the surviving appellants inflicted any specific injury to the deceased, which could prove fatal.

28. The conclusion drawn above, is also fortified by the circumstance that the eye-witnesses' account does not appear natural and probable. In this regard it be noticed that as per the eye witness account Bhala injuries were inflicted first, followed by gunshot. Interestingly, according to the ocular account, the accused wanted to finish off the deceased and, therefore, they requested co-accused Tilak to fetch a gun. If that was so, what prevented the accused, having *Bhalas*, from finishing off the deceased by inflicting multiple *Bhala* blows. More so, when, according to the prosecution evidence, the accused held two *Bhalas* and the deceased was pinned down by the assailants. But, here, interestingly, according to PW-4, the accused waited 15 minutes for Tilak to fetch his gun and fire shot at the deceased. In our view, though, nothing can be predicted about how one would react, be it a victim or an assailant, but, in the given situation, non use of *Bhala* to finish off the deceased, when the intention was to kill, is not a natural or probable conduct.

29. The upshot of the discussion is that the prosecution story and the evidence as against the surviving appellants Nathu (appellant no.1) and Kaloo (appellant no.4) does not inspire our confidence for all the reasons discussed above. Therefore, the benefit of doubt would have to be extended to them. Consequently, the appeal of the surviving appellant nos.1 and 4, namely, Nathoo and Kaloo alias Raja Ram, respectively, is ***allowed.*** The judgment and order of the trial court to the extent it convicts and sentences them is set aside and they are acquitted of the charges for which they have been tried and convicted. The accused-appellant nos.1 and 4 are reported to be on bail, they need not surrender, subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court below.

30. Let a certified copy of this order along with record of the court below be sent to the court below for information and compliance.

(2022)04ILR A534
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 879 OF 1986

Ram Autar & Ors. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri R.B. Sahai, Sri Rizwan Ali Akhtar, Sri Sadaful Islam Jafri, Sri S.I. Jafri, Sri Anurag Shukla, Sri G.S. Chaturvedi (Senior Adv.)

Counsel for the Opp. Party:
A.G.A., Sri Ashok Kumar Singh, Sri D.S.M. Tripathi, Sri Kailash Nath, Sri Manish Shukla, Pratibha Singh, Sri S.S. Rathore, Sri Prem Prakash Yadav, Sri Kailash Nath

Criminal Law- Indian Evidence Act 1872- Section 3- Inimical, Interested and Chance Witnesses-The informant's side and the accused side were inimical to each other and were embroiled in litigation, both civil and criminal, for long-The ocular account is flowing from highly inimical and interested witnesses-The two witnesses who have stood up to support the prosecution case are chance witnesses-The incident is in broad day light on a busy street and in the presence of shop keepers as well as passersby yet, there is no effort to intervene. This raises a serious doubt with regard to the presence of PW-2 and PW-3 on the spot as also with regard to the incident occurring in the manner alleged.

Where the witnesses are apparently inimical, interested and are chance witnesses and their testimony fails to inspire the confidence of the court, then it is not safe to place reliance on the testimony of such witnesses.

Evidence Law - Indian Evidence Act 1872- Section 3 -Simple narration of assault by rod and lathi-The fracture of right parietal and frontal bone of the skull, sternum and ribs of the deceased, as a result of compression, find no explanation in the ocular account-The doctors have accepted that the nature of injuries found on the deceased as well as the injured could be a result of an accident.

Where the ocular account is untrustworthy and the same is contradicted by the medical evidence, then reliance may not be placed by the court on the testimony of the prosecution witnesses. (Para 18, 19, 22)

Criminal Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Lakshman Prasad Vs St. of Bih., 1981 (Supp) SCC 22

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Shamim Ahmed, J.)

1. This appeal has been preferred against the judgment and order dated 14.03.1986 passed by the Special Sessions Judge, Jaunpur in Sessions Trial No. 29 of 1982, convicting the appellants Ram Autar, Ram Pal, Panna Lal and Ram Chandra alias Bishun Chand under Sections 302/34 and 323/34 I.P.C. and sentencing them to imprisonment for life under Section 302/34 I.P.C. and one year rigorous imprisonment under Section 323/34 I.P.C. It be noted that the appeal of appellant no.2 (Ram Pal), consequent to his death, was abated vide order dated 30.09.2019.

INTRODUCTORY FACTS

2. The prosecution case in brief, as per the allegations in the written report (FIR) (Ex. Ka-1), lodged by the Babu Nandan (PW-1), brother of the deceased

Ram Harakh, is that the the accused Ram Autar alias Bishun Dayal, Ram Pal, Panna Lal and Ram Chandra, who are residents of informant's village, are in litigation with the informant and, therefore, inimically disposed. On account of this enmity, two days prior to the incident i.e. 03.01.1980 informant's brother Ram Harakh (the deceased) was assaulted with a Gandasi resulting in an injury on his left arm which had to be stitched and of which a case was registered at Jafarabad. After narrating the above background, it is alleged that on 05.01.1980 when Ram Harakh (the deceased) was with his son Banwari @ Gungey and had gone to fetch medicine from Sadar Hospital, Jaunpur, at about 9.30 a.m., near Line Bazar, as soon as they reached in front of the shop of a fodder seller, from a truck (i.e. No. U.S.F.-904), which was loaded with fodder, the accused-apellants and the truck cleaner, who can be recognised if produced, alighted and attacked the deceased and his son (nephew of the informant), with iron rod and *lathi*. As a result of that assault, both of them received injuries. At the spot, informant's brother Raja Ram (P.W.2) and Rajendra (P.W.3), who were returning after selling milk, were present and they witnessed the incident. It is alleged that the deceased and his son were taken to the Sadar Hospital, Jaunpur by Raja Ram where he was declared dead whereas his son (Banwari @ Gungey) was admitted in the hospital after medical examination. The written report, scribed by Ram Adhar (not examined), was registered as an FIR at 11.00 a.m. on 05.01.1980 at Police Station Kotwali, District Jaunpur, giving rise to Case Crime No. 11/1980 of which Chik Report (Ex. Ka-5) and G.D. Entry (Ex. Ka-6) was made by Trilokinath Singh (not examined), whose signatures were proved by PW-6. Inquest was conducted at Sadar Hospital, Jaunpur by about 3.30 p.m. of which inquest report (Ex. Ka-9) was prepared. After completing the investigation, charge-sheet (Ex Ka 14) was submitted against four accused, namely, the appellants herein. After taking cognisance on the charge-sheet, the matter was committed to the court of session. On 13.09.1982, all the four accused i.e. accused appellants were charged with offences punishable under Sections 302 /34 I.P.C. and 323 /34 I.P.C. The accused pleaded not guilty and claimed to be tried.

PROSECUTION EVIDENCE

3. During the course of trial, the prosecution examined six witnesses, their testimony, in brief, is as follows:-

4. **PW-1**- Babu Nandan (the informant). He proved the enmity between the informant and the accused party and claimed that he received information about the incident when he was near Line Bazar crossing. Upon receipt of the information, he had arrived at the spot. He noticed blood on the spot and there, he came to know that people have taken Ram Harakh (the deceased) to the hospital. After receiving the said information, he and Bhaiya Lal (not examined) reached the hospital. At the hospital Buddhoo (not examined), Raja Ram (PW-2) and Rajendra (PW-3) were there. Raja Ram (PW-2) had requested him to lodge the report. He stated that on the information received from Raja Ram he got the report scribed by Ram Adhar (not examined) at the Hospital and, thereafter, he lodged the report. He proved the written report, which was exhibited as Ex. Ka-1. He stated that by the time he reached the hospital, Ram Harakh had died.

In his cross-examination, he stated that his house is about half a Kos

(equivalent to one mile) towards south of the spot. He stated that on that day he had gone to Husainabad to select a cow. He denied the suggestion that he got the information at his house. He also denied the suggestion that the deceased was not killed by the accused, but they have been falsely implicated. He also denied the suggestion that the First Information Report was lodged on the suggestion of the police and was not dictated in the hospital. In his cross-examination, he admitted that he was employed in Deewani Kutchery but is not working for the last two years.

5. **PW-2 -Raja Ram**. He described the relationship between the accused persons and the informant side by stating that Jai Karan had three sons, namely, Bharosh, Jivbodh and Panchoo. Bharosh had four sons, namely, Babu Nandan (informant), Ram Harakh (the deceased), Raja Ram (PW-2) and Ballabh. Babu Nandan had two sons, namely, Ram Raj and Ram Aadhar. Ram Harakh (the deceased) had three sons, namely, Bajrangi, Radhe and Banwari @ Gungey (the injured). Jivbodh had four sons, namely, Ramnandan, Subhkaran, Shivnath and Kishun. Accused persons, namely, Ram Awtar @ Bishunpal, Ram Pal, Panna Lal and Ram Chandra are sons of Shiv Nath. After describing the spot as a busy place with several shops, in respect of the incident, PW-2 stated that on the date of incident at about 9.30 a.m. while he was returning from Olandganj, after selling milk, along with Rajendra (PW-3), on reaching near Ram Prasad's shop, they noticed a truck parked there. He noticed that Ram Harakh (the deceased) and his son Gungey were travelling from Line Bazar towards T.D. College to go to the hospital for medicine. Then he noticed accused Rampal, Panna Lal, Ram Chandra (PW-3) and Ram Autar, who were sitting in that truck alighting therefrom and assaulting Ram Harakh and Gungey. Along with them, truck cleaner was also there. Ram Pal held an iron rod, whereas rest had *lathi*. Ram Harakh was inflicted blow on the head by Ram Pal with the aid of iron rod, whereas the rest of the accused assaulted Gungey with *lath*i. Upon suggestion by the government counsel, PW-2 clarified that first Ram Pal assaulted Ram Harakh with iron rod, thereafter the rest of the accused persons assaulted him with *lathi*. Gungey was, however, assaulted by Ram Pal, Ram Chandra and Ram Autar with lathi. On a specific question as to whether any of the accused were exhorting the other, PW-2 stated that Ram Pal exhorted by saying "finish off the victims". He stated that at the time when the appellants were assaulting he was at a distance of 10-15 paces from the spot and with him there were Rajendra and Buddhoo, who also witnessed the incident. He stated that as they were terrified, they did not intervene. He stated that Ram Harakh, after assault, fell on the northern Patri (pavement) of the road, where blood also fell. He stated that after Ram Harakh fell, the accused escaped. Thereafter, Ram Harakh and Gungey were brought to the hospital by him on rickshaw. The doctor, however, after examining Ram Harakh, declared him dead. Gungey was not only medically examined but also admitted in the hospital. He stated that after about half an hour Babu Nandan (the informant) arrived at the hospital and then he informed Babu Nandan about the incident. In paragraph 9 of his statement he stated that the accused and the informant side were in litigation, both civil and criminal, for last about a year and a half. PW-2 stated that two days before the incident, Ram Harakh was assaulted by Ram Pal, Panna, Ram Chandra and

Shivnath, which caused him injury on his left arm and that incident was also reported. He stated that they had won the civil proceedings in court.

In his cross-examination, he stated that he has no knowledge about his brother Ballabh being a witness of the inquest proceeding. He was questioned with regard to the route that he took but nothing much could come out of it, though, he admitted that in between the spot and the hospital, on way, police chowki Olandganj falls. *In paragraph 20 of his statement, during cross-examination, he stated that after half an hour of their arrival at the hospital, Ram Raj arrived at the hospital and by that time, the doctor had already declared Ram Harakh dead and had admitted Gungey in the hospital. In paragraph 21 of his statement, PW-2 stated that when they returned back to the spot from the hospital, then he noticed Ram Prasad, the Fodder seller i.e. shop keeper, washing the spot where blood had scattered. He stated that the blood had scattered on the metalled portion of the road, about 7-8 paces north of the shop of Ram Prasad, and not on the Patri.*

In respect of the incident, during cross-examination, PW-2 stated that all five accused had assaulted Ram Harakh and Banwari. First Ram Pal attacked Ram Harakh with iron rod and when Ram Harakh fell the rest assaulted him with "danda". Immediately, thereafter, he stated "गिरने के बाद रामपाल ने रामहरख के ऊपर कोई वार नहीं किया" After that he stated that the accused started assaulting Gungey. He stated that Ram Pal did not inflict any blow on Gungey, but the rest of the accused assaulted Gungey. He, thereafter, reiterated that only four of the five accused had assaulted Banwari @ Gungey. He stated that each of the four accused inflicted one or two lathi blows on Gungey and when 04-06 lathi blows were inflicted upon him, he fell. *In paragraph 25 of his statement during cross-examination he stated that he watched the entire incident from a distance of about 50 paces and several people including shop keepers over there also witnessed the incident and at least 10-5 persons were standing there*. He denied the suggestion that no such incident, as alleged by him, occurred. He also denied the suggestion that the two victims were found injured and upon receipt of information, accused were falsely implicated on account of enmity.

6. **PW-3 Rajendra**- He also stated that while he was returning after selling milk and Raja Ram was with him, near the fodder seller shop, they noticed a truck parked. The accused came from behind the truck, and assaulted Ram Harakh and Gungey while they were on their way. At that time Ram Pal held an iron rod and the rest had lathi. He stated that Ram Harakh was assaulted by Ram Pal with the aid of iron rod, whereas the remaining four accused assaulted Gungey with lathi. He stated that accused were shouting to finish off Ram Harakh and despite intervention, they did not listen. He stated that PW-2 and he took Ram Harakh and Gungey to the hospital, where Ram Harakh was declared dead.

During cross-examination, he stated that his sister Kamla is married to Hanshraj. Hanshraj and Vanshraj are real brothers. Vanshraj is married to informant's daughter. In paragraph 13 he stated that when he arrived at the spot already 50-60 people had gathered there. They were shop keepers and passersby. He denied the suggestion that the incident did not occur in

the manner alleged and that he is telling lies because of his relationship.

7. **PW-4 (Dr. Suresh Chandra Srivastava**) is the doctor, who conducted autopsy. He stated that on 06.01.1980 at about 10.30 a.m. the body of the deceased was received. He conducted the autopsy of the body. According to him death could have occurred a day before and it was possible that it could have occurred on or about 9.30 a.m. on 05.01.1980. He proved the injuries noticed and mentioned by him in the Autopsy Report, which was exhibited as Ex. Ka-2. The injuries noticed by him on the body were stated to be as follows:

(i) lacerated wound 2.0 cm x 1.0 cm x 0.5cm, 3.0 cm above the left eye brow on the head;

(ii) abrasion 1.5 cm x 1.5 cm on the left knee;

(iii) abrasion 0.5 cm x 0.5 cm on right ankle inner side;

(iv) abrasion 1 cm x 0.5 cm on left scapula

(v) stitched wound 0.5 cm x 0.5 cm on the outer aspect of left arm

In respect of the internal examination PW-4 noticed-

Head- (i) clotted blood beneath the skin of the head; (ii) fissured fracture measuring 12.0 cm x 0.5 cm on right parietal bone of skull; (iii) fissured fracture on the right frontal bone of the skull measuring 6.0 x 0.5 cm in a diagonal direction with membranes congested; and on the left side margin of brain there was contusion measuring 4.0 cm x 4.0 cm

Chest- second to sixth ribs on left side and second and third ribs right side from front including sternum were fractured and had punctured the heart.

In paragraph 3 of his statement PW-4 stated that death was due to haemorrhage and injuries on the head and chest. He stated that the ribs might have been fractured on account of the external pressure.

In respect of the injury no. 1, in paragraph 4, he stated that this could be caused by rod or *lathi* and on its own injury no.1 as well as injury on the chest, were sufficient to cause death. He accepted the possibility of death having occurred at 9.30 a.m. on 05.01.1980.

During cross-examination, he specifically stated that the abrasion found on the body could be due to friction against hard object but they could not be a consequence of an impact of *lathi* or rod. *He stated that there was no corresponding external injury to the internal injury noticed on the chest. He stated that in ordinary course, if a lathi blow had been inflicted then external injury would have been noticed. In respect of the injury no.1, he accepted the possibility that it could be a result of collision with a hard object and could also be a result of an accident with a truck. In paragraph 6, he stated that injury nos. 1, 2, 4 and 5 were all on the left side though injury no.3 was on the right side. He stated that the compression injury noticed could also be a result of being crushed by a truck tyre. He also stated that, if a truck tyre goes over the body, the ribs can get fractured. In paragraph 7 he stated that if a truck collides in slow speed and its tyre hits the body then also ribs can get fractured.*

8. **PW-5 Dr. K.N. Yadav**. He stated that on 05.01.1980, while he posted at District Hospital, Jaunpur, at 10.30 a.m., he examined Banwari @ Gungey for his

injuries, who was brought by his cousin brother Ram Raj. He had noticed the following injuries at the time of examination, namely:

i) lacerated wound 6.0 cm x 1.0 cm, skin deep on left side of head, 10.0 cm above left ear, which was bleeding and was kept under observation with advice for X-ray;

(ii) contusion 10.0 cm x 2.0 cm on right side back, 5.0 cm below right scapula (oblique red)

(iii) abrasion 2.0 cm x 1.0 cm on back of left hand, 04 cm below to the wrist. (oozing)

(iv) lacerated wound 3.5 cm x 1cm x skin deep on front and inner aspect of left leg, 7 cm above knee joint, bleeding and paining.

He stated that all injuries, except injury no.1, were simple. Injury no. 1 was kept under observation and X-ray was advised. He stated that all the injuries noticed could have been caused by hard and blunt object, such as *lathi* and were fresh and could have been caused between 9.00 and 9.30 a.m. on 05.01.1980. The injury report prepared by him, noticing the above injuries, was exhibited as Ex. Ka-4.

In his cross-examination, he admitted the possibility of the injuries noticed by him being caused on account of a push from a truck. He accepted the possibility of those injuries being sustained between 5 and 6 a.m. of that day.

9. **PW-6 Hausla Bahadur-Investigating Officer of the case**. He proved the registration of the FIR by Head Moharrir, Triloki Nath Singh as also the G.D. entry thereof. He also proved the various stages of the investigation. He stated that at the spot he did not notice any blood, as that was washed away; and that aspect was therefore specifically mentioned in the Site Plan (Ex. Ka-7), which he prepared after inspection. He proved the inquest proceedings as also the preparation of *Challan Nash, Photo Nash*, letter to the C.M.O. etc., prepared in connection with autopsy. He stated that he had taken custody of the truck in which the accused were allegedly hiding and the custody was given back to its owner of which Custody Memo was prepared, which was exhibited as Ex. Ka-13 on his statement. He proved submission of charge-sheet under his signature, which was exhibited as Ex. Ka-14.

In his cross-examination, he stated that he did not record the statement of Ram Prasad in front of whose shop the incident occurred. He stated that at the spot he could not get a witness of the incident. He stated that he had arrived at the spot with the witnesses as well as the informant at about 11.00 a.m. and when he had arrived Ram Prasad was washing off the blood spot. He stated that the witness Raja Ram (PW-2) did not accompany him to the spot and that PW-6 could not gather any information about the truck cleaner. He stated that he made efforts to ascertain the identity of the truck cleaner but did not get information about him from the truck owner. He stated that he did not notice any blood stains on the truck. He denied the suggestion that an accident from that truck has been given colour of an offence of murder in collusion with the informant and the witnesses.

10. The incriminating circumstances appearing in the prosecution evidence were put to the accused while recording their statements under Section 313 Cr.P.C. They denied their involvement in the crime and

claimed that they have been falsely implicated on account of enmity and past litigation. The accused, however, did not examine any witness in defence.

TRIAL COURT FINDINGS

11. The trial Court accepted the ocular account rendered by PW-2 and PW-3 and, upon finding that there existed strong enmity and underlying motive for the crime, convicted the accused-appellants for the offences specified above.

12. We have heard Sri G.S.Chaturvedi, learned Senior Counsel assisted by Sri Anurag Shukla for the surviving appellants; Sri Ashok Kumar Singh, Sri Prem Prakash Yadav and Sri Kailash Nath for the informant; Sri Pankaj Saxena and Sri J. K. Upadhyay, learned A.G.A. for the State; and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

13. Sri Chaturvedi, learned senior counsel, appearing for the surviving appellants, submitted that the autopsy report of the deceased suggests that the injuries were sustained in an accident. In this regard, attention of the court was invited to the autopsy report to highlight that there was no underlying fracture beneath the lacerated wound (injury no.1). Rather, the fissured fracture was on the right side parietal bone of the skull, which means that when the body fell, head banged on the hard surface, or may be compressed by pressure of a tyre going over, the parietal bone got fissured. Had there been a blow on the head with an iron rod as alleged, then the underlying bone would have been fractured but here the fracture is on the other side. He also pointed out that all the injuries except injury no.3 were on the left side whereas the injury no.3 is on right ankle, which is suggestive of the fact that the body collided from the left side and fell on the right side, injuring the knee and banging the head on the floor or hard surface, resulting in fissured fracture on the right parietal bone and when the tyre went over or pressed the body by compression the ribs got fractured. He submitted that the ocular account does not describe infliction of any such blows, which may result in fracture of the ribs as well as sternum and puncturing of the heart by those fractured ribs. Notably, there is no ocular account of any person sitting over, or pressing, the deceased. Rather, the ocular account is in respect of infliction of blow with an iron road on head by Ram Pal and *lathi* blows by others but the doctor had specifically stated that if there had been a *lathi* blow, it would have left an external injury mark, which was conspicuous by its absence despite there being an underlying fracture of the ribs and the sternum. This is suggestive of the fact that the internal chest injury was caused on account of compression, either on account of the tyre crushing the body or some heavy weight falling over the body, but as this is not there in the ocular account, and the ocular account does not at all explain these injuries, the ocular account is unworthy of acceptance. He further pointed out that both PW-2 and PW-3 are chance witnesses. The incident took place on the road side, which was a busy road and, admittedly, a large number of people had collected there, as is clear from the statement of PW-3 therefore, it is unbelievable that the accused would assault a person in front of the public. More over, the presence of PW-2 and PW-3 is falsified from the circumstance that the injured Gungey was brought to the hospital

not by PW-2 or PW-3, as stated by them, but by Ram Raj, as per the statement of PW-5, which is corroborated by the injury report (Ex. Ka-4). It has been submitted that admittedly the informant's side and the accused side were embroiled in litigation, both civil and criminal, they had thus strong reason to falsely implicate and, therefore, it appears to be a case where an accident has been taken as an opportunity to settle a score by falsely implicating the accused-appellants.

14. Sri Chaturvedi also submitted that in so far as the charge of an offence punishable under Section 302 read with 34 I.P.C. is concerned, that is not made out against the surviving appellants Ram Autar, Panna Lal and Ram Chandra alias Bishun Chand, inasmuch as, the allegation in the ocular account is of infliction of iron rod blow on the head of the deceased by Ram Pal (the appellant, who died during the pendency of appeal) whereas there is no specific allegation that the deceased was assaulted by the surviving accused-appellants. Even assuming that at one place infliction of lathi blows on the deceased is alleged but no corresponding external injury has been noticed. The abrasions noticed by the autopsy doctor, from the testimony of PW-4, are ruled out to be an outcome of *lathi* blows. It has thus been submitted that the appellants 1, 3 and 4 have not caused any injury to the deceased hence their conviction under Section 302 I.P.C. with the aid of Section 34 I.P.C. is not at all justified.

15. Lastly, it was contended that it is a case where no independent witness has been examined, despite the fact that it was a road side occurrence, in front of a shop and the shop keeper Ram Prasad was very much available, but, even during the course of investigation, his statement was not recorded by the Investigating Officer therefore the prosecution has suppressed best evidence, as a result whereof, an adverse inference be drawn against the prosecution. In this regard it was submitted that even though Banwari @ Gungey might be dumb and deaf but he could have been examined with the aid of sign language interpreter as is permissible under Section 119 of the Evidence Act and, therefore, non-examination of Gungey is also a reason to draw an adverse inference against the prosecution.

SUBMISSIONS ON BEHALF OF THE STATE AND OPPOSITE PARTIES

16. Per contra, the learned counsel for the State as well as the informant submitted that this is a case where a prompt FIR was lodged. It is a day light occurrence. There is no suggestion to the eye-witnesses to dispute the spot and, therefore, washing off the blood spot, would not make a difference. Assuming that the witnesses were interested, it is not the law that an interested witness testimony cannot be accepted, particularly, when it is corroborated by medical evidence on material aspects. It has been submitted that the injury sustained by Banwari @ Gungey appeared to be on account of an assault on him by lathis and those injuries cannot be a result of an accident. Further, it cannot be a mere coincidence that the deceased as well as the injured suffered injuries on or about the same time and, therefore, it can be assumed that the incident occurred in the manner alleged. Non-examination of the independent witnesses and non-examination of a deaf and dumb injured witness would not be fatal to the prosecution case in the given facts of the

case. It has also been submitted that the medical opinion expresses only a possibility, but where the ocular account is clear and cogent, unless it is totally ruled out by the medical opinion, the ocular account is to be accepted and cannot be rejected only because the possibility of injury occurring in some other manner than suggested by the ocular account is there. It has been submitted that since the ocular account is largely corroborated and not ruled out by the medical evidence and there is a prompt First Information Report, the conviction recorded by the trial court does not call for interference.

17. In respect of the surviving accused-appellants not sharing common intention with Ram Pal, learned A.G.A. submitted that lathi blows are alleged to have been inflicted upon the deceased by other remaining accused, therefore, it can be accepted that all had participated with common intention to finish off the deceased.

ANALYSIS

18. Having considered the rival submissions and having noticed the prosecution evidence, before we proceed to test the testimony of the eyewitnesses PW-2 and PW-3, we may put on record that it is clear from the evidence brought on record that the informant's side and the accused side were inimical to each other and were embroiled in litigation, both civil and criminal, for long. PW-2 is the brother of the deceased as well as of the informant and PW-3 is also related to the victim family as could be noticed from his testimony. It is, therefore, a case where the ocular account is flowing from interested witnesses. We notice from paragraph 7 of PW-1's deposition that he had worked in the Kutchery. In these circumstances, it is probable that he would be aware of the nuances of litigation and might not like to miss an opportunity to out manoeuvre the other side. In **Lakshman Prasad V. State of Bihar, 1981 (Supp) SCC 22**, in paragraph 3, the Supreme Court had observed that *mere congruity and consistency are not the sole test of truth. It was observed that sometimes even falsehood is given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface*. Thus, keeping in mind that the prosecution version is flowing from highly inimical and interested witnesses, we would have to be circumspect in accepting the ocular account without putting it to stringent tests.

19. What we notice here is that the ocular account not only flows from interested witnesses but the two witnesses who have stood up to support the prosecution case are chance witnesses. Notably, the informant (PW-1) is not the eye witness of the incident. PW-2 and PW-3, the alleged eyewitnesses, according to them, had gone to sell milk and were returning after having sold the milk, when, on way return, they witnessed the incident on a busy public street with shops around. According to their ocular account, they witnessed the incident from a short distance across the road. They also stated that there were several persons in the area, when they arrived. Yet, they do not make an attempt to save the victim or to intervene even though it is not the prosecution case that the accused were armed with deadly weapons such as cutting instruments or firearms. From PW-3's testimony it appears 50-60 people had collected there when he arrived. With 50-60 men around and there being just four or five assailants with hard blunt objects, easily people could have

intervened and stopped the occurrence. But, here, there is no statement of any of the witnesses in respect of any effort in that regard. In a night occurrence, on a secluded street, non interference by bystanders may not raise a doubt. But here the incident is in broad day light on a busy street and in the presence of shop keepers as well as passersby yet, there is no effort to intervene. This raises a serious doubt with regard to the presence of PW-2 and PW-3 on the spot as also with regard to the incident occurring in the manner alleged.

20. Our doubt noticed above gets amplifies from the following circumstance - PW-2 states that Gungey was taken to hospital by him whereas, Ram Raj (not examined) arrived at the hospital about fifteen minutes to half an hour later, after Gungey had been admitted in the hospital. But, when we see the record (Ex. Ka-4) and notice the statement of PW-5, we find that Gungey was brought to the hospital by Ram Raj (i.e. son of the informant who has not been examined). PW-1 says that he rushed to the spot on receiving information. But how and from whom he got information PW-1 does not disclose. This clearly suggests that informant got the information ahead of PW-2 and PW-3 about the incident and, on receipt of information, the informant rushed to the spot and his son Ram Raj took the injured to the hospital and admitted him there. Notably, Ram Raj has not been examined by the prosecution. Had Ram Raj been examined, he could have cleared our doubts as to in what circumstances could he accompany the injured to the hospital. Name of Ram Raj in medical paper, on its own, might not be of significance as, out of many present there, the doctor while admitting the patient may record the name of any one of them in the admission register. But, here, PW-2 states that Ram Raj arrived 15 minutes to half an hour after Gungey was admitted. This circumstance definitely dents the credibility of PW-2's deposition that he was present at the spot and had rushed the injured and the deceased to the hospital. As PW-2 and PW-3 were allegedly together, credibility of PW-3's statement gets equally dented more so, because, during cross-examination, he stated that when he reached the spot already 50-60 persons had gathered, which suggests that the incident had already occurred.

21. Another aspect of the case is that the shop keeper Ram Prasad, in front of whose shop the incident occurred, has not been examined. Another striking feature of the case is that the Investigating Officer (PW-6) noticed the shop keeper washing off the blood stains from in front of his shop, but he took no steps to stop that and to collect the blood to confirm the spot. When we notice the site plan (Ex. Ka-7), spot A is the place where the deceased was assaulted and where the blood was washed off by Ram Prasad. Noticeably, spot A is located across the road/ street, if one views it from the shop of Ram Prasad. No doubt, the Truck is allegedly shown parked in front of the shop of Ram Prasad at point X but since spot A is across the road, why would Ram Prasad wash off the blood-stain there. All of this creates a serious doubt with regard to the spot where the deceased was allegedly assaulted, that is, whether it was on *Patri* of the road or in the middle of the road. Notably, the Investigating Officer did not record the statement of Ram Prasad to verify whether the allegations made before him were truthful. Another important feature in this regard is that as per the Site Plan (Ex. Ka-7) the blood was washed off from the Patri whereas in the

testimony of PW-2 it has come that the blood was not on the *Patri* but on the metalled surface of the road 7-8 paces in front of the shop of Ram Prasad. All of this raises a strong suspicion that the incident occurred in the middle of the road and might be a case of a road accident which has been deftly given the colour of a heinous crime. In ordinary circumstances such a doubt may not arise but here the parties had been litigating with each other for few years and, therefore, well versed with nuances of law and well equipped to grab an opportunity of the kind offered by the incident to out manoeuvre their opponent.

22. When we notice the autopsy report, we find that there is no underlying fracture to the injury no.1. The fissured fracture noticed by the autopsy surgeon is on the right side parietal bone of the skull and on the right side of the frontal bone of the skull, whereas the lacerated wound is found on the left side which suggests that the fracture was caused not on account of infliction of iron rod blow, but on account of falling on the hard surface, after being hit on the left side of the head. Another important aspect noticeable in the autopsy report as well as in the testimony of the autopsy surgeon (PW-4) is that fracture of the ribs and sternum had no corresponding external injury. A specific suggestion was put to the doctor in respect of such injury being caused by a lathi blow to which he responded by saying that if it had been so, it would have left an external injury mark. PW-4, rather, accepted the possibility of that kind of injury as a consequence of compression. But the ocular account of PW-2 and PW-3 details no such circumstance on the basis of which we may be in a position to infer that, that kind of compression was a result of any specified overt act of the accused. Notably, it is not the case of the prosecution that the accused were kicking the deceased or were sitting over him, or pressing him. It is a simple narration of assault by rod and lathi. In fact, at one place, the witness stated that there was solitary assault by iron rod on the head though, later, it was added that lathi blows were also inflicted. But at no stage there is an allegation of pressing the deceased or kicking him or beating him with fists or of sitting over him. In these circumstances, the fracture of right parietal and frontal bone of the skull, sternum and ribs of the deceased, as a result of compression, find no explanation in the ocular account thereby making our suspicion stronger that those injuries were a consequence of an accident. Admittedly, there was a truck parked on the spot. The ownership of that truck has not come out in the prosecution evidence, though it has come in the statement of the Investigating Officer that that truck was seized and custody of that truck was passed on to its owner. This means that there was an involvement of a truck. PW-2 states that the accused were sitting on the truck and they alighted from that truck to launch an assault. PW-3 states that the accused came out from behind the truck. Both state that the truck was parked in front of the shop of Ram Prasad. Ram Prasad has not been examined. The cleaner, who also allegedly participated, has not been identified. Notably, it is not the prosecution case that the accused were lying in ambush to launch an assault on the victims as that spot was frequently visited by the victims at a specified time. For all the reasons detailed above, we do not find conviction in the prosecution story and the testimony of the eyewitnesses does not inspire our confidence. There appears a cloak of suspicion shrouding the prosecution case giving us a strong feeling

that the informant party has grabbed the opportunity of an occurrence, perhaps an accident, to spin a story against its rivals. More so, because both PW-4 and PW-5 i.e. the doctors have accepted that the nature of injuries found on the deceased as well as the injured Gungey could be a result of an accident. Our doubts could have been dispelled by independent witnesses had they been examined by the prosecution, particularly because the incident occurred on a busy public street and in the presence of 50 odd bystanders including shop keepers who had their shops there, but, unfortunately, the shop keeper who allegedly washed off the blood from the spot was not even interrogated. Not only that, even the spot of occurrence could not be confirmed by lifting of blood-stained earth therefrom. Once that is the position, and the prosecution case flows from highly interested witnesses, who are witnesses by chance, and their presence at the spot is not confirmed by medical paper of the injured, which shows that the injured was brought by some other person to the hospital, we have no hesitation to extend the benefit of doubt to the accused-appellants.

23. As we have already doubted the ocular account of PW-2 and PW-3, we do not propose to examine the alternative argument on behalf of the surviving appellants that in the facts of the case they could not have been fastened liability for the charge of murder with the aid of section 34 IPC.

24. For the reasons above, the appeal is **allowed**. The judgment and order of conviction and sentence recorded by the trial court qua the surviving appellants, namely, appellants 1 (Ram Autar), 3 (Panna Lal) and 4 (Ram Chandra @ Bishun Chand, is set aside. The surviving appellants are acquitted of the charges for which they have been tried and convicted. They were on bail therefore, they need not surrender subject to compliance of the provisions of section 437A CrPC to the satisfaction of the trial court below. However, we notice that on 10.03.2022 non-bailable warrants were issued to the surviving appellants as none had appeared to press the appeal on their behalf. In that scenario, we direct that if, non-bailable warrants have not yet been executed, they shall not be executed and treated as cancelled, but if they have already been executed, the surviving appellants shall be released forthwith, subject to compliance of the provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court.

25. Let a certified copy of this order along with the record be sent to the trial court for information and compliance.

(2022)04ILR A545
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.03.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE VIKRAM D. CHAUHAN, J.

Criminal Appeal No. 2846 of 2018

Arun Chand **...Appellant**

Versus

State of U.P. **...Opp. Party**

Counsel for the Appellant:
Sri Yogesh Kumar, Sri Dhirendra Kumar Srivastava, Sri Ghan Shyam Das, Sri Ranjit Saxena, Sri Kamal Krishna (Senior Adv.)

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

Criminal Law- Circumstantial Evidence- The links in the chain of circumstances is necessary to be established for conviction resting upon circumstantial evidence.

Settled law that in a case resting upon circumstantial evidence the prosecution has to connect the links of the circumstances pointing only towards the guilt of the accused.

Evidence Law - Indian Evidence Act, 1872- Section 27-The confession part is inadmissible in evidence-Appellant-accused was not present at the time of recovery-In the circumstances special knowledge of the spot of the dead body cannot be made attributable to the appellant-accused. The recovery of the dead body on the pointing of the accused is highly doubtful. Section 8 of Evidence Act would also not be attracted- If the recovery memos were prepared at the Police Station itself then the same would lose its sanctity-The body of the deceased infant was not recovered on the pointing out of the accused; the accused was not present with the police officials at the spot of recovery; the body was sealed but the recovery memo was prepared at the Thana.

Where the corpus delicti is not recovered upon the pointing out of the accused and the post recovery proceedings are conducted in the police station, then the said recovery would stand vitiated and in violation of Section 27 of the Evidence Act.

Criminal Law - Indian Penal Code, 1860- Section 364A - In addition to first condition either Condition (ii) or (iii) has to be proved, failing which conviction under Section 364-A cannot be sustained. The prosecution in the case at hand failed to prove condition (i) and (ii) to constitute offence under Section 364A IPC.

For establishing the offence under Section 364 A of the IPC it is incumbent upon the prosecution to not only establish that kidnapping or abduction has been committed, but also to establish that threat to cause death or hurt to such person was made or the said person was put to death or hurt.

Criminal Law - Code of Criminal Procedure, 1973- Section 313- The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and must be excluded from consideration- Unless a circumstance against an accused is put to him in his examination, the same cannot be used against him.

Settled law that all the incriminating circumstances against the accused have to put to him while recording his statement under section 313 of the CrPc and the circumstances which have not been put to him during his examination u/s 313 of the CrPc, cannot be used against him by the prosecution. (Para 26, 27, 29, 32, 34, 35, 37, 38)

Criminal Appeal Allowed. (E-3)

Judgements/ Case law relied upon:-

1. Sharad Birdhichand Sarda Vs St. of Mah. (1984) 4 SCC 116

2. Harivadan Babubhai Patel Vs St. of Guj. (2013) 7 SCC 45

3. A.N. Venkatesh Vs State of Karn. (2005) 7 SCC 714

4. Prakash Chand Vs St. (Del. Admin.) (1979) 3 SCC 90

5. Varun Chaudhary Vs St.of Raj. AIR 2011 SC 72

6. Shaik Ahmed Vs St. of Telangana (2021) 9 SCC 59

7. Sujit Biswas Vs St.of Assam (2013) 12 SCC 406

8. Hate Singh Bhagat Singh Vs State of Madhya Bharat AIR 1953 SC 468

9. Shamu Balu Chaugule Vs St of Maha. (1976) 1 SCC 438

10. Harijan Magha Jesha Vs St. of Guj. (1979) 3 SCC 474

(Delivered by Hon'ble Suneet Kumar, J. & Hon'ble Vikram D. Chauhan, J.)

1. Heard Sri Kamal Krishna, learned Senior Counsel assisted by Sri Ghanshyam Das, learned counsel for the appellant and Sri Vikas Goswami, learned A.G.A. for the State.

2. This criminal appeal has been filed against the judgment and order dated 15.5.2018 passed by Additional Sessions Judge, Khurja, District Bulandshahr, in Sessions Trial No. 440 of 2016 (State of U.P. Vs. Arun Chand), arising out of Case Crime No. 124 of 2016 under Sections 302, 364A, 379, 411 and 201 I.P.C., Police Station Chhattari, District Bulandshahr, whereby the appellant has been convicted and sentenced under Section 302 I.P.C. with life imprisonment and fine of Rs. 10,000/- and in case of default in payment of fine, he has to undergo additional one year imprisonment; under Section 364A I.P.C. he has been convicted and sentenced with life imprisonment and fine of Rs. 10,000/- and in case of default in payment of fine, he has to undergo additional one year imprisonment; under Section 379 I.P.C. he has been convicted and sentenced for three years imprisonment; under Section 411 I.P.C. he has been convicted and sentenced for three years imprisonment and under Section 201 I.P.C. he has been convicted and sentenced with seven years imprisonment and fine of Rs. 2,000/- and in case of default in payment of fine, he has to undergo additional six months imprisonment.

3. As per prosecution case, informant, father of the infant victim, aged about four months, alleged that on 16.6.2016, he and his wife had gone to their agricultural field; at about 9:30 a.m., he received an information that appellant-accused who had come to his house on 15.6.2016 had taken the infant and his mobile phone bearing number 976.....602 along with him. It was further alleged that his neighbours, Khempal Singh and Umesh Kumar had seen the appellant-accused taking the infant. It was further stated that at about 3:00 p.m., a resident of the village Girish Kumar received a call on his mobile number i.e. 976.....332 from the mobile number of the informant i.e. 976....602 demanding 5 lakhs towards ransom in lieu of the life and safety of the infant. The First Information Report (FIR) came to be lodged at 5:00 p.m. The scribe of the F.I.R. is Shiv Kumar. After investigation, the accused came to be charged under Sections 302, 364A, 379, 411 and 201 I.P.C.

4. The prosecution to prove the charge in all examined 12 witnesses, namely, (PW-1) Reshampal Singh/Informant; (PW-2) Khempal Singh and (PW-3) Umesh Kumar Verma, last seen witnesses (both the witnesses were declared hostile); (PW-4) Azeem, who has assigned the motive; (PW-5) Shivkumar, scribe of the F.I.R.; (PW-6) Satyadev, (PW-7) Murarilal, (PW-8) Jitendra Kumar, are witnesses to inquest; (PW-9) Dr. Dinesh Kumar, who conducted autopsy on the body of the infant deceased; (PW-10) Shyampratap Patel, Inspector, who proved recovery of the mobile; (PW-11) Gulab Singh Head Mohrir proved the F.I.R. and other entries in the G.D. and (PW-12) Brajmohan Singh, Sub Inspector who is witness of recovery of the dead body.

5. The following documents were exhibited i.e. Written Report (Exhibit Ka-1), Panchayatnama (Exhibit Ka-2), Postmortem Report (Exhibit Ka-3), Site Plan of incident (Exhibit Ka-4), Recovery Memo of Nokia Mobile (Exhibit Ka-5), Site Plan (Exhibit Ka-6), Charge sheet (Exhibit Ka-7), Chik FIR (Exhibit Ka-8),

Photocopy of G.D. (Exhibit Ka-9), Letter of C.M.O. (Exhibit Ka-10), Photo Naash (Exhibit Ka-11), Challan Laash (Exhibit Ka-12) and Namuna Mohar (Exhibit Ka-13).

6. The accused on being confronted with the prosecution evidence, in statement under Section 313 Cr.P.C. denied the allegations stating that he has been falsely implicated, accordingly, demanded trial. No defence witness was produced.

7. Learned counsel for the appellant submits that the prosecution case is based on circumstantial evidence. The prosecution failed to prove the chain of events pointing to the guilt of the accused. He further submits that prosecution failed to prove that accused was last seen with the infant. The circumstance of recovery of the mobile and the dead body has not been proved; no recovery memo was drawn with regard to recovery of the dead body of the infant; the Panchayatnama was prepared at the Thana. As per the statement of the informant PW-1, accused came to be arrested on 16.6.2016 itself and not on the subsequent date i.e. 17.6.2016 as stated by the formal witnesses. In the circumstances, the case of prosecution stands demolished. It is further submitted that the alleged mobile recovered from the accused, no call detail record (CDR) was obtained so as to prove the demand of ransom. It is further submitted that as per the prosecution case, demand of ransom was made on the mobile number 976.....332 belonging to Girish Kumar, but Girish Kumar was not examined to prove the circumstance. It is submitted that the prosecution case is based on no evidence.

8. PW-1 in examination-in-chief stated that he works as a labour at Aligarh Company Bagh where the accused joined in the same capacity 2-3 days earlier and both were working together. On 15.6.2016, the appellant accompanied him to his village and on the subsequent day i.e. 16.6.2016, he and his wife went to the agricultural field for work. At about 9:30 a.m., appellant had taken along with him his infant child aged about four months and his Nokia phone bearing number 976.....602. He was seen carrying the infant by neighbours, Khempal (PW-2) and Umesh Kumar (PW-3). At about 3:00 p.m. Girish Kumar, resident of village, received a call on his mobile phone from the mobile phone of PW-1 conveying demand of ransom at Rs. 5 lakhs, failing which the child would be put to death. In cross-examination, PW-1 stated that he does not know the appellant, nor did he earlier dine with the accused; a day earlier, accused-appellant contacted the appellant, thereafter, he brought the appellant to the village. After dinner at 10:00 p.m. they went to sleep. PW-1 further stated that apart from his wife, he has three children aged about 8, 6 and 5 years, who were present in the house. He further stated that at 9:00 a.m. in the morning he left for his agricultural field and reached the field within fifteen minutes. At the field, he was until 10:15 a.m., he received an information that the appellant had escaped with his son. He further stated that the son (Prakash) of his uncle (Chacha) came on a cycle and informed that the accused on being contacted on the mobile of PW-1 demanded Rs. 5 lakhs towards ransom. The mobile number is 976.....332. He further stated that he informed the police officer at 2:00 p.m. He further admitted that he does not have his mobile; PW-2 (Khempal) and PW-3 (Umesh Kumar) and Arun Kumar were not known to the accused earlier and no other person in the village knows about

the appellant, except PW-1. He further stated that on the date on which the FIR was lodged (16.6.2016) he was informed by the police official that the accused has been apprehended and his mobile recovered. The information was received at 10:30 p.m. He further stated that the mobile was recovered from Barauli crossing.

9. PW-2 (Kehmpal Singh) denied having knowledge of the incident and about the accused; he stated that he is the neighbour of the complainant and had gone to Thana along with complainant. He further stated that for the first time he has seen the accused who is present in the court. The witness was declared hostile.

10. Similarly, PW-3 (Umesh Kumar) denied knowing and recognising the accused; he had not seen the accused carrying the infant along with him. He further stated that he was not present in the village. The witness was declared hostile.

11. PW-4 (Azeem) stated that he is an employee at the ornament shop and was not aware as to whether the accused had sold ornaments; he was not aware of the incident as alleged by PW-1. The witness was declared hostile.

12. On close analysis of the testimony of PW-1 to PW-3, the following circumstance emerge:-

(i) PW-1 informant was not present and had not seen the incident;

(ii) PW-1 received information of the crime at his agricultural field;

(iii) the demand of ransom was not made to him but to a third person Girish Kumar;

(iv) the nephew of PW-1 informed him of the demand of ransom made on the mobile phone of Girish Kumar, but neither of them were examined by the prosecution;

(v) PW-1 categorically deposed that the accused came to be arrested on the same day (16.05.2018) and the mobile phone (976...602) was also recovered;

(vi) the last seen witnesses PW-2 and PW-3 were declared hostile on not having seen the accused.

13. PW-5 the scribe of the F.I.R. stated that on 17.6.2016, the body of the infant was found from the jungle; in his presence, Panchayatnama was prepared by the police officer and the body was sealed and sent for postmortem. He signed the Panchayatnama. In cross-examination, he admitted that he had written the report (Tahrir) as was told and dictated to him by the police officer (Daroga Ji). After writing the complaint, he handed it to the police official. He further stated that when he was writing the complaint Reshampal (PW-1) was not present. He further stated in cross-examination that he had not seen the accused earlier; the body of the infant was not recovered on the pointing out of the accused. He further stated that he did not accompany the police, nor, the accused was present on the spot; the body of the infant was sealed and brought to the Thana and at Thana, the formalities of the Panchayatnama were undertaken and completed. He further stated that at the Thana, he had signed the Panchayatnama. The witness was not declared hostile by the prosecution.

14. PW-6 (Satyadev) is a witness to the Panchayatnama. He stated that on 17.6.2016 in his presence between 8:30 - 9, Panchayatnama was prepared at Jawa Range jungle; he thereafter signed the Panchayatnama; he further stated that on the spot, he reached on a vehicle other than

that of the police vehicle. In cross-examination, he admitted that the body of the infant was brought to the Thana and he had signed the Panchayatnama at the Thana; he further admitted that the body of the deceased was not recovered on the pointing out of accused; he further stated that the accused had not accompanied, either, him or the police officials to the spot. The witness was declared hostile.

15. Murari Lal (PW-7) is a witness to the Panchayatnama. He reiterated that the Panchayatnama was prepared at Jawa Range jungle; the body was found in the Jawar field in the Jawa Range jungle. He declined giving any statement to the police that the offence was committed by the accused and the body was disposed off in the jungle. The witness was declared hostile. On being cross-examined the witness admitted that he had not earlier seen the accused; the accused had not accompanied, nor was the accused brought on the spot of recovery by the police officials. He admitted his thumb impression on the Panchayatnama. The witness was declared hostile.

16. Jitendra Kumar (PW-8) is a witness of the Panchayatnama. He reiterated that the Panchayatnama was prepared at Jawa Range jungle. The witness was declared hostile. He denied recognising the accused.

17. PW-5, PW-6, PW-7 and PW-8 are witnesses to the Panchayatnama and PW-5 is the scribe of the report given at the Thana. PW-6, PW-7 and PW-8 were declared hostile. From their testimony, the following circumstance stands established:-

(i) all the witnesses are unanimous that the body of the infant was sealed on the spot of recovery i.e. Jawar field;

(ii) all of them stated that the appellant accused was not present on the spot of recovery;

(iii) Panchayatnama was filled and prepared at the Thana, in contradiction to the testimony of PW-12;

(iv) PW-5 was not declared hostile and the other witnesses (PW-6, PW-7, PW-8) though declared hostile corroborate the version of PW-5 that accused was not present and the formalities of Panchayatnama was done at the Thana.

18. Dr. Dinesh Kumar (PW-9) conducted the postmortem on the body of the infant on 17.6.2016 at 4:05 p.m. and the following ante mortem injuries were noted:

1. Abraded contusion 1 ½ cm. x 1 ½ cm. on right side neck 5 cm. below from right ear.

2. Abraded contusion two in number a front of neck at the middle part. On opening the wound congested blood found underneath the injuries. Trachea congested; hyoid bone fractured.

3. Abrasion multiple injuries 4 in number 10 cm. x 10 cm. area at right side abdomen 1 cm. x 1 cm. in size.

19. In the opinion of PW-9, asphyxia due to pressing of the neck was the cause of death; the approximate time is one day earlier; he further stated that injury no.1 and injury no.2 were caused due to strangulation; the time of death probably would be after 3:00 p.m. on 16.6.2016. In cross-examination, he further stated that death could have been caused between 12 noon to 2:00 p.m.

20. Inspector Shyampratap Patel (PW-10) proved the entries of Chik F.I.R., G.D. entries made on 16.6.2016; the statement of Head Muharir Gulab Singh, who has written the FIR; he further stated that PW-1 informant was present at Thana; on the pointing out of the informant, the spot was inspected and site plan was prepared on 17.6.2016. PW-10 along with Sub Inspector and other police officials left the Thana in search of accused at 5:00 a.m.; on the pointing out of the informer, accused was apprehended at 6:30 a.m. while holding a mobile phone of Nokia company in his right hand; the SIM bearing no. 976....602 was recovered. At that moment, informant PW-1 reached the spot and identified the mobile phone and the accused and further stated that it is through this mobile, ransom was demanded; the mobile and the SIM card as sealed on the spot. Thereafter, accused was brought to Thana and his statement was recorded; accused confessed of committing the crime, thereafter, PW-10, S.O. and police force along with the accused went to the spot in the jungle of Village Kallupura; accused went towards the agricultural field of Roshanlal and on his pointing out, the body of the deceased infant was recovered. The site plan of recovery was prepared on the spot after inspection; after the recovery of the body Section 302 I.P.C. was added on 21.7.2016 and charge sheet was filed under Sections 379/411/364A/302 and 201 IPC;

21. PW-1 informant identified the mobile on opening of the seal. In cross-examination, PW-10 stated that the signature of the accused is not to be seen on the seal, but his signature is present; he further stated that he is not aware as to whether the signature was taken in his presence; he admitted that the IMEI number of the recovered mobile was not noted; he further stated that the complainant had reached the spot while preparing the recovery memo; the complainant signature is not present on the recovered mobile; he further stated that he had not prepared the site plan of the spot of arrest or recovery of the mobile; he further stated that no enquiry with regard to mobile, SIM card and IMEI number and in whose name SIM card was issued in respect of mobile number 976..602 was enquired; the witness, however, admitted that he also had made no enquiry with regard to mobile number 976....332 and in whose name SIM card was issued, nor, the witness was aware as to whether PW-1 had sold any land; he further admitted that he had not taken the statement of minor daughter (8 years) of the informant; he further admitted that he had not taken the statement of Girish Kumar, the owner of mobile number 976....332, on whose mobile it is alleged that ransom was demanded; he further admitted that CDR of either of the mobile was not obtained; he further admitted that there is no independent witness to the recovery memo of the mobile phone; he further stated that the spot from where the body of the infant was recovered is 10 to 15 kms from the house of informant.

22. Brajmohan Singh, Sub Inspector (PW-12) stated that he was posted at Thana Chatari on 17.6.2016; the accused upon arrest was taken to the spot where the family members of the deceased were present; in the presence of the family members on the pointing out of accused, the body of the deceased was recovered from the Jawar field of Roshanlal; Panchayatnama was prepared on the spot and signature and thumb impression of the panch witnesses were taken; all formalities for postmortem were completed. In cross-examination, he admitted

that on the Panchayatnama, date was initially recorded 16.6.2016, thereafter it was scored out and 17.6.2016 was recorded. Similarly, he admitted that the time was recorded 7:30 a.m. which was subsequently struck off and 8:20 a.m. was recorded; he admitted that a.m./p.m. was not noted; the witness further admitted that the distance initially recorded was 20 km. which was thereafter struck off and 16 km. was recorded; in the last paragraph, the time 8:30 was struck off and 8:20 was recorded; a.m./p.m. was not recorded and similarly in the same paragraph, time 9:00 was struck off and 9:50 was recorded; a.m/p.m. was not recorded. Further, he admitted that in the first para, the expression house "makaan" was struck off and "jungle" was written; he admitted that there is cutting in "jungle" and "Kallupura" Village. The witness further admitted that the recovery memo of the dead body was not prepared.

23. From the statement of the Inspector PW-10 and Sub Inspector PW-12, the following circumstances emerge:-

(i) the accused came to be arrested on 17.05.2018 at 6:30 a.m. as against the testimony of PW-1 who stated that accused was arrested on 16.05.2018 and the mobile was recovered on the same day, he was informed by the Thana at 10:30 p.m.;

(ii) the accused was brought to the Thana, he confessed commission of the crime;

(iii) on the information of the accused, on his pointing out the body of the infant was recovered as against the statement of witness of the Panchayatnama PW-5, PW-6, PW-7 and PW-8;

(iv) the family members were already present on the spot of recovery;

(v) Panchayatnama was prepared on the spot and the signatures of the panchayat witnesses were taken, as against the testimony of PW-5 to PW-8 that formalities were completed at the Thana;

(vi) PW-12 admitted the cuttings/interpolation in the Panchayatnama with regard to time, date, am/pm, place of recovery;

(vii) the recovery memo of the body of the informant at the pointing out of the accused was not prepared;

(viii) the call details (CDR) of both the mobile numbers were not taken;

24. In the statement under Section 313 Cr.P.C., the incriminating circumstance that the body was recovered on the pointing out of accused, in absence of recovery memo, was not put to the accused i.e. no explanation was sought from the accused with regard to the recovery of the body of the infant at his pointing out.

25. The prosecution case rests on circumstantial evidence; there is no last seen evidence that the accused had taken the infant and the mobile phone along with him; the demand of ransom was received on the phone number 976...332 belonging to Girish Kumar, resident of the village, who was not examined. Nephew (Prakash) to whom the information with regard to demand of ransom was conveyed by Girish Kumar was not examined; the demand of ransom and threat/hurt to be caused to the infant in the event ransom is not paid, has not been proved; it is not the case of the prosecution that the demand of ransom was made from PW-1.

26. The position of law is well settled that the links in the chain of circumstances is necessary to be established for conviction resting upon circumstantial evidence. This has been articulated in one

of the early decisions of the Supreme Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra**1. The relevant paragraphs reads thus:

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobadev. State of Maharashtra where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be' and "must be' is long and divides vague conjectures from sure conclusions."

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

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

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

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

27. Further, the prosecution case that the accused came to be arrested on 17.6.2016 at about 6:30 a.m., is not substantiated by the statement of informant (PW-1). In cross-examination, PW-1 categorically admitted that the accused came to be arrested on the date on which the FIR was lodged (16.6.2016). He was informed about the recovery of the mobile duly conveyed by the police officials to PW-1 at 10:30 p.m. In these circumstances, the arrest of accused on 17.6.2016 at about 6:30-7:00 a.m. on the pointing out of informer becomes doubtful; as per the statement of police officials, including PW-10, after arrest complainant reached the spot, thereafter, the accused was taken to Thana; from Thana, the accused was taken to the spot as per his information to recover the body of the infant. As per the statement of PW-12, the family members were already present on the spot and in presence of the family members, the body of the deceased was recovered from a Jawar field in the jungle on the pointing out of accused. In the circumstances, it becomes doubtful that the body was recovered on the information which was in the exclusive knowledge of the accused, admittedly, the family members were already present at the spot of recovery. Meaning thereby, the body was already discovered and not recovered at the behest of the accused, which is also established from the statement of PW-5 to PW-8 that appellant accused was not present on the spot at the time of recovery..

28. The various requirements of Section 27 of Evidence Act, can be summed up as follows:

"(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by accused's own act.

(4) The persons giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

29. There can be no shadow of doubt that the confession part is inadmissible in evidence. It is also not in dispute that the Panch witnesses had categorically deposed that the appellant-accused was not present at the time of recovery and the Panchayatnama was done at the Thana. In the circumstances special knowledge of the spot of the dead body cannot be made attributable to the appellant-accused. The recovery of the dead body on the pointing of the accused is highly doubtful. Section 8 of Evidence Act would also not be attracted.

30. The Supreme Court in **Harivadan Babubhai Patel Vs. State of Gujarat**2 referred to **A.N. Venkatesh Vs. State of Karnataka**3, wherein, it has been ruled that:

"9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found... would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act or not..."

31. In the said decision, reliance was placed on the principle laid down in **Prakash Chand Vs. State (Delhi Admin.)**4. It is worth noting that in the said case, there was material on record that the accused had taken the investigating officer to the spot and pointed out the place where the dead body was buried and the Court treated the same as admissible piece of evidence under Section 8 as the conduct of the accused.

32. If the recovery memos were prepared at the Police Station itself then the same would lose its sanctity as held by Supreme Court in **Varun Chaudhary Vs. State of Rajasthan**5.

33. Further, the recovery memo was not prepared of the body. The Panchayatnama witnesses were unanimous and categorically stated that the accused was not present on the spot and in cross-examination, they admitted that the Panchyatanama was prepared and signed at

the Thana. The Panchyatnama witnesses, except PW-5, were declared hostile, but having regard to the statement of PW-1, that accused came to be arrested on the day of lodging of the FIR on 16.6.2016, the statements of Panchayatnama witnesses becomes relevant that the Panchayatnama was not prepared on the spot but at the Thana.

34. In the circumstances, the arrest of the accused and the consequent recovery of mobile phone from accused and the subsequent recovery of the body of the infant at his pointing out is not proved beyond reasonable doubt. Further, as per the statement of the scribe (PW-5), he stated that complainant was not present at the Thana; the complaint was written on the direction and dictation of the police official, thereafter, the informant put his signature. In cross-examination, PW-5 admitted that the body of the deceased infant was not recovered on the pointing out of the accused; he further stated that the accused was not present with the police officials at the spot of recovery; the body was sealed but the recovery memo was prepared at the Thana.

35. Further, the ingredients of the offence under Section 364A IPC is not made out from the prosecution evidence taken on face value. The demand of ransom and upon failure to satisfy the demand, the infant would be hurt or there would be threat to his life has not been proved. Admittedly, PW-1 (informant) did not receive the call for ransom; as per informant and his nephew (Prakash), Girish Kumar is said to have received the call on his mobile phone 976...332; neither of them were examined. The CDR of both the mobile phones were not obtained or enquired by the Investigating Officer to prove the demand of ransom.

36. In **Shaik Ahmed Vs. State of Telangana**6 after noticing the statutory provision of Section 364-A of the Indian Penal Code, 1860, and the law laid down by the Court in the cases noted therein, concluded that the essential ingredients to convict an accused under Section 364-A which are required to be proved by the prosecution are as follows:

"(i) Kidnapping or abduction of any person or keeping a person in detention after such kidnapping or abduction; and

(ii) threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt or;

(iii) causes hurt or death to such person in order to compel the Government or any foreign State or any Governmental organization or any other person to do or abstain from doing any act or to pay a ransom."

37. Thus, after establishing first condition, one more condition has to be fulfilled since after first condition, word used is "and". Thus, in addition to first condition either Condition (ii) or (iii) has to be proved, failing which conviction under Section 364-A cannot be sustained. The prosecution in the case at hand failed to prove condition (i) and (ii) to constitute offence under Section 364A IPC.

38. Further, recovery of the body on the pointing out of the accused has not been proved. Admittedly, the recovery memo was not drawn as mandated under Section 27 of the Evidence Act, neither the incriminating circumstance that the body was recovered on the pointing of the accused was put to him under Section 313 Cr.P.C. The prosecution evidence (per PW-12) the family members were already

present on the spot of recovery. The body was discovered and not recovered on the pointing out of the deceased. The Panchayatnama was drawn at the Thana, the Panchayatnama witnesses signed the document at the Thana. The accused was not present at the spot as per Panch witnesses. The prosecution evidence and conduct of the accused would not fall within the ambit of Section 8 of the Evidence Act.

39. The Supreme Court in **Sujit Biswas Vs. State of Assam**7 held that in criminal trial, the purpose of examining the accused under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and must be excluded from consideration.

"20. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice, i.e. audi alterum partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement."

40. In **Hate Singh Bhagat Singh Vs. State of Madhya Bharat**8 Supreme Court held, that any circumstance in respect of which an accused has not been examined under Section 342 of the Code of Criminal Procedure, 1898 (corresponding to Section 313 Cr.P.C.), cannot be used against him. The said judgment has subsequently been followed in a catena of judgments uniformly, taking the view that unless a circumstance against an accused is put to him in his examination, the same cannot be used against him. (See also: **Shamu Balu Chaugule Vs. State of Maharashtra**9; **Harijan Magha Jesha Vs. State of Gujarat**10; and **Sharad Birdhichand Sarda Vs. State of Maharashtra**11.

41. Having regard to the cumulative prosecution evidence, the chain of events do not connect the accused-appellant with commission of the offence. It appears that the body was discovered by the family members, thereafter, the formalities were completed at the Thana. The accused never accompanied the police officials to the spot to get the body recovered; the report was also lodged on the dictation of the police official. The finding reached by the trial court is per se perverse, conviction is based on the statement of PW-1 and the alleged recovery of the mobile and the body. In the backdrop of statements of witnesses, reasonable doubt has been created by learned counsel for the appellant contending that the Panchayatnama was drawn earlier, interpolations and corrections were made with regard to the spot and the recovery of the body. Earlier it was recorded

that the recovery was made from the house (makaan) but was subsequently scored out and recorded "jungle'; similarly, cuttings with regard to timing, which according to learned counsel for the appellant, was done so as to match the timing of arrest. Further, on close scrutiny of the document (Panchayatnama), there is no countersign of the police official on the cuttings, except at one or two places. The document casts serious doubt with regard to the arrest and recovery of the mobile phone and the body at the pointing out of the accused. The date and time of arrest of the accused is seriously doubtful. The demand of ransom or of causing harm to the infant has not been proved.

42. The appeal is, accordingly, **allowed**. The impugned judgment and order of conviction and sentence is set aside. The appellant- Arun Chand is directed to be released forthwith, if not required in any other offence.

43. The appellant on being released the mandate of Section 437-A Cr.P.C. to be complied.

44. Let the lower court record be sent back to the court below forthwith, along with a copy of this judgment, for ascertaining necessary compliance.

(2022)04ILR A557
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.02.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE VIKRAM D CHAUHAN, J.

Criminal Appeal No. 3781 of 2002

Raj Veer Singh ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Raj Kumar Khanna, Sri Bharat Singh, Sri Mohd. Imran Khan

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

Criminal Law- Indian Penal Code, 1860- Section 376- Indian Evidence Act, 1872- Section 3- The statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration- The court can record conviction of the accused on the sole testimony of the prosecutrix- If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice- The evidence of rape victim stands at par with the evidence of an injured witness- Even where no external or internal marks of injury on the private part of the victim of rape was found in medical examination, the testimony of the prosecutrix that she was raped by the accused, cannot be discarded- The medical expert opinion with regard to the commission of the offence would not demolish the prosecution case.

Where the court finds the testimony of the prosecutrix credible, trustworthy, and inspiring then without seeking further corroboration, the court can secure the conviction of the accused solely based on the said testimony as the testimony of the prosecutrix is held to be at par with that of an injured witness. Corroboration would be required only where the testimony of the prosecutrix has deficiencies and lacunae.

Criminal Law- Indian Penal Code, 1860- Section 376- Quantum of Punishment- Proportionate Punishment- Theory of deterrence- On arriving at the conclusion that the appellant is liable to be convicted under Section 376 IPC and the appropriate sentence to be imposed needs consideration. The incident in

question is based on the complaint dated 31.3.2001- Section 376 has been amended w.e.f. 21.04.2018 providing for the minimum sentence of 10 years, the case on hand is of 2001 and the conviction of the appellant was on 6.9.2002. The incident having occurred prior to amendment, the preamended provision will have to be taken note of. The same provides that a person committed of rape shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine. In the instant case, taking into consideration all facts including that no material is available on record to indicate that the appellant has any criminal antecedents and that there is no reason to apprehend that the appellant would indulge in similar acts in future. Further, victim has left the village where the appellant resides. In the circumstances, we deem it appropriate that the sentence of 10 years rigorous imprisonment would have been sufficient deterrent to serve the ends of justice.

As the incident is of before the amendment of Section 376 hence the applicant/ accused shall have to be sentenced according to the pre-amended provision which provides minimum punishment of 7 years and in view of the mitigating circumstances in favour of the appellant, sentence accordingly modified to 10 years R.I (Para 21, 24, 27, 29, 30, 36)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon:-

1. St. of Raj. Vs N.K. The Accused (2005) SCC 30

2. St. of Orissa Vs Thakara Besra (2002) 9 SC 86

3. St. of H.P. Vs Raghubir Singh (1993) 2 SCC 622

4. Rai Sandeep Vs State (NCT of Delhi) (20120 8 SCC 21

5. St. of Pun. Vs Gurmit Singh (1996) 2 SCC 384

6. Madan Gopal Kakkad Vs. Naval Dubey & anr. 1992 SCC (3) 204

7. Rajinder @ Raju Vs. St. of H.P. (2009) 16 SCC 69

8. St.of U.P. Vs. Chhoteylal (2011) 2 SCC 550

9. Ranjit Hazarika Vs The State of Assam (1998) 8 SCC 635

10. St. of H.P. Vs Manga Singh(2019) 16 SCC 759

11. Sham Singh Vs St. of Har. (2018) 18 SCC 34

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

1. Heard Sri Bharat Singh, learned counsel for the appellant, learned AGA for the State and perused the lower court record with the assistance of learned counsels.

2. This criminal appeal has been filed against the judgment and order dated 6.9.2002 passed by Additional Sessions Judge IV, Moradabad in S.T. No.184 of 2002 (State Vs. Rajveer), under sections 452 and 376 IPC, P.S. Hayat Nagar, District Moradabad, whereby, the appellant has been convicted and sentenced under section 452 IPC with one year rigorous imprisonment and fine of Rs.5,000/- and convicted and sentenced under Section 376 IPC with life imprisonment and fine of Rs.10,000/-. In case of default in payment of fine, additional simple imprisonment for a period of two years.

3. As per prosecution case, husband of the victim i.e. Sukhram lodged a report on 31.3.2001 at 12:10 p.m. alleging that on 30.3.2001 at about 11:00 p.m. in the night,

appellant taking advantage that his wife was alone in the house, committed offence of rape. It was further alleged that the appellant is neighbour and earlier in the morning of the day of incident, he had quarrel with the appellant over a drain. On fear of the appellant, he left the village and had gone to his cousin's place in another village.

4. After investigation, police report/charge sheet came to be filed under Section 376 IPC against the appellant. The appellant was summoned to stand trial on charges under Sections 376 and 452 IPC.

5. The prosecution to prove the charge, examined in all five witnesses. Three witnesses of fact and two formal witnesses. Sukhram, informant/husband of the victim (PW-1), victim (PW-2), Noshe (PW-3) an independent witness/neighbour of the complainant, Constable Harendra Singh (PW-4) who proved the Chik F.I.R. and G.D. Entry and Dr. Aruna Pal (PW-5) proved the medical examination report and pathology report.

6. Sukhram (PW-1), the complainant stated that he is aged about 28 years and a labour. On the day of the incident at about 10:00 a.m., a brawl ensued between him and the accused-appellant over a drain and the flowing water, which the accused had obstructed. He further deposed that out of fear of the accused, he left the village and went to neighbouring village, at his cousin's house. On returning to his village on the following day, his wife (victim) informed that at about 11:00 p.m. on the previous night; accused entered the house after opening the latch (kundi) and committed the offence of rape. He further stated that victim informed him that on hearing her scream neighbours, Noshe Ali and Shamim, came on the spot and saw the accused escaping from the premises. He further stated that he had taken his wife to the Thana and report came to be lodged on a written complaint, reduced in writing at his home.

7. He identified his thumb impression on the complaint (Exhibit Ka-1). He further stated that the clothes of the victim was taken, recovery memo was drawn, on which his thumb impression was taken (Exhibit Ka-2). In cross examination, he stated that Maluki Pradhan, and Hari Singh had not accompanied him to the court, but they met him within the premises of the court. He further stated that Maluki Pradhan, and Hari Singh are facing trial for murder of the brother of the accused. He further stated that the house of the accused is adjacent to his house, as well as, one of his (appellant) house is opposite to his house. There is a drain between the house of the complainant and that of the accused. The drain vests in gram panchayat and is not owned by either of the parties. He further stated that at 6:00 in the evening, he left the village on foot to the neighbouring village to his cousin's house. He further deposed that with regard to the dispute of the drain, he had not given any written complaint. He returned to the village at 7:00 in the morning on the following day, it is then his wife informed him of the incident that had occurred at 11:00 p.m. in the night. He further stated that in the afternoon of the incident he met Maluki Pradhan, and denied that a false case was lodged at the behest of Maluki Pradhan and that Noshe Ali (PW-3) falsely testified, as he had transferred his house to him. He further stated that the police had visited his house on the day, on which the complaint was lodged and after two days, police inspected the site.

8. Victim (PW-2) in her examination-in-chief stated that at the time of incident she was residing at the village and after the incident, she left the village out of fear of the accused-assailant. She further stated that her husband left the village due to fear as on the said date, a brawl with regard to a drain had taken place between the accused and her husband. At the time of incident she was alone in the house; the accused barged into her house and pushed her down, thereafter, committed the offence of rape. She further stated that the accused had pressed her mouth with his hand so she could not scream. On opportunity she screamed, her neighbour, Noshe Ali (PW-3) and Shamim came; accused escaped from the room; she identified the accused in the light of lamp.

9. In cross examination, victim deposed that accused has a house opposite to her house, as well as, adjacent to her house; two adjacent houses are separated by a narrow lane, where only human being can pass through; the drain between two houses was a bone of contention between her husband and the accused. She further stated that accused had obstructed the drain by putting mud, earlier in the morning, thereafter, he abused her husband and also beat him, as well as, her. She further stated that she did not incur any injury. She stated that she did not complain of the incident to Maluki Pradhan of the village and had not informed any other villager. She further stated that her husband had left the house after the incident out of fear. She out of fear kept quite. While she was sleeping, the door of the house was bolted with latch. She further deposed that the face of the assailant was not covered by any cloth and on her scream, neighbour, including, Noshe Ali (PW-3) reached the spot.

10. Noshe Ali (PW-3) in his statement deposed that the complainant and his wife are resident of the village; he is immediate neighbour; incident is of 11:00 p.m. and on hearing scream of the victim, he reached the spot and on seeing him, accused escaped from the spot. He saw the victim half clad and the victim informed him of the incident and the offence committed by the accused. He further stated that no other person was present in the house. In cross examination, he deposed that earlier he had submitted an affidavit in the court of Chief Judicial Magistrate. He identified and proved the affidavit. He further stated that he visited the house of the victim on hearing her scream and saw the accused escaping from the house of the victim. He further stated that accused was wearing nikkar and dhoti and his dhoti was open. He further stated that he had seen the victim at her house/kotha. He identified the accused in torch light. He further stated that his son had purchased the house of the complainant/victim. On suggestion, he denied that due to this reason he is giving false statement.

11. Clerk Constable Harendra Singh (PW-4) proved the documentary evidence, the F.I.R. and G.D. entry being Exhibit Ka-3 and Exhibit Ka-4. In cross examination, PW-4 stated that he asked the complainant about the scribe of the report, but, complainant did not tell the name of the scribe; complainant had come to police station with a written complaint. He further stated that on the written complaint, thumb impression of the complainant was already made.

12. Dr. Aruna Pal (PW-5) stated that on 31.3.2001, at about 5:45 p.m., she examined the victim; she was brought by constable Bhupendra Chaubey. She proved the medical examination report and the pathology report, wherein, it is noted that

on general examination there was no mark of injury over her body. On internal examination, it is noted that there is no mark of injury over private parts. Vagina admits two fingers easily. Uterus and cervix normal. No bleeding was present. Vaginal smear taken and sent for histopathology. Medical Expert opined that no definite opinion about rape can be given. On a suggestion, PW-5 stated that it is wrong to say that the offence of rape was not committed merely in absence of spermatozoa.

13. The accused on being confronted with the prosecution evidence and the incriminating circumstance, in statement under Section 313 Cr.P.C. denied the charge and stated that he has been falsely implicated due to enmity; the prosecution witnesses have given false statements. On specific query as to whether accused wants to say anything in defence, he declined.

14. It is submitted by learned counsel for the appellant that witnesses of fact PW-1, PW-2 and PW-3 have been implanted at the behest of Maluki, Pradhan of village and Hari Singh for the reason that brother of the appellant was murdered by Maluki Pradhan and Hari Singh. It is urged that witnesses of fact were won over by them. This fact is also substantiated by the statement of PW-1 that after the dispute and brawl with regard to the drain, he visited the Pradhan and informed him in the afternoon. It is further submitted that the testimony of PW-3, the independent witness cannot be relied upon, as he is beneficiary of having purchased the house of the complainant/victim.

15. It is further submitted that as per testimony of PW-2 she stated that after commission of offence, accused left the Kotha, thereafter, she screamed, on hearing her scream neighbours came. In other words, it is submitted that the testimony of the independent witness PW-3 cannot be relied upon/believed, as it is in contradiction to the statement of the victim that the accused had left the site of incident. It is further submitted that as per medical examination report and medical expert opinion, the incident of rape is not corroborated. There is no internal/external injury, nor, spermatozoa was found.

16. Finally, it is submitted that appellant is having no previous criminal history; throughout trial he was on bail; thereafter, on conviction, he was enlarged on bail by this Court on 11.9.2002. It is urged that the accused has not misused his liberty, nor, indulged in any other criminal activity. In the circumstances, it is urged that maximum quantum of sentence imposed by the trial court is excessive. Having due regard to the conduct of accused-appellant, a lessor sentence would suffice.

17. The fact in issue to be determined is as to whether the prosecution was able to prove the incriminating circumstance connecting the accused-appellant with the commission of the offence of rape. As per prosecution case, complainant, husband of the victim, reported that the accused-appellant had committed the offence in his absence taking advantage that his wife was alone at the house. He further stated that out of fear, he left the village as he was threatened by the accused over a dispute of a drain. On returning to the village on the subsequent day at 7:00 a.m., victim informed him about the incident. The victim in her statement clearly identified the accused of having committed the offence taking advantage that she was

alone at the house and further on hearing her scream, neighbours rushed and they had identified the accused. PW-3, a next door neighbour, clearly stated that he had seen the accused leaving the door of the house of the victim at the relevant time of the incident, he reached the house of the victim on hearing her scream. He further stated that he had seen that victim was half clad and weeping; while accused escaped, he was wearing nikkar and dhoti, which was open and his eyes was red. The testimony of PW-2 and PW-3 prove the commission of the offence and presence of the accused at the relevant time at the site beyond reasonable doubt.

18. The site-map shows both houses of the accused, one across the road and one adjacent to the house of the victim. In between the adjacent houses, a narrow lane and drain has been shown. On the other side of the victim's house, house of PW-3 has been shown. The place of the incident has also been shown in the site plan. The site-plan corroborates the testimonies of PW-1, PW-2 and PW-3. The medical examination report alone is not sufficient to demolish the testimony of the victim and the independent witness PW-3. Further, victim (PW-2) deposed that out of fear, her husband left the village and after the incident they sold the house and left the village permanently.

19. On the day of cross examination, PW-1 admitted that Maluki Singh and Hari Singh were present in the court premises. In this backdrop, it is urged that the testimony of PW-1 and PW-2 is not trustworthy and reliable. The witnesses were won over by Pradhan to settle scores with the accused.

20. The questions arising for consideration before us are: whether the prosecution story, as alleged, inspires confidence of the court on the evidence adduced? Whether the prosecutrix, is a witness worthy of reliance? Whether the testimony of a prosecutrix who has been in victim of rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case? Whether she was a consenting party to the crime?

21. At the outset the testimony of the prosecutrix cannot be doubted merely for the reason that her husband met the Pradhan and Hari Singh and that they were present in the court premises on the date of examination of PW-1. The defence has not produced any evidence or material to substantiate that the witnesses of fact have been implanted. The doubt has to be a reasonable doubt and not on excuse for acquittal.

22. In **State of Rajasthan v. N.K. The Accused**1, Supreme Court has held:

"9. ...A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women.....In **State of Punjab v. Gurmeet Singh, (1996) 2 SCC 384**, "[A] rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the

very should of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. The must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case."

23. The contention of learned counsel for the appellant on close scrutiny would not demolish the prosecution case. PW-1 meeting the village Pradhan (Maluki) in the afternoon after the dispute/brawl over the drain is a natural behaviour, PW-1 probably met the Pradhan either to intervene or settle the dispute between the neighbours. That would certainly not mean that witnesses were won over. The presence of the Pradhan in the court premises on the day of the testimony of PW-1 also does not show that PW-1/PW-2 were influenced in falsely implicating the accused. It can be a co-incidence or an assurance to the PW-1 that the accused or any person on his behalf would not harm PW-1 in the court. PW-1 and PW-2 categorically stated that PW-1 left the village out of fear of the accused and PW-2 stated that after the incident, fear and humiliation compelled them to sell their house and permanently leave the village.

24. The prosecution case must stand on it legs to bring home the charge beyond reasonable doubt. The prosecution case stands proved on the sterling, credible and trustworthy testimony of the victim duly corroborated by PW-1 and the independent witness PW-3. The presence of the accused was duly proved by PW-3 immediately after the incident.

25. In **State of Orissa v. Thakara Besra**2, Supreme Court held that rape is not mere physical assault, rather it often distracts (sic destroys) the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

26. In **State of H.P. V. Raghubir Singh**3, Supreme Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated in Wahid Khan v. State of M.P.4, placing reliance on an earlier judgment in Rameshwar v. State of Rajasthan5.

27. Thus, the law that emerges on the issue that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court can record conviction of the accused on the sole testimony of the prosecutrix.

28. Who can be said to be a "sterling witness", has been dealt with and considered in **Rai Sandeep v. State (NCT**

of Delhi)6. In para 22, it is observed and held as under:

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have correlation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

29. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults. [See **State of Punjab v. Gurmit Singh**7].

30. It is settled legal position that the evidence of rape victim stands at par with the evidence of an injured witness. Injury of the rape victim being physical, as well as, psychological in the form of traumatised assault and ravishment of her chastity and womanhood. Corroboration from medical evidence varies from case to case as it depends upon the circumstances of each case. (Refer : Ganga Singh Vs. State of

M.P.8; Santosh Prasad @ Santosh Kumar Vs. State of Bihar9).

31. Through judicial pronouncements rendered in several cases viz, **Madan Gopal Kakkad Vs. Naval Dubey and another**10, **Rajinder @ Raju Vs. State of H.P.11 and State of U.P. Vs. Chhoteylal**12, the Supreme Court has clarified that even where no external or internal marks of injury on the private part of the victim of rape was found in medical examination, the testimony of the prosecutrix that she was raped by the accused, cannot be discarded. Where observations recorded by doctor during medico-legal examination of prosecutrix clearly making out that prosecutrix having been subjected to rape and the doctor as witness of the prosecution stating in response to a suggestion put to her by defence counsel that injury of the nature found on the hymen of prosecutrix could be caused by a fall, does not lead the court anywhere. The Court proceeded to observe that why would the girl or her mother charge the accused, who is a near relation, with rape if the injury was caused by the fall, that too, when the victim in her deposition had spoken of penetration. Further discovery of spermatozoa in the private part of the victim is not a must to establish penetration as there are several factors which may negate the presence of spermatozoa.

32. In **Ranjit Hazarika V. The State of Assam**13 , the victim was aged about 14 years and her testimony was corroborated by other evidences and was found trustworthy, even though the doctor had opined that there was no sign of rape. The Supreme Court held that on the given facts corroboration of testimony of prosecutrix by medical evidence was not essential.

33. In **State of Himanchal Pradesh v. Manga Singh**14, the victim was aged about nine years and she had levelled allegations of rape against her cousin. The medical opinion was not supporting the factum of rape, however, the victim was found consistent and corroborated by other evidences. The Supreme Court dismissed the appeal against conviction.

34. In the case of **Sham Singh v. State of Haryana**15, it is observed that testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. The courts should not get swayed by minor or insignificant contradictions/discrepancies in the statement of the prosecutrix. In paragraphs 6 and 7, it is observed and held as under:

"6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an

accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults. [See State of Punjab v. Gurmit Singh [State of Punjab v. Gurmit Singh, (1996) 2 SCC 384] (SCC p. 403, para 21).]

7. It is also by now well settled that the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. (See Ranjit Hazarika v. State of Assam (1998) 8 SCC 635)."

35. Applying the principle of law to the facts of the case at hand, in the backdrop of the prosecution evidence, the prosecution version is proved beyond reasonable doubt. The victim PW-2 informed her husband PW-1 in the morning on returning home. The prosecutrix with clarity stated and identified the appellant-accused of having committed the offence of rape. The incident is duly corroborated by the testimony of the neighbour PW-3. The defence failed to demolish the statements of PW-1, PW-2 and PW-3 or cast reasonable doubt. In the backdrop of the testimony of the witnesses of fact, in particular, of the prosecutrix, the medical expert opinion with regard to the commission of the offence would not demolish the prosecution case.

36. On arriving at the conclusion that the appellant is liable to be convicted under Section 376 IPC and the appropriate sentence to be imposed needs consideration. The incident in question is based on the complaint dated 31.3.2001. In this circumstance, though it is noted that Section 376 has been amended w.e.f. 21.04.2018 providing for the minimum sentence of 10 years, the case on hand is of 2001 and the conviction of the appellant was on 6.9.2002. The incident having occurred prior to amendment, the preamended provision will have to be taken note of. The same provides that a person committed of rape shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine. In the instant case, taking into consideration all facts including that no material is available on record to indicate that the appellant has any criminal antecedents and that there is no reason to apprehend that the appellant would indulge in similar acts in future. Further, victim has left the village where

the appellant resides. In the circumstances, we deem it appropriate that the sentence of 10 years rigorous imprisonment would have been sufficient deterrent to serve the ends of justice.

37. The conviction and sentence under Section 452 IPC is confirmed. The conviction order made by the trial court under Section 376 IPC is modified. The appellant is instead convicted under Section 376 IPC and is sentenced for a period of 10 years rigorous imprisonment. The fine and default sentence as imposed by the trial court shall remain unaltered. The fine shall be paid to the victim towards compensation.

38. The appeal is allowed in part as provided hereinabove.

39. The record of the trial court shall be returned forthwith along with a copy of this order.

(2022)04ILR A567
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.04.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 5824 of 2010

Satish Sharma ...Appellants
Versus
State of U.P. ...Opp. Parties

Counsel for the Appellants:
Sri Saurabh Gaur, Sri A.B.L. Gaur, Sri Anurag Shukla, Sri Manish Tandon, Sri Neeraj Tiwari, Sri Siddharth Singh, Sri Anshuman Vidhu Chandra, Sri Navin Kumar Sharma, Sri G.S. Chaturvedi (Sr. Adv.)

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

Evidence Law - Indian Evidence Act, 1872- Sections 3 & 106- Circumstantial evidence- Though the prosecution has been able to prove some kind of initial relationship and an initial dispute between the accused-appellant and the deceased but it could lead no evidence to demonstrate that that relationship, and the dispute, continued till about the time of the incident- The circumstances sought to be proved throw multiple hypotheses not inconsistent with the innocence of the accused-appellants therefore, even if there had been no proper explanation on the part of the accused, it would not be appropriate to presume their guilt by taking recourse to the provisions of section 106 of the Evidence Act - There is complete lack of evidence of the deceased being last seen alive with the accused, it would not be safe on our part to convict the accused-appellants for the charge of murder of the deceased, particularly, when the body of the deceased carried only one fatal injury on the head which could be a consequence of banging the head on the wall or on the iron gate or any hard substance. In so far as the evidence of recovery of the bamboo stick is concerned, that becomes doubtful because the witnesses of recovery have not only denied the recovery but have also denied their signatures on the recovery memo yet, no effort was made by the Investigating Officer to prove their signature.

Evidence Law - Indian Evidence Act, 1872- Sections 3 , 102 & 106- In a case of circumstantial evidence 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 therefore the guilt of the accused cannot be presumed on the basis of Section 106 of the Evidence Act, specially where there is no evidence of the deceased having been last seen in the company of the accused, there is a possibility of multiple

hypotheses and the recovery is doubtful. (Para 18, 19, 20, 21)

Criminal Appeal allowed. (E-3)

Case law/ Judgements relied upon:-

1. Vijay Shankar Vs St. of Har., (2015) 12 SCC 644,

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

3. Bablu Vs St. of Raj., (2006) 13 SCC 116

4. Shivaji Sahabrao Bobade & anr. Vs St. of Maha., (1973) 2 SCC 793

5. Devi Lal Vs St. of Raj., (2019) 19 SCC 447

6. Sheikh Hasib @ Tabard Vs St. of Bih., (1972) 4 SCC 773

7. Damodarprasad Chandrikaprasad Vs St. of Maha., (1972) 1 SCC 107

8. Shivaji Chittappa Patil Vs St. of Maha., (2021) 5 SCC 626

(Delivered by Hon'ble Manoj Misra, J.)

1. This appeal is filed against the judgment and order dated 26.08.2010, passed by Additional Sessions Judge, Court No.10, Ghaziabad in connected Sessions Trial Nos.440 of 2000; 440A of 2000; and 699 of 2000. Sessions Trial Nos.440 of 2000 and 440A of 2000 arise from case Crime No.778 of 1999, police station Kavinagar, district Ghaziabad, whereas Sessions Trial No.699 of 2000 arises from Case Crime No.1 of 2000. In Sessions Trial No. 440 of 2000 appellant Satish Sharma has been convicted under Section 302/34 IPC whereas in Sessions Trial No.440-A of 2000, the appellant no.2 Naresh Sharma has been convicted under section 302/34 IPC and both have been sentenced to imprisonment for life with fine of Rs.5,000/- each and a default sentence of six months imprisonment. In Sessions Trial No.699 of 2000, appellant Naresh Sharma has been convicted under Section 25 of the Arms Act and sentenced to two years R.I. with fine of Rs.1,000/- and a default sentence of two months imprisonment. Both sentences awarded to appellant Naresh Sharma were to run concurrently.

INTRODUCTORY FACTS

2. On a written report (not exhibited) submitted by one Nijakat (not examined), on 31.12.1999, G.D. Entry, vide report no.19 (Exb. Ka-2), and a Chik FIR (Exb. Ka-1) was made by PW-5 at 11.35 hours, giving rise to Case Crime No.778 of 1999 at P.S. Kavinagar, district Ghaziabad. In the first information report (FIR), it was alleged that in the evening of 30.12.1999 the accused-appellant Naresh Kumar Sharma and his brother Satish Sharma brought their help Jaiveer, took him to the upper storey of their house, assaulted him and, thereafter, brought him on their shoulder to the ground floor and locked him in their shop. It is alleged that the informant heard Jaiveer crying and in the morning, informant came to know that Jaiveer is dead. The FIR alleges that the entire incident had been witnessed by persons in the neighbourhood including Rickshaw pullers. Pursuant to the FIR, inquest was completed by 2.15 p.m. on 31.12.1999 at shop no.1452, ward no.12, Lal Kuan, police station Kavinagar, district Ghaziabad of which the witnesses were Mukesh Kumar (PW-1), Kunwar Pal, Radhey Shyam, Buddha Pal Yadav and Bharat Singh. The inquest report (Exb. Ka-10) prepared by PW-9 describes the body position as follows :

''मृतक का शव दुकान के अन्दर लोहे के किवाड़ से सटकर बैठी हुई अवस्था मे है पैर आलती फालती मार बैठने की अवस्था में है दोनो हाथ दोनों जाँघो पर

टिके है हाथ के पंजे खुले हुऐ पीठ पश्चिम में है व आगे का हिस्सा पूर्व दिशा में है गर्दन उत्तर दिशा मे बॉयी तरफ झुकी हुई व बॉये कन्धे पर टिकी है नाक से खून निकल रहा है बॉयी ऑख बन्द व दायी ऑख खुली हुई। मुह खुला है''

3. The body was thereafter sent for autopsy. The autopsy report (Exb. Ka-3), dated 01.01.2000, prepared by PW-6 reveals that the autopsy was completed at 4.30 pm on 01.01.2000. The body was described as of Jaiveer son of unknown and it was shown to be brought by CP 2324 Mahesh Chand and CP 684 Rakesh Kumar of police station Kavinagar. The external examination of the body revealed presence of rigor mortis all over body; eyes closed. The ante-mortem injuries noticed were as follows: (1) abraded contusion on the whole of the right arm, elbow and forearm; (2) abraded contusion multiple on the whole of the back; (3) lacerated wound size 1 cm x 2 cm on the lower third of the right leg; (4) multiple abraded contusion on the whole of the leg, left side; and (5) lacerated wound size 3 cm x 2 cm on the right side of the head. The internal examination of body of the deceased revealed fracture of parietal bone of the skull plus laceration. Stomach contents were empty and no other abnormality was noticed. According to the Doctor, the death was about a day before caused by coma due to head injury relating to ante-mortem injuries.

4. In between, the Investigating Officer (I.O.) (PW-9), on 31.12.1999 lifted plain earth and blood stained earth from the spot of which recovery memo (Exb.Ka-7) was prepared and the same was got signed by Anil (PW-2) and Mukesh (PW-1). I.O. (PW-9) also inspected the spot and prepared site plan (Exb. Ka-8) on 31.12.1999. During the course of investigation, on 01.01.2000, PW-9 (Anurag Prakash Dixit) along with other fellow police officers disclosed arrest of appellant no.2 Naresh Sharma from near Dharam Kanta in the Industrial Area of Bulandshahar and showed recovery of a country made .315 bore pistol with two live cartridges from him of which recovery memo (Exb. Ka-10) was prepared, which had no public witness. On 01.01.2000 itself, PW-9 effected recovery of two bamboo sticks on the pointing out of the appellant no.2 (Naresh Sharma) from inside the house, the recovery memo (Ex. Ka-9) of which is stated to be signed by Mukesh Sharma (PW-1).

5. Consequent to the recovery of the country made .315 bore pistol from appellant no.2, Case crime No.1 of 2000 was registered at police station Kavinagar, district Ghaziabad of which Chik FIR (Exb. Ka-5) was prepared by PW-8, giving rise to a case under Section 25 of the Arms Act.

6. During the course of investigation, the body of the deceased was got identified and it was found to be not of Jaiveer but of Mahaveer. Ultimately, after investigation, the police submitted charge-sheet in both the cases. After taking cognizance on the charge-sheets, the two cases were committed to the court of session giving rise to Sessions Trial Nos.440 of 2000 and 440A of 2000, arising out of Case Crime No.778 of 1999, and Sessions Trial No.699 of 2000, arising out of Case Crime No.1 of 2000. All three Sessions Trials were connected and decided by impugned judgment and order.

PROSECUTION EVIDENCE

7. During the course of trial, the prosecution examined as many as 12

witnesses. We notice their testimony, in brief, below :

(i) **PW-1 -Mukesh Kumar**. He is a witness of the inquest; recovery of plain earth/blood stained earth from the spot; recovery of two bamboo sticks from the house of the accused. PW-1 stated that though Naresh Sharma and Satish Sharma are real brothers but he has no knowledge whether their truck helper has been killed or not. He denies being a witness of lifting of plain earth/blood stained earth from the spot. At this stage, the prosecution declared him hostile and sought permission for his cross-examination. During cross-examination by the prosecution, PW-1 denied his signature on the seizure memo of plain earth/blood stained earth; he denied recovery of bamboo sticks in his presence and also stated that no recovery memo with regard to that was prepared in his presence and that the recovery memo does not bear his signature. He also stated that neither the inquest report dated 31.12.1999 was prepared in his presence nor the body was sealed in his presence. When confronted with his signature appearing on the inquest report, he denied his signature thereon. When confronted with his statement recorded under Section 161 CrPC, he denied having given any such statement. He denied the suggestion that the seizure memo and the inquest carried his signatures and that he has colluded with the accused.

(ii) **PW-2 - Anil Kumar**. He is also a witness of recovery of the plain earth/blood stained earth from the spot. He denied that on 31.12.1999 the police recovered plain earth/blood stained earth in his presence. The prosecution declared him hostile and cross examined him. In his cross-examination by prosecution, PW-2 stated that he had not signed the recovery memo and that the recovery memo was not prepared in his presence. He stated that if someone has forged his signatures then he cannot provide reason. When confronted with the statement recorded under Section 161 CrPC, he stated that he had never given any such statement. He also denied the suggestion of having colluded with the accused.

(iii) **PW-3 - Ram Singh**. He is a resident of village Siauli, district Badaun of which the deceased was a domicile. He stated that the deceased Mahaveer son of Raghunath Singh was a helper in the truck of Naresh and Satish (the appellants). On 02.12.1999, the accused-appellants had come to the house of Raghunath Singh (the father of the deceased) and shouted that either Mahaveer should handover the papers of their truck or else they will do something adverse. PW-3 stated that after extending threats both the accused-appellants left village Siauli. He stated that later, the accused did send a man calling for Mahaveer to get a settlement of his dues. Thereafter, Mahaveer went to Ghaziabad and when Mahaveer did not return for 4-5 days, PW-3 came to Lal Kuwan, Ghaziabad along with Raghunath Singh and Ram Bahadur Singh (PW-4) then he came to know that Mahaveer has been killed. In his cross-examination, PW-3 stated that prior to the incident he had never come to see as to where Mahaveer worked. PW-3 also could not give the date when he had come to Lal Kuan. PW-3, however, stated that he came to know from the people there that Mahaveer has been killed. PW-3 could not tell the name of the person from whom he came to know of that fact. PW-3 stated that he recognised Mahaveer from the photograph maintained at the police station. PW-3 stated that when Raghunath Singh had visited the police station he had got some report written. PW-3 stated that it

must have been the twelth month of the year 1999 when the report was written but he does not remember the exact date. PW-3 denied the suggestion that Raghunath Singh had made no report at the police station. PW-3 stated that after lodging the report, they all returned back to their village. PW-3 added that police never visited his village but used to call him at the police station. PW-3 stated that interrogation in respect of the incident was made sometimes in the month of December, 1999 though, he does not remember the date and, thereafter, the police also inquired from him in January, 2000. He stated that in January, 2000, the police had inquired from him at village Siauli and then he had informed the police that people at Lal Kuan had informed him that Mahaveer has been killed. When this witness was confronted with his previous statement recorded under Section 161 CrPC, he stated that this fact which he has just stated is not mentioned there. He also stated that when he along with Raghunath Singh and Ram Bahadur Singh visited Lal Kuwan, they had not stayed at anybody's house. At Lal Kuwan, the people residing on road had informed him that Mahaveer has been killed.

(iii-a) On further cross-examination, PW-3 stated that he saw Naresh and Satish (accused-appellants) for the first time at village Siauli in December, 1999 and after the incident he did not meet them. He identified the accused Naresh and Satish in the court. He denied that while recording the statement in court the Government Counsel had got him to identify the accused. He stated that at the time of the incident, Mahaveer must have been 23-24 years old and was of average built. He stated that he has come to give his statement on receiving court summons. He stated that Mahaveer used to work in the field and also use to drive vehicle. He stated that he was not aware as to whose vehicle he drove but he drove vehicle for about a year. He stated that he does not know whether Mahaveer had a license. He denied the suggestion that Raghunath Singh is his maternal uncle and because of his relationship with Rathunagh Singh he is telling lies. He also denied the suggestion that he never met the accused and that he is telling lies because he is related to the deceased.

(iv) **PW-4 Ram Bahadur**. He is the brother of the deceased Mahaveer. PW-4 stated that his deceased brother was working as a truck-helper with accused Satish and Naresh for which he used to get Rs.1,200/- per month. He stated that the accused had not given salary for a year as a result his brother had returned to village Siauli. This fact was disclosed by his brother to PW-4 as well as his father. He stated that on 02.12.1999, the accused had come to village Siauli and had enquired about Mahaveer. When PW-4 asked as to what they want from Mahaveer, they stated that Mahaveer has got vehicle papers which they want back. PW-4 stated that the accused thereafter hurled abuses; at that time Ram Singh (PW-3), Raghunath and other persons were present. PW-4 stated that the accused Naresh and Satish threatened that if Mahaveer does not return vehicle papers then he will have to face adverse consequences, on which, PW-4 told them that Mahaveer's salary of one year has not been paid therefore, that salary be paid. He stated that, thereafter, Naresh and Satish (accused-appellants) sent another man to village Siauli, who told Mahaveer to come for settlement of his dues. Thereafter, Mahaveer left with that person to visit the accused. When Mahaveer did not return, PW-4 and others went to Lal Kuan, Ghaziabad on 17/18.01.2000 and found the house of the accused locked there, upon

enquiry, they came to know that the accused have killed Mahaveer. When they went to police chowki, they were sent to police station Kavinagar where they identified the deceased Mahaveer from his photograph and clothes. He stated that at that time his father Raghunagh Singh and Ram Singh were both there. PW-4 also stated that the police has incorrectly mentioned the name of deceased as Jaiveer in place of Mahaveer. He stated that he believes that the accused have killed Mahaveer.

(iv-a) **In his cross-examination**, PW-4 stated that he has not seen any person assaulting or beating Mahaveer but, this fact came to his knowledge when he had visited accused's house; there, people of the locality told him this fact; that prior to the incident he had never come to the house of the accused at Lal Kuan; that he did not see the place where his brother was killed, as that place was locked. He could not remember as to what was around that place. PW-4 stated that after visiting the police station he came straightway to the village; that at the police station they had lodged written report but copy of that report was not provided to them. He further stated that he met Mahaveer about 1 ½ months before the incident and that Mahaveer used to work for last 1 ½ year. He stated that where Mahaveer used to work earlier, he does not know. He stated that he came to know about the incident when he went to the house of the accused and enquired from the people around but he does not remember the name of those persons. He identified accused Satish in court and told that accused Naresh is not present in court.

(iv-b) PW-4 further stated that when the accused had come to his village on 02.12.1999, Mahaveer was there and he had told him that these persons were Satish and Naresh with whom he used to work. Mahaveer had also told him that his salary has not been paid for months. PW-4 clarified that Mahaveer had not gone with Satish and Naresh and that Mahaveer had left with a man sent by the accused though he does not remember the name of that man. PW-4 admitted that he did not make any report in respect of the threats extended on 02.12.1999 but denied the suggestion that no threats were extended by the accused. He stated that when threats were extended by the accused there were 10-12 people around including Chhatrapal, Brijpal, Veerpal, Gajram, Ram Nath and others. Some of them are his relatives whereas some are neighbour but none have come to the court. He denied the suggestion that at the time of the incident Mahaveer was not working with the accused. He denied the suggestion that only for getting the salary dues of the deceased he has set up false case and that the entire exercise is at the behest of the police.

(v) **PW-5 Ram Babu Gautam**. He is the Head Constable at Kavinagar police station, Ghaziabad, who made G.D. Entry of the FIR of Case Crime No.778 of 1999. He proved the Chik FIR and G.D. Entry by which report was registered giving rise to Case Crime No.778 of 1999. **In his cross-examination**, he stated that the informant's report was registered under the belief that he is Nijakat though, personally he was not known to PW-5. PW-5 stated that copy of the Chik FIR was handed over to the informant and that a copy was sent to the Circle Officer through post on 01.01.2000. He stated that his statement was recorded on 31.12.1999. He denied the suggestion that the report was not lodged by Nijakat but it was got lodged at the police station at the dictate of the police.

(vi) **PW-6 Dr. Anil Kumar Agrawal**. He proved the autopsy report and stated that the autopsy was conducted at 4.30 p.m.

on 01.01.2000. He proved the contents of the autopsy report and stated that the death could have been caused a day before on account of coma as a result of head injury. He also stated that the death could have occurred in the night of 30.12.1999 also. **In his cross-examination**, he stated that rigor mortis starts about six hours after death and remains for 24 hours depending on the weather condition. He accepted the suggestion that the parietal bone fracture noticed by him could also be a result of head banging on the wall but not on account of fall. He accepted the suggestion that sometimes foul odour is noticed immediately after 24 hours of death. He, however, denied the suggestion that at the time of post-mortem, the body was emitting foul odour. He also denied the suggestion that he had himself not seen the injuries on the body of the deceased and that he had prepared the report sitting at the table of the hospital.

(vii) **PW-7 Sub-Inspector Ambika Prasad Bhardwaj**. He is the second Investigating Officer of case crime no.778 of 1999 who submitted charge-sheet on 26.01.2000, which, on his statement, was marked as Exb. Ka-4. In his cross-examination, he stated that he had not recorded statement of any witness and that on the date when this first information report was lodged he had not been posted at the police station concerned. He denied the suggestion that he had submitted an incorrect charge-sheet.

(viii) **PW-8 Constable CC Hari Shankar** Lal. He proved the Chik FIR (Ex. Ka-5) of Case Crime No.1 of 2000 and the G.D. Entry (Ex. Ka-6) thereof. **In his cross-examination**, he stated that the copy of the Chik FIR was sent to the Circle Officer through post. He also stated that he prepared the Chik FIR as was in the Fard Baramadgi. He stated that at the time when the Chik FIR was prepared, Sanjay Bhardwaj (informant of case no.1 of 2000-S. O. P.S. Kavi Nagar) was not there at the police station but CC 472 Ajit Khan was present and the Chik FIR was prepared by getting it copied from the Fard Baramadgi. He denied the suggestion that the Chik FIR was prepared on the oral dictation of the informant and not on the basis of what was written in the Fard Baramadgi. He, however, admitted that at the time when the first information report was written, the accused was not in front of him and that he had himself put the accused in the lockup and at that time when the accused was searched by him, except for clothes nothing was found.

(ix) **PW-9 Anurag Prakash Dixit.** The first Investigating Officer of Case Crime No.778 of 1999. He stated that the investigation of this case was handed over to him on 31.12.1999. In furtherance of the investigation, he lifted plain earth/blood stained earth from the spot, prepared recovery memo in respect thereof, which was signed by Mukesh and Anil in his presence, which was exhibited as Exb. Ka-7. He proved the preparation of site plan on the basis of his inspection, which was marked Exb. Ka-8. He proved the arrest of accused Naresh on 01.01.2000 at about 7.10 a.m. at Dharmkanta near Bulandshahr Industrial Area and stated that at the time of arrest, a country made pistol .315 bore with two live cartridges was recovered. He stated that on the disclosure statement of Naresh, he also recovered two Danda (sticks) of which recovery memo was prepared which was marked Exb. Ka-9. He produced the plain earth/blood stained earth; clothes etc. of the deceased; country made pistol etc., which were made material exhibits. He stated that the inquest report was prepared by him on 31.12.1999 and he also prepared photo nash, challan nash,

letter to the Prabhari and all the papers in respect of autopsy of the body and got these papers exhibited. He also produced bamboo sticks recovered by him which were made material exhibits. He proved various other stages of investigation and stated that an effort was made to ascertain the identity of the deceased and, on 18.01.2000, the deceased was identified by Raghunath Singh on the basis of his photograph and clothes; and from Raghunath's statement real name of the deceased could be known as Mahaveer and necessary entry to that effect was made.

(ix-a) **In his cross-examination**, he stated that the site plan was prepared as per the instructions of the informant; that the informant had come to him on his own, however, he could not tell the age of the informant; that he could not give the description of the informant with regard to his height though, stated that he was dark in colour. He also could not describe the clothes that he was wearing. PW-9 stated that in the site plan he had not mentioned the spot from where the informant had witnessed the incident; that the place of incident was inside the shop; that the spot was Adhkachha (semi built) i.e. built of Khadanja (vertically laid bricks) and mud. He clarified that, by saying that the floor of the shop was semi-built and that blood was noticed on the floor and he had lifted the blood stained soil from there. He admitted that he had not sent the blood stained soil to Forensic Laboratory rather, it was sent to the office. He stated that the country made pistol recovered was sealed by Station Officer Sanjay Bhardwaj (not examined) and the recovery memo of the bamboo sticks was prepared by him and they were sealed on the spot but currently they are not sealed. He denied that the bamboo sticks were not recovered from the spot. He also denied the suggestion that the witnesses of the recovery were not present.

(ix-b) On further cross-examination, he stated as follows :

''यह सही है कि घटना स्थल से सटा हुआ आम रास्ता है। उस पर 24 घंटे लोग आते जाते रहते है। घटना स्थल के पूरब, पश्चिम, उत्तर, दक्षिण में क्या है। मुझे ध्यान नही है। यह मै नक्शा नजरी देखकर बता सकता हूँ''

(ix-c) He stated that the country made pistol recovered was sealed in his presence but the sample seal is not there on record at present. He admitted that at the time of making the site plan of the recovery i.e. Case Crime No.1 of 2000, he was present with the informant of that case. He could not tell as to what were the surroundings from where recovery of the country made pistol was made though he stated that he can tell after looking at the site plan. He then clarified by stating that it was recovered from in front of Veer Narayan's Dharmkanta where the accused was found standing. On further cross-examination, he stated that a person who makes the recovery, seals it, the seals are distinct and separate. He stated that the distance of the place from where recovery was made was about 4 km from the police station, he could not tell the time they took to reach the spot. He admitted that the recovery in respect of Case Crime No.1 of 2000 was made from a place which is an Aam Rasta (public road) where 24 hours people are present and that there were many people around but none were prepared to be a witness of the recovery. He admitted that he did not ask the name of persons whom he had requested to be a witness. He denied the suggestion that the entire exercise was carried out at the police station and that no recovery was made. He also denied the suggestion that the accused has been falsely implicated.

(ix-d) He admitted that at the time of inquest, the name of the deceased was stated to be Jaiveer and the inquest was prepared as Lawaris (father not known) and that, later, father of the deceased arrived, recognised the deceased on the basis of his photograph and clothes, and informed the police that the deceased is Mahaveer. PW-9 stated that the name of deceased's father was Raghunah Singh and Raghunath Singh did not inform him that the name of his son is Jaiveer @ Mahaver. PW-9 stated that he did not investigate to confirm the identity of Jaiveer as his father had already recognised him on the basis of his photograph and clothes. He admitted that he had not requested for the voter list or Ration Card to ascertain the identity of the deceased as his identity was proved by his father. He denied the suggestion that the entire exercise was completed while sitting at the police station and that the records were fabricated. He denied the suggestion that he used to extort Rs.5,000/- a month from the accused and when the accused refused they were falsely implicated.

(x) **PW-10 Sub-Inspector Ajit Roria**. He conducted the investigation of Case Crime No.1 of 2000. He stated that he recorded the statement of Sub-Inspector Anurag Dixit (PW-9) and after completing the investigation he had submitted charge-sheet which was marked as Exb.Ka-19. He also proved that he obtained sanction from the District Magistrate for prosecution under Section 25 of the Arms Act. The sanction letter was proved and marked as Exb.Ka-18.

(xi) **PW-11 Ved Bhushan**. He is one of the witnesses of recovery of bamboo sticks at the instance of appellant Naresh. He denied having witnessed the recovery and was declared hostile. On being confronted with the recovery memo, he stated that the signatures appearing thereon are not his and that the Investigating Officer had never recorded his statement. On being confronted with the statement recorded under Section 161 CrPC, he stated that he had never made any such statement. He denied the suggestion that he has colluded with the accused.

(xii) **PW-12 Constable Rajendra Kumar**. He was examined on 23.02.2010 to prove that the informant Nijakat is no more. He stated that he had gone to serve court summons to Nijakat. There he came to know that two years before, he died of TB. He also produced death certificate of Nijakat, which is there on record as paper no. 95-Kha and was exhibited C-1. **In his cross-examination**, he stated that he has not enquired as to in which hospital the informant was admitted. He also stated that he is not aware whether the summons were sent at the address of the informant or not. He stated that he had gone on a bus to Alapur, Badaun where the informant resided.

8. The incriminating circumstances appearing in the prosecution evidence were put to both the accused. The accused Naresh not only claimed that the allegations are incorrect and false but also denied both the alleged recoveries. And also denied that the deceased was employed as his helper. He also stated that he had no truck. Similarly, accused Satish denied the prosecution allegations as incorrect and stated that the accused was not employed as his helper and that he owned no truck.

9. The accused also examined a defence witness (DW-1) Devendra Mittal who stated that he is a neighbour of Kanchhilal Sharma (the father of the accused). He stated that neither from the shop nor from the house of the accused

recovery of the body was made and that Kanchhilal Sharma does not have any truck. He also stated that the police had come to him to interrogate him but he had informed the police that no such occurrence had ever taken place. **In his cross-examination**, he feigned ignorance that the cycle repairing shop which he has, has been purchased by Kanshilal Sharma (the father of the accused). He stated that Kanchhilal Sharma though had a shop on the ground floor but to whom it was let out he is not aware but, reiterated that on 31.12.1999 no body was recovered from the shop of Kanchhilal Sharma. He also denied the suggestion that on 31.12.1999 the inquest was conducted at the spot.

TRIAL COURT FINDINGS

10. The trial court found following circumstances proved-that body was recovered from the shop of the accused; that the medical evidence indicated that that man was killed; that the body was identified to be of Mahaveer; that it was proved that Mahaveer was employed as a helper by the accused; that accused had visited the house of Mahaveer to demand vehicle papers, which Mahaveer seemed to be withholding in lieu of his salary dues, and had threatened Mahaveer of dire consequences; that the accused resided on the upper floor of the building in the ground floor of which there was the shop from where the body of Mahaveer was recovered; and that sticks used to assault the deceased was recovered at the instance of appellant no.2. All these circumstances complete a chain, pointing towards the guilt of the accused appellant and, therefore, in absence of explanation, the appellants were liable to be convicted. In addition to above, on the basis of recovery of country made pistol, the appellant no.2 Naresh Kumar was convicted under section 25 of the Arms Act.

11. We have heard Sri Manish Tandon, as amicus curiae, representing the appellants; Sri H.M.B. Sinha and Sri Amit Sinha, learned AGA, for the State; and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANT

12. Learned counsel for the appellants submitted that there is no eye witness account / direct evidence of the crime and consequent to non-examination of the informant the contents of the FIR cannot be looked into therefore, the prosecution case rests purely on circumstantial evidence. He submitted that in so far as the circumstantial evidence is concerned, there is no substantive evidence of the deceased being last seen alive with the appellants on or about the night of the incident. The motive for the crime is also not convincing because the testimony of PW-3 and PW-4 with regard to the employment of the deceased under the appellants is inconclusive, inasmuch as, they have not specifically disclosed whether the appellants had any truck for which the deceased used to work as a helper. The Investigating Officer also could not collect evidence to demonstrate that the appellants had a truck and, in fact, the appellants had categorically denied having a truck in their statement recorded under Section 313 CrPC. Thus the stand that the deceased had worked as a helper for the appellants and in connection with his services there were dues is not satisfactorily established. Otherwise also it can only provide a weak motive for the crime and that by itself would not be sufficient to record conviction. In so far as recovery of the

body of the deceased from the shop is concerned, firstly, the recovery was denied and independent witnesses have not confirmed the recovery, secondly, the plain earth and blood-stained lifted from the spot has not been sent for forensic examination, and, thirdly, it has not been proved that the shop was in exclusive control and possession of the accused; further, shop's floor was semi-built and it was adjoining the road where there was 24 hours traffic; and it has not been demonstrated by the Investigating Officer that the shop was not accessible to all or that it was locked, of which the key was with the accused, or that the door of the shop was broke open to recover the body or that the key to the lock put on the door of the shop was found in possession of any of the accused. It has been pointed out that the site plan (Exb.Ka-8) does not disclose that the shop had a door, which was locked. Importantly, the body was found in a sitting posture reclining on the iron gate which is at the internal end of the shop. The front portion of the shop, which opens on the road, is not shown to have a door and there is no evidence at all to suggest that the door was locked and had to be broke open. It was thus submitted that since the case now turns on circumstantial evidence, unless there is cogent evidence that nobody other than the accused could have had access to the shop, conviction of the appellants for the offence punishable under Section 302/34 IPC is not at all sustainable. It was submitted that in so far as the recovery of bamboo sticks is concerned, firstly, that recovery has not been proved because the witness of the recovery has squarely denied having signed the recovery memo and no effort was made to obtain expert report to prove his signatures on the recovery memo; and, secondly, the bamboo sticks have not been sent for forensic examination to determine whether it carried any blood stain or not. Other than that a bamboo stick is readily available and is ubiquitous in every house. Therefore, recovery of bamboo stick by itself is not an incriminating circumstance that may indicate the guilt of the accused-appellants.

13. In addition to above, learned counsel for the appellants questioned the recovery of country made pistol on the ground that, admittedly, the recovery was made at a public place yet, there is no support of a public witness. Further, the recovery is stated to have been made early morning on 01.01.2000 by stating that the Investigating Officer had received information from an informer with regard to the presence of the accused at that spot. No good reason has been shown for the presence of the accused there, so early on a winter morning, as also the reason for arrest that early in the morning, particularly, when the accused had a house and were men with property and their arrest could easily have been effected by taking recourse to coercive processes had they been evading their arrest. Under the circumstances, this arrest is nothing but to implicate the appellants in an additional case under the Arms Act. Further, the genuineness of the arrest is also doubtful because when the Investigating Officer was required to give description of the surroundings of that place from where the arrest and recovery of country made pistol was made, he stated that he cannot disclose without looking at the site plan and the police records, which suggests that the recovery was nothing but bogus. It has thus been submitted that this is a fit case where the benefit of doubt should be extended to the appellants and that the judgment and order of conviction be set aside and the appellants be released.

SUBMISSIONS ON BEHALF OF THE STATE

14. Learned AGA submitted that although no ocular direct evidence survives consequent to death of the informant, but the lodging of the first information report has been duly proved; the employment of the deceased under the accused-appellant is proved; the dispute between accused-appellant and the deceased in connection with salary dues and vehicle papers is proved therefore, motive is proved; the spot where the body of the deceased was found has been proved; this spot is a shop in the ownership of accused-appellants' father whereas, there is no cogent explanation as to how the body came to be there; that the recovery of bamboo stick, which could have been utilised to inflict injuries, completes the chain of incriminating circumstances, which conclusively indicate that the prosecution story as set out in the first information report is correct and, therefore, the trial court in absence of cogent explanation has justifiably convicted the appellants. In respect of conviction of appellant no.2 under section 25 of the Arms Act, learned AGA submitted that it is not always necessary that independent witnesses are roped in for effecting recovery because many a times the witnesses, out of fear and generation of ill-will, do not agree to be witness and, even if they agree, more often than not, they resile from their commitment, therefore, if the Investigating Officer has been able to prove the recovery, the same is sufficient to record conviction, particularly, when no cogent motive for false implication has been proved.

ANALYSIS

15. Before we proceed further, we must clarify that we shall divide our analysis into two parts. First part would be in respect of the charge of the offence punishable under section 302 read with section 34 against both the appellants; and the second would be in respect of the charge under section 25 Arms Act against the appellant no.2 (Naresh Kumar). In respect of the charge relating to murder, at the outset, we may observe that this a case where there is no direct evidence of murder. We are thus dealing with a case where the prosecution seeks to bring home the charge of murder against the accused-appellants on the strength of circumstantial evidence. It would therefore be useful to notice the legal principles which a court must bear in mind before recording conviction on the basis of circumstantial evidence. The earliest judgment of the Supreme Court on the issue was in the case of **Hanumant Govind Nargundkar V. State of UP, AIR 1952 SC 343**, which has been consistently followed and elaborated from time to time in various subsequent decisions. In **Hanumant Govind's case (supra)**, it was held that: "*in cases where the evidence is of circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all 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 other 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.* In a relatively recent decision in **Vijay Shankar V. State of Haryana, (2015) 12 SCC 644**, the Supreme Court following its earlier

decisions including the celebrated decision in **Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116 and Bablu V. State of Rajasthan, (2006) 13 SCC 116**, held that "*the normal principle is that in a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of any hypothesis other than that of the guilt of the accused and inconsistent with their innocence".* In **Sharad Birdhichand Sarda's case**, vide paragraph 153, it was further clarified that the circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby they 'must or should' and not 'may be' established. In addition to above, we must bear in mind the most fundamental principle of criminal jurisprudence which is that *the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions* (**vide Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793**). These settled legal principles have again been reiterated in a three-judge Bench decision of the Supreme Court in **Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

"18.On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

*(*Emphasis Supplied)

16. Bearing the above legal principles in mind we now proceed to examine whether the incriminating circumstances on which the prosecution seeks to bring home the charge have been proved beyond reasonable doubt; and whether they form a chain so complete that there is no escape from the conclusion that within all human probability the murder was committed by the accused appellant; and whether they (the circumstances) are incapable of explanation of any hypothesis other than that of the guilt of the accused-appellants and inconsistent with their innocence. The

circumstances which the prosecution seeks to prove to bring home the charge of murder against the appellants are: (i) the deceased was employed by the appellant as a helper for their Truck; (ii) the deceased had salary dues which the appellant had withheld; (iii) in connection therewith, the deceased had retained vehicle papers; (iv) that on 02.12.1999, the accused-appellants came to the village of the deceased and threatened him to return the papers or face dire consequences; (v) that few days before the incident, a man was sent by the accused-appellant to the deceased calling for him to come to Lal Kuan for settlement of his dues; (vi) that in the morning of 31.12.1999 the body of the deceased was recovered from a shop in the ground floor of a building, on the upper storey of which the accused-appellant had their place of residence; (vii) that report was lodged in respect of homicidal death of the deceased alleging that the deceased was assaulted and dumped by the accused-appellants in the shop; (viii) inquest proceedings were held in that shop; (ix) autopsy conducted on 01.01.2000, at about 4.30 pm, confirmed homicidal death, a day before, upon noticing that the deceased had suffered multiple injuries including a fracture of parietal bone of the skull; and (x) at the instance of appellant no.2, two bamboo sticks alleged to have been used to assault the accused were recovered from under the bed of the accused.

17. Now we shall examine whether the above noted circumstances have been established beyond doubt. In respect of past employment of the deceased under the accused-appellants, there are two witnesses, namely, PW-3 and PW-4. Their testimony in respect of deceased's employment with the appellants is not direct, that is, they only heard from the deceased about him working for the appellants at a salary of Rs.1200 /- pm. They, however, are witnesses of an incident dated 2.12.1999 when the accused-appellants came to the village and threatened the deceased to return vehicle papers. No doubt, the prosecution has not succeeded in proving that the accused-appellants owned a Truck, but, as rightly held by the trial court, there is no reason to disbelieve PW-3 and PW-4 in respect of their deposition that there existed some relationship between the deceased and the accused-appellants in connection with which there was a dispute. But, what is important is that there is no cogent evidence that this relationship continued up to the date of the incident. There is a huge time-gap between 02.12.1999 and 31.12.1999, that is, the date when the deceased died. Whether on the date of his death, the deceased was still under the employment of the accused-appellant is a question that needs to be addressed. Notably, there is no evidence in that regard except that few days after the incident dated 2.12.1999, a man was sent by the accused-appellant sending a feeler to the deceased that he may come for settlement on which he went away with that man. Whether that earlier relationship got restored thereafter; and whether the deceased was seen working thereafter for the appellants, has not been answered by any evidence. Notably, the identity of that man who had arrived for settlement is not disclosed and the exact date when that man arrived and the deceased went for settlement is also not disclosed. Importantly, it is stated by PW-4, the brother of the deceased, that when the deceased did not return then PW-4 and his father came from the village in search of the deceased on or about 17/18.1.2000. Then they came to learn about his death.

Interestingly, the prosecution evidence is totally lacking as to whether the deceased used to reside with the accused-appellant or in the shop where his body was found. Thus, though the prosecution has been able to prove some kind of initial relationship and an initial dispute between the accused-appellant and the deceased but it could lead no evidence to demonstrate that that relationship, and the dispute, continued till about the time of the incident.

18. In this background we now proceed to examine other circumstances. Before that, we may notice certain key features that are missing in the prosecution evidence. These are: (i) there is no direct eye-witness account of the incident and since the informant did not appear to prove the contents of the first information report, its contents cannot be read in evidence as they can be used for limited purposes such as corroborating or contradicting its maker or to show the implication of the accused, not to be an after thought, or that the information is a piece of evidence res gestate or is otherwise admissible under section 32 (1) of the Evidence Act (vide **Sheikh Hasib @ Tabard V. State of Bihar, (1972) 4 SCC 773 and Damodarprasad Chandrikaprasad v. State of Maharashtra, (1972) 1 SCC 107**), which is not the case here; (ii) there is no substantive evidence on record that the deceased was seen alive in the house or in the shop of the appellants with the appellants; (iii) the shop from where the body of the deceased is stated to have been recovered has a semi-built floor and nothing has been brought on record that in the shop commercial goods or tradeable goods belonging to the accused-appellants were present; and (iv) nothing has been brought on record to show that to retrieve the body of the deceased from inside the shop any door had to be broke open or that the shop was bolted from outside or there was a lock put on the door of the shop of which the key was with the accused. Further, from the site plan it is clear that the shop from where the body of the deceased was recovered is adjoining the main road. The site plan does not indicate that to have access to the shop there existed a door. The testimony of the Investigating Officer does not indicate that access to the shop was not possible except through the living area of the house of the accused persons. Importantly, the ante-mortem injuries found on the body of the deceased though are many but except for the head injury, there is no fatal injury. The Doctor had also opined that the head injury could be on account of banging the head with the wall or hard object. The body of the deceased, at the time of inquest, was noticed in a sitting posture. In that kind of a scenario, it is possible that the deceased might have received injuries elsewhere, in the night, and may have used the place, where he was found dead, to rest, or he may have been beaten elsewhere and put there. Thus, the circumstances sought to be proved throw multiple hypotheses not inconsistent with the innocence of the accused-appellants therefore, even if there had been no proper explanation on the part of the accused, it would not be appropriate to presume their guilt by taking recourse to the provisions of section 106 of the Evidence Act.

19. At this stage, we may notice a recent decision of the Apex Court in the case of **Shivaji Chittappa Patil V. State of Maharashtra, (2021) 5 SCC 626** wherein, following earlier decisions, in paragraph 23 of the report, it was observed: "*it could thus be seen that it is well settled that section 106 of the Evidence Act does not directly operate against either husband or wife*

staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused." In paragraph 25 of this judgment, the Apex Court observed: "*Another circumstance relied upon by the prosecution is that the appellant failed to give any explanation in his statement under Section 313 CrPC. By now it is well settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused. However, it cannot be used to complete the chain*." Seen in the light of the law noticed above, what clinches the issue in the present case is that the prosecution has failed to lead evidence to rule out other hypotheses not inconsistent with the innocence of the appellant. The recovery of bamboo sticks is denied by the witnesses whose signatures are, purportedly, there on the memorandum. Those witnesses have challenged their signatures on the recovery memo but no effort is there to prove their signature. Importantly, the plain earth and the blood stained earth that is alleged to have been lifted from the spot from where the body was recovered has not been sent for serological examination to find out the presence of human blood. Thus, it is not certain whether the deceased died there from where he was recovered or was brought dead from somewhere else or he suffered injury somewhere else and came there. Further, the seizure memo of the blood stained earth and plain earth has not been supported by the eye-witnesses PW-1 and PW-2. They have even denied their signatures on the recovery memo as also on the inquest report and no other witness of the inquest has been examined. No effort has been made to prove the signatures of PW-1 on the inquest memo and of PW-2 on the recovery memo. No doubt, the recovery memo can still be believed and be treated as proved by the Investigating Officer but here the Investigating Officer has not send the blood stained earth and plain earth for serological examination to confirm the presence of human blood on the spot therefore, the issue whether the deceased died in the shop or was brought dead from outside and planted in the shop is an issue which remains unanswered, particularly, when the eyewitness (informant) has not been examined and the exclusive control and possession of the shop with the accused-appellant is not proved.

20. Now, we may notice the site plan prepared by the I.O. on inspection and at the instance of the informant. The site plan is there on record as Exb. Ka-8. It appears from the site plan that the spot from where the body of the deceased was recovered was a shop. This shop appears on the ground floor and seems to have direct access to the Ghaziabad - Dadri road. In front of the shop, there is open space which can be considered as Patri (pavement) of the main road. The shop has an opening on the main road. The body of the deceased is shown inside the shop at some distance from the open space outside the house. It has not been established by any evidence as to who is the owner and in exclusive possession of that shop. It has also not been established by any evidence that the deceased used to reside as a helper in the

premises of the accused or in that shop. Further, there is no clear and specific evidence that the place from where the body of the deceased was recovered is not accessible to anybody except the accused or inmates of the house of the accused. Thus, keeping in mind that there is complete lack of evidence of the deceased being last seen alive with the accused, it would not be safe on our part to convict the accused-appellants for the charge of murder of the deceased, particularly, when the body of the deceased carried only one fatal injury on the head which could be a consequence of banging the head on the wall or on the iron gate or any hard substance. In so far as the evidence of recovery of the bamboo stick is concerned, that becomes doubtful because the witnesses of recovery have not only denied the recovery but have also denied their signatures on the recovery memo yet, no effort was made by the Investigating Officer to prove their signature. Further, bamboo sticks are freely available in the market and commonly found in every house. Importantly, those bamboo sticks were not sent for forensic examination to find out whether there is any mark of human blood on it. In view of the above discussion, we are of the view that the prosecution has not been successful in proving the guilt of the appellants beyond reasonable doubt for the charge of an offence punishable under Section 302 read with Section 34 IPC.

21. In so far as the conviction of the appellant no.2 for the offence punishable under Section 25 Arms Act is concerned, the recovery of firearm has been denied by the appellant no.2. The recovery does not inspire our confidence for the reason that the recovery is stated to have been made while the police was in the process of arresting the accused wanted in Case Crime No.778 of 1999. No justification has been given for taking steps to effect the arrest of the accused in the early hours of a winter morning, particularly, when it has not been demonstrated that the accused was evading arrest or that coercive processes had already been issued to effect his arrest. Notably, the accused is a person having property therefore, there was no logical reason for him to escape. In such circumstances, there appears very little justification to arrest the accused in the early hours of a winter morning. The recovery, which has been vehemently denied by the accused, in our view, appears to be to add colour to the prosecution case. More so, because it has no public witness to support it. Further, when the Investigating Officer was cross-examined as to the surroundings from where the accused was arrested, he could not remember the surroundings and sought to refresh his memory from the records, which also makes the recovery doubtful. We, therefore, give the benefit of doubt to the accused in the matter of recovery of firearm from him.

22. For the reasons recorded above, we are of the view that the prosecution has failed to prove beyond reasonable doubt the charges for which the appellants have been tried and convicted. Consequently, the appeal is **allowed**. The impugned judgment and order of the trial court dated 26.08.2010 in Sessions Trial Nos. 440 of 2000, 440A of 2000 and 699 of 2000 is hereby set aside. The appellants are acquitted of the charges for which they have been tried and convicted. The appellants are reported to be in jail, they shall be released forthwith subject to compliance of Section 437A CrPC to the satisfaction of the court below.

23. Let a copy of this judgment and order be certified and sent along with the record of the record of the court below to the court below concerned for compliance.

(2022)04ILR A584
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.04.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Revision No. 140 of 2021
Connected with
Criminal Revision No. 143 of 2021

Ajay Kumar Singh @ Babloo Singh ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Kailash Nath Mishra, Rahul Mishra

Counsel for the Respondents:
G.A., Gaurav Misra, Rama Pati Shukla

A. Criminal Law - Determination of age of juvenile - The Juvenile Justice (Care and Protection of Children) Act, 2015: Section 94 - The age of juvenality at the first instance be determined by the date of birth certificate from school, matriculation or equivalent certificate from the concerned examination Board. In absence of the certificate obtained from the above mentioned authority, the birth certificate obtained from a corporation or a municipal authority or a panchayat can be made basis of determination of age of a juvenile. The medical test (ossification test) of the minor is the last measure to be adopted by the Board or the Court. (Para 12)

The Court did not find any irregularity in High School certificate and mark sheet produced as a documentary proof by the private respondents. (Para 26)

Revision Dismissed. (E-10)

List of Cases cited:-

1. Atul Singh Sengar Vs St.of U.P. & anr. Criminal Revision No. 2881 of 2019 *(distinguished)*

2. Irfan Vs St.of U.P. & anr. Criminal Revision No. 3188 of 2017 *(distinguished)*

3. Yalajindra Kaur Vs St.of U.P. & anr. Criminal Revsiison No. 1472 of 2014

4. Jai Nand Sharma Vs St.of U.P. & anr. 2009 (6) Adj 723

5. Sher Singh alias Sheru Vs St.of U.P. 2017 Crl. L.J. 233

6. Shailendra Kumar Yadav Vs St.of U.P. & anr. 2014 (8) ADJ 329

7. Kallu Yadav @ Balram Vs St.of U.P. & anr. 2017 (6) ADJ 81

8. Sri Ganesh Vs St.of T.N. & anr. Criminal Appeal No. 39 of 2017

9. Ashwani Kumar Saxena Vs St.of M.P. (2012) 9 SCC 750

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. These two revisions arise out of same crime number and the offence(s) in which both the private respondents have been implicated are the same, they are taken up together and are being decided by the present common order.

2. Both the Criminal Revisions have been preferred challenging orders dated 29.7.2020 passed by Juvenile Justice Board, Gonda in Misc. Case No.15 of 2020 State versus Uday Pratap Singh and others and the judgment and order dated 21.11.2020 passed by Addl. Sessions Judge/Special Judge, POCSO Act, Gonda

in Criminal appeal Nos. 29 Ajay Kumar Singh versus State of U.P. and Pushpendra Singh, and 30 of 2020 Ajay Kumar Singh alias Babloo Singh versus State and Uday Pratap Singh, arising out of Case Crime No.66 of 2020, under sections 147, 148, 149, 307, 302, 504, 506 I.P.C. and 7 Criminal Law Amendment Act, P.S. Umari Begum Ganj, district Gonda.

3. By orders dated 29.7.2020 (supra), the Juvenile Justice Board has declared both the private respondents, i.e. Uday Pratap Singh and Pushpendra Singh as juvenile on the basis of High School Mark Sheet and by appellate order dated 21.11.2020, learned Addl. Sessions Judge/Special Judge, POCSO Act, Gonda while upholding the order dated 29.7.2020 has dismissed the appeal preferred by the informant/revisionist Ajay Kumar Singh alias Babloo Singh.

4. Heard learned counsel for the revisionist as well as learned counsel appearing for private respondents and learned Addl. Government Advocate for the State.

5. The private respondents, i.e. respondent No.2 in both the criminal revisions moved an application for declarating them juvenile. The said applications were decided on the basis of evidence adduced by the private respondents by the Juvenile Justice Board vide order under challenge. The date of birth of Pushpendra Singh in High School mark sheet has been mentioned as 10.7.2002. The incident took place on 3.4.2020. On the basis of this date of birth as recorded in the High School mark sheet, it has been held by Juvenile Justice Board that Pushpendra Singh was 17 years 8 months and 24 days on the date of incident and thus, he has been declared as juvenile.

The date of birth of other accused/respondent No.2 Uday Pratap Singh as recorded in the High School Mark Sheet is 5.7.2002 and on the date of incident, he has been declared as juvenile being his age as 17 years 8 months and 29 days. For determination of age, the learned court below has also considered the evidence given by C.W.1 mother(s) of private respondents and C.W.2 Maan Singh, Incharge Principal of Shri Parashar Rishi Uchchtar Madhyamik Vidyalaya, Paras Gonda and other educational certificates. As said above, the appeals preferred against the order passed by the Juvenile Justice Board have been rejected.

6. Learned counsel for the revisionist submits that on the date of incident, i.e. on 3.4.2020, the respondents No.2 were major. The real grandfather of Pushpendra Singh was Head Master in Primary School and he has got recorded the date of birth of Pushpendra Singh. He received initial education from Primary to Tenth class in Raghukul Vidya Peeth, Gonda and since he was not successful in Tenth Class, hence he took his admission in Parashar Rishi High School, Paras Patti and cleared the High School examination in 2018. It is submitted by learned counsel for the revisionist that although he has submitted before the Board to summon the transfer certificate from the Primary School, however, the Board did not accede the prayer made by the revisionist.

Learned counsel for the revisionist further submits that both the Courts below also did not consider the objection raised by the revisionist that the both the accused/respondents No.2 are major. To substantiate his argument, the revisionist's counsel has submitted before the Courts below that it is necessary that the private

respondents be sent to undergo medical examination to be conducted by Medical Board so as to assess their correct age. However, during the course of hearing, the juvenile has produced school certificate issued by Raghukul vidya Peeth. Thus, it was opined by the Board that the objection is quite formal in nature. Learned lower appellate court has also failed to consider the grounds taken in the appeal.

Learned counsel has next submitted that the source of information on the basis of which entry of date of birth of respondent No.2 in the school record has not been furnished and there is no evidence on the record which can be said to be source of information regarding date of birth of respondent No.2. In support of his submission, learned counsel has relied on a judgment dated 21.1.2020 rendered in Criminal Revision No.2881 of 2019 **Atul Singh Sengar** versus **State of U.P. and another** and judgment and order dated 24.9.2018 passed in Criminal Revision No.3188 of 2017 **Irfan** versus **State of U.P. and another.**

Supplementing his arguments, learned counsel has submitted that the certificate/mark sheet issued by the school or the school record cannot be relied upon blindly and in case of any doubt, the court is empowered to ignore it. In this context, learned counsel has relied on a judgment of this Court dated 12.9.2019 passed in Criminal Revision No.1472 of 2014 **Yalajindra Kaur** versus **State of U.P. and another**.

Learned counsel for the revisionists has submitted that the learned appellate court while passing the impugned judgment dated 21.11.2020 has failed to consider the grounds mentioned in the appeal and rejected the same by a cryptic order with the observation that there is no infirmity and illegality in the order dated 29.7.2020 passed by the Juvenile Justice Board.

7. On the other hand, learned counsel appearing on behalf of respondents No.2 submits that the both the courts below have appreciated the evidence on record and have rightly declared the private respondents/accused as juvenile on the basis of the date of birth as recorded in the High School certificate. The Board has examined C.W.1 Kiran wife of Dinesh Singh and C.W.2 Maan Singh, Incharge Head Master of Sri Parashar Rishi Higher Secondary School, Paras, District Gonda in the case of Pushpendra Singh. They stated in unambiguous terms that the date of birth as recorded in the High School certificate is correct.

In the case of Uday Pratap Singh, C.W.1 Yashoda Singh who is his mother and Maan singh, who is Incharge Head Master of Sri Parashar Rishi Higher Secondary School, Paras, district Gonda were examined. They proved the date of birth of Uday Pratap Singh as recorded in the certificate as correct.

It is next submitted on behalf of private respondents that the provisions of Section 102 of The Juvenile Justice (Care and Protection of Children) Act, 2015 are pari-materia with the provisions of Section 397 CrPC and as such, it is submitted that the findings of facts cannot be interfered without showing that the findings are perverse. In this context, learned counsel has relied on **Jai Nand Sharma** versus **The State of U.P. and another** 2009(6) AdJ 723(relevant para 5), **Sher Singh alias Sheru versus The State of U.P**. 2017 Crl. L.J. 233 (relevant paras 60, 67, 68).

It is further submitted that there is no illegality in the orders passed by both the courts below as regards the determination of age of the accused on the basis of the date of birth as recorded in the matriculation certificate and the

evidence(s) adduced before it. In this context, learned counsel has relied on **Shailendra Kumar Yadav** versus **The State of U.P. and another** 2014(8) ADJ 329 (para10) and **Kallu Yadav alias Balram** versus **The State of U.P. and another** 2017(6) ADJ 81 (relevant paras 14, 15, 16).

The respondents No.2 in both the cases are languishing in jail since 4.4.2020, i.e. for the last about two years and under the statute, three years punishment to the juvenile has been provided and thus, the accused/juveniles have already undergone a substantial period in jail.

8. I have considered the arguments advanced by the learned counsel for the parties.

9. A perusal of the order dated 29.7.2020 passed by the Juvenile Justice Board reveals that in case of Uday Pratap Singh, the Board has considered the Transfer Certificates issued by Raghukul Vidya Peeth and Shri Parashar Rishi Uchchtar Madhyamik Vidyalaya, Paras, Gonda and the Assessment Report Card as also the table register (Sarniyan Panjika) of Madhyamik Shiksha Parishad, U.P. Examination, 2018 which has been counter signed by the Principal and District Inspector of Schools, Gonda. In all these documents, the date of birth of the juvenile has been recorded as 5.7.2002. The Board has also considered the evidence of C.W.1 Yashoda Singh, mother of the juvenile and C.W.2 Man Singh, incharge Principal, Shri Parashar Rishi Uchchtar Madhyamik Cidyalaya Paras, Gonda.

C.W. 1 Yashoda Singh has proved the date of birth of her son Uday Pratap Singh as 9.7.2002. She stated that Uday Pratap Singh had studied from class First to Fifth in Raghukul Vidya Peeth and at the time of his admission, she had got recorded his date of birth. Uday Pratap Singh has studied from Sixth to Tenth class in Parashar Rishi School.

C.W.2 Maan Singh also substantiated the date of birth of Uday Pratap Singh as 5.7.2002. The juvenile Uday Pratap Singh had taken his admission in Shri Parashar Rishi Uchchtar Madhyamik vidyalaya, Gonda in Class-IX and at the time of his admission, transfer certificate of Class-VIII was submitted in the school and the date of birth recorded in the transfer certificate was recorded in the school register, i.e. the scholar register which has been duly counter signed by District Inspector of Schools.

10. After considering all the certificates, evidence adduced before it as also the objections raised by the informant/revisionist, the Board by means of order under revision has declared the private respondent as juvenile.

Likewise, in the case of Pushpendra Singh, the Juvenile Justice Board after considering the transfer certificate issued by Shri Parashar Rishi Uchchtar Madhyamik vidyalaya, Gonda, the table register (Sarniyan Panjika) of Madhyamik Shiksha Parishad, U.P. Examination, 2018 which has been counter signed by the Principal and District Inspector of Schools, Gonda in which the date of birth of the accused has been recorded as 10.7.2002 as also the statement of C.W.1 Kiran, mother of Pushpendra Singh and C.W.2 Maan Singh, has come to the conclusion that Pushpendra Singh was a juvenile at the time of the incident, being his age as 17 years 8 months and 24 days.

11. The orders passed by the Juvenile Justice Board were challenged before the

learned lower appellate court who found no illegality in the orders passed by the Board and thus rejected both the appeals.

12. Section 94 of The Juvenile Justice (Care and Protection of Children) Act, 2015 provides the procedure to be followed by the courts or the Boards for the purpose of determination of age in every case concerning a child in conflict with law. The said provision is extracted below :

*"**94. Presumption and determination of age**.- (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.*

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

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

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

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

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

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

(Emphasised)

A perusal of sub section (2) of Section 94 provides that the Court or the Board shall determine the age by undertaking the process of age determination by seeking evidence by obtaining the date of birth certificate from the school, matriculation or equivalent certificate from the concerned examination Board if available, and in absence thereof and in case the certificate as given in Clause (i) above, is not available, then the birth certificate of a corporation or a municipal authority or a panchayat can be made the basis of determination of age of a juvenile. Further, in case the document(s) as given in clauses (i) (ii), above extracted, are not available, then the age shall be determined by an ossification test to be conducted on the order of the Board.

13. In the case in hand, the Board was having the matriculation certificate or equivalent certificate of the concerned examination and since they were available, there was no occasion for the Board to have gone into the other documents, such as birth certificate issued by the local bodies or even electoral roll etc.

14. The argument of the learned counsel for the revisionist that the juvenile

should have been produced before the Medical Board for ossification test is misconceived in the light of specific provision given in Clause (iii), above extracted, which provides that age shall be determined by an ossification test to be conducted on the order of the board in case the documents as provided in Clause (i) and (ii) of Sub Section (2) of Section 94 are not produced before the Board or the Committee as the case may be. The medical test of the minor is the last measure to be adopted by the Board or the Court in case no authentic document is available before it as provided in section 94 of the Act.

15. As regards the judgment in **Valajindra Kaur's case (supra),** particularly para 14 thereof, relied on by revisionist's counsel, it would be appropriate to refer the said para which is extracted below :

"14. The purpose of the above discussion is that the age of juveni1ity can be determined on the basis of high school certificate/marks-sheet or school record if there is no doubt with regards to genuineness and authenticity thereof. When there arises reasonable doubt in respect thereof, the same cannot be relied blindly and the court is empowered under law to ignore the same. "

From the above extracted finding, it is evident and has no doubt that the age of juvenality at the first instance can be determined on the basis of High School mark sheet or the school record in case there is no doubt regarding its genuineness or authenticity. The said document can only be ignored if there is any doubt about its genuineness.

16. In the present case, there was no doubt regarding the correctness of the matriculation certificate produced on behalf of the juvenile. The date of birth recorded in the High School certificate has been further fortified by the evidence of C.W.1 and C.W.2 and other educational cerficates. Thus, there was no occasion for the Board to have sent the accused/juvenile for ossification test.

17. As regards the argument that the learned Court below should have summoned the original document of the school in which the private respondents had first taken admission and the case relied on in this respect, i.e. **Atul Singh Sengar's** case (supra), it is significant to mention that in the case of Atul Singh Sengar, there were tampering and manipulation in the school register qua the date of birth of the accused/juvenile as also false averment was made by the accused and in those circumstances, the Court has relied on the date of birth as recorded in the school where the juvenile first attended. It is not the case here in the present case, as elaborated above and need not be repeated, and therefore, the case relied on by the learned counsel is also not applicable in the present case.

18. The judgment relied on by the learned counsel for the revisionist in the case of Irfan (supra) is also not of any help to the revisionist in the present case as the facts of the said case were quite different from the case in hand. In that case, a transfer certificate was filed by the applicant claimed to have been issued by Madan Junior Basic School with respect to his schooling prior to his admission in High School in Prem Prayag Kanya Inter College, Bhogaon, Mainpuri. A suspicion was raised on the veracity of the High

School record and the very important witness C.W.4 Principal of Madan Junior Basic School revealed that the juvenile had never studied in Madan Junior Basic School, Bhagaon, Mainpuri and the transfer certificate allegedly issued by the school is fake. In such circumstances the Juvenile Justice Board did not give effect to the date of birth found recorded in the High School certificate of the applicant and instead gave effect to the date of birth found recorded in the record of the Primary School, Muitra Chak.

19. Further, in this case, C.W.2 Maan Singh Incharge Principal of Shri Parashar Rishi Uchchatar Madhyalaya, Paras, Gonda has testified before the Juvenile Justice Board and has proved the date of birth of both the juveniles as correct as recorded in matriculation certificate.

20. Similarly, C.W.1 who are mother of the private respondents have adduced their evidence and have proved the date of birth of the juveniles.

21. Supreme Court in the case of **Sri Ganesh** versus **State of Tamilnadu and another** Criminal appeal No.39 of 2017 while relying on the judgment in Ashwani Kumar Saxena versus State of Madhya Pradesh (2012)9 SCC 750 has held in paras 32 and 33 as under :

"32. Consequently, the procedure to be followed under the J.J. Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under section 7A of the Act. Many of the cases, we have come across, it is seen that the Criminal Courts are still having the hangover of the procedure of trial or inquiry under the code if they are trying an offence under the Penal laws forgetting the fact that the specific procedure has been laid down in section 7A read with Rule 12.

33. We also remind all Courts/J.J. Board and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate etc. mentioned in Rule 12 (3) (a) (i) to (iii). The courts in such situations act as a parens patriae because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

34. "Age determination inquiry" contemplated under section 7A of the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

From the above extracted judgment, it is evident that only in absence of a matriculation or equivalent certificate or date of birth of the school first attended, the Court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The court further held that in case the above referred document is not available then only the age determination can be made on the basis of the report of the Medical Board constituted for the purpose.

22. As said above, in the present case, the matriculation certificate and the other school records as also the testimony of C.W.1 and C.W.2 were there before the Board, therefore, there was no occasion for the Board to call for the records of Primary School or the school where the juvenile had first attended. There was also no justification at all to send the juveniles for ossification test as the sufficient evidence was available before the Board to determine the age of the juveniles.

23. Section 102 of Indian Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability depends on existence of facts which he asserts, must prove that those facts exist. Thus, when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Thus, the burden of proof would ordinarily be on the party who asserts the affirmative of the issue.

24. In the present case, the case of juvenility has been proved by both the accused persons/private respondents. Contrary to it, the informant revisionist was under legal obligation to prove by cogent evidence that respondents No.2 were not juvenile. No evidence has been adduced by the informant/revisionist to discharge his burden that the respondents No.2 were not juvenile. The application filed by the Juveniles for declaration of their being a juvenile will fail only if both the parties do not adduce any evidence in view of Section 102.

25. In the present case, the date of birth figuring in the High School certificate has been endorsed and affirmed by C.W.1, mother of the private respondents as also by C.W.2 Maan Singh, Incharge, Head Master of Sri Parashar Rishi Higher Secondary School, Paras, district Gonda. The informant/revisionist has not filed any document to prove that the date of birth of Pushpendra Singh and Uday Pratap Singh is different than recorded in High School mark-sheet and certificate. During enquiry before the Board and before the learned appellate court, no evidence to show that the date of birth is different or they are not juvenile could not be shown by the informant/revisionist.

26. The High School certificate as per the Juvenile Justice Act as also the various judgments of this Court as well as Supreme Court is a reliable document to determine the date of birth of the juvenile. The determination of the age has been done according to the date of birth recorded in the matriculation certificate and the other evidence adduced before the Courts below. Unless some documentary proof or evidence is produced before the Board or the lower appellate court which may negate the correctness of the High School certificate and mark sheet, no irregularity or illegality can be fastened to the finding given by the Board or the lower appellate Court while declaring the accused as juvenile.

27. I find no irregularity or illegality in the concurrent finding of fact arrived at by the Juvenile Justice Board and the lower appellate court.

28. The revisions, being devoid of merit, are dismissed.

(2022)04ILR A592
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.04.2022

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Revision No. 189 of 2014

Sagir Ahmad ...Revisionist
Versus
The State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Arun Sinha, Siddharth Sinha

Counsel for the Opp. Parties:
Govt. Advocate

A. Criminal Law - The Court observed that the lower court has not taken into consideration the other circumstances available before him and passed the order solely on the basis of the St.ment of P.W. 1 and P.W. 3 which is not proper. (Para 15)

In absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation, cannot be a ground for conviction. (Para 13)

Revision Allowed. (E-10)

List of Cases cited:-

1. Anjan Kumar Sarma Vs St. of Assam (2017) 14 SCC 359

2. Brijendra Singh & ors Vs St. of Raj. (2017) 7 SCC 706

3. Arjun Marik & ors. Vs St. of Bihar 1994 Supp. (2) SCC 372

4. Hardeep Singh Vs St. of Pun.(2014) 3 SCC 92

5. Ravindra Nath Mishra Vs St. of U.P. Application under Section 482 bearing No. 6936 of 2019

6. Sartaj Singh Vs St. of Har. & anr. (2021) 5 SCC 337

7. Dev Wati & ors. Vs St. of Har. & ors. 2019 (195) AIC 225 (S.C.)

(Delivered by Hon'ble Brij Raj Singh, J.)

1. Heard Sri Arun Sinha, learned counsel for the revisionist and Sri Anurag Verma, learned AG.A. for the State and perused the record.

2. This Criminal Revision has been filed against the judgment and order dated 11.04.2014 passed by Additional Sessions Judge, Court No.8, Sitapur in Case S.T. No.772/2009, State versus Mainul Haq and others,arising out of Case Crime No.534/2009, Under section 302, 120-B I.P.C., Police Station- Khairabad, District-Sitapur, summoning the revisionist as accused under Section 319 Cr.P.C. to face trial under Section 302/120-B I.P.C. Further prayer has been made that the proceeding of the case may be stayed during the pendency of the present revision.

3. The complainant had moved an application on 11.04.2012 to summon the accused-revisionist in proceedings under Section 319 Cr.P.C. In the said application, the complainant submitted that the revisionist was named in the F.I.R. In the complaint, it is also alleged that there was dispute of land property in between Azra Rizvi and Sagir Ahmad(revisionist) and her husband was threatened by the revisionist.

It is further alleged in the application that in her cross examination before the trial court, she stated that when her husband went out from her house, she rang her husband after twenty minutes, who told her that Azra Rizvi, Sagir, Mainul Haq and 2-4 other persons were sitting with him. She further stated that it was the last seen evidence and on the basis of the said happening, the F.I.R. was lodged, but the police did not file chargesheet against the accused. It is further stated that the complainant (P.W. 1) and P.W.3-Misbahul Hasan have been cross examined and during the cross examination, P.W. 1 and P.W.-3 have specifically named the accused-revisionist. Therefore, he should be summoned and trial should be done.

4. The court below passed the impugned order dated 11.04.2014, by which the accused revisionist has been summoned, which has been challenged by the accused in present revision.

5. Learned counsel for the revisionist has submitted that the charge-sheet was filed against the accused, who committed the offence. It has been further submitted that there was no complicity for the offence found against the revisionist and, therefore, charge sheet was not filed against him, rather the chargesheet was filed against Mainul Haq s/o Ainul, Zahid s/o Munne Khan and Zunaid s/o Shoaib Ahmad. He further submitted that even if the statement of P.W. 1 and P.W. 3 are taken into consideration, no offence is made out because no evidence had been produced by them which indicates that the revisionist is involved in commission of offence. He has further submitted that P.W.1 has specifically mentioned the names Sagir s/o Munne Khan in the F.I.R. as well as in the statement but the revisionist is Sagir s/o Ali Ahmad and without ascertaining the parentage of the revisionist, the impugned order has been passed.

6. In support of his argument, he placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Anjan Kumar Sarma versus State of Assam; (2017) 14 SCC 359, Brijendra Singh and others versus State of Rajasthan; (2017) 7 SCC 706, Arjun Marik and others versus State of Bihar; 1994 Supp.(2) SCC 372, Hardeep Singh versus State of Punjab;(2014) 3 SCC 92 and one judgment passed by this Court in Application under Section 482 bearing No.6936 of 2019(Ravindra Nath Mishra versus State of U.P.).***

7. Learned counsel for the revisionist further submitted that the parentage of the revisionist is Sagir s/o Ali Ahmad, whereas P.W.1 has stated the revisionist as Sagir son of Muneer. The parentage of the revisionist has neither been identified nor verified and the name mentioned by P.W.1 is different because as per version of P.W.1 the accused is Sagir s/o Muneer. The statement of P.W.1 is annexed at page 44 of the paper book, which clearly indicates that the accused is Sagir s/o Muneer, whereas the application has been made against the accused whose name is Sagir, however, the father's name of the revisionist is Ali Ahmad.

8. Per contra, learned A.G.A. has invited the attention of this Court towards the F.I.R. in which the revisionist Sagir has been named. He has further submitted that from the statements and cross examination of P. W. -1 and P.W. 3, it is quite evident that the revisionist has committed the offence. In her statement, P.W.1 has stated that her husband got a call at 9:00 p.m. in

the night. On asking as to who called him, he told to his wife Smt. Sabira(complainant) that Mainul Haq s/o Ainul Haq called him at temple situated at Moti Jheel. After 20 minutes from his departure, she called her husband on phone who told her that he was in the company of Azra Rizvi, Sagir, Mainul Hasan and 2-4 other persons and thereafter phone was disconnected. It is further submitted by learned counsel for the State that P.W. 3 Misbahul Hasan, the brother of the deceased also narrated the same fact as stated by P.W. 2. He also deposed before the court below that he was standing at the gate of his house and saw a white car standing in front of the house in which Sagir, Zunaid and Mainul Haq were sitting.

9. Learned A.G.A. while relying on the judgment of the Hon'ble Supreme Court in the case of ***Sartaj Singh versus State of Haryana and another; (2021) 5 SCC 337 and Dev Wati and others versus State of Haryana and others;2019(195) AIC 225(S.C.)*** submitted that the Hon'ble Supreme Court has discussed the scope of Section 319 Cr.P.C and held 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 complicity of the persons against whom the court proceeds.

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

11. It is mentioned that when the case was investigated, the charge sheet was filed against three accused persons namely Azra Rizvi, Sagir, Mainul Hasan and the revisionist was not charge sheeted. The I.O. had recorded the evidence and weapon and after recording the statement, three persons, who committed the offence were charge-sheeted. Since the revisionist was not found in the complicity of the offence in any manner, therefore, the charge sheet was not filed. P.W. 1 and P.W. 3 have given statement before the court below during the examination-in-chief as well as cross examination, wherein they have mentioned that the revisionist might have committed the offence because before two months from the date of incident, he had threatened the deceased. P.W.3 also stated that he had seen the revisionist sitting in car in front of his house alongwith other persons, but no other act of commission of offence is mentioned by him. The accused Mainul s/o Ainul Haq confessed the offence and Banka(tabli) was recovered on his pointing out. The other associate Zunaid and Zahid were also involved in the crime against whom a charge-sheet was filed.

12. This Court has to see whether from the entire material available in the charge-sheet as well as in statement made by the prosecution witnesses, any offence is made out or any act of commission can be attributed.

13. The Hon'ble Supreme Court has considered the aforesaid aspect in various cases. The last seen evidence has been discussed in the case of *Anjan Kumar Sarma(supra)*, in which, it has been held that in absence of proof or other circumstances, the only circumstance of last seen together and absence of satisfactory explanation, cannot be a ground for conviction. Further in the case of ***Brijendra(supra),*** which is a matter pertaining to Section 319 Cr.P.C., the Hon'ble Supreme Court has laid parameter in Para 14 and 15 of the decision. The

Supreme Court has observed that the evidence recorded during the trial should be credible for commission of offence. Once the I.O. had collected the plethora of evidence and there is no act of commission of offence found against the person the trial court was at least duty bound to look into the same while forming opinion to summon. The relevant paragraph 14 and 15 are quoted below:

"14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 km. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 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 were 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 the agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

14. Similarly paragraph 31 of the case of ***Arjun Marik(supra)*** is also relevant to be seen, which is quoted below:

"31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together

with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded."

15. After looking into the material available on record, I found that the court below has not taken into consideration the other circumstances and material available before him collected by the I.O. and passed the order only on the basis of the statement of P.W. 1 and P.W. 3 which is not proper course. The trial court has also not verified/ identified the parentage of the revisionist whose father is Ali Ahmad whereas P.W. 1 has categorically stated in the examination-in-chief that the name of the accused is Sagir s/o Muneer, which is also to be enquired by the court below.

16. In view of the aforesaid discussion, I set aside the impugned order dated 11.04.2014 and remand the matter to the court below, who will pass fresh order within four months from today keeping in view the observations made hereinabove.

17. The revision is accordingly **allowed**. No order as to costs.

18. Office is directed to communicate this order to the court below for necessary compliance, forthwith.

(2022)04ILR A596
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.04.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Crl. Revision (D) No. 475 of 2008

Razia **...Revisionist**

Versus

State of U.P. **...Opp. Party**

Counsel for the Revisionist:
Ashok Kumar Srivastava

Counsel for the Opp. Party:
G.A., Abdul Jabbar

A. Criminal Law - Criminal Procedure Code, 1973: Section 125 - The divorced Muslim women is entitled to claim maintenance from her husband even after expiry of period of *iddat* as long as she does not remarry. (Para 11)

Revision Allowed. (E-10)

List of Cited cases:-

1. Danial Latifi & anr. Vs U.O.I. AIR 2001 SC 3958

2. Shabana Bano Vs Imran Kham Criminal Appeal No. 2309 of 2009 *(followed)*

3. Rajnesh Vs Neha (2021) 2 SCC 324 *(followed)*

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. The application seeks condonation of delay in filing the criminal revision.

2. Heard learned counsel for the revisionist and learned A.G.A. for the State.

3. None appears for respondent no.2.

4. Since cause shown in the affidavit filed in support of application for condonation of delay in filing the instant revision is satisfactory, the application for condonation is allowed and delay in filing the instant revision is hereby condoned.

(Order on the memo of Revision)

1. Heard Shri Avinash Srivastava holding brief of Shri Ashok Kumar Srivastava, learned counsel for the revisionist and learned A.G.A. for the State as well as perused the record.

2. None appears for respondent no.2. However, learned counsel for the revisionist submits that the present revision is pending since 2008 and even objections have not been filed by respondent no.2 and the matter has never been argued by respondent no.2.

3. The present revision has been filed against the judgment and order dated 11.4.2008 passed by learned Additional Sessions Judge, Court No.5, Pratapgarh passed in Criminal Revision No.54 of 2007, whereby the order of trial Court dated 23.1.2007 has been modified. The maintenance allowance of Rs.1000/- awarded in favour of the revisionist no.1 has been canceled or set aside and maintenance allowance in favour of revisionist nos. 2 and 3 has been reduced to Rs.250/- per month from Rs.500/- per month each.

4. Learned counsel for the revisionist submits that learned trial Court vide judgement and order dated 23.1.2007 has allowed the application under Section 125 Cr.P.C. filed by the revisionist after adjudicating five issues. All those issues have been decided in favour of the revisionist. Aggrieved by the order passed by the trial Court, respondent no.2 filed the revision before the revisional court, wherein the impugned order dated 11.4.2008 has been passed.

5. Submission of learned counsel for the revisionist is that the revisional Court has wrongly relied and misinterpreted the judgment of **Danial Latifi and another vs. Union of India** reported in AIR 2001 SC 3958 by allowing the revision. He submits that revision has been allowed only on the ground that since the revisionist no.1 has been divorced by respondent no.2 both are governed by The Muslim Women (Protection of Rights on Divorce) Act 1986 and therefore in view of judgment of Hon'ble Supreme Court in the case of Danial Latifi (supra), after enforcement of this Act, the divorced Muslim women is entitled to get maintenance under Section 3 and Section 4 of the aforesaid Act even after the stage of iddat and therefore she is not entitled to receive maintenance under Section 125 Cr.P.C. In support of his arguments, he has relied on the judgment of Hon'ble Supreme Court in the case of **Shabana Bano vs. Imran Khan** passed in Criminal Appeal No.2309 of 2009.

6. Learned counsel for the revisionist submits that till date not a single penny has been given by respondent no.2 to the revisionist.

7. On due consideration and perusal of the record as well as the impugned judgment passed by the trial court, it is not in dispute that respondent no.2 is a person of having sufficient means to maintain his divorced wife and minor children. Issue no.1 has been decided by learned trial Court in favour of the revisionist. Likewise he has neglected to maintain his wife and minor children. The revisionist is destitute and have no source of income and revisionist is entitled to get the maintenance allowance from respondent no.2 and consequently issue nos. 2 to 5

have been decided in favour of the claimant revisionist.

8. It appears that revisional court has modified the order passed by the learned trial court and maintenance allowance granted under Section 125 Cr.P.C. in favour of respondent no.1 has been set aside and the allowance granted in favour of respondent nos.2 and 3 have been reduced to Rs. 250/- from Rs. 500/- per month.

9. From perusal of the impugned order, it appears that the finding of fact regarding the monthly income of the respondent no.2 given by the learned trial Court has been substituted by the revisional Court by its own finding and a different finding, which, in my opinion, is not permissible, while exercising jurisdiction in the criminal revision. On this ground, the maintenance allowance awarded to the revisionists no.2 and 3 has been reduced to half, which is also not proper.

10. Learned revisional Court, while setting aside the maintenance allowance granted in favour of the revisionist no.1 by the trial court, has relied on the judgment of Hon'ble Supreme Court in the case of Danial Latifi (Supra). The finding given by learned revisional Court is extracted below:-

तलाक के बिन्दु पर पक्षकारों के विद्वान अधिवक्ता की ओर से काफी बहस की गयी है। निगरानीकर्ता के विद्वान अधिवक्ता की ओर से यह कहा गया है कि तलाकशुदा पत्नी किसी भी रूप में धारा 125 द०प्र०सं० के अन्तर्गत गुजारा भत्ता पाने को अधिकारिणी नहीं है। इस सन्दर्भ में निगरानीकर्ता के विद्वान अधिवक्ता ने मुस्लिम वोमेन प्रोटेक्शन आफ राइट आन डाइवोर्स एक्ट 1986 की धारा 03 तथा धारा 04 के प्रावधानों पर न्यायालय का ध्यान आकर्षित कराया। धारा 03 में यह कहा गया है कि जब मुस्लिम महिला को तलाक दिया जाता है तब वह मैहर तथा अन्य सम्पत्तियाँ पाने की अधिकारिणी होती है तलाक के समय पहले पति से यह इद्दत के पीरियड के अन्दर रिजनेबुल तथा पेपर एंव निर्वाह भत्ता पाने की अधिकारिणी होती है। यह सामान पहले वाले पति द्वारा वापस दिया जाता है। इसी प्रकार से धारा 04 में यह कहा गया है कि अपने पति से यदि यह निर्वाह भत्ता पाने में स्वयं को असमर्थ पाती है तो उसका निर्वाह भत्ता रिश्तेदार देगें। यदि वह लोग भी देने में सक्षम न हो तब मजिस्ट्रेट वक्फ अधिनियम की धारा 09 के अन्तर्गत राज्य वक्फ बोर्ड को आदेश दे सकता है कि तलाकशुदा पत्नी का निर्वाह भत्ता दिया जाय। निगरानीकर्ता के विज्ञान अधिवक्ता की ओर से नजोर 2001 वॉलूम 45 ए०एल०आर० पेज 426 डेनियल लतीफh आदि बनाम यूनियन आफ इंडिया दाखिल किया है यह नजीर माननीय उच्चतम न्यायालय के पाँच न्यायमूर्ति गण के द्वारा यह अभिनिर्धारित किया है कि यदि एक मुस्लिम औरत अपने पति के द्वारा तलाक पा लेती है और वह 125 सी०आर०पी०सी० के अन्तर्गत निर्वाह भत्ता उस पति से प्राप्त कर लेती है तो यदि यह अधिकार समाप्त कर दिया जो रिजनेबुल जस्ट तथा पेपर न होगा । माननीय उच्चतम न्यायालय के कहने का तात्पर्य है कि अधिनियम की धारा 09 व 04 के अन्तर्गत पति को अपनी तलाकशुदा पत्नी के भविष्य के लिये कुछ न कुछ निर्वाहन के लिये करना होगा। यह केवल इदत्त के समय को अवधि तक के लिये सीमित नहीं है । मुस्लिम तलाकशुदा औरत अपने रिश्तेदारों के विरूद्घ कार्यवाही कर सकती है कि यदि वे रिश्तेदार निर्वाह भत्ता देने में असमर्थ है तो मजिस्ट्रेट स्टेट वक्फ बोर्ड को आदेश निर्वाह भत्ता के लिये जारी कर सकता है। इस नजीर के अवलोकन से इस निष्कर्ष पर पहुँचा जा सकता है कि तलाक शुदा पत्नी अपने पूर्व पति से निर्वाह भत्ता पाने की अधिकारिणी नहीं है ।

- तलाक से सम्बन्धित तथ्य का उल्लेख पहले आ चुका है। कि निगरानीकर्ता ने पहली बार तलाक को बात अपने जबाब दावे में नहीं कही

बल्कि साक्षी नासिर अली जो निगरानीकर्ता की ओर से साक्षों के रूप में प्रस्तुत हुआ है उसने कहा है कि पक्षकारों के मध्य पहले तलाक हो तलाक का चुका था। तलाक के समय रजिया उस समय नकाब में नहीं थी तलाक जुबानी हुआ थाA तलाक में लिखापढ़ी नही हुई थी। इस साक्षी के कथनानुसार तलाक के समय रजिया उपस्तिथी यह तिथि 16-10-99 की थी जिस दिन रजिया के उपेक्षा एवं तिरस्कृत पूर्ण रवैये से क्षुब्ध होकर जैनुउद्दोन को तलाक देने की आवश्यकता हुई । इससे स्पष्ट है कि पक्षकारों के मध्य तलाक वैध रूप से प्रभावी है। इस तलाक के लिये रजिया को ही दोषी ठहराया जायेगा जैनुद्दीन को नहीं क्योंकि jजिया ही स्वेच्छा से मायके में रह रही है। निगरानीकर्ता के द्वारा दाखिल उपरोक्त नजीर के अवलोक्त से स्पष्ट है कि तलाकशुदा मुस्लिम महिला थारा 125 सी०आर०पी०सी० के अन्तर्गत पूर्व पति से जिसने मेहर तथा इदत्त की अवधि की पूरा पैसा अदा कर दिया है निर्वाह भत्ता पाने को अधिकारिणी नहीं है । मौजूदा केस में यही है कि निगरानीकर्ता ने रजिया को तलाक दे दिया है जिसके फस्वरूप रजिया निर्वाह भत्ता धारा 125 फौजदारी के अन्तर्गत पाने को अधिकारीणी नहीं है। निगरानीकर्ता यह स्वीकार करता है कि अपने दोनों बच्चों को निर्वाह भत्ता देने को तैयार है परन्तु अधीनस्थ न्यायालय में निगरानी कर्ता की आय को ध्यान में रखते हुए बहुत अधिक निर्वाह भत्ता की धनराशि प्रदान करने का आदेश पारित है।

माननीय उच्चतम न्यायालय ने रिजनेबुल एण्ड पेपर का सिद्न्त है कि वह धारा 03 मुस्लिम वोमेन प्रोटेक्शन आफ राइट आफडाइवोट एक्ट 1986 के अन्तर्गत पारित किया गया है। धारा 125] के प्राध्यान इस एक्ट के लागू हो जाने से मुस्लिम तलाकशुदा महिला का कोई वास्ता सरोकार नहीं रह जाता है। उक्त एक्ट की धारा 30 व 04 के अन्तर्गत वह इदरत की अवधि के पश्चात भी निर्वाह भत्ता अपने पूर्व पति से पा सकती है।

इस प्रकार उपरोक्त विवेचना के आधार पर मैं इस निष्कर्ष पर पहुॅचा हूँ कि विपक्षी संख्या 01 रजिया धारा 125 द०प्र०सं० के अन्तर्गत निर्वाह भत्ता पाने को अधिकारी नहीं है। विपक्षी संख्या 2 व 3 निगरानीकर्ता से निर्वाह पाने के अधिकारी हैं। अधीनस्थ PRITI निर्वाह भत्ता की धानराशि 500/= 500/- रूपये प्रदान के लिए आदेश पारित किया है वह इसिलए जो तर्कसंगत नहीं है कि निगरानीकर्ता को आय का एक मात्र साधन उसको वेतन है यह वेतन 1500/= रुपये प्रतिमाह है जिसे विपक्षी ने भी स्वीकार किया है। ऐसी दशा में विपक्षी सं० 2 व 3 के निर्वाह भत्ता की धनराशि पांच सौ रुपये से घटाकर 250/= 250/= रूपये निर्धारित किया जाना उचित एंव तर्क संगत प्रतीत होता है। फलस्वरूप निगरानी स्वीकार किये जाने योग्य है ।

आदेश

निगरानी स्वीकार की जाती है। अधीनस्थ न्यायालय का आदेश दिनांकित 23-01-2007 संशोधित किया जाता है। विपक्षी संख्या 01 के हक में निर्वाह भत्ता की धनराशि 1000/- रूपये समाप्त की जाती है विपक्षी 2 व 3 के हक में निवाह भत्ता दिये जाने की न्यू० धाराशि 500/-, 500/- रूपये से कम करके 250/= दो सौ पच्चास रूपये दिये जाने हेतु आदेश पारित किया जाता है। पक्षकार वाद व्यय स्वयं वहन करेगें पत्रावली अधीनस्थ न्यायालय को वापस भेजी जाय ।

11. Hon'ble Supreme Court in the case of **Sabana Bano (Supra)** has held that a divorced Muslim women can be entitled for divorce as long as she does not re-marry. Further, it has been held that provision under Section 125 Cr.P.C. are beneficial piece of legislation and the benefit thereof must accrue to the divorced Muslim women. It has also been held that the divorced Muslim women shall be entitled to claim maintenance from her husband under Section 125 Cr.P.C. even after expiry of period of iddat as long as

she does not remarry. Relevant paragraphs 29 and 30 of the judgment are extracted below:-

"29. Cumulative reading of the relevant portions of judgments of this Court in Danial Latifi (supra) and Iqbal Bano (supra) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.

30. In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry."

12. In view of the aforesaid judgement of **Sabana Bano (Supra**), I have no hesitation in holding that the view taken by the revisional Court is contrary to the law laid down by Hon'ble Supreme Court. The revisionist no.1 being a divorced Muslim women was entitled to claim maintenance under Section 125 Cr.P.C. There is no illegality in the order passed by the trial Court.

13. Accordingly, the impugned order passed by the learned revisional Court is set-aside in view of law laid down by Hon'ble Supreme Court in the case **Sabana Bano (supra).**

14. While passing the judgment, this Court has noticed that the maintenance has been awarded to the revisionist under Section 125 Cr.P.C. from the date of the order, which according to recent judgment of Hon'ble Supreme Court in Rajnesh vs. Neha and another reported in (2021) 2 SCC 324, should be paid from the date of application filed under Section 125 Cr.P.C. and therefore, judgment being retrospective in nature is applicable in present case.

15. Hence, the order passed by the learned trial court dated 23.1.2007 is also modified to the extent that the revisionist shall be paid maintenance by respondent no.2 from the date of filing of the application under Section 125 Cr.PC. Any amount already paid during the pendency of the proceedings under Section 125 Cr.P.C. by respondent no.2 shall be adjusted.

16. The present revision is, accordingly, **allowed**.

(2022)04ILR A600
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.04.2022

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Revision No. 650 of 2014

Dr. Ansar Ahmad Khan ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Party

Counsel for the Revisionist:
Arun Sinha, Siddharth Sinha

Counsel for the Opp. Party:
Govt. Advocate

A. Criminal Law - The Court did not find any reason for interference in the judgment of the lower court as the St.ment of the prosecutrix against the revisionist is clear. The Court upheld the law that in heinous crime like rape, a single testimony of the prosecutrix is sufficient for conviction. (Para 18)

Revision Dismissed. (E-10)

List of Cases cited:-

1. Anjan Kumar Sarma Vs St. of Assam (2017) 14 SCC 359

2. Brijendra Singh & ors Vs St. of Raj. (2017) 7 SCC 706

3. Arjun Marik & ors. Vs St. of Bihar 1994 Supp. (2) SCC 372

4. Hardeep Singh Vs St. of Punj. (2014) 3 SCC 92

5. Ravindra Nath Mishra Vs St. of U.P. Application under Section 482 bearing No. 6936 of 2019

6. St. of Mah. Vs Chandraprakash Kewal chand Jain AIR 1990 SC 658

7. St. of U.P. Vs Pappu @ Yunus & anr. AIR 2005 SC 1248

8. St. of Pun. Vs Gurmit Singh & ors. AIR 1996 SC 1393

9. St. of Orissa Vs Thakara Besra & anr. AIR 2002 SC 1963

10. St. of H.P. Vs Raghubir Singh (1993) 2 SCC 622

11. Wahid Khan Vs St. of M.P. (2010) 2 SCC 9

12. Rameshwar Vs St. of Raj. AIR 1952 SC 54

13. Phool Singh Vs The St. of M.P. Criminal Appeal No. 1520 of 2021

(Delivered by Hon'ble Brij Raj Singh, J.)

1. Heard Sri Arun Sinha, learned counsel for the revisionist and Sri Ravish Chandra Mishra, learned AG.A. for the State and perused the record.

2. This Criminal Revision has been filed for setting aside the summoning order dated 03.07.2013 passed by Additional District & Sessions Judge, TECP-3, Lucknow in S.T. No.552/2012, State versus Deepak Verma arising out of Case Crime No.14/2012 of Police Station-Para, Lucknow summoning the revisionist as accused under Section 319 Cr.P.C. to face trial under Section 366/323/343/506 I.P.C.

3. The A.P.O. had moved application under Section 319 Cr.P.C. with averment that P.W. 1 - Jahanvi Yadav, P.W.2-Smt. Pammi Yadav and P.W.3-Km. Aarti have been examined by the court and their cross examination have also been recorded. The application under Section 319 Cr.P.C. is made to the effect that after looking into the statement of P.W.2- Arti recorded under Section 164 Cr.P.C. before the court, the complicity of Dr. Ansar Ahmad Khan in furtherance of the offence is found. Therefore, a prayer was made to summon the revisionist for trial. It has been further submitted that in the case of rape, no other evidence is required and the statement of the prosecutrix is sufficient. The prosecutrix had stated that the accused Deepak Verma had brought her to the clinic of Dr. A.A. Khan, the revisionist on the pretext that he will provide job to her with good emolument. She reached to the clinic of the revisionist at 6:00 p.m., where they asked her to go to the operation theater, which was situated in the basement. When she reached to the operation theater, nobody was present there. When she protested and asked them to allow her to go, she was beaten by the revisionist and Deepak Verma. As per statement of the prosecutrix, she was caught hold by the doctor i.e. the revisionist. She further stated that she heard the arguments between the revisionist-Dr. A.A. Khan and Deepak Verma and they were having dispute on the question that who will firstly commit

sexual intercourse with her. On the application of the public prosecutor, the court had summoned the revisionist by order dated 03.07.2013.

4. Learned counsel for the revisionist has submitted that I.O. investigated the matter and collected the evidence and submitted his report. However, he did not find any evidence against the revisionist and the chargesheet was only filed against the co-accused Deepak Verma. He has submitted that on the date of occurrence, the revisionist had gone to Delhi alongwith his patient. He has produced the train ticket, chart of the railway, the statement of the patient, who had accompanied along with Dr. A.A.Khan at Delhi. Statement of the patient was recorded and the I.O. found that on the date of occurrence, the revisionist was not present at the place of occurrence and he was falsely implicated, hence, charge-sheet was filed only against Deepak Verma, the co-accused. He further submitted that while issuing the summoning order, the court below has overlooked the material of the charge-sheet collected by the I.O.

5. In support of his submissions, learned counsel for the revisionist has placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Anjan Kumar Sarma versus State of Assam; (2017) 14 SCC 359, Brijendra Singh and others versus State of Rajasthan; (2017) 7 SCC 706, Arjun Marik and others versus State of Bihar; 1994 Supp.(2) SCC 372, Hardeep Singh versus State of Punjab;(2014) 3 SCC 92*** and one judgment passed by this Court in ***Application under Section 482 bearing No.6936 of 2019(Ravindra Nath Mishra versus State of U.P.***).

6. In the case of ***Brijendra Singh (supra),*** which is a matter pertaining to Section 319 Cr.P.C., the Hon'ble Supreme Court has laid parameter in Para 14 and 15 of the decision. The Supreme Court has observed that the evidence recorded during the trial should be credible for commission of offence. Once the I.O. had collected the plethora of evidence and there is no act of commission of offence found against the person the trial court was at least duty bound to look into the same while forming opinion to summon. The relevant paragraph 14 and 15 are quoted below:

"14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 km. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 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 were 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 the agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

7. Similarly, it has been argued by the counsel for the revisionist that the ratio in case of ***Arjun Marik (supra)*** is also applicable to the case in hand and he has relied upon the relevant portion of the said judgment which is quoted below:

"Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded."

8. Per contra, learned A.G.A. has submitted that in case of rape, single testimony of prosecutrix is sufficient for conviction. The prosecutrix has specifically mentioned the name of the revisionist, who injected her due to which she became unconscious. She has further stated that she was beaten by Dr. A.A.Khan. Thus, since the evidence is made out against the revisionist and there is direct evidence of the Act of the commission of offence, therefore, revision is liable to be dismissed.

9. The prosecutrix was brought before the court and her statement was recorded under Section 164 Cr.P.C. on 27.02.2012. She stated before the Court that co-accused Deepak made promise to get her employed in the Clinic of Dr.A.A. Khan(revisionist), who will provide her sufficient salary. She has stated that she reached at the clinic of Dr.Khan at 6:00 p.m. on 23.01.2012, where Dr.Khan and co-accused Deepak Verma had beaten her and threatened to kill her. She further mentioned that Deepak Verma committed rape with her in the clinic of Dr. A.A. Khan. She has further stated that when she shouted Dr.Khan injected anesthesia and she was kept in confinement for seven days. The said statement under Section 164 Cr.P.C. clearly indicates the direct evidence against the revisionist. The prosecutrix Km.Aarti was examined before

the Court and her statement is quoted below:

"नाम – कु0 आरती उम्र – 18 वर्ष पुत्री श्री मुन्ना, निवासी – म0न्र0–31/4 काशीराम कालोनी, पारा थाना पारा, जिला–लखनऊ ने सशपथ बयान दिया कि –

घटना दिनांक 23.1.2012 समय 6.00 बजे शाम की है, उस दिन मैं क्लीनिक पर जॉब करने कई थी। डॉ0 शुभम क्लीनिक पर मैं काम करती थी, वहाँ पर डॉ0 ए0ए0 खान व दीपक वर्मा वहां आते थे। दीपक वर्मा ने मुझसे कहा कि तुम्हे कितनी तनख्वाह मिलती है। मैंने बताया कि 2000/– रू0 यहां मिलता है। वह कहने लगा कि अगर तुम्हे काम करना है तो मेरे यहां कर लो वहां दोगुना पैसा मिलेगा। उस हास्पिटल का नाम वीनस नर्सिंग होम है। 23 तारीख को घटनावाले दिन मैं वीनस नर्सिंग होग जॉब के लिये गई थी। वहां पर वीनस नर्सिंग होम का बड़ा सा बोर्ड लगा था मैं अन्दर चली गई जब मैं वहां पर गई तो वहां पर डॉ0 ए0ए0 खान व दीपक वर्मा मौजूद थे। उन्होने कहा कि तुम्हे यहां पर पर्चा बनाना पड़ेगा और 4000/– रू0 देंगे अगर काम करना है तो अभी दीपक वर्मा के साथ जहां ऑपरेशन होता है तो वह जगह देख लो तो मैं दीपक वर्मा के साथ जाकर चली गई। जब मैं वहां पहुंची तो वहां पर कोई मरीज नहीं था एकदम तहखाने जैसा था। यह देखकर मैंने कहा कि मैं यहां काम नहीं कर पाउँगी हम जा रहे हैं। उसके बाद दीपक वर्मा ने मुझे एक तमाचा मारा और कहने लगा कि तुम्हे कहीं जाने की जरूरत नहीं है तुम यहीं रहोगी। मैंने चिल्लाने की कोशिश की तो डॉ0 खान भी वहां आ गये। उसके बाद डॉ0 खान व दीपक वर्मा ने मुझे बहुत मारा–पीटा डॉ0 खान ने रिवाल्वर निकालकर धमकी दी कि अगर यहां से भागने की कोशिश करोगी तो तुम्हे जान से मार देगें। उसके बाद दीपक वर्मा व डॉ0 खान ने मुझे बांध दिया मेरा मुँह दबाया और कहने लगे कि चुप–चाप रहे यहां से जाने नहीं देगे। फिर डॉ0 खान वहां से चले गये और आपस में बाहर लड़ाई करने लगे कि पहले मैं गलत काम करूंगा दोनो अपने–अपने को पहले गलत काम करने के लिये लड़ाई करने लगे। फिर थोड़ी देर में आये और डॉ0 खान ने मुझे किसी चीज की सुई लगा दी और वो वहां से चले गये। दीपक वर्मा ने मेरे साथ गलत काम किया। अपने पेशाब की जगह मेरी पेशाब की जगह में डाली। उसके बाद मुझे जब होश आया तो मैं एक गांव में थी। उस गांव का नाम नहीं पता। वहां पर दीपक वर्मा ही था। दीपक वर्मा ने नर्सिंग होम में 7 दिन गलत काम किया था और गांव में भी 6–7 दिन गलत काम किया था। उसने हमारी वी0डी0ओ0 भी मोबाइल से गांव में बनाई थी। पुलिस ने मुझे बुद्धेश्वर चौराहे से दिनांक 9 तारीख दूसरा महीना सन् 2012 को बरामद किया था। उस समय मेरे साथ दीपक भी था जिसे गिरफ्तार किया गया था। मेरी डाक्टरी बरामदगी के दिन ही हुई थी। डाक्टरी कराने मेरे साथ मम्मी और महिला पुलिस गई थी। डॉ0 ने वहां मेरा निशानी अंगूठा लगवाया था। उसके बाद दूसरे दिन थाने से मुझे मेरी मम्मी के साथ भेज दिया था। मैं इस समय बी0बी0ए0 कर रही हूँ। घटना के वक्त मैं इण्टर फर्स्ट इयर में मोती लाल नेहरू मेमोरियल गर्ल्स इण्टर कॉलेज में पढ़ती थी। मेरी जन्मतिथि 22.09.94 है। मैंने हाईस्कूल भी इसी स्कूल से किया था। मजिस्ट्रेट साहब के सामने मेरा बयान हुआ था। अभियुक्त दीपक वर्मा ने मेरे साथ जो गलत काम किया था वह मेरी इच्छा कें विरूद्ध किया था। वह धमकी देता था कि विरोध करोगी तो तुम्हारे घर वालों को मार डालूगां और विडियो दिखाने की भी धमकी देता था। गवाह को 164 द0प्र0सं0 का बयान पढ़कर सुनाया गया तो गवाह ने कहा कि यह बयान मजिस्ट्रेट साहब को दिया था जिस पर मेरे हस्ताक्षर है। दरोगा जी ने मुझसे पूंछ–ताछ किया था। यही बातें मैंने दरोगा जी को बताई थी।"

10. On perusal of the statement made by prosecutrix before court, it is amply clear that there is complicity of the offence found against the accused-revisionist. He had injected anesthesia on the body of prosecutrix and he also gagged her mouth and threatened her. It is thus clear that the statement of the prosecutrix is very clear, which is direct evidence against the revisionist and there is no iota of doubt regarding the offence committed by the revisionist.

11. In ***State of Maharashtra Vs. Chandraprakash Kewalchand Jain*** AIR 1990 SC 658, this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under :-

"A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot

be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

12. In ***State of U.P. Vs. Pappu @Yunus & Anr. AIR 2005 SC 1248***, this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under :-

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do."

13. In ***State of Punjab Vs. Gurmit Singh & Ors***. AIR 1996 SC 1393, this Court held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and

it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under :-

"The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix?

The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.....The courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.....Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury.....Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

** ** ** **

The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

14. In ***State of Orissa Vs. Thakara Besra & Anr.*** AIR 2002 SC 1963, this Court held that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

15. In ***State of Himachal Pradesh Vs. Raghubir Singh*** (1993) 2 SCC 622, this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity.

16. A similar view has been reiterated by this Court in **Wahid Khan Vs. State of Madhya Pradesh (2010) 2 SCC 9**, placing reliance on earlier judgment in Rameshwar Vs. State of Rajasthan AIR 1952 SC 54.

17. In another case the Supreme Court in ***Phool Singh Vs. The State of Madhya Pradesh*** [*Criminal Appeal No. 1520 of 2021*, decided on 01.12.2021], has taken the similar view in respect of the sole testimony of the prosecutrix, which follows as under:

"5.1 At the outset, it is required to be noted that in the present case, the prosecutrix has fully supported the case of the prosecution. She has been consistent right from the very beginning. Nothing has been specifically pointed out why the sole testimony of the prosecutrix should not be believed. Even after thorough cross-examination, she has stood by what she has stated and has fully supported the case of the prosecution. We see no reason to doubt the credibility and/or trustworthiness of the prosecutrix. The submission on behalf of the accused that no other independent witnesses have been examined and/or supported the case of the prosecution and the conviction on the basis of the sole testimony of the prosecutrix cannot be sustained is concerned, the aforesaid has no substance."

18. So far the other arguments advanced by learned counsel for the revisionist that the material of the charge-sheet should be taken into consideration, does not conspire confidence. In my opinion, the statement of prosecutrix against the accused-revisionist is clear and there is no iota of doubt. The order passed by the Court below needs no interference and there is no need to discuss the other material filed by the I.O. while filing the report before the court below. The plea of alibi will be subject to further evidence and at this moment, I cannot infer that the revisionist was absent and he had gone to Delhi because the evidences to that effect are subject to further examination before the trial court. It is also a settled law that in case of heinous crime like rape, a single testimony of the prosecutrix is sufficient for conviction.

19. In such circumstances, the impugned order dated 03.07.2013 does not suffer from any illegality or infirmity and is based upon relevant considerations and supported by cogent reasons,hence requires no interference by this Court. The revision is accordingly **dismissed**. However, it is made clear that the court below will not be influenced with any observations made by this Court.

20. Office is directed to communicate this order to the court below for necessary compliance, forthwith.

(2022)04ILR A607
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.04.2022

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Revision No. 758 of 2021

Amarjeet ...Revisionist
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Revisionist:
Vivekanand Misra, Ravindra Kumar Dwivedi

Counsel for the Respondents:
G.A., Rama Pati Shukla

A. Criminal Law - The Court did not find any irregularity in the order dated 26.03.2019 passed by the Juvenile Justice Board, Sultanpur wherein the public prosecutor in compliance with the government order dated 25.06.2014 moved an application under Section 321 Cr.P.C. withdrawing the pending case against the juvenile opposite parties. The application for withdrawal was moved in good faith keeping in mind the future of the children. (Para 14)

Revision Rejected. (E-10)

List of Cases cited:-

1. Ram Narayan Yadav Vs St. of U.P. & Ors. Criminal Misc. Writ Petition No. 10816 of 2015

2. V.L.S. Finance Ltd. Vs S.P. Gupta & anr. (2016) 3 SCC 736

3. Bairam Murlidhhar Vs St. of A.P. AIR 2014 SC 3437

(Delivered by Hon'ble Brij Raj Singh, J.)

1. Heard Sri R.K.Dwivedi, learned counsel for the revisionist, Sri Rama Pati Shukla, learned counsel for the opposite party nos. 2 and 3 and Sri Anurag Verma, learned AG.A. for the State and perused the record.

2. This Criminal Revision has been filed against the judgment and order dated 26.03.2019 passed by learned Juvenile Justice Board, District-Sultanpur in Juvenile Case No.83 of 2013 arising out of Case Crime No. 668 of 2012, under Section 325, 323, 504, 427, 352 of I.P.C. and Section 3(1)(X) of S.C./ S.T. Act, Police Station- Kurwar, District Sultanpur "State versus Amar Bahadur and another" as well as order dated 24.08.2021 passed by Sessions Judge, Sultanpur in Criminal Appeal No.37 of 2021 "Amarjeet versus State of U.P. and others".

3. The State of U.P. had issued Government Order on 25.06.2014 addressed to the District Magistrate, Sultanpur, in which decision has been taken that after looking into the facts and circumstances, the State Government has decided to withdraw the Case Crime No.668/2012, under Section 325, 323, 504, 427, 352 I.P.C. and Section 3(1)(x) SC/S.T.Act, Police Station-Kurwar, District-Sultanpur. The said Government Order further envisages that Government has taken decision to direct the Public Prosecutor to withdraw the case in the court.

4. In pursuance of the Government Order dated 25.06.2014, the application dated 12.02.2015 was filed under Section 321 Cr.P.C. to the effect that aforesaid case pending against the opposite party nos. 2 and 3 may be withdrawn. It is stated in the application that the opposite party nos. 2 and 3 are juvenile. Therefore, in the interest of justice, it would be appropriate that the case may be withdrawn so that they may come in the main stream of the society. The application further indicates that in the interest of society, it is needed that the opposite party nos. 2 and 3, being child, may not be prosecuted. It is further mentioned in the application that it is a case of sudden quarrel and by persuing the present case, their future will be hampered.

5. On the said application under Section 321 Cr.P.C., the case was heard by the Court of Juvenile Justice Board on 26.03.2019 and the application was allowed acquitting opposite party nos. 2 and 3 from

the charges. Being aggrieved against the order dated 26.03.2019, the revisionist filed an appeal before District Court, Sultanpur, which was also dismissed on 24.08.2021 by the Sessions Judge, Sultanpur. Being aggrieved against both the orders, the present revision has been preferred before this Court.

6. Prior to discussing the merits of the case, I have to discuss the order dated 24.08.2021 passed by the District and Sessions Judge, Sultanpur. The District & Sessions Court, Sultanpur has held that against the order dated 26.03.2019, the appeal is not maintainable. It is noted here that there is provision of revision under Section 102 of Juvenile Justice (Care and Protection) Act 2015(hereinafter referred to as the Act of 2015). The power of revision under Section 102 of the Act of 2015 is similar to power under Section 397 Cr.P.C.. Once the revision is provided against the order of Juvenile court under Section 102 of the Act of 2015, there was no occasion to the revisionist to file appeal against the order dated 26.03.2019. Therefore, the order passed by the Sessions Court dated 24.08.2021 is perfectly alright and needs no interference.

7. The revisionist has challenged the order dated 26.03.2019, which is the order passed by the Juvenile Justice Board, Sultanpur and, admittedly, he was pursuing the remedy before the Sessions Court, Sultanpur in appeal, which was not maintainable. Therefore in the revisional jurisdiction of Section 102, I am going to look into the legality of the order dated 26.03.2019.

8. Learned counsel for the revisionist has submitted that the order passed by the Court of Juvenile Justice Board dated 26.03.2019 is not sustainable in the eyes of law because the court below has not applied its mind and the nature of the crime is serious. It has been further argued that Public Prosecutor is required to act in good faith, which was not done in the present case.

9. Learned counsel for the revisionist has relied on three judgements, ***Criminal Misc. Writ Petition No.10816 of 2015(Ram Narayan Yadav versus State of U.P. & Others, V.L.S. Finance Limited versus S.P.Gupta and another; (2016) 3 SCC 736 and Bairam Muralidhar versus State of Andhra Pradesh; AIR 2014 SC 3437*** in support of his submissions.

10. Per contra, learned counsel for the respondent no.2 and 3 Sri R.P. Shukla has argued that as per Section 2 (15)(33), the definition Clause of Act of 2015 itself is supporting the case of the opposite party nos. 2 and 3 and being children, friendly behaviour was required so that they may make their good future and become good citizen of the country. Therefore he submitted that the Board has not committed any error.

11. Sri Anurag Verma, learned A.G.A. has submitted that the revisional power under Section 102 of the Act of 2015 is akin to Section 397 of Cr.P.C.. He submitted that the Court can only look into the legality and perversity of the order passed by the court below. He further submitted that the Public Prosecutor has acted in good faith by applying his mind and he moved detailed application to withdraw the case under Section 321 Cr.P.C.. He further submitted that the Government Order dated 25.06.2014 is the Government Order issued by the State of U.P. after due consideration and the Public

Prosecutor was directed to file application and, thus,there is no illegality and infirmity in the procedure for withdrawal of the case under Section 321 Cr.P.C.

12. In the present case, it is admitted on record that opposite party nos. 2 and 3 have been declared juvenile by the Court of Juvenile Justice Board. The opposite party no.2 was declared aged about 15 years 5 months on the date of the incident, i.e., on 11.07.2012. The purpose of Act 2015 is very relative in the present case, wherein it is provided that the accused children should be given friendly atmosphere and their future interest should be paramount. Both the children i.e. opposite party nos. 2 and 3 were school going and their future may have been hampered, in case, criminal cases were to be allowed for trial.

13. The judgement cited by learned counsel for the revisionist (supra) have no relevance in the present case. In the case of ***V.L.S. Finance Limited versus S.P.Gupta and another***, the Court has pronounced that while dealing with application preferred under section 321 Cr.P.C., the Public Prosecutor is required to act in good faith. Similar view has been expressed in case of ***Bairam Muralidhar versus State of Andhra Pradesh and Ram Narayan Yadav versus State of U.P. & Others***, wherein it is held that Public Prosecutor has to apply his mind to the facts of the case independently.

14. The judgment cited by learned counsel for the revisionist are supporting the case of the respondent nos. 2 and 3, because in the present case, the Public Prosecutor has presented the detailed application in pursuance of the Government Order dated 25.08.2014 and the court has observed that in the interest of justice, children should be set free so that they may serve the society and their career may not be hampered. There is nothing on record which indicates that Public Prosecutor did not apply his mind while presenting the application, rather he acted in good faith and opposite party nos. 2 and 3, being children, have been rendered liberal approach by the State Government as well as Public Prosecutor so that they may become good citizen of the country.

15. The aim and object of the Act of 2015 is also very important in the present withdrawal of criminal case because the Act has been promulgated not to treat the children as criminal.

16. In view of above, the order passed by the Court of Juvenile Justice Board dated 26.03.2019 and 24.08.2021 passed by Session Judge are perfectly alright and needs no interference. The revision is accordingly **dismissed**. No order as to costs.

(2022)04ILR A610
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJNISH KUMAR, J.

Crl. Misc. Writ Petition No. 3192 of 2022

Vikash Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shivam Shukla, Rahul Srivastava

Counsel for the Respondents:
G.A.

A. Criminal Law - Constitution of India, 1950-Article 226 - Uttar Pradesh Gangsters and Anti-Social activities (Prevention) Act, 1986-Section 14(1)-rejection of representation for release of vehicle-writ petition filed directly against the order of attachment and rejection of representation without availing the remedy before the court concerned is not maintainable-Interference by the Writ Court would not be warranted at this stage, inasmuch as orders of administrative authority are yet to attain finality under the Act, 1986-At this stage, petition is not maintainable-petitioner can raise all legal and factual issues during course of inquiry u/s 17 of the Act, 1986.(Para 1 to 21)

B. Attachment of property is permissible u/s 14 of the Act by the District Magistrate where he has reason to believe that such property, whether movable or immovable, has been acquired by a gangster as a result of commissioning of offence. Upon conducting the inquiry the concerned court would adjudicate the question as to whether the property is acquired by a Gangster by commissioning offence triable under the Act, 1986-The determination made by the Court is then subjected to appeal contemplated u/s 18 of the Act, 1986.(Para 1 to 20)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Badan Singh Vs St. of U.P. & ors. (2001) 43 ACC

2. Afzal Begum Vs St. of U.P. (2012) 1 ACR 456

3. Whirlpool Corp. Vs Registrar of Trade Marks, Mumbai (1998) 7 JT SC 243

4. L. Chandra Kumar Vs U.O.I. & ors. (1997) AIR 3 SCC 261

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

1. This Writ Petition has been filed under Article 226 of the Constitution of India challenging the orders dated 10.9.2021 and 9.12.2021, passed by the District Magistrate, Azamgarh in case No. 630 of 2021 (Computer Case No. 0202115090000630) State Vs. Vikas Yadav alias Guddu under Section 14 (1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as the 'Act of 1986') whereby petitioner's representation for release of his vehicle (Truck bearing registration number UP 61AT 2942) attached under Section 14 of the Act of 1986, has been rejected.

2. Arguments are advanced on behalf of petitioner to submit that the District Magistrate has failed to take note of relevant materials on record and the scheme of the Act has not been correctly applied. It is also urged that application of mind on part of the District Magistrate is lacking which renders the orders impugned otherwise wholly arbitrary. Reliance is placed upon judgments of this Court in Badan Singh Vs. State of U.P. and others, 2001 (43) ACC as also in Afzal Begum Vs. State of U.P. 2012 (1) ACR 456 to submit that the orders impugned are liable to be quashed.

3. Learned A.G.A., on the other hand, opposes the prayer made in the writ petition, primarily on the ground that the petition is not maintainable, at this stage, inasmuch as the factual inquiry contemplated by the Court is yet to be undertaken and the petitioner has otherwise not exhausted the remedies available to him as per the Act of 1986. Attention of the Court has been invited to Sections 14 to 18 of the Act of 1986 in order to submit that after attachment of property is made and

representation against it is rejected (as is the case here) the person aggrieved i.e. petitioner herein, has the remedy available under the Act of 1986 to approach the Court hearing cases arising out of the Act of 1986, for an appropriate order in the matter, on the basis of enquiry conducted in the matter on the issue as to whether the property in question is acquired by a gangster, from the proceeds of crime triable under the Act of 1986, or not? The determination by Court on the above question remains subject to an appeal contemplated under Section 18 of the Act of 1986 and the writ petition filed directly against the order of attachment and rejection of representation without availing the remedy before the Court concerned is not maintainable. Submission thus is that interference by the Writ Court would not be warranted at this stage, inasmuch as orders of administrative authority are yet to attain finality under the Act of 1986.

4. We have heard Sri Rahul Srivastava, advocate for the petitioner and learned A.G.A. for the respondents and perused the materials brought on record.

5. In order to appreciate the arguments advanced it would be worth referring to the statutory scheme contained in Sections 14 to 18 of the Act of 1986, providing for attachment and release of properties. Attachment of property is permissible under Section 14 of the Act of 1986 by the District Magistrate, where he has reason to believe that such property, whether movable or immovable, has been acquired by a gangster as a result of commissioning of offence triable under the Act of 1986. The provisions of Code of Criminal Procedure are held applicable by virtue of sub-section (2). Sub-section (3) of Section 14 contemplates appointment of an Administrator for managing the property attached under Section 14 (1) of the Act while sub-section (4) of Section 14 provides for police help to the Administrator for proper and effective administration of such property. Any person aggrieved by attachment of property under Section 14 is entitled to make a representation against the order of attachment, under sub Section (1) of Section 15 of the Act of 1986, showing the circumstances and the sources by which such property was acquired to dislodge the opinion formed by the administrative authority that the property has been acquired from the proceeds of crime triable under the Act of 1986.

6. Sub-Section (2) of Section 15 provides that if the District Magistrate is satisfied with the genuineness of the claim made under sub Section (1), he shall release the property from attachment to the claimant. However, where such a representation is not accepted or if no representation is made, the matter is referred by the District Magistrate alongwith his report to the Court, having jurisdiction to try an offence under Section 16(1) of the Act of 1986. Sub Section (2) of section 16 of the Act of 1986 also provides that where the District Magistrate refuses to attach any property or has ordered for release of such property, the State Government or any person aggrieved by such refusal or release shall also have remedy of approaching the Court for an inquiry on the question as to whether property, which is the subject matter of attachment, has been acquired by proceeds of crime, as a result of commissioning of any offence triable under the Act of 1986. On receipt of such reference or application, the Court is required to fix a date for inquiry after giving notice and for such

purposes the Court, while conducting inquiry will have the power of Civil Court. Based upon the inquiry so conducted, the concerned Court would adjudicate the question as to whether the property is acquired by a Gangster by commissioning offence triable under the Act of 1986. The determination made by the Court is then subjected to appeal contemplated under Section 18 of the Act of 1986.

7. The statutory scheme, noticed above, has a specific purpose to achieve inasmuch as the determination made by administrative authorities about property in question having been acquired by a gangster from proceeds of crime, triable under the Act of 1986, is made subject to a judicial enquiry by the competent court, which is entrusted with the powers of civil court to determine the factual and legal issues, finally, subject to an appeal under Section 18 of the Act of 1986. The object of conferring such power upon the court is to check arbitrary exercise of power by the administrative authorities and to ensure that none is deprived of his property except in accordance with law. Since the powers of court for undertaking such enquiry is wide and comprehensive and is otherwise efficacious and effective, we find no reason not to allow the issues to be determined in the manner stipulated in the Act of 1986 and refrain from entertaining a petition for judicial review under Article 226 of the Constitution of India.

8. In light of the above deliberations, we would not be inclined to entertain the present writ petition, at this juncture, directly against the order of District Magistrate and to embark upon a factual and legal inquiry in the matter, which is yet to be undertaken by the Court authorised to do so, at the first instance and thereafter by the appellate court.

9. Learned counsel for the petitioner has relied upon the judgment of learned Single Judge of this Court in Badan Singh (supra), wherein the Court proceeded to observe as under in para-18:-

"18. Chapter XXIX of the Code of Crimi nal Procedure, 1973 under caption "Appeal" contains twenty three sections running from Ss. 372 to 394. Section 372 provides that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force. Section 373 makes provision for appeal against order passed under S. 117 and 121, Cr. P.C. Under S. 374 appeal lies to the Supreme Court and the High Court against the order of conviction. Section 375 bars appeal against the order of conviction on the accused admitting his guilt. Section 376 provides that no appeal shall lie in petty cases, Under S. 377 right has been conferred on the State Government to move in appeal against inadequacy of sentence. Section 378 provides for filing appeal against the order of acquittal. Section 379 makes provision for appeal to the Supreme Court aginst the order of the High Court reversing acquittal to conviction. Special right to appeal in certain cases is provided under S. 380. Section 381 and 382 prescribe the procedure for filing of appeal in the Court of Sesions and the manner of hearing. The Act is a penal Statute and Section 3 thereof prescribes punishment to be awarded to a gangster as well as public servant redering illegal help or support to a gangster. No separate procedure is prescribed to challenge the order of conviction or acquittal passed by the Special Judge in exercise of power conferred by the Act. So on a conspectus of Chapter XXIX, Cr. P.C. and Ss. 3 and 18 of the Act what appears is that appeal would

lie against the order of conviction or acquittal under the Act and not against the order of attachment of the District Magistrate or the order of the Special Court on the reference made by the District Magistrate. Even assuming that Section 18 has the application and orders of the District Magistrate and the Special Court can be challenged by way of appeal yet I would hold that the writ petition under Art. 226 of the Constitution is maintainable when the very order of attachment passed by the District Magistrate is illegal, arbitrary and without jurisdiction. For arriving at such conclusion, I derive support from the decision of the Apex Court in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai, (1998) 7 JT (SC) 243 : ((1998) 8 SCC 1 : AIR 1999 SC 22) where it is laid down that availability of effective and efficacious remedy will not operate as bar to approach the High Court under Art. 226 of the Constitution in at least three contingencies, namely where writ petition has been filed for enforcement of fundamental rights, or where there has been violation of principle of natural justice or where the order or proceedings are without jurisdiction or vires of an Act is challenged."

10. The observations contained in the aforesaid paragraph proceeds on two premises; firstly, the Court has opined that the appeal stipulated under Section 18 of the Act of 1986 since refers to the applicability of the provisions of Chapter-XXIX of the Criminal Procedure Code, which is limited to an order of acquittal or conviction, therefore, no appeal would lie against the determination made by the judicial forum on the question as to whether the property subjected to attachment has been acquired by a Gangster as a result of commissioning of an offence triable under the Act and secondly, the Court has observed that even if such a remedy of appeal lies, yet the remedy before the Writ Court would not be ousted in view of the law laid down by the Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai (1998) 7 JT (SC) 243.

11. The question, in our opinion, is not with regard to ouster of jurisdiction of writ Court under Article 226 of the Constitution of India inasmuch as it has already been held that judicial review therein is a basic feature of Constitution of India and, the constitutional remedy, in that regard, cannot be ousted under a statute (See:- L. Chandra Kumar Vs. Union of India and others, AIR (1997) 3 SCC 261).

12. The question, herein, rather is as to whether jurisdiction under Article 226 of the Constitution of India is required to be invoked against the order of District Magistrate, directly, when a detailed procedure otherwise is contemplated under the Special Act to determine issues that arise for consideration in the present petition?

13. Section 18 of the Act, which has been referred to in Badan Singh (supra), reads as under:-

"The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgement or order of a Court passed under the provisions of this Act."

Provisions of Chapter XXIX of the Code are made applicable, mutatis mutandis, to an appeal against any judgment or order of a Court passed under the provisions of the Act of 1986. The

applicability of Chapter XXIX primarily refers to the procedural part while stipulation of appeal in the substantive part refers to appeal being against any judgment or order of a Court passed under the provisions of the Act of 1986.

14. It is well settled that appeal is a creature of statute. The statute, herein, clearly provides for an appeal against any judgment or order of a Court passed under the provisions of the Act of 1986. There is no exclusion clause in Section 18 and, therefore, the plain language of the statute leaves no ambiguity that appeal shall lie against all orders or judgments of a Court passed under the provisions of the Act of 1986.

15. We are of the considered view that merely because the provisions of Chapter-XXIX of the Code of Criminal Procedure are made applicable in section 18 of the Act of 1986, it would not mean that appeal would be restricted only to an order of acquittal or conviction, as is contemplated in the Code of Criminal Procedure. Chapter XXIX APPEALS in the Code of Criminal Procedure begins with Section 372 Cr.P.C. as per which no appeal shall lie from any judgment or order of a criminal court except as provided for by in the code or by any other law for the time being in force. Even the code of criminal procedure contemplates filing of appeal in matters other than conviction and acquittal [See: Section 458(2) Cr.P.C. in which an appeal lies in respect of release of property to the Court to which appeal ordinarily lie from convictions by the Magistrate]. Section 18 in the Act of 1986 providing for appeal is any other law providing for appeal in terms of Section 372 of the Code. The Act of 1986 is otherwise a special Act and its provisions would prevail over general law by virtue of Section 20 of the Act of 1986 since its provisions would prevail, notwithstanding anything in consistent therewith contained in any other enactment.

16. Reference to Code of Criminal Procedure in Section 18, and its applicability mutatis mutandis, must therefore be restricted to the procedural part. Any limitation on the scope of appeal under Section 18 to conviction or acquittal, by applying the provisions of Chapter-XXIX of the Code otherwise would go contrary to the plain language of Section 18 which permits filing of appeal against any judgment or order of the Court and would be hit by Section 20 of the Act of 1986.

17. Any order or judgment, referred to in Section 18 would include an order for release of property where the Court upon inquiry under Section 17 finds that the property was not acquired by a Gangster as a result of commission of any offence triable under the Act of 1986. The determination by the Court, on the question whether property is acquired by Gangster as a result of an offence triable under the Act, would be an order and, therefore, the remedy of an appeal would clearly be available in such circumstances. With utmost respect, we therefore do not subscribe to the view taken by learned Single Judge in Badan Singh (supra) that an appeal would not lie against the determination made by the competent court on the question as to whether the property subjected to attachment is a property acquired by the Gangster, as a result of commissioning of an offence triable under the Act.

18. We may also note that offences under the Act of 1986 are to be tried by

special courts constituted under Section 5 of the Act of 1986. By virtue of sub-section (4) of Section 5 only a Sessions Judge or Additional Sessions Judge in the State can man the Special Court under the Act of 1986 and, therefore, an appeal against his order would lie as per Chapter-XXIX of the Code only to the High Court. Once that be so, a writ otherwise would not be entertained directly against the order passed under Section 15 of the Act of 1986 by the District Magistrate.

19. Petitioner, therefore, can get no relief on the basis of judgment in Badan Singh (supra) which otherwise was a case arising out of an order passed under Section 17 of the Act and does not support the view that a writ would lie directly against an order passed by the District Magistrate attaching the property. The objection of learned A.G.A. to the maintainability of the present petition is, therefore, sustained.

20. The other judgment relied upon by the counsel for the petitioner in the case of Afzal Begum (supra) was delivered in an criminal appeal under Section 18 of the Act of 1986 arising from an order passed by the Court under Section 17 of the Act of 1986. We are in agreement with the reasoning assigned in para -14 of the judgment in Afzal Begum (supra), which is reproduced hereinafter:-

"14. The power of the Court to hold an inquiry under section 16 on the reference made by the District Magistrate is not an empty formality, which has a purpose behind it. The object behind providing the power of judicial scrutiny under section 16 of the Code is to check arbitrary exercise of the power by the District Magistrate in depriving a person of his properties and to restore the rule of law, therefore, a heavy duty lies on the court to hold a thorough inquiry to find out the truth with regard to the question, whether the property was acquired by or as a result of the commission of an offence triable under the Act. The order to be passed under section 17 of the Act must disclose reasons and the evidence in support of the finding of the court. The Court is not expected to act as a post office or mouthpiece of the State or the District Magistrate. If a person has no criminal history during the period the property was acquired by him, how the property can be held to be a property acquired by or as a result of commission of an offence triable under the Act is a pivotal question which has to be answered by the Court. Besides the aforesaid question, the other important question to be considered by the Court is whether the property which was acquired prior to the registration of the case against the accused under the Act or prior to the registration of the first case of the gang chart, can be attached by the District Magistrate under section 14 of the Act."

Above judgment also, in no way, supports the petitioner's contention with regard to entertainment of writ petition, at this stage, against the order of the District Magistrate.

21. For the reasons enumerated above we decline to entertain the present writ petition, at this stage, while leaving it open for the petitioner to raise all legal and factual issues during course of inquiry under Section 17 of the Act of 1986. Writ petition, accordingly, is summarily rejected without any order passed as to costs.

(2022)04ILR A617
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2022

BEFORE

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

First Appeal No. 546 of 1994

Smt. Kailasho Devi ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri Bishnu Sahai, Sri Ashok Kumar Tripathi (Now Ashok Tripathi), Sri B. Dayal, Sri P.K. Rajput, Sri R.P. Singh Yadav, Sri R.P.S. Raghav, Sri R.P.S. Yadav, Sri Sanjay Srivastava, Sri V. Sahai, Smt. Anjali Rajput

Counsel for the Respondents:
S.C., Sri Nipun Singh

A. Civil Law - Land Acquisition Act,1894 - Section 23 - Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 - Section 28 - Land Acquisition - Compensation - determination of market value - While fixing the market value of the acquired land, one is required to keep in mind the following factors : -(a) Existing geographical situation of the land (b) Existing use of the land. (c) Already available advantages, like proximity to National or State Highway or road and/ or developed area (d) Market value of other land situated in the same locality/ village/ area or adjacent or very near the acquired land - Market value can be determined on the basis of price paid within a reasonable time in bona fide transactions of purchase of the lands adjacent to the lands acquired and possessing similar advantages - Exemplars - it is the general rule that the highest of the exemplars, if it is satisfied, that it is a bona fide transaction has to be considered and accepted - It is not that the lowest available rate amongst the exemplars that is to be regarded as the embodiment of a genuine and truthful transaction (Para 17, 19)

Notification u/s 28 published on 29.09.1979 - High Court found that the acquired land was in the vicinity of a stadium and close to two highways & a high yielding land, the acquired land not located very far away from the village abadi also - large number of exemplars showed private sale of small portions of land varied between Rs.100/- to Rs.200/- per square yard - High Court held appellant entitled to compensation at the rate of Rs.99/- per square yard - statutory entitlements, such as solatium, additional compensation and interest to be worked out accordingly (Para 19, 21)

List of Cases cited:-

1. Uttar Pradesh Avas Evam Vikas Parishad Vs Ganga Saran (Dead) through LR & ors., (2020) 14 SCC 238

2. Meerut Development Authority Through its Secretary Vs Basheshwar Dayal (Dead) Through L.Rs. & anr., 2013 SCC OnLine All 13200

3. Bhule Ram Vs U.O.I. & anr., (2014) 11 SCC 307

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

1. This first appeal is directed against a judgment and award of Mr. M.P.S. Tejan, the then 7th Additional District Judge, Bulandshahr dated 24th July, 1991 rejecting L.A.R. No.233 of 1987 and affirming an award of the Special Land Acquisition Officer (Second), Uttar Pradesh Avas Evam Vikas Parishad, Kamla Nagar, Agra (for short, 'the SLAO') dated 11.10.1984, awarding the claimant-appellant compensation at the rate of Rs.29.08 per square yard for her land acquired by the Uttar Pradesh Avas Evam Vikas Parishad (for short, 'the Parishad').

2. One Kallan son of Ganga Sahai had agricultural land in Village Tanda, Pargana

Baran, Tehsil and District Bulandshahr comprising *Khasra* No.157 admeasuring 1 bigha 17 *biswa* and *Khasra* No.158 admeasuring 2 *biswa*. The land was of good quality and described as class *'Sinchit Bada'*. It was assessed to land revenue in the sum of Rs.12.50 per bigha. The land aforesaid shall hereinafter be referred to as, "the acquired land'. A notification under Section 28 of the Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 (for short, 'the Act') relating to the acquired land was published on 29.09.1977 in the State Gazette. This was followed by a notification under Section 32 of the Act dated 25.11.1979, also published in the Official Gazette. On 11.10.1984, an award was made under the Act by the SLAO, assessing the value of the land at Rs.38.77 per square yard. After deducting 25% per square yard, compensation for Kallan's land was assessed at the rate of Rs.29.08 per square yard.

3. In accordance with the award made by the SLAO, Kallan's substantive compensation for the acquired land worked out to a figure of Rs.1,71,535.65. Adding to it 30% solatium and 12% additional compensation, besides interest, a total sum of Rs.3,27,854.67 was determined.

4. Aggrieved by the award made by the SLAO, Kallan prefered a reference under Section 18 of the Land Acquisition Act, 1894 to the District Judge, Meerut. It must be clarified here, for the sake of record, that pending proceedings before the Judge and not before Kallan's evidence was recorded in Court, he passed away on 03.12.1990, leaving behind him, as his sole heir and LR, his married daughter Smt. Kailasho Devi wife of Malwant Singh. Kallan's estate devolved upon Smt. Kailasho and she was substituted in his stead in the pending reference before the Judge. Kallan and after him, his heir and LR, Smt. Kailasho, shall hereinafter be referred to as "the appellant', unless the context otherwise requires. Kallan in his time, while moving the reference, came up with a case that his acquired land fell within the local limits of the Nagar Palika, Bulandshahr, but the SLAO had proceeded to determine its value on fallacious grounds. It was urged that though the SLAO has admitted the fact that the acquired land has housing potential, he had not looked into the exemplar sale deed relating to land lying in front of the acquired land, that was executed before the time when the notification dated 29.09.1979 under Section 28 of the Act was published. This exemplar clearly indicates that between the willing buyer and the willing seller, the sale consideration, that was settled and paid, was Rs.100/- per square yard. A number of other contemporaneous exemplars were referred to, where the rate of land, that was settled and paid by willing buyers to willing sellers for land, similarly circumstanced as the acquired land, was Rs.100/-. These exemplars were from Khasra Nos.56 and 72. It was pleaded that the acquired land had in its vicinity a wholesale market of foodgrains (अनाज मण्डी) and developing residential and commercial sites. It was the appellant's demand in the reference that the rate of land assed by the SLAO for the purpose of compensation was clearly fallacious and he was entitled to Rs.100/- per square yard.

5. A written statement was put in on behalf of the State Government represented by the Collector of Bulandshahr. It was pleaded that Village Tanda has been included in the local limits of the Nagar Palika after the first notification was

published for acquisition. It must be remarked here that the notification for acquisition of the appellant's land, along with a large number of other similarly situate lands in Village Tanda, was for the purpose of a housing scheme to be developed by the Parishad. It was the State's case that the appropriate exemplar had been selected after searching through a number of them. It was also pleaded that upon knowledge of a housing scheme being floated, there were sale transactions at inflated rates entered into, that did not represent the true value of the land. The acquired land was agricultural and had no housing over it. It was employed for agriculture. The Mandi site had been constructed after the acquisition. It was broadly on these counts that the appellant's case was contested.

6. In support of his case, Kallan, the original appellant, testified in the dock before the Judge on 29.11.1989 and was thoroughly cross-examined. For the exemplar that the appellant relied on, a certified copy of the sale deed dated 04.04.1979 was filed, where land similar to the acquired land, admeasuring 216 square yards was sold by one Pt. Ghasiram son of Pt. Munshiram to Makkhan Lal and Narendra Pal Saxena for a total sale consideration of Rs.21,600/-. The rate indicated by the said exemplar was Rs.100/- per square yard. The said sale deed was assigned paper No. 30C.

7. The learned Judge did not accept the appellant's case for an enhanced value of the acquired land, that he urged. It was noticed by the learned Judge in the judgment impugned and the fact is not in dispute that the entire parcel of land, of which the acquired land is a part, acquired by the Parishad, was located on two main Highways, that is to say, Bulandshahr-Shikarpur Highway and the Bulandshahr-Anupshahr Highway. The appellant's land was found to be located close to the Bulandshahr-Shikarpur Highway. Upon scrutiny of the various exemplars, that were filed by the appellant and similarly situate land oustees, it was opined that the sale deeds listed at serial Nos.23-26 were close exemplars. Amongst these, the sale deed at serial No. 26 dated 07.07.1979 executed by Om Prakash in favour of one Dinesh Kumar, conveying to the latter an area of 245 square yards of land, was held to be a true exemplar. It represented the correct value of the acquired land. The rate of land indicated in the said exemplar was Rs.38.77 per square yard. After deducting 25%, the rate of compensation was worked out to be Rs.29.08 per square meter. The learned Judge took note of the sale deed dated 04.04.1979, that was relied upon by the appellant as well as another claimant, Niranjan Singh, whose reference was decided as the leading case by the Reference Court.

8. It was remarked that the rate of land reflected by sale deeds of smaller areas of land could not serve as valid exemplars. The learned Judge in the Reference Court has observed that it is true that where it is found that the acquired land is of good quality and has factories etc. in its vicinity, a higher compensation should be determined for it. The Judge, however, felt that it is not necessary that a sale deed of higher value may be the true exemplar. About the sale-deed executed by Ghasiram, on which the appellant has relied, it has been noticed that the relative land is located to the north of the road, whereas towards the south, there is a College and the Anupshahr Bus Stand.

9. About the appellant's land, it has been observed that in his cross-examination, the appellant has said that he had not filed on record sale deed for the past three years, because he did not know that it was necessary. It has also been admitted by the appellant that the acquired land has not been declared an abadi by the by S.D.O. The acquired land is located at a distance two furlongs from the Shikarpur-Bulandshahr Highway and from the Anupshahr-Bulandshahr Highway at a distance of one and a half furlongs. It has been remarked by the learned Judge that the appellant agrees that the acquired land is located not towards the Anupshahr Highway. It has been observed that the most valuable land is that which is located on the Anupshahr Highway and not on the Shikarpur Highway. It has also been observed that the witnesses, who have appeared in the appellant's case and the connected matters, have accepted that the land gets submerged under flood-water. The SLAO's award was perused by the Judge to opine that the SLAO acknowledges the fact that the acquired land is located close to two main highways, where they have in their vicinity commercial sites and abadi. The learned Judge has suspected most of the exemplars as evidencing inflated rates that were executed after notification of the housing scheme. He has gone with the SLAO to hold that the sale deeds at serial Nos. 23-26 represent the correct value. It is broadly on the aforesaid reasoning that the learned Judge has agreed with the SLAO.

10. Heard Mr. Ashok Tripathi, learned Counsel for the appellant, Mr. Awadhesh Kumar, learned Standing Counsel appearing on behalf of respondent no.1 and Mr. Nipun Singh, appearing on behalf of respondent no.2.

11. Mr. Ashok Tripathi, learned Counsel for the appellant has seriously assailed the award as one contrary to the evidence on record, both documentary and oral. He has drawn the attention of this Court to a copy of the sale deed dated 04.04.1979, paper No. 30C and the testimony of Kallan in the dock. Besides that, he has placed before the Court a copy of the judgment of their Lordships of the Supreme Court in **Uttar Pradesh Avas Evam Vikas Parishad v. Ganga Saran (Dead) through LR and others, (2020) 14 SCC 238**. The judgment was rendered relating to the same award covered by the same notification relating to Village Tanda, where a different Court of Reference had enhanced the compensation in LAR No. 128 of 1987 from Rs.29.08 per square yard to Rs.99/- per square yard. This Court had dismissed the first appeals, whereagainst their Lordships, after considering the various factors that the Reference Court took into account, because the judgment of this Court had not considered much evidence, opined the assessment to be correct. It is impressed upon this Court that the said assessment of compensation is squarely applicable to the facts here.

12. Mr. Awadhesh Kumar, learned Standing Counsel appearing on behalf of respondent no.1 and Mr. Nipun Singh, learned Counsel appearing on behalf of respondent no.2, have opposed the submissions and said that the Reference Court here has carefully distinguished relevant factors in judging the suitability of the appropriate exemplar to follow and has reached a correct conclusion that ought not to be disturbed.

13. This Court has carefully gone through the evidence on record.

14. What cannot be ignored is the fact that the acquired land is located close to two highways, the Bulandshahr-Anupshahr Highway and the Bulandshahr-Shikarpur Highway. Whether the land is located closer to one highway or the other, would not be of such decisive significance so as to trifle the value of the acquired land from what is evidenced by the exemplar cited by the appellant, paper No. 30C and support the meagre assessment made by the Trial Judge and the SLAO.

15. A perusal of the extract of the Khasra, paper No. 26C clearly shows the land to be of good quality, that is described as *Sinchit* Bada, which is irrigated land. There is no documentary evidence about the land getting submerged by flood waters. In his examination-in-chief, Kallan has said that the acquired land is near the stadium and I.P. Degree College, besides houses. No doubt, the appellant has said that he has not filed on record the exemplar of sale deeds for the past three years, but that appears to be more the result of a grueling cross-examination than a well-evidenced fact. The exemplar that has been filed is a sale deed dated 04.04.1979, whereas the notification under Section 28 of the Act in the present case was published on 29.09.1979. Thus, the exemplar relied upon by the appellant is very proximate in point of time to the notification under Section 28, that is relevant for the purpose of determination of the market value. In his cross-examination, Kallan, after admitting the fact that the acquired land did not house any abadi and had farming done over it, has said:

"इस जमीन से शिकारपुर वाली सड़क दो फर्लांग दूर है और अनूपशहर वाली सड़क 1 या 1-1/2 फर्लांग दूर है। नई मन्डी की स्थापना इस भूमि को अध्यापित करने से पहले हुई थी। इस भूमि से नई मन्डी 30-40गज की दूरी पर है। एक किलोमीटर दूर दूर नहीं। मेरे खेत से यदि अनूपशहर रोड पर आकर नई मन्डी को जावे तो 250 गज की दूरी है। स्टेडियम भाई पुरा वाली जमीन में नहीं है बल्कि टांडे की जमीन में है। अध्यापिती के समय काश्त की जमीन 50 हजार रूपये बीघा के हिसाब से बिकी है। उसके बैनामें भी है।

मैनें अध्यापिति के समय अधिकारी के समक्ष तीन फसलों की बावत खसरा दाखिल किया था। और यहाँ भी दाखिल किया है जिसमें तीन से ज्यादा फसले लिखी है। पटवारी फसलों की पड़ताल करता था।"

16. A perusal of the said cross-examination shows that the acquired land is located at two furlongs from the Shikarpur Highway and one and a half furlong from the Anupshahr Highway. The learned Judge says that the land on the Anupshahr Highway is more valuable. The land being valuable on a particular highway does not mean that it should be virtually within the control area of that highway. A land, that is at a distance of one and a half furlong from the Anupshahr Highway, would be entitled to all the benefits that accrue from the higher value of lands located on that highway. This particular land is in the vicinity of the two highways and would, therefore, be logically more valuable; may be like others similarly situate. The fact that the stadium was built prior to the acquisition has been specifically asserted by the appellant in his cross-examination, about which he has neither been contradicted or confronted with any previous statement or material.

17. The agricultural value of the land has been described as Rs.50,000/- per bigha. The land has been asserted to be one yielding three crops a year and this fact has also not been disputed on behalf of the State. The land that is shown in the exemplar relied upon by the appellant more or less represents the true value of lands located in the vicinity of the two State Highways. There is no particular feature about the acquired land that may diminish

its value compared to others. In the context of parameters on which value of acquired land may be assessed, reference may be made with profit to the decision of a Division Bench of this Court in **Meerut Development Authority Through its Secretary v. Basheshwar Dayal (Dead) Through L.Rs. and another, 2013 SCC OnLine All 13200. In Meerut Development Authority v. Basheshwar Dayal** *(supra),* the principles, governing assessment of compensation based on various decisions of their Lordships of the Supreme Court, have been culled out thus:

"11. Having heard and considered the contentions of the learned Counsel for the parties and perused the material available on record including the impugned judgments of the Reference Court, we now first proceed to summarize the legal principles settled by Hon'ble Supreme Court in various judgments relevant for determination of market value, as under:

(i) Function of the Court in awarding compensation under the Act is to ascertain the market value of the land on the date of the notification under section 4(1),

(ii) The method for determination of market value may be:

(a) Opinion of experts,

(b) the price paid within a reasonable time in bona fide trans-actions of purchase of the lands acquired or the lands adjacent to the lands acquired and possessing similar advantages,

(c) a number of years purchase of the actual or immediately prospective profits of the land acquired.

(Ref. Jawajee Nagnatham v. Revenue Divisional Officer [(1994) 4 SCC 595 para 5.]). (iii) While fixing the market value of the acquired land, comparable sales method of valuation is preferred than other methods of valuation of land such as capitalisation of net income method or expert opinion method. Comparable sales method of valuation is preferred because it furnishes the evidence for determination of the market value of the acquired land at which a willing purchaser would pay for the acquired land if it had been sold in the open market at the time of issue of notification under section 4 of the Act. However, comparable sales method of valuation of land for fixing the market value of the acquired land is not always conclusive but subject to the following factors:--

(a) Sale must be a genuine transaction,

(b) the sale-deed must have been executed at the time proximate to the date of issue of notification under section 4 of the Act,

(c) the land covered by the sale must be in the vicinity of the acquired land,

(d) the land covered by the sales must be similar to the acquired land,

(e) the size of plot of the land covered by the sales be comparable to the land acquired.

(f) if there is dissimilarity in regard to locality, shape, site or nature of land between land covered by sales and land acquired, it is open to the Court to proportionately reduce the compensation for acquired land.

(iv) The amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition, suitable adjustment has to be made having regard to various positive and negative factors vis-a-vis the land under acquisition which are as under:

Positive factors	Negative factors
(i) smallness of size	(i) largeness of area

(ii) proximity to a road	(ii) situation in the interior at a distance from the road
(iii) frontage on a road	(iii) narrow strip of land with very small frontage compared to depth
(iv) nearness to developed area	(iv) lower level requiring the area depressed portion to be filled up
(v) regular shape	(v) remoteness from developed locality
(vi) level vis-a-vis land under acquisition	(vi) some special disadvantageous factors which would deter a purchaser.
(vii) special value for an owner of an adjoining property to whom it may have some very special advantage	

(v) For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality.

(vi) Deduction not to be done when land holders have been deprived of their holding 15 to 20 years back and have not been paid any amount.

(vii) In fixing market value of the acquired land, which is undeveloped or under-developed, the Courts have generally approved deduction of 1/3rd of the market value towards development cost except when no development is required to be made for implementation of the public purpose for which land/is acquired. (Ref. Valliyammal v. Special Tahsildar Land Acquisition, [(2011) 8 SCC 91.] paras 13, 14, 15, 16, 17, 18 and 19).

(viii) When there are several exemplars with reference to similar lands, it is the general rule that the highest of the exemplars, if it is satisfied, that it is a bona fide transaction has to be considered and accepted. When the land is being compulsorily taken away from a person, he is entitled to the highest value which similar land in the locality shown to have fetched in a bona fide transaction entered into between a willing purchaser and a willing seller near about the time of the acquisition.

(Ref. Mehrawal Khewaji Trust (Registered), Faridkot v. State of Punjab [(2012) 5 SCC 432 : 2012 (114) AIC 268.]).

(ix) In view of section 51-A of the Act certified copy of sale-deed is admissible in evidence, even the vendor or vendee thereof is not required to examine themselves for proving the contents thereof. This, however, would not mean that contents of the transaction as evidenced by the registered sale-deed would automatically be accepted. The Legislature advisedly has used the word "may'. A discretion, therefore, has been conferred upon a Court to be exercised judicially, i.e., upon taking into consideration the relevant factors. Only because a document is admissible in evidence, the same by itself would not mean that the contents thereof stand proved. Having regard to the other materials brought on record, the Court may not accept the evidence contained in a deed of sale.

(Ref. Cement Corpn. Of India Ltd. v. Purya [(2004) 8 SCC 270 para 28 and 38,]).

(x) While fixing the market value of the acquired land, the Land Acquisition

Collector is required to keep in mind the following factors:--

(a) Existing geographical situation of the land.

(b) Existing use of the land.

(c) Already available advantages, like proximity to National or State Highway or road and/or developed area,

(d) Market value of other land situated in the same locality/village/area or adjacent or very near the acquired land.

(xi) section 23(1) of the Act lays down what the Court has to take into consideration while section 24 lays down what the Court shall not take into consideration and have to be neglected. The main object of the enquiry before the Court is to determine the market value of the land acquired. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. The determination of market value is the prediction of an economic event viz. a price out-come of hypothetical sale expressed in terms of probabilities. For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality.

(xii) The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like water, electricity, possibility of their further extension, whether near about town is developing.

(xiii) In fixing market value of the acquired land, which is undeveloped or under-developed, the Courts have generally approved deduction of ⅓rd of the market value towards development cost except when no development is required to be made for implementation of the public purpose for which land is acquired. Deduction of "development cost" is the concept used to derive the "wholesale price" of a large undeveloped land with reference to the "retail price" of a small developed plot. The difference between the value of a small developed plot and the value of a large undeveloped land is the "development cost".

(Ref. Sabhia Mohammed Yusuf Abdul Hamid Mulla (dead) [2012 (95) ALR 219 (SC) : (2012) 7 SCC 595 paras 16, 17, 18, 21 and 22.]).

18. Reference may also be made to the decision of the Supreme Court in **Bhule Ram v. Union of India and another, (2014) 11 SCC 307**, where various factors, including the provisions of Section 23 of the Land Acquisition Act, have been emphasized to assess the market value; some play for guesswork has also been permitted. The distance from a National or State Highway has been emphasized in the said authority.

19. Here, this Court finds that clearly, the land is in the vicinity of a stadium, existing on the date of notification and close to two highways. It is high yielding land and there is not much evidence to convincingly show that the land is submerged by flood waters. So far as the exemplar relied upon by the appellant is concerned, there is no reason to infer it to be a case of sale at inflated rate. The learned Judge in the Reference Court has

virtually suspected every transaction of contemporaneous sale, but those three that have supported the lowest rate. It is not the parameter by which a claim for compensation is to be judged that the lowest available rate amongst the exemplars is to be regarded as the embodiment of a genuine and truthful transaction. Rather, the large number of exemplars noticed in the connected references that show rates between Rs.100/- and Rs.200/- per square yard, would clearly exclude the abysmally poor value of Rs.29.08 per square yard accepted by the Judge. Though, it is not before this Court on facts whether the order of the Reference Court, that was upheld by their Lordships of the Supreme Court in **Uttar Pradesh Avas Evam Vikas Parishad v. Ganga Saran** *(supra)* is precisely related to an identically situate acquired land, but the decision is a safe index about the true value of the land, going by the fact that the land acquired is for the same housing scheme and all of it lies close to two public roads. It has been observed in the judgment of their Lordships of the Supreme Court in **Uttar Pradesh Avas Evam Vikas Parishad v. Ganga Saran** thus:

"10. It is the case of the respondent claimants that the land which was required for the purpose of housing scheme is within the municipal limits and near to residential and commercial buildings."

20. The fact that the acquired land has been acquired for the same housing scheme, makes the observation of the Supreme Court applicable for the assessment of value of the land here as well.

21. In the opinion of this Court, after considering all possible dimensions that are relevant to assess fair and just compensation, the rate of Rs.99/- per square yard would be correct assessment, that has been approved for similar land in **Uttar Pradesh Avas Evam Vikas Parishad v. Ganga Saran**. This inference is based on the fact that the land relates to the same scheme and more or less governed by similar exemplars, where private sale of small portions of land has varied between Rs.100/- to Rs.200/- per square yard. Moreover, the land here is valuable and located very close to two highways, a stadium and other upcoming development on the date of acquisition. It is not located very faraway from the village abadi also.

22. In the circumstances, this appeal **succeeds** and is **allowed with costs**. The impugned judgment and award passed by the Reference Court is **set aside** and the reference is **accepted** in the terms that for the acquired land, the appellant shall be entitled to compensation at the rate of Rs.99/- per square yard. The statutory entitlements, such as that to solatium, additional compensation and interest, would be worked out accordingly.

(2022)04ILR A625
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1164 of 2015
&
First Appeal From Order No. 1053 of 2015

Smt. Sarita Sharma & Anr. ...Appellants
Versus
Mohd. Usman & Ors. ...Respondents

Counsel for the Appellants:

Neeharika Sinha Narayana, Sri Vivek Saran

Counsel for the Respondents:
Sri Nishant Mehrotra

(A) Torts Law - Motor Vehicles Act, 1988 - Section 173 - compensation enhancement - contributory negligence - Tribunal not required to adopt standard of proof as adopted in criminal trials - required to decide claim petitions on touchstone of preponderance of probabilities - not on the basis of proof beyond reasonable doubt - should take holistic view of the matter on the basis of evidence available on record - future loss of income. (Para - 15)

(B) Torts law - Motor Vehicles Act, 1988 - principle of "res ipsa loquitur" - "the things speak for itself" - principle of contributory negligence - A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.(Para - 17,18,)

Claim petition of claimants - awarded a sum of Rs.34,50,000/- as compensation to claimants - interest rate of 6% per annum - multiplier 15 - contributory negligence - 50% each of the drivers - involved in the accident - claimants - enhancement of compensation - contributory negligence on part of deceased/driver of the car - Insurance Company of truck - involvement of the truck in question in the accident. (Para - 1,2,12)

HELD:-Tribunal rightly concluded that truck in question was involved in the accident. Truck driver major contributor to the accident. Contributory negligence of truck driver to the tune of 80% and contributory negligence of the deceased to the tune of 20% fixed. Total compensation payable to the claimants appellants, Rs. 86, 56,516/- . Rate of interest fixed, 7.5% .(Para - 15)

Appeal of claimants partly allowed .

Appeal of Insurance Company dismissed. (E-7)

List of Cases cited:-

1. Anita Sharma & ors. Vs The New India Assurance Co. Ltd. & anr., 2020 (0) Supreme (SC) 704

2. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors., F.A.F.O. No. 1818 of 2012

3. Rylands Vs Fletcher, (1868) 3 HL (LR) 330

4. Jacob Mathew Vs St. of Punj., 2005 0 ACJ(SC) 1840)

5. Vimal Kanwar & ors. Vs Kishore anr. & ors., 2013 (3) T.A.C. 6 (SC)

6. Sarla Verma & ors. Vs Delhi Transport Corp. & Anr., 2009 LawSuit (SC) 613

7. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 LawSuit (SC) 1093

8. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

9. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd., 2007(2) GLH 291

10. Smt. Sudesna & ors. Vs Hari Singh & anr., F.A.F.O. No.23 of 2001

11. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd., F.A.F.O. No.2871 of 2016

(Delivered by Hon'ble Ajai Tyagi, J.)

1. These two appeals have been preferred against the same judgment and award dated 07.03.2015 passed by Motor Accident Claims Tribunal/Special Juede (E.C.), Act, Ghaziabad (hereinafter referred to as "Tribunal') in M.A.C.P. No. 264 of 2012 (Smt. Sarita Sharma and another Vs. Mohammad Usman and others), whereby the claim petition of the claimants was allowed and awarded a sum of Rs.34,50,000/- as compensation to the

claimants with interest at the rate of 6% per annum. Learned Tribunal also held contributory negligence to the tune of 50% each of the drivers, involved in the accident.

2. The claimants have preferred an appeal bearing no. F.A.F.O. No. 1164 of 2015 for enhancement of compensation and setting aside the part of contributory negligence on the part of the deceased/driver of the car, whereas, the Insurance Company of the truck preferred an appeal bearing no. F.A.F.O. No.1053 of 2015, mainly on the ground that the truck in question was not involved in accident and if not so, the deceased was the major contributor to the accident.

3. Heard Mr. Vivek Saran, learned counsel for the appellants-claimants and Mr. Nishant Mehrotra, learned counsel for the Insurance Company-respondents. Perused the record.

4. Brief facts of the case are that claim petition was filed by claimants on account of death of Mr. Vimal Kaushik (husband of appellant-claimant no.1), who died in road accident no 10.04.2011. It is averred in claim petition that on 10.04.2011 at about 2:30 AM (night), deceased Vimal Kaushik was coming from Merrut to Ghaziabad in his car bearing no. U.P. 14 BH 1232. Leaving the Merrut road, when he turned to Hapur road and crossed the flyover a truck bearing no. H.R 38 G 1780, which was being driven very rashly and negligently by its driver, came from opposite direction and hit the car of the deceased. In this accident, husband of claimant no.1 was badly injured and died on the way to the District Hospital Ghaziabad. Accident was reported in police station Kavinagar, District Ghaziabad on the same day by brother of the deceased.

5. Learned counsel for the appellants-claimants has submitted that learned Tribunal has held deceased's guilty of 50% contributory negligence in the accident but the plea of contributory negligence was neither pleaded nor proved. Plea of contributory negligence was not proved by any of the parties to the claim petition. Apart from it, there is no evidence on record, to show or prove that deceased was contributor to the accident. It is further submitted that deceased was on correct side of the road while the truck was on the wrong side. At the site of the accident, there is divider on the road. The driver of the truck came on the same road on which deceased was coming which was left side of the road of the car. In fact, the truck should have gone across the divider but to make short-cut, the truck came on the wrong side of the divider and hit the car of the deceased.

6. In this way, the truck driver was solely negligent but learned Tribunal erroneously held the deceased's guilty also to the tune of 50% for contributory negligence. Site plan, prepared by Investigating Officer also shows that the truck was being driven on the wrong side of the divider of the road.

7. Learned counsel for the claimants has also submitted that learned Tribunal has given finding that there was night at the time of accident and head light of the truck must have been visible to the deceased from a certain distance, hence, he had an opportunity to avoid the accident but due to high speed he could not avoid the accident. This finding is perverse and based on surmises and conjectures only.

8. Learned counsel for the claimants contended that there is no evidence on

record that deceased was driving the car in rash and negligent manner and there is no evidence at all that he was driving at a high speed yet the learned Tribunal held him guilty for negligence. Moreover, there is no basis on which learned Tribunal has fixed the percentage of negligence of both the drivers. It is next argued that the compensation is calculated on the lower side, deceased was professor in a Degree College. His pay structure is duly proved by the accountant of the collage but learned Tribunal has deducted the component of House Rent Allowance and City Compensatory Allowance from the salary of the deceased, which was duly payable to him.

9. Per contra, learned counsel for the Insurance Company has vehemently objected the arguments advanced by the claimants and submitted that the involvement of the truck is not proved by the claimants because the F.I.R. of the accident was lodged by brother of the deceased against unknown truck. Truck number is also not mentioned in F.I.R. and later on with the collusion of the truck owner, it was impleaded in the accident for making unlawful gain to the claimants.

10. Learned counsel for the Insurance Company has also submitted that there is no evidence on record that truck driver was driving rashly and negligently at the time of accident. The manner by which the accident took place is only the result of imagination of the learned Tribunal. If at all the accident happened, it was on account of sole negligence on the part of the deceased or he was the major contributor. Presence of so called eye witnesses is completely doubtful on the spot. In site plan also no truck number is mentioned by the Investigating Officer. Moreover, brother of the deceased, who lodged the F.I.R., was not produced in evidence which weakens the claimants' case to the great extent and it was proved that he had not seen the incident.

11. It is further submitted by learned counsel for the Insurance Company that as far as the quantum of compensation is concerned, it is already fixed on the higher side, which needs no interference by this Court.

12. Apart from the issue of quantum of compensation, there are two main issues in both appeals; one issue relates to the involvement of the truck in question in the accident and second issue relates to contributory negligence on the part of the drivers of both the vehicles involved.

13. As far as the involvement of truck is in question, learned counsel for the Insurance Company has taken plea before us that truck in question was not involved in accident because no truck number is mentioned in the F.I.R. and during the investigation also. I.O. did not mention any truck number in site plan.

14. We are not convinced with the arguments of Insurance Company in this regard, because the accident had taken place in the night of 10.04.2011 at 2:30 AM and the F.I.R. was lodged at 07:05 AM on the same day i.e. after four and half hours of the incident. Hence, there was no opportunity for claimants to plant a wrong vehicle in the accident, in such a short-time that too in the dark hours of the night because it is very important and pertinent to mention that F.I.R. does not say that unknown vehicle hit the car but it says that unknown truck hit the car, hence it is established in F.I.R. that the vehicle which

caused the accident was truck. If truck number is not mentioned in F.I.R. it does not weaken the case of claimants because in the dark night it was not expected by anybody to note the truck number when it is admitted case that truck was not caught on the spot and it ran away from the spot after causing the accident. It is not disputed that both the vehicles dashed in each other from opposite direction because the technical inspection report of the car shows all damages in front side of the car.

15. The Hon'ble Supreme Court in the case of ***Anita Sharma and Others Vs. The New India Assurance Co. Ltd. and Another, 2020 (0) Supreme (SC) 704*** has held that learned Tribunal is not required to adopt the standard of proof as is adopted in criminal trials. Learned Tribunal is required to decide the claim petitions on touchstone of preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt. In such matters, learned Tribunal should take holistic view of the matter on the basis of evidence available on record. Learned Tribunal has rightly concluded that truck in question was involved in the accident, hence, on this point we confirm the finding of learned Tribunal.

16. Now, we come to the controversy of negligence in the matter. Let us consider the negligence from the perspective of the law laid down.

17. 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.

18. 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.

19. 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 (section 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)

20. Learned Tribunal has held that in the said incident, the truck was coming on wrong side of the divider. At the time of accident, it was found on the road, which was correct side of the road, for truck and the car was on correct side of the divider. But the learned Tribunal held that although the truck was on the wrong side of the divider yet due to the night, head lights of the truck were on and were visible to the deceased from a certain distance but due to high speed of the car, the deceased could not save the accident. Hence, truck driver and the deceased were held negligent to the tune of 50% each.

21. After analyzing the evidence on record, it is not in dispute that at the time of accident, truck was on the wrong side of the divider and the car was on correct side of the divider. Site plan, which was prepared by I.O. during the investigation, shows that accident took place at the point shown by letter "A", which is absolutely very near of speed breaker, hence, it was expected from the deceased also that the speed of the car should have been very moderate due to presence of speed breaker, yet the impact of the accident was so high that it took away the life of the deceased. But we are not convinced to concur with the aforementioned finding and degree of percentage holding the deceased to be negligent to the tune of 50%.

22. Further it is very important to note that the truck driver has not stepped in the witness-box, hence, claimants could not get opportunity to cross-examine the driver on the factum of accident, which could elicit the truth because in this case, unfortunately, the car driver lost his life and truck driver has not stepped in witness-box, hence, only circumstances remain before the learned Tribunal and this Court to ascertain the degree of contributory negligence on the part of each of the drivers. It is jurisprudence of law that cross-examination is an acid test of the truthfulness of the statement made by a witness but truck driver is not produced in evidence, hence, claimants lost the opportunity to elicit the truth from the best witness namely driver of the truck.

23. On the basis of discussions made above, we are of considered opinion that truck driver even if he was not solely responsible for the accident, was the major contributor to the accident. He is the main author of the accident, yet we cannot shut our eyes to the fact that deceased was also driving the car at a high speed at the time of accident because in spite of there being a speed breaker very near to the accident site, the deceased was not able to reduce the impact of the accident. Had he been driving at a moderate speed due to approaching the speed breaker, impact of accident could have been much lesser. Hence, we set aside the finding of learned Tribunal with regard to the degree of percentage of contributory negligence on the part of the each of the drivers of the vehicles involved to the tune of 50% each and instead we fix the contributory negligence of truck driver to the tune of 80% and contributory negligence of the deceased to the tune of 20%.

Compensation:-

24. The question of quantum of compensation has to be reevaluated. The

deceased was professor in a degree college in Ghazibad, his salary certificate is produced on record, which is duly proved by the concerned employee of the college by entering in witness-box before the learned Tribunal. As per the salary certificate, after deduction of income tax etc., the deceased was getting Rs.63,734/- as salary. He was also getting Rs.3,00/- as city compensatory allowance and Rs.6960/- as house rent allowance. These allowances were deducted bythe learned Tribunal from the salary and assessed the salary for computation at Rs.54,474/-.

25. In our opinion, city compensatory allowance and house rent allowance are not deductable component from the salary because these are allowance, which were used for the benefit of family also. Salary certificate of the deceased is on record, which shows that gross salary of the deceased was Rs.78,658/- deduction for provident fund/G.P.F. of Rs.4924 and income tax of Rs.10,000/- are shown in salary certificate. In our opinion deduction towards Provident Fund/G.P.F. is made from salary, hence, it is to be included in the salary for the purpose of computation. Only the income tax of Rs.10,000/- shall be deducted from gross salary. Hence, for the purpose of computation of salary, the income will be assessed Rs. 78,658-10,000 = Rs.68,658 and learned Tribunal has not awarded any sum towards future loss of income. The learned counsel for the appellant has also relied on the decision in ***Vimal Kanwar and Others Vs. Kishore An and Others, 2013 (3) T.A.C. 6 (SC).***

26. According to the judgment of the Apex Court in ***Sarla Verma and Others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC) 613 and National Insurance Co. Ltd. Vs. Pranay Sethi and Others, 2017 LawSuit (SC) 1093***, due to being employed and being of 40 ½ years of age, 30% shall be added towards future loss of income to the income of the deceased as per the aforesaid decisions.

27. As far as the dependency is concerned, there are two dependents of the deceased. Keeping in view the number of dependents, 1/3rd of the income shall be deducted for personal expenses. Learned Tribunal has applied multiplier of 15 for which there is no dispute. Under the non pecuniary head, claimants-appellants shall be entitled to get Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses. Apart from it, claimants shall also be entitled to get Rs.40,000/- + 40,000/- for loss of consortium. In this way, claimants shall get Rs.1,10,000/- under the head of non pecuniary damages as per the judgment of Hon'ble Apex Court in **Pranay Sethi** *(Supra).*

28. Hence, the total compensation payable to the claimants appellants are computed herein below:

(i) Annual income Rs.68,658 X 12 = Rs. 8,23,896/- Per annum.

(ii) Percentage towards future prospects : 30%. Rs.2,47,168/-

(iii) Total income : Rs.8,23,896 + 2,47,168/- = Rs.10,71,064/-

(iv) Income after deduction of 1/3rd:Rs.10,71,064-3,57,021/-= Rs.7,14,043

(v) Multiplier applicable : 15

(vi) Loss of dependency : Rs.7,14,043 X 15 = Rs.1,07,10,645/-

(vii) Amount under non pecuniary head : Rs.1,10,000/-

(viii) Total compensation: Rs.1,07,10,645/- + 1,10,000/- = Rs. 1,08,20,645/-

(ix)Amount after 20% deduction towards contributory negligence : Rs.1,08,20,645 - 21,64,129/- = Rs. 86,56,516/-

29. 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."

30. Learned Tribunal has awarded rate of interest as 6% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

31. In view of the above, the appeal preferred by the claimants bearing F.A.F.O. 1164 of 2015 is partly **allowed**. The appeal preferred by the Insurance company bearing F.A.F.O. No. 1053 of 2015 is, accordingly, **dismissed**. Judgment and award passed by the learned 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.

32. 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 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.

(2022)04ILR A633
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 1333 of 2000

The New India Assurance Co. Ltd.
...Appellant
Versus
Smt. Shail Kumar & Ors. ...Respondents

Counsel for the Appellant:
Sri Rajiv Chaddha

Counsel for the Appellants:
Sri A.K. Singh, Sri G.K. Pandey, Sri Hari Manish Bahadur Sinha, Sri R.O.V.S. Chauhan, Sri Satya Deo Ojha, Sri Yashpal Chaturvedi

(A) Torts Law - Motor vehicle Act,1988 - Section 173 - enhancement of compensation - Principle of " res ipsa loquitur" - " the things speak for itself" .

(B) Torts law - Principle of Contributory negligence - a person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place - that amount will be detected from the compensation payable to him if he is injured - to legal representative if he dies in the accident .(Para - 8)

(C) Tax Law - The Income Tax Act, 1961- Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' - if the amount of interest does not exceeds Rs.50,000/- in any financial year - registry of Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income-Tax Authority.(Para - 14)

Accident occurred - causing death - deceased aged about 46 years of age - left behind him, widow and two children - Tribunal has assessed the income of the deceased to be Rs.96,000/- per annum - awarding a sum of Rs.8,06,000/- with interest at the rate of 12% as compensation - aggrieved by order - hence appeal.

HELD:-Total compensation : Rs.13,19,652/- . Direction to respondent-Insurance Company to 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. Amount already deposited be deducted from the amount to be deposited.(Para - 12,18)

Appeal partly allowed. (E-7)

List of Cases cited:-

1. Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh & ors., F. A. F. O. No. 1818 of 2012

2. Rylands Vs Fletcher, (1868) 3 HL (LR) 330

3. Jacob Mathew Vs St.of Pun., 2005 0 ACJ (SC) 1840).

4. National Insurance Co.Ltd. Vs. Pranay Sethi & ors. 2017 0 Supreme (SC) 1050

5. Sarla Verma Vs. Delhi Transport Cor., (2009) 6 SCC 121

6. A.V. Padma Vs Venugopal, 2012 (1) GLH (SC), 442

7. Smt. Hansagauri P. Ladhani Vs The Oriental Insurance Co. Ltd., 2007(2) GLH 291

8. Smt. Sudesna & ors. Vs. Hari Singh & anr., First Appeal From Order No.23 of 2001

9. National Insurance Co. Ltd. Vs. Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

10. Lakkamma & ors. Vs The Regional Manager M/S United India Insurance Co. Ltd & anr., AIR 2021 SC 3301

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Shri Rajiv Chaddha, learned counsel for the appellants, Shri Satya Deo Ojha, learned counsel for the respondents; and perused the record.

2. This appeal, at the behest of the insurance company, challenges the

judgment dated 31.5.2000 passed by Motor Accident Claims Tribunal/IIIrd Additional District Judge, Etawah (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.290 of 1994 awarding a sum of Rs.8,06,000/- with interest at the rate of 12% as compensation.

3. The brief facts of this case are that on 14.02.1994 one deceased (Krishna Kant Pandey) was going back from Bharthana to Auraiya by his Ambassador Car No.UHH-2100 at about 11.30 p.m. he reached near Madhupur Satiyapur where truck No.UPG-2108 was standing in the middle at the road without any lights on. As soon as Krishna Kant Pandey reached near the truck another truck came from the front with very bright lights on and his eyes got dazzled and he hit the truck no.UPG-2018 which resulted in the death of Sri Krishna Kant Pandey.

4. The submission of Sri Chaddha, learned counsel for appellant that income of deceased was considered by the tribunal without any proof and according to him the deceased as the lecturer in a Degree College his income could not be Rs.8000/- p.m.

5. It is submitted by Shri Ojha, learned counsel for respondents that cross objections are filed for enhancement of compensation and therefore the amount requires to be recalculated.

6. The issue of negligence has to be decided from the perspective of the law laid down by the Courts.

7. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance. Negligence can be both intentional or accidental which can also be accidental. More particularly, term negligence connotes reckless driving and the injured of claimants 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.

8. The principle of contributory 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.

9. 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."

10. 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 calls for enhancement.

11. Having heard learned counsel for the parties and considered the factual data, this Court found that the accident occurred on 14.2.1994 causing death of Krishna Kant Pandey who was aged about 46 years of age and left behind him, widow and two children. The Tribunal has assessed the income of the deceased to be Rs.96,000/- per annum. The deceased was lecturer by profession according to his pay certificate which is on record. To which as the deceased was in age bracket of 40 to 50 years and a salaried person, 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 1/3 as the deceased had three persons to feed. The multiplier of 13 would be applied and the rate of interest shall be 9% instead of 12% as granted by the court below.

12. In this backdrop let us evaluate the income in view of the judgment of **National Insurance Company Limited Vs. Pranay Sethi** and **Others, 2017 0 Supreme (SC) 1050 and Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** and, the recalculation would be as follows:

i. Income = Rs.8,000/- per month as per pay certificate.

ii. Percentage towards future prospects : 30% namely Rs.2400/-

iii. Total income : Rs. 10,000 + 2400 = Rs.12,400/-

iv. Income after deduction of 1/3 : Rs.8,267/-

v. Multiplier applicable : 13 (as the deceased was in the age bracket of 46-50 years)

vii. Loss of dependency: Rs. 8,267 x 13 = Rs.1,07,471/-

viii. Annual income : Rs.1,07,471 x 12 = Rs.12,89,652/-

ix. Amount under non pecuniary heads : Rs.30,000/-

x. Total compensation : **Rs.13,19,652/-.**

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 applicants /claimants are neither illiterate or rustic villagers.

14. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagauri 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. 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.

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. The Apex Court in **AIR 2021 SC 3301, Lakkamma & others. v. The Regional Manager M/S United India Insurance Co. Ltd & another** has accepted the submission of the insurance company that for a period when the appeal is belated, interest shall not be paid. This Court will adopt the similar mode from the date of the judgment till the cross objection is filed. The delay is condoned, interest be not granted.

18. 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.

19. The Appeal and the Cross objection are allowed in light of the latest decisions of the Apex Court. .

20. Record be sent back to court below forthwith, if any.

21. This Court is thankful to Shri Rajiv Chaddha and Shri S.D. Ojha, learned

counsels for the parties for ably assisted the Court.

(2022)04ILR A639
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal from order No. 3087 of 2011
With F.A.F.O.Nos. 3086 of 2011 and 3085 of 2011

Smt. Kavita Verma & Ors. ...Appellants
Versus
Jogendra Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri Ramesh Kumar Shukla

Counsel for the Respondents:
Sri Pranjal Mehrotra, Sri M.K. Maurya

(A) Torts Law - Motor vehicle Act,1988 - Section 163-A,166,173 - compensation for death - rate of interest - income tax returns should be considered as proof of income. (Para -8,10)

(B) Tax Law - The Income Tax Act, 1961- Section 194A (3) (ix) - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/- - insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' - if the amount of interest does not exceeds Rs.50,000/- in any financial year - registry of Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income-Tax Authority. (Para - 16)

Accident caused death of three people - deceased (Prashant Verma), his younger brother (Sandeep Verma) and mother (Smt. Vimlesh) succumbed to the injuries on the spot - same accident - three different awards - rate of interest 7% - dissatisfied with compensation awarded by Tribunal - hence three appeals.

HELD:-Total compensation payable Rs.7,08,550/- for (DECEASED SMT. VIMLESH VERMA); Rs.14,98,000/- for (DECEASED SANDEEP VERMA) ; Rs.25,95,000/- for (DECEASED PRASHANT VERMA).The respondent-Insurance Company shall deposit the amount with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. Amount already deposited be deducted from the amount to be deposited. (Para -15)

Appeals partly allowed. (E-7)

List of Cases cited:-

1. Smt. Anamika Bhardwaj & ors. Vs Ashok Gulati & ors. , F.A.F.O. No. 3251 of 2010

2. Malarvizhi & ors. Vs United India Insurance Company Limited & anr. , AIR (2020) SC 90

3. Sunita & ors. Vs Raj. State Road Transport Corporation & anr. ,2019 (SC) 994

4. Sarla Verma & ors. Vs Delhi Transport Corporation & anr., 2009 Lawsuit (SC) 613

5. Lata Wadhwa & ors. , AIR 2001 SC 3218

6. Anita Sharma Vs New India Assurance Co. Ltd. ,(2021) 1 SCC 171

7. Vimla Devi & ors. Vs National Insurance Company Ltd. & anr., (2019) 2 SCC 18

8. Puttum & ors. Vs K.N. Narayan Reddy ,AIR 2014 (SC) 706

9. Munna Lal Jain & anr. Vs Vipin Kumar Sharma & ors. , (2015) 6 SCC 347

10. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 LawSuit (SC) 1093

11. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

12. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Company Ltd., 2007(2) GLH 291

13. Smt. Sudesna & ors. Vs Hari Singh & anr., F.A.F.O. No. 23 of 2001

14. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd., F.A.F.O. No. 2871 of 2016

15. Bajaj Allianz General Insurance Company Private Ltd. Vs Union of India & ors.

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Shri Ramesh Kumar Shukla, learned counsel for the appellants and Shri Pranjal Mehrotra, learned counsel for the respondents. None appears for the owner.

2. These three appeals are preferred by the appellants who were the original claimants being dissatisfied with the compensation awarded by the Tribunal. The appeal No. 3087 of 2011 arises out of Claim Petition No. 88 of 2010 which was instituted for the death of Prashant Verma. The F.A.F.O. No. 3086 of 2011 arises out of Claim Petition No. 89 of 2010 decided on 14.04.2011 which was filed for death of Sandeep Verma who died in motor accident and F.A.F.O. No. 3085 of 2011 arises out of the Claim Petition being No. 90 of 2010 seeking compensation for the death of Smt. Vimlesh Verma. All the three appeals arise out of three different awards but the accident arose out of the same accident, hence we decide these appeals together.

3. The facts as revealed go to show that on the fateful day when the vehicle in which the deceased were travelling, at about 2.30 p.m. when their vehicle reached near village Deval a tanker bearing registration no. HR 45-A-4558 which was being driven rashly and negligently by its driver, dashed against the Santro Car in which the deceased were travelling by coming from the opposite direction and wrong side and caused the accident. The accident caused death of three people namely deceased Prashant Verma, his younger brother Sandeep Verma and mother Smt. Vimlesh succumbed to the injuries on the spot.

4. At the time of accident deceased Prashant Verma was hale and hearty young man of 30 years and used to carry on bullion business and used to earn Rs. 2,00,000/- per annum. He was also an income tax payee and used to file his income tax returns which are on record for the year of accident and prior there to. The claimants who are widow two years son and one months daughter claimed Rs. 82,25,000/- as compensation. Sandeep Verma the younger brother was unmarried and was engaged in his business of coaching institute and was also preparing for his I.A.S. examination, his income tax return showed that his income was Rs. 1,60,000/- per annum but strange enough the Tribunal considered the income to be Rs. 15,000/- per annum and deducted 1/2 granted multiplier of 5 as per the age of the father and granted Rs. 4,500/- for non pecuniary damages. This computation is under challenge as according to the counsel for appellant the income tax returns have been ignored and the judgment of Apex Court in Srala Verma (intra) directing to grant compensation as per the age of the deceased has also been ignored, which requires re computation. The third petition is by the husband for the death of his wife whose income has been considered to be Rs. 2,000/- per month and has deducted 1/3

amount for personal expenses and granted multiplier of 5 which is also against the decision of Apex Court and granted meagre amount towards non pecuniary damages. According to the counsel for the appellants the compensation and rate of interest requires to be re evaluated.

5. The parties are referred to as appellant/appellants/claimants and respondent/Insurance Company.

6. The appeals raise sole issue of compensation to be granted to the appellant/appellants for death, by this Court. The accident herein having taken place on 08.01.2010 whereby three persons died on the spot is not in dispute. The vehicle being insured with the respondent is not in dispute. The driver of the offending vehicle has been held to be negligent is not in dispute. The tanker driver has been held to be rash and negligent in causing the accident is also not in dispute. The Insurance Company has not challenge the findings by the Tribunal and the findings as to their liability have attained finality.

7. None of the grounds which were raised so as to avoid the liability have found favour with the Tribunal.

8. General submissions by the learned counsel for the appellants the legal heirs of deceased are that though the income tax returns have been filed they have been brushed aside by the Tribunal holding they are not proved by the Income Tax Officer. The learned counsel for the appellants has submitted that this finding is perverse and is against the record. It is submitted that the respondents have not proved that the said documents are either fake or not filed before the department. It is further submitted that PW-1, PW-2 and PW-3 have all testified about the income tax returns being filed just because total income of the firm has not been produced, the Tribunal can not hold that the deceased has to be considered to be earning Rs. 100 or less per day. In that view of the matter the learned counsel has submitted that said finding is against the decision of this Court. This court in case of ***Smt. Anamika Bhardwaj And Others Vs. Ashok Gulati And Others in F.A.F.O. No. 3251 of 2010*** has held that income tax returns should be considered as proof of income. We are fortified in our view by the decision of the Apex Court titled ***Malarvizhi & Others Vs. United India Insurance Company Limited & Anr. reported in AIR (2020) SC 90***. The judgment in ***Sunita and Others Vs. Rajasthan State Road Transport Corporation and Another 2019 (SC) 994*** would enure for the benefit of the appellant/appellants herein, as strict trappings of Civil Procedure Code, 1908 cannot be made applicable to proceeding under such beneficial piece of legislation as has been done by the Tribunal in accepting the submission of the counsel for Insurance Company that the income cannot be fixed on the basis of income tax return this reasoning is bad in eye of law.

FAFO NO. 3085 OF 2011 (DECEASED SMT. VIMLESH VERMA)

9. The F.A.F.O. No. 3085 of 2011 relates to the death of the wife of the appellant the deceased as per the testimony of this witness deceased was 52 years of age at the time of accident. The Tribunal has considered the income of the deceased (house wife) to be Rs. 2,000 per month as the Tribunal held that the income tax return was not proved and as there were no

income tax return filed for the assessment year prior to the one produced and prior to death the same could not be relied upon.

10. This court in case of ***Smt. Anamika Bhardwaj And Others (Supra)*** has held that income tax returns should be considered as proof of income. The Tribunal in the year 2011 very strangely did not fallow the judgment of the Apex Court in ***Sarla Verma and others Vs. Delhi Transport Corporation and another, 2009 Lawsuit (SC) 613*** for grant of multiplier. The Tribunal again relied on the schedule of Motor Vehicles Act 1988 appended for guidance for Section 163-A of the Motor Vehicles Act whereas the Claim Petition was preferred under Section 166 of the Motor Vehicles Act, 1988. The judgment in ***Sarla Verma and others Vs. Delhi Transport Corporation and another, 2009 Lawsuit (SC) 613*** categorically mentioned that the age of the deceased is in the age bracket of 56 to 60 years multiplier of 9 should be applied, even if we go by the second schedule the multiplier of 8 would be admissible and not 5. This entire computation will have to be reworked the reason being the Apex Court in decisions referred herein above has held that income tax return if has been filed, the same has to be considered to be a guiding principle for considering the income of the deceased. The finding of fact that the said document has to be thrown in waste paper does not portray beneficiton which a Motor Accident Claims Tribunal should show, while deciding compensation matter which was a certified copy of order is known as income tax statement of the deceased. The learned counsel submitted that the Tribunal even if did not accept the income tax return the Tribunal ought to have at least applied the principle admissible on death of house wife as enunciated in ***Lata Wadhwa and others reported in AIR 2001 SC 3218***, even if there was no documentary evidence produced. There is no reason assigned as to why the Tribunal does not accept the oral testimony of the husband the deceased was 52 years of age and comes to the conclusion that postmortem report should be accepted and held are to be 60 years. May that as it may be the Tribunal has committed error in not considering the income tax return or the statement of the income of the deceased which proved that the income of the deceased was Rs. 1,49,800/- per annum. In the case of ***Anita Sharma Vs. New India Assurance Co. Ltd. (2021) 1 SCC 171*** and in case of ***Vimla Devi and Others Vs. National Insurance Company Limited and another, (2019) 2 SCC 18 and the fact that way back in Puttum and Others Vs. K.N. Narayan Reddy AIR 2014 (SC) 706*** the Apex Court has held that the schedule is unworkable there are faults in a schedule despite that the Tribunal relied on the same. The Tribunal relied on the schedule despite to the fact that the Tribunal was pointed out the decision in ***Sarla Verma (Supra).*** The judgment in ***Vimla Devi (Supra)*** would apply to the facts of this case. We are fortified in our view by the decision of the Apex Court in Malarvizhi & Others (Supra) would which ensure for the benefit of the appellant herein, as strict trappings of Civil Procedure Court be made applicable. Hence the income of the deceased has to be considered Rs. to be Rs. 1,49,000/- per annum out of which Rs. 20,000/- has to be deducted by way of income tax we consider the age of the deceased to be 56 years and upturn the finding of the Tribunal that the deceased was 60 years of age when she passed away. To the income which we have considered, 10% will have to be added for future loss of income as the husband is the sole dependent and she had major children

who were married, from the said amount 1/2 will have to be deducted and not 1/3 for personal expenses, the multiplier would be 9 to which looking to the year of the accident Rs. 70,000/- would be admissible for non pecuniary damages the interest would be as decided herein below:-

(i). Annual income after deduction of income tax= Rs. 1,29,000/-.

(ii). 10% for future loss of income =Rs. 1,29,000+12,900=1,41,900/-.

(iii). Deduction for personal expenses 1/2 = 1,41,900-70950=70950.

(iv). Multiplier applicable=9

(v). Loss of dependency Rs. 70,950X9=6,38,550/-.

(vi). Amount under non pecuniary heads Rs. 70,000/-

(vii). Total compensation Rs. 6,38,550+70,000=7,08,550/-.

FAFO NO. 3086 OF 2011 (DECEASED SANDEEP VERMA)

11. Sandeep Verma was running coaching classes and was preparing for his I.A.S examination the Tribunal has considered his income in the year 2010 to be Rs. 15,000/- per annum based on schedule as if it was a petition under 163-A we have assigned reason that the same is bad in foregoing paragraphs by assigning reason that though he was income payee, the income tax return was for the year 2010 and that is also not relied on. The Tribunal has held that as there is no statement of income of the previous years, therefore, the same has not been believed. The Tribunal has not considered the concept of potential of the young boy who had cleared his I.A.S. preliminary exam and also was doing business, even, if we discard the certificate of income, his income can be considered to be Rs. 10,000/- per month to which as he was self employed 40% will have to be added which is not added by the Tribunal. Hence, Rs. 10,000+4,000=Rs. 14,000/- and the father and mother were dependent upon him 1/2 can be deducted. The multiplier granted by the Tribunal was 5 as per section ***163-A of the Motor Vehicles Act*** on the basis of the age of the father which is not permissible the age of the deceased will have to be considered even in the year of the decision namely the judgment on the basis of decision of ***Munna Lal Jain And Another Vs. Vipin Kumar Sharma and Others reported in (2015) 6 SCC 347***. The multiplier would be 17 as the deceased was 28 years of age to which Rs. 40,000/- under the head of non pecuniary damages will have to be granted to the father with interest.

(i). Annual income = Rs. 10,000X12=1,20,000/-.

(ii). Future loss of income @ 40%=Rs. 48,000/-.

(iii). Total income Rs. 1,20,000+48,000=1,68,000.

(iv). Income after deduction of 1/2 for personal expenses=84,000-.

(iv). Multiplier applicable=17

(v). Loss of dependency Rs. 84,000X17=14,28,000/-.

(vi). Amount under non pecuniary heads Rs. 70,000/-

(vii). Total compensation Rs. 14,28,000+70,000=14,98,000/-.

FAFO NO. 3087 OF 2011 (DECEASED PRASHANT VERMA)

12. Third matter relates to the death of Prashant Verma who had a jewellery shop who was an income tax payer whose income tax return was filed as document C-15. He was survived by his widow

aged 28 years, son of 2 years and daughter of 1 month and his father who was also dependent upon him. The Tribunal very strange enough in this matter also discarded the income tax returns which was filed and proved by the widow of the deceased where the total gross income was shown to be Rs. 1,97,800/- per annum, which can safely be considered to be Rs. 1,50,000/- per annum as income tax can be deducted per annum. The deceased was below the age of 50, hence 40% will have to be added to the said income. As he was survived by his widow and two minor children and father 1/3 will have to be deducted and the multiplier of 17 granted is maintained. The Tribunal could not have held that his income should be that of a labourer. The deceased was a B.Sc. graduate that because documents about his degree were not filed it cannot be held that he was a labourer. The oral testimony of widow and father testified this fact. The certified copy of income tax return was already filed. The Tribunal granted Rs. 2,000/- for funeral expenses, Rs. 5,000/- for loss of consortium and Rs. 2,000/- for loss of estate, the petition is decided on 14.04.2011 namely after the judgment in ***Sarla Verma (Supra***). We would have to recalculate the compensation Rs. 50,000/- each to two minor children as filial consortium who lost their father at a tender age. A sum of Rs. 1 Lakh to the widow in addition to Rs. 59,000/- granted by the Tribunal for loss of love affection and consortium and for losing her husband at a young age of 28 with two children to maintain. Rs. 15,000 for funeral expenses as per the judgment of Apex Court ***National Insurance Co. Ltd. Vs. Pranay Sethi and Others, 2017 LawSuit (SC) 1093***, under non pecuniary damages, the father is adequately compensated in the other two matters hence in this matter out of total compensation Rs. 50,000/- be paid to the father of the deceased.

(i). Annual income = Rs. 1,50,000.

(ii). Future loss of income @ 40%=Rs. 60,000/-.

(iii). Total income Rs. 1,50,000+60,000=2,10,000.

(iv). Income after deduction of 1/3 deduction for personal expenses=Rs. 1,40,000/-.

(iv). Multiplier applicable=17

(v). Loss of dependency Rs. 1,40,000X17=23,80,000/-.

(vi). Amount under non pecuniary heads Rs. 50,000+50,000+1,00,000+15,000=2,15,000/-.

(vii). Total compensation Rs. 23,80,000+2,15,000=25,95,000/-.

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. Learned Tribunal has awarded rate of interest as 7% per annum but we are

fixing the rate of interest as 7.5% in the light of the above judgment.

15. In view of the above, these appeals are **partly allowed**. 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 08 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. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd., [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 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.

17. The Tribunal shall follow the guidelines issued by the Apex Court in ***Bajaj Allianz General Insurance Company Private Ltd. Vs Union of India and others*** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As 10 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

18. While parting the request to Registrar General to show our concerned to the learned Tribunal about the method in which the matters were decided. We request the Tribunal in the State to consolidate the matter given consolidated the judgment and award in matters there were more than two claim petitions.

19. We request the Registrar General to send the copy of this order to the learned Tribunal so that in future he may more cautious.

(2022)04ILR A645
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 3381 of 2003

Raghuraj Singh ...Appellants
Versus
Gyan Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri Y.S. Bohra

Counsel for the Respondents:
Sri Pradeep Kumar Sinha, Sri Arvind Kumar

(A) Torts Law - Motor Vehicle Act,1988 - quantum of compensation - 'just-compensation' - Hindu Succession Act, 1956 - class-1 heir - mother of the deceased - Although, the deceased had not joined service, yet the salary mentioned in the appointment-letter even if it cannot be made sole basis of assessment of income of the deceased, but it can certainly be viewed to assess the potentiality of the deceased person to earn - compensation shall also be granted to the claimants for 'future loss of income' also - multiplier shall be granted on the basis of the age of the deceased .(Para - 2,8,9,10,20)

(B) Evidence Law - Indian Evidence Act, 1872 - Section 106 - Burden of proving fact especially within knowledge - whether any driver of the vehicle was having a valid driving-licence or not is the fact, which is in 'special-knowledge' of the driver - burden to prove the fact of valid driving-licence always lie on the driver.(Para - 19,20)

Appellant (father of deceased) filed claim petition - seeking compensation - death of his unmarried son in a road accident - awarding sum of Rs.9,62,000/- as compensation to the claimants - interest at the rate of 6% per annum - aggrieved - filed appeal for enhancement of compensation - failure of offending truck-driver to produce his driving-licence before Tribunal.(Para - 3,5,16)

HELD:-Total compensation payable to appellants and daughters of the deceased Rs.23,98,000/- . Direction to respondent No.3 to deposit entire amount with interest @ 7.5% per annum from the date of filing of the claim petition till amount is deposited. Owner and driver of offending truck failed to prove that truck-driver was having valid driving-licence on the date of accident. Court direct that amount of compensation shall be paid by respondent No.2- and after that, it will be open to the Insurance Company to recover the amount, paid, from the owner of the truck. (Para - 12,15,22)

Appeal partly allowed. (E-7)

List of Cases cited:-

1. Meena Pawaia & ors. Vs Ashraf Ali & ors., 2021 LawSuit (SC) 743

2. Munna Lal Jain Vs Vipin Kumar Sharma, 2015 (3) TAC 1 (SC)

3. Smt.Sarla Verma Vs Delhi Transport Corp. & ors., 2009 (2) TAC 677 (SC)

4. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

5. Ravindra Kumar Sharma Vs St. of Assam & ors., 1999 (8) Supp.62

6. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Company Ltd., 2007(2) GLH 291

7. Smt. Sudesna & ors. Vs Hari Singh and another, F.A.F.O. No.23 of 2001

8. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd., F.A.F.O. No.2871 of 2016

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the claimants have challenged the judgment and award dated 15.11.2003 passed by Motor Accident Claims Tribunal/ District Judge, Gautam Budh Nagar (*herein after referred to as "Tribunal"*) in M.A.C.P. No.211 of 2001 (*Shri Raghuraj Singh vs. Gyan Singh and others*) awarding sum of Rs.9,62,000/- as compensation to the claimants with interest at the rate of 6% per annum.

2. At the very outset, it is relevant to mention that the claim petition was instituted by his father on account of death of a unmarried boy, who met with a road-accident. Initially, the mother of the deceased was not made party before the learned Tribunal though she was and is still alive. She being the class-1 heir as per Hindu Succession Act, 1956, should have

been made party as claimant. It was on the face of record before the learned Tribunal that mother of the deceased was alive even though the learned Tribunal did not take pain to call upon the claimant to implead the mother as a party. Claim petition was decided in favour of claimant. Now at the time of hearing this appeal, we pointed out the aforesaid fact to the parties and on our behest, appellant/claimant made the mother of the deceased as party/claimant in the memo of appeal.

3. The brief facts of the case are that appellant Raghuraj Singh (father of the deceased) filed a claim petition before learned Tribunal for seeking compensation on account of death of his unmarried-son in a road accident. It is averred in petition that on 24.5.2001, the deceased, namely, Vaibhav Talan, was going to Lucknow from Kanpur in a car bearing No.UP-78-AC/9288. He was sitting on the back-seat. At about 2:30 p.m., when the aforesaid car reached near Sainik School Pulliya, within the jurisdiction of Police Station-Sarojini Nagar, Lucknow, a truck bearing No.UP-78/9655 coming from backside at a very high-spead, driven rashly and negligently by its driver dashed against the car. In the accident, deceased sustained fatal injuries and died.

4. Heard Shri Y.S.Bohra, learned counsel for the appellant-claimant and Shri Pradeep Kumar Sinha, learned counsel for the respondents. Perused the record.

5. The accident, in this case, is not in dispute. The liability of respondent No.2-Insurance Company is not in dispute. Finding of negligence is also not challenged. The claimant/appellants have filed the appeal for enhancement of compensation while during the course of arguments, the Insurance Co. has orally objected to the finding, arrived at by learned Tribunal regarding Issue No.3, which relates to the driving-licence of the truck-driver.

6. Hence, apart from the finding regarding the driving licence of the truck-driver, it remains the issue of quantum of compensation. Learned counsel for the appellants submitted that the deceased was a boy of 24 years only. He had passed M.B.A. from Jamuna Lal Bajaj Institute of Management, Mumbai, and had secured the job in Ranbaxy Company and he had to join on 1st June, 2001, i.e., just after a week of this unfortunate accident. Learned counsel further submitted that a copy of the aforesaid appointment-letter is filed on record, which also shows that his salary was fixed more than Rs.20,000/- per month, but learned Tribunal ignored this fact and assessment of his monthly income was met on the basis of his basic-salary only.

7. *Per contra*, Shri Sinha, learned counsel appearing on behalf of Insurance Company, has submitted that the deceased had not joined the service, therefore, the salary mentioned in appointment-letter cannot be taken into account for calculation of compensation. He elaborates that at the time of death, the deceased was not earning, hence notional income should be taken.

8. We are unable to concur with the above submission of by Shri Sinha, learned counsel appearing for the Insurance Company. It is a fact that the deceased had yet not joined the service in pursuance of his appointment-letter, but this Court cannot ignore the fact that only a week was left for him to join when the deceased met

with the accident and lost his life. In such a situation, learned Tribunal should have analyzed the aspect of potentiality of the deceased to earn as the claimants are entitled to 'just-compensation'. Tribunal has committed an error in presuming the monthly income of the deceased at Rs.10,000/- on the basis of basic-salary from his appointment-letter. The deceased had graduated from a reputed management institute and had secured appointment in a prestigious company like Ranbaxy. Therefore, looking to the educational qualification and the family-background, the deceased was having a bright future. Although, the deceased had not joined service, yet the salary mentioned in the appointment-letter even if it cannot be made sole basis of assessment of income of the deceased, but it can certainly be viewed to assess the potentiality of the deceased person to earn as held by Hon'ble Apex Court in ***Meena Pawaia and others vs. Ashraf Ali and others***, *2021 LawSuit (SC) 743*. Hence, we are unable to subscribe to the submission of Insurance Company that notional income of the deceased should be considered. Keeping in view the potentiality of the deceased to earn on the basis of above appointment order, we hold the income of the deceased at ***Rs.15,000/- per month***.

9. Hon'ble Apex Court in National Insurance Co. vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093 has held that compensation shall also be granted to the claimants for 'future loss of income' also. In case of salaried or self-employed persons or on a fixed wages. This case law is further extended by Hon'ble Apex Court in ***Meena Pawaiya*** *(supra)* to the deceased, who was not serving at the time of accident and had no income at the time of death and held that legal heirs of such person shall also be entitled to future prospects by adding future-rise in income, i.e., addition of 40% of the income determined on guess-work considering the educational qualification, family-background, etc., where the deceased was below the age 40 years. In the case on hand, the age of the deceased was 24 years. The deceased was well educated and about to join service after a week of the accident, hence in the light of the aforesaid observations of Hon'ble Apex Court, 40% shall be added to the income of the deceased for future prospects.

10. Learned Tribunal has committed gross-error in not deducting any sum towards personal expenses of the deceased. It is an admitted fact that the deceased was unmarried person, therefore, as per the judgment of Hon'ble Apex Court in ***Munna Lal Jain vs. Vipin Kumar Sharma***, *2015 (3) TAC 1 (SC)*, learned Tribunal has applied multiplier of 8 only on the basis of age of the father. According to the decision in Munna Lal (supra), the multiplier shall be granted on the basis of the age of the deceased. Therefore, keeping in view the age of the deceased, namely, 24 years, multiplier of 18 will be applicable in light of the decision of Hon'ble Apex Court titled ***Smt.Sarla Verma vs. Delhi Transport Corporation and others***, *2009 (2) TAC 677 (SC).*

11. Learned Tribunal has awarded only Rs.2,000/-for funeral expenses and no other amount is awarded under the head of non-pecuniary damages, which could not be done. Hence, we hold that as per the judgment of Hon'ble Apex Court in ***Pranay Sethi*** (supra), appellants shall be entitled to Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses. Appellants are father and mother of the

deceased, who lost their young-son at his age of just 24 years, therefore, both of them shall be entitled to filial consortium of Rs.50,000/- each for loss of love and affection.

12. Hence, the total compensation payable to the appellants and daughters of the deceased as per the discussion above is recomputed herein below:

i.	Annual Income	Rs.15,000/- x 12	Rs.1,80,00/-
ii.	Percentage towards Future-Prospects (40%)		Rs.72,000/-
iii.	Total Income	Rs.1,80,000/- + Rs.72,000/-	Rs.2,52,000/-
iv.	Income after deduction of 1/2	Rs.2,52,000/- Rs.1,26,000/-	Rs.1,26,000/-
v.	Multiplier applicable	18	
vi.	Loss of dependency	Rs.1,26,000/- x 18	Rs.22,68,000/-
vii.	After adding Non-pecuniary Damages	Rs.22,68,000/- + Rs.1,30,000/-	Rs.23,98,000/-
viii.	Total Compensation		Rs.23,98,000/-

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. Learned Tribunal has awarded rate of interest as 6% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

15. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal is modified to the aforesaid extent. United India Insurance Company Limited-respondent No.3 shall deposit the entire amount within a period of **12 weeks** from today with interest @ 7.5% per annum 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. Now, there is another issue to be decided in this appeal with regard to the failure of offending truck-driver to produce his driving-licence before the learned Tribunal. Learned counsel for the Insurance Company made submission that although no cross-objection has been filed by him as per Order XLI, Rule 22, Clause-I. In this regard, learned counsel has relied on judgment of Hon'ble Apex Court in ***Ravindra Kumar Sharma vs. State of Assam and others,*** *1999 (8) Supp.62*, wherein it is held that it is respondents'

right to attack the adverse finding. Filing of cross-objection is purely optional and not mandatory. Adverse finding can be attacked by the respondent-defendant without filing cross-objection. Learned counsel for the National Insurance Co.Ltd-respondent No.2 submitted that the offending truck was insured by it, but during the proceedings before learned Tribunal, the driver of the truck did not appear nor filed his driving-licence. Hence, it is not proved that truck driver was having a valid driving-licence at the time accident and this issue is wrongly decided by the Tribunal. Learned Tribunal held that the Insurance Co. has taken the plea that the driver of the truck was not having a valid driving-licence, therefore, it was the burden on the shoulders of the Insurance Co. to prove that truck-driver was not having the aforesaid licence. We are in full agreement with the submissions made by learned counsel appearing on behalf of National Insurance Co.-National Insurance Co. Perusal of impugned judgments shows that Issue-3 was framed by the Tribunal as under:

"Whether the driver of the offending vehicle had no vaild driving licence on the date of accident? If so, its effect?"

17. While deciding the aforesaid issue, learned Tribunal has held as under:

"No driving-licence has been filed by the Tribunal as he has not come to contest it. The plea was taken by the Insurance Co. Therefore, it was its duty to have proved it that the driver of the truck was not having a valid driving-licence and no such evidence has been produced. It is for the purpose, who takes the plea to prove it, but no such evidence has been given."

18. With the aforesaid finding, learned Tribunal decided Issue-3 in negative.

19. Learned Tribunal has opined that it is for the person, who takes the plea to prove it, but this is not the law of evidence everywhere. Section 106 of Indian Evidence Act, 1872, provides as follows:

*"**106**. Burden of proving fact especially within knowledge.--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations*

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

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

20. Hence, whether any driver of the vehicle was having a valid driving-licence or not is the fact, which is in 'special-knowledge' of the driver. Therefore, burden to prove the fact of valid driving-licence always lie on the driver and, therefore, we are not convinced with the findings given by the Tribunal on Issue-3 and, accordingly, we upturn the said finding and hold that it is not proved that the driver of the offending truck was having valid driving-licence at the time of accident.

21. In view of the above, the appeal and oral cross-objection are **partly allowed**. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The Insurance Company shall deposit the amount within a period of 8 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.

22. Since, it is held by us that owner and driver of the offending truck have failed to prove that the truck-driver was having valid driving-licence on the date of accident, we direct that amount of compensation shall be paid by respondent No.2-National Insurance Co., Insurance Company of the offending truck and after that, it will be open to the Insurance Company to recover the amount, paid, from the owner of the truck.

23. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd***., *[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 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.

24. It is made clear that learned Tribunal has discharged the liability of respondents 1, 3 and 4. The liability of owner of the truck, i.e., respondent No.2 cannot be discharged because the owner of the vehicle is liable to pay the compensation and Insurance Company has to indemnify the liability of the owner. Hence, we upturn the finding of Tribunal to the extent it discharged the liability of owner of the truck.

25. It is pertinent to mention that both the appellants (mother and father of the deceased) shall get equal amount of enhanced compensation.

26. The Tribunal shall follow the guidelines issued by the Hon'ble Apex Court in Bajaj Allianz General Insurance Company Privae Ltd. vs. Union of India and others vide order dated 27.1.2022, as the prupose of keeping compensation is to safeguard the interest of the claimants. Since long time has elapsed, the amount be deposited in the Saving Bank Account of claimant(s) in a nationalized Bank without F.D.R.

(2022)04ILR A651
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.04.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJNISH KUMAR, J.

Habeas Corpus Writ Petition No. 5 of 2022
Connected with
Habeas Corpus Writ Petition Nos. 6 of 2022 & 8 of 2022

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

Counsel for the Petitioner:
Sri Ajay Kumar Mishra, Sri Amit Daga

Counsel for the Respondents:
G.A., A.S.G.I., Sri Alok Ranjan Mishra

A. Criminal Law - Constitution of India, 1950 - Article 226 - Indian Penal Code, 1860- Sections 147, 148, 149, 302, 504, 506 & 34 - Criminal Law Amendment Act-Section 7- challenge to-Order of detention- murder-informant brother was killed-accused persons enmity with informant since they had not voted for accused person when he contested for the office of village pradhan-the order of detention passed by District Magistrate u/s 3(3) of the National Security Act, 1980 does not satisfy the conditions exists in Section 3(2) of the Act-the application of mind on part of the District Magistrate must be reflected or else the satisfaction itself of the detaining authority would be vitiated-ground of detention, language as well as phraseology of facts remains unaltered and clearly suggest lack of independent application of mind on the part of District Magistrate, such satisfaction on the part of the sponsoring authority would not suffice-there is nothing to indicate that the District Magistrate applied his mind to the question whether an order of detention was necessary despite the fact that the petitioner was already in custody in connection with the criminal case-the cases of other two petitioner are identical and they are released forthwith, unless they are warranted in connection with some other cases- the grounds of detention merely refers to the fact that the petitioner had applied for grant of bail in one case alone-no reference of filing of any bail application in the grounds of detention in the other cases-this omission appears to be a direct consequence of failure in that regard contained in the recommendation of the sponsoring authority wherein also no fact about filing of bail application are recorded-Thus, the detention order suffers from jurisdictional infirmity-the detention order stands quashed. (Para 1 to 37)

B. In the instant case, the District Magistrate, State Government did not discharge the first of the two-fold obligation and rejected the petitioner's representation in a routine manner without application of independent mind. The normal rule of law is that when a person commits an offence or a number of offences, he should be prosecuted and punished in accordance with the normal appropriate criminal law; but if he is sought to be detained under any of the preventive detention laws as may often be necessary to prevent further commission of such offences, then the provisions of Article 22(5) must be complied with. It provides that the detaining authority shall as soon as may be communicate the grounds of detention and shall afford him the earliest opportunity of making a representation against the order. The representation, if any, submitted by the detenu is meant for consideration by the Appropriate Authority without any unreasonable delay as it involves the liberty of a citizen guaranteed by Article 19 of the Constitution. the non-consideration of representation tantamount to non-compliance of Article 22(5) of the Constitution. (Para 29)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Jai Singh & ors. Vs St. of J &K (1985) 1 SCC 561

2. Vashdev Adnani Vs St. of Mah. & ors. (2005) 8 SCC 390

3. Sarabjeet Singh Mokha Vs DM, jabalpur & ors. (2021) SCC OnLine SC 1019

4. Ayya @ Ayub Vs St. of U.P. & anr. (1989) 1 SCC 374

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Detention orders of different dates, founded on a common basis, have been passed against three petitioners, which are under challenge in the present bunch of habeas corpus writ petitions. We have heard all three petitions together and are

being disposed off by this common judgment.

2. Habeas Corpus Writ Petition No.5 of 2022 is treated as the leading case wherein the order of detention passed by District Magistrate, Bijnor is challenged alongwith the order of the State Government approving it and the order rejecting petitioner's representation. Orders extending the term of detention, from time to time, are also assailed. Similar reliefs are claimed in the other connected petitions, as well.

3. Basis of impugned detention orders in all three cases is the implication of petitioners in the First Information Report dated 19.5.2021, registered as Case Crime No.291 of 2021, under Sections 147, 148, 149, 302, 504, 506, 34 IPC and Section 7 of the Criminal Law Amendment Act, Police Station Chandpur, District Bijnor. This FIR requires a little elaboration at the outset. Informant in the said FIR is one Rajeev son of Chhatrapal, resident of Village Baseda, Police Station Chandpur, District Bijnor, whose brother Sanjay was killed at 8.30 pm on 18.5.2021. The FIR was lodged on 19.5.2021 at 1.44 am. As per the FIR the accused persons namely Ajab Singh, Nikhil Kumar, Shailendra Singh, Parvendra Kumar and Sunil Kumar maintained enmity with the informant and his family, since they had not voted for Ajab Singh,when he contested for the office of Village Pradhan, despite request made in that regard. On 18.5.2021 at about 8.30 pm accused persons armed with country made firearm (Tamancha), gun and other arms attacked the informant's house and Ajab Singh shot dead the informant's brother Sanjay. Other accused including the three petitioners are said to have indiscriminately fired creating an atmosphere of terror in the village. The incident is alleged to have been seen by Brahmapal son of Gangaram, Kalyan son of Atar Singh and Ranpal son of Zileram. It is claimed in the FIR that widespread fear prevailed in the village and people were running helter-skelter. The villagers had locked themselves in their houses by shutting their doors and windows from inside. Specific role of firing in which the deceased died however is attributed to Ajab Singh while all other accused (three petitioners herein) were assigned the role of carrying Tamancha (Country made Pistol) and Bandook (gun) and indiscriminately firing upon the informant's side. All three petitioners were arrested and applied for bail. It is at this stage that the Station House Officer recommended action against the petitioners under the National Security Act, 1980 (hereinafter referred to as the "Act of 1980') leading to petitioners' detention under the Act of 1980.

4. The chronology of events in the leading Habeas Corpus Writ Petition No.5 of 2022 is that the order of detention came to be passed against the petitioner on 27.8.2021 by the District Magistrate, Bijnor on the basis of a recommendation made by the sponsoring authority. This order has also been approved by the State Government on 6.9.2021. It is alleged that a representation was made against the detention order by the petitioner on 6.9.2021. However, an issue was raised about the filing of representation on the said date and consequently we summoned the original records to find that the representation in fact was made only on 8.9.2021 instead of 6.9.2021, as is alleged in the petition. Upon a perusal of original records it transpires that the representation was sent on the same date to the office of District Magistrate, Bijnor and the Additional District Magistrate, Bijnor on

behalf of the District Magistrate called for the comments of Superintendent of Police, Bijnor in the matter. The representation was consequently sent to the Station House Officer of the concerned police station for his comments in the matter. The comments were submitted on 13.9.2021 to the office of Superintendent of Police, who forwarded the same to the District Magistrate alongwith his comments on the same date. The District Magistrate rejected the representation on 13.9.2021. The decision was informed to the petitioner through the authorities on the same date. The District Magistrate simultaneously forwarded the copies of representation to the State Government on 14.9.2021. The State Government after due deliberation and examination of records rejected the representation on 21.9.2021, which order has been communicated to the detenue on 22.9.2021. The representation was also forwarded to the Central Government by the District Magistrate on 13.9.2021, which came to be rejected on 22.9.2021. The term of 3 months detention has been extended by subsequent orders dated 23.11.2021 and 15.2.2022, which are also under challenge.

5. In Habeas Corpus Writ Petition No.6 of 2022, filed by Nikhil Kumar, the order of detention came to be passed on 22.10.2021. It has been approved by the State Government on 1.11.2021. The representation against the order of detention was submitted on 8.11.2021, which was rejected by the District Magistrate on 29.11.2021, while the representations made to State Government came to be rejected on 7.12.2021 and the Central Government rejected it on 8.12.2021. Aggrieved by these orders as also the extension of detention vide subsequent orders, the petitioner is before this Court.

6. In Habeas Corpus Writ Petition No.8 of 2022, Surendra Singh @ Shailendra Singh questions the detention order passed by the District Magistrate, Bijnor on 6.9.2021. A representation was made against this order on 30.9.2021. Comments in the matter were called from the office of Superintendent of Police, Bijnor. Comments were submitted in the matter on 4.10.2021 and the District Magistrate after considering such comments rejected the representation on 5.10.2021. The representation made to the State Government was rejected on 7.10.2021 while the Central Government rejected petitioner's representation on 18.10.2021. The detention order was also approved by the State Government on 26.10.2021. The period of detention has been extended for six months vide order dated 23.11.2021 and has further been extended for a period of nine months vide order dated 24.2.2022, which are under challenge.

7. The aforesaid three petitions have been entertained and counter affidavits have been filed by the State Government and its authorities, as also the Union Government, to which rejoinder affidavits have been filed on behalf of the petitioners. The three petitions have thus been heard on different dates and are being disposed off by this common judgment.

8. We have heard Sri Amit Daga, learned counsel for the petitioners, Sri Alok Ranjan Mishra, Sri Kameshwar Singh and Ms. Annapurna Singh for the Union of India and Sri Ali Murtza, learned AGA for the State and its authorities.

9. Learned counsel for the petitioners in support of the writ petitions has made following submissions:-

(i) That the detention order passed by the District Magistrate concerned lacked application of mind on his part inasmuch as the proposals made by Sponsoring Authority have been virtually copied without any satisfaction having been recorded at his own level. The grant of routine approval by the State is also questioned on the ground of it being mechanical in nature.

(ii) The alleged offence, which forms the basis of detention order at best depicts instance of law and order with no trappings of public order involved in it. It is also stated that there is no allegation of panic etc. caused amongst public on account of alleged offence.

(iii) It is then submitted that the apprehension that the detainee would be released or that he would cause similar offence in future is not based on any material brought on record.

(iv) It is lastly contended that there was delay occasioned in disposal of the representation against the order of detention at every level i.e. at the level of District Magistrate; State Government; and also Central Government, which vitiates the order of detention itself.

10. We may record that during the course of arguments original records have been produced by the office of District Magistrate, State Government and also Central Government on various aspects in order to consider the respective submissions advanced by the counsel for the parties. The original records of the concerned Magistrate containing case diaries in Case Crime No. 291 of 2021 have also been produced before us in sealed envelope, on our directions and have been perused.

11. First and foremost, it is urged on behalf of petitioners that there is no independent application of mind on part of the District Magistrate to the facts recorded in the proposal of the sponsoring authority with regard to existence of conditions justifying exercise of power under Section 3(3) of the Act of 1980 in as much as the order of detention virtually copies the recommendation of sponsoring authority, line by line, page by page except for his conclusion contained in one sentence, recording his satisfaction.

12. We have perused the recommendation made by the sponsoring authority i.e. the Officiating Inspector, Police Station Chandpur, District Bijnor; the forwarding letter of the Superintendent of Police, Bijnor, as well as the order of detention passed by the District Magistrate, which contains the grounds of detention. Learned counsel for the petitioners has taken us through the recommendation made by the sponsoring authority, as also the grounds of detention accompanying the detention order dated 27.8.2021, in order to submit that the order of detention lacks due application of mind on part of the detaining authority, which renders the order of detention itself bad in law.

13. The recommendation made by the sponsoring authority is contained in Annexure-3 and is addressed to the Superintendent of Police, Bijnor. The recommendation runs into 65 pages. Specific reference is made in it to the incident of 18.5.2021 in which the petitioners alongwith Ajab Singh and other accused persons came to the house of the deceased Sanjay armed with Tamancha (countrymade pistol) and Bandook (gun) and resorted to indiscriminate firing, which allegedly caused an atmosphere of terror in the village and the public order was disturbed. Reference has also been made to the materials collected during the course of

investigation, on the basis of which chargesheet has been submitted in the matter against the petitioners. Further materials forming part of the recommendation by the sponsoring authority includes the statements recorded of various persons, even after submission of chargesheet, on the basis of which it is alleged that in the event petitioners are released on bail, they are likely to indulge in activities prejudicial to public order.

14. The orders impugned have been passed in exercise of powers under the Act of 1980. The Act of 1980 came to be introduced with an intent that law and order situation in the country is tackled in a most determined and effective way by containing social and antisocial elements. The object was to ensure security and defence of State as also the public order and ensure that other services essential to the community are not disrupted. The appropriate Government i.e. Central Government or the State Government was thus conferred authority to pass orders of preventive detention against a person with a view to prevent him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community. The order of detention purportedly is alleged to have been passed by the District Magistrate exercising his jurisdiction under sub section (3) of Section 3 of the Act of 1980, upon being satisfied that exigency stipulated in sub-section (2) of Section 3 exists in the facts of the case. Section 3(2) and (3) of the Act of 1980 are reproduced hereinafter:-

"3(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of Public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation.--For the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such

order to extend such period from time to time by any period not exceeding three months at any one time."

15. Sub-section (4) of Section 3 of the Act of 1980 is also relevant, which is reproduced hereinafter:-

"3(4) When any order is made under this section by an officer mentioned in sub-section (3), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government:

Provided that where under section 8 the grounds of detention are communicated by the officer making the order after five days but not later than ten days from the date of detentions, this sub-section shall apply subject to the modification, that, for the words "twelve days", the words "fifteen days" shall be substituted."

16. Power of preventive detention, therefore, is conferred on the appropriate Government only to prevent a person from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community.

17. The power under sub-section (3) of Section 3 can also be exercised by the District Magistrate or the Commissioner of Police in respect of areas falling within their limits of jurisdiction. Where such an order is passed by the District Magistrate, he must satisfy himself with regard to existence of conditions referred to in sub-section (2) of Section 3 of the Act of 1980. The exercise of power by the District Magistrate under sub-section (3), therefore, is dependent upon the existence of conditions stipulated in sub-section (2) of Section 3 of the Act of 1980 and such satisfaction has to be of the District Magistrate or the Commissioner of Police, as the case may be. The first argument advanced in the matter is that such satisfaction on part of the authority concerned i.e. detaining authority/District Magistrate, is missing in the facts of the case which initiates the order of detention as well as all other consequential orders challenged in the writ petitions.

18. We have perused the recommendation of the sponsoring authority as also the grounds of detention passed by the District Magistrate and we find substance in the argument advanced on behalf of the petitioners that independent satisfaction with regard to existence of conditions under Section 3(2) of the Act of 1980 is wanted on part of the District Magistrate.

19. The order of the District Magistrate is in two parts. The first part is the operative portion which directs the petitioners to be detained in District Jail Bijnor, by invoking his jurisdiction under sub-section (3) of Section 3 as conditions exists for exercise of power under sub-section (2) of Section 3 of the Act of 1980. This part of order is contained in the standard format in which the only details of detenue as also the date of order varies. It is the second part of the order that contains the grounds of detention and contains the satisfaction of detaining authority about existence of conditions referred to in sub-

section (2) of Section 3 of the Act of 1980 so as to justify his order passed under sub-section (3). The grounds of detention starts at page 121-A of the paper book by mentioning that the petitioner is a man of desperate and cunning nature and goes on to refer to the incident of 18.5.2021 in respect of which FIR is registered as Case Crime No. 291 of 2021. The order then proceeds to virtually copy, page by page, line by line the contents of the proposal of the sponsoring authority. Page 1 to 55 of the grounds of detention, therefore, are copied from the recommendations of the sponsoring authority. The contribution of District Magistrate in the entire 55 pages is his satisfaction that petitioners release is detrimental to maintenance of public order and his preventive detention is required.

20. Contentions are advanced by respective counsels on the aspect relating to application of mind on part of the District Magistrate, as also the manner of its ascertainment, for the purposes of arriving at his independent satisfaction with regard to existence of conditions referred to in sub-section (2) of Section 3 of the Act of 1980 so as to justify invocation of jurisdiction under sub-section (3).

21. Sri Ali Murtaza, learned AGA submits that the material on the basis of which such satisfaction is to be recorded by the District Magistrate remains the same, as is referred to by the sponsoring authority in his report and, therefore, the District Magistrate has done no wrong while copying facts from the recommendation of the sponsoring authority.

22. While we do agree that facts and circumstances which have led to the recommendation by the sponsoring authority for preventing detention of petitioners remains the same on which satisfaction of the District Magistrate is to be based, but from the phraseology of the order and reference of material relied upon by the District Magistrate in the order of detention the application of mind on part of the District Magistrate must be reflected or else the satisfaction itself of the detaining authority would be vitiated.

23. Page by page we are shown that grounds of detention contained in the order of the District Magistrate is virtual copy of the recital contained in the recommendation of the sponsoring authority. Language as well as phraseology of facts remains unaltered and clearly suggests lack of independent application of mind on part of the District Magistrate.

24. Except for the satisfaction recorded by the District Magistrate in one sentence that on the basis of materials referred to in the grounds of detention, he is satisfied about existence of conditions warranting petitioners' preventive detention there is nothing on record which may even remotely suggest that District Magistrate has cared to read the recommendation of the sponsoring authority or satisfy himself about existence of conditions which justify the passing of order of preventive detention.

25. The satisfaction that conditions exist to detain a citizen with a view to preventing him from acting in any manner prejudicial to the maintenance of public order has to be of the District Magistrate or the Commissioner of Police, as the case may be. Such satisfaction on part of the sponsoring authority would not suffice. While District Magistrate is entitled to go through the recommendation made by the sponsoring authority for exercise of power

under sub-section (3) of Section 3, but the satisfaction with regard to existence of necessary conditions has to be of the designated authority i.e. District Magistrate alone, which must be reflected in his own order.

26. The satisfaction of the detaining authority is sine qua non for exercise of jurisdiction under sub-section (3) of Section 3 of the Act of 1980. Recording of satisfaction by the District Magistrate/detaining authority in his own language would be necessary to indicate application of mind on part of the detaining authority. The satisfaction of the detaining authority may not be as exhaustive as is contained in the proposal of the sponsoring authority but he must record his independent satisfaction with regard to existence of conditions justifying invocation of power under Section 3(3) of the Act of 1980. His satisfaction need not be a virtual reproduction of all facts narrated in the recommendation of the sponsoring authority but must concisely refer to the materials on record on the basis of which he has come to the conclusion about existence of conditions justifying preventive detention of the detenue.

27. Importance of application of mind on part of the detaining authority and his independent satisfaction about existence of necessary conditions has been emphasised by the Supreme Court in Jai Singh and Others Vs. State of Jammu & Kashmir, (1985) 1 SCC 561, wherein the Supreme Court has observed as under:-

"These seven writ petitions under Article 32 of the Constitution have to be allowed on the sole ground that there has been a total non-application of the mind by the detaining authority, the District Magistrate of Udhampur. We had called for the records and the learned counsel for the State of Jammu & Kashmir has produced the same before us. First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the senior Superintendent of Police, Udhampur to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jai Singh, father's name is mentioned as Sardar Ram Singh and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited "The subject is an important member of...." Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words "the subject is" into "you Jai Singh, s/o Ram Singh, resident of village Bharakh, Tensil Reasi". Thereafter word for word the police dossier is repeated and the word "he" wherever it occurs referring to Jai Singh in the dossier is changed into 'you' in, the grounds of detention. We are afraid it is difficult to find greater proof of non-application of mind. The liberty of a subject is a serious matter and it is not to be trifled with in this casual, indifferent and routine manner. We also notice that in the petition filed by the detenu, he had expressly alleged that he and the others had already been taken into custody in connection with a criminal case on July 6, 1984 itself and all of them were in custody since then. The detenu has given details of where he was taken and when. He has also referred to the circumstance that an application for bail was moved on his behalf on the 18th before the High Court and it was only thereafter that the order of detention was made. These facts have not

been denied in the counter-affidavit filed by the respondents. In fact we are unable to find anything in the records produced before us, either in the police dossier submitted to the District Magistrate for action or in any other document forming part of the record that the District Magistrate was aware that the petitioner was already in custody. There is nothing to indicate that the District Magistrate applied his mind to the question whether an order of detention under the Jammu & Kashmir Safety Act was necessary despite the fact that the petitioner was already in custody in connection with the criminal case. The cases of the other six petitioners are identical and in the circumstances, we have no option, but to direct their release forthwith, unless they are wanted in connection with some other case or cases."

28. Judgment in Jai Singh (supra) has been followed in Rajesh Vashdev Adnani Vs. State of Maharashtra and others, (2005) 8 SCC 390, wherein the Supreme Court observed as under in para 9 to 13:-

"9. Perusal of the proposal made by the sponsoring authority and the order of detention passed by the detaining authority would show that except by substituting word "he" by "you" no other change was effected.

10. But for the said change the proposal and the order of detention is verbatim the same.

11. Mr Naphade, learned Senior Counsel appearing for the respondent submitted that from the records produced before us it would be evident that there had been due application of mind on the part of Respondent 2 in passing the order of detention. This may be so but keeping in view the safeguards envisaged under Article 22 of the Constitution it was absolutely essential for the second respondent herein to apply her mind not only at the time of grant of approval to the proposal for detention but also when the actual order of detention and grounds thereof are prepared. To the aforementioned extent there has been no application of mind on the part of the second respondent herein, and, thus, we are of the opinion that the impugned order of detention dated 3-11-2004 cannot be sustained.

12. The views we have taken derive support from the judgment of this Court in Jai Singh v. State of J&K, (1985) 1 SCC 561, wherein the Division Bench held: (SCC pp. 561-62, para 1)

"We had called for the records and the learned counsel for the State of Jammu & Kashmir has produced the same before us. First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the Senior Superintendent of Police, Udhampur to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jai Singh, father's name is mentioned as Sardar Ram Singh and the address is given as Village Bharakh, Tehsil Reasi. Thereafter it is recited "The subject is an important member of....' Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate, has done is to change the first three words "the subject is' into "you Jai Singh, s/o Ram Singh, resident of Village Bharakh, Tehsil Reasi'. Thereafter word for word the police dossier is repeated and the word "he' wherever it occurs referring to Jai Singh in the dossier is changed into "you' in the grounds of detention. We are afraid it is difficult to

find greater proof of non-application of mind. The liberty of a subject is a serious matter and it is not to be trifled with in this casual, indifferent and routine manner."

13. For the reasons aforementioned the order of detention passed against the detenu Vashdev Gobardhan as also the impugned judgment cannot be sustained. It is quashed accordingly. He is directed to be released if not wanted in connection with any other case."

29. Constitutional safeguards and legislative scheme of the Act of 1980 has been referred to in a recent judgment of the Supreme Court in Sarabjeet Singh Mokha Vs. District Magistrate, Jabalpur and others, 2021 SCC OnLine SC 1019. Though the aspect for examination was distinct there i.e. delay in disposal of representation, but the constitutional safeguards in such matters have been emphasised by the Court in following words:-

"17. Article 22 of the Constitution provides specific protections to undertrials and detainees in India. The framers of the Constitution, who were also our freedom fighters, were conscious of founding a polity that secured civil and political freedoms to its citizens. Dr. B R Ambedkar, while proposing the article, noted the necessity of retaining the concept of preventive detention "in the present circumstances of the country". However, the discontinuity from the colonial regime lay in the introduction of strict countervailing measures that ensured that "exigency of liberty of the individual [is not] placed above the interests of the State" in all cases.

18. The specific provisions relating to preventive detention under Article 22 were framed in the following terms:

"(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases

be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

(emphasis supplied)

19. The text of Article 22 enshrines certain procedural safeguards, many of which are otherwise available in the CrPC. In elevating these safeguards to a constitutional status, the framers imposed a specific "limitation upon the authority both of Parliament as well as [State] Legislature [to] not abrogate" rights that are fundamental to India's constitution. Dr Bakshi Tek Chand, a conscientious dissenter to preventive detention in peaceful times, proposed a further safeguard in the provision of a right to make representation to the detenu, which was eventually accepted by the Constituent Assembly as a reasonable compromise43 Therefore, preventive detention in independent India is to be exercised with utmost regard to constitutional safeguards.

20. This history of the framing of Article 22 is critical for the judiciary's evaluation of a detenu's writ petition alleging, inter alia, a denial of the timely consideration of his representation. While several arguments have been preferred by the appellant to argue for his release from preventive detention, we are confining our analysis to the most clinching aspect of this case - the failure of the Central Government and the State Government to consider his representation dated 18 May 2021 in a timely manner."

30. Whether the material referred to in the communication of the sponsoring authority depicts concerns of law and order vis-a-vis public order or that possibility exists of detenue indulging in acts prejudicial to maintenance of public order or that he is likely to be released etc. are issues that directly affect the liberty of citizens and cannot be allowed to be dealt with in a cursory manner. Routine exercise of power in that regard or passing of formatted orders where recommendations made by the sponsoring authority are physically lifted and included in the body of the grounds of detention cannot be approved of. Unless it is shown from the order that the detaining authority has independently applied his mind upon the materials placed before him, to come to a conclusion with regard to existence of material justifying invocation of power under Section 3(3) of the Act of 1980, the order itself would be rendered invalid. One of the surest ways to ascertain application of mind on part of the detaining authority is the independent recording of reasons/satisfaction by the detaining authority in the grounds of detention.

31. At this juncture, we would like to emphasis one of the main factors which has persuaded us to accept petitioner's contention that there is no independent application of mind on part of the detaining authority with regard to existence of conditions justifying the order of preventive detention. The petitioner in leading case is nominated as accused in two cases i.e. Case Crime No. 291 of 2021, under Sections 147, 148, 149, 302, 504, 506, 34 IPC and Section 7 of the Criminal Law Amendment Act as also in Case Crime No. 333 of 2021, under Section 3/25 Arms Act, Police Station Chandpur, District Bijnor. The sponsoring authority has mentioned that the detenue has applied for bail in Case Crime No. 291 of 2021, but there is no disclosure of any bail application having been filed in Case Crime No. 333 of 2021. The possibility of likely release of detenue would arise only

when he is enlarged on bail in both the cases. There is nothing on record to show in the recommendation of the sponsoring authority that detenue has applied for bail in Case Crime No. 333 of 2021 or that there exists material to show that he would be enlarged on bail in the other case.

32. The omission of aforesaid fact in the recommendation of the sponsoring authority is virtually dittoed in the grounds of detention also, passed by the detaining authority. His order also refers to filing of bail application by the petitioner in Case Crime No. 291 of 2021 only and completely omits to consider the import of non filing of bail application in other case i.e. 333 of 2021.

33. The fact that petitioner had not applied for bail in other case i.e. Case Crime No. 333 of 2021 was an extremely important fact and its non consideration would vitiate the satisfaction warranted for exercise of jurisdiction under Section 3(3) of the Act of 1980. We are reminded of the observations made by the Supreme Court in Ayya Alias Ayub vs State Of U.P. & Another, (1989) 1 SCC 374 highlighting the need of protection of personal liberty in Constitution as also the observance of procedural safeguards in paragraphs 11 to 21 of the judgment, which are reproduced hereinafter:-

"11. Personal liberty protected under Article 21 of the Constitution is held so sacrosant and so high in the scale of constitutional values that this Court has shown great anxiety for its protection and wherever a petition for writ of habeas corpus is brought up, it has been held that the obligation of the detaining authority is not confined just to meet the specific grounds of challenge but is one of showing that the impugned detention meticulously accords with the procedure established by law. Indeed the English courts a century ago echoed the stringency and concern of this judicial vigilance in matters of personal liberty in the following words: [Thomas Pelham Dales case, (1881) 6 QBD 376, 461]

"Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."

12. It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is stressed in the words of Lord Denning: [Freedom Under The Law, Hamlyn Lectures, 1949]

"Whenever one of the King's Judges takes his seat, there is one application which by long tradition has priority over all others. counsel has but to say "My Lord, I have an application which concerns the liberty of the subject' and forthwith the Judge will put all other matters aside and hear it. It may be an application for a writ of habeas corpus, or an application for bail, but, whatever form it takes, it is heard first."

13. Personal liberty, is by every reckoning, the greatest of human freedoms and the laws of preventive detention are strictly construed and a meticulous compliance with the procedural safeguards,

however technical, is strictly insisted upon by the courts. The law on the matter did not start on a clean slate. The power of courts against the harsh incongruities and unpredictabilities of preventive detention is not merely "a page of history" but a whole volume. The compulsions of the primordial need to maintain order in society, without which the enjoyment of all rights, including the right to personal liberty, would lose all their meaning are the true justifications for the laws of preventive detention. The pressures of the day in regard to the imperatives of the security of the State and of public order might, it is true, require the sacrifice of the personal liberty of individuals. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State provides grounds for a satisfaction for a reasonable prognostication of a possible future manifestations of similar propensities on the part of the offender. This jurisdiction has been called a jurisdiction of suspicion; but the compulsions of the very preservation of the values of freedom, or democratic society and of social order might compel a curtailment of individual liberty. "To lose our country by a scrupulous adherence to the written law" said Thomas Jefferson "would be to be lose the law itself, with life, liberty and all those who are enjoying with us; thus absurdly sacrificing the end to the means". This is, no doubt, the theoretical justification for the law enabling preventive detention.

14. But the actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by the genius of its administration so as to strike the right balance between individual liberty on the one hand and the needs of an orderly society on the other. But the realities of executive excesses in the actual enforcement of the law have put the courts on the alert, ever-ready to intervene and confine the power within strict limits of the law both substantive and procedural. The paradigms and value judgments of the maintenance of a right balance are not static but vary according as the "pressures of the day" and according as the intensity of the imperatives that justify both the need for and the extent of the curtailment of individual liberty. Adjustments and readjustments are constantly to be made and reviewed. No law is an end in itself. The "inn that shelters for the night is not journey's end and the law, like the traveller, must be ready for the morrow".

15. As to the approach to such laws which deprive personal liberty without trial, the libertarian judicial faith has made its choice between the pragmatic view and the idealistic or doctrinaire view. The approach to the curtailment of personal liberty which is an axiom of democratic faith and of all civilised life is an idealistic one, for, loss of personal liberty deprives a man of all that is worth living for and builds up deep resentments. Liberty belongs what correspond to man's inmost self. Of this idealistic view in the judicial traditions of the free world, Justice Douglas said: [See "On Misconception of the Judicial Function and the Responsibility of the Bar", Columbia Law Review, Vol. 59, p. 232]

"Faith in America is faith in her free institutions or it is nothing. The Constitution we adopted launched a daring and bold experiment. Under that compact we agreed to tolerate even ideas we despise. We also agreed never to prosecute people merely for their ideas or beliefs...."

16. Judge Stanley H. Fuld of the New York Court of Appeals said: [Quoted by Justice Douglas, id. at p. 233]

"It is a delusion to think that the nation's security is advanced by the

sacrifice of the individual's basic-liberty. The fears and doubts of the moment may loom large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees."

It was a part of the American judicial faith that the Constitution and Nation are one and that it was not possible to believe that national security did require what the Constitution appeared to condemn.

17. Under our Constitution also the mandate is clear and the envoy is left under no dilemma. The constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions.

18. In Icchu Devi Choraria v. Union of India [(1980) 4 SCC 531 : 1981 SCC (Cri) 25 : AIR 1980 SC 1983] Bhagwati J. spoke of this judicial commitment: [AIR p. 1988 : SCC p. 538, SCC (Cri) p. 32, para 5]

"The court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade.

This is an area where the court has been most strict and scrupulous in ensuring observance with the requirements of the law, and even where a requirement of the law is breached in the slightest measure, the court has not hesitated to strike down the order of detention..." (emphasis supplied)

19. In Vijay Narain Singh v. State of Bihar [(1984) 3 SCC 14 : 1984 SCC (Cri) 361 : AIR 1984 SC 1334] Justice Chinnappa Reddy, J. in his concurring majority view said : [AIR p. 1336 : SCC p. 19, SCC (Cri) p. 366, para 1]

"... I do not agree with the view that "those who are responsible for the national security or for the maintenance of public order must be the sole Judges of what the national security or public order requires'. It is too perilous a proposition. Our Constitution does not give a carte blanche to any organ of the State to be the sole arbiter in such matters ... There are two sentinels, one at either end. The legislature is required to make the law circumscribing the limits within which persons may be preventively detained and providing for the safeguards prescribed by the Constitution and the courts are required to examine, when demanded, whether there has been any excessive detention, that is, whether the limits set by the Constitution and the legislature have been transgressed."

20. In Hem Lall Bhandari v. State of Sikkim [(1987) 2 SCC 9 : 1987 SCC (Cri) 262 : AIR 1987 SC 762, 766] it was observed: [SCC p. 14, SCC (Cri) p. 267, para 12]

"It is not permissible, in matters relating to the personal liberty and freedom of a citizen, to take either a liberal or a generous view of the lapses on the part of the officers."

21.There are well-recognised objective and judicial tests of the subjective satisfaction for preventive detention. Amongst other things, the material considered by the detaining authority in reaching the satisfaction must be susceptible of the satisfaction both in law and in logic. The tests are the usual administrative law tests where power is couched in subjective language. There is, of course, the requisite emphasis in the context of personal liberty. Indeed the purpose of public law and the public law courts is to discipline power and strike at the illegality and unfairness of Government wherever it is found. The sufficiency of the evidentiary material or the degree of probative criteria for the satisfaction for

detention is of course in the domain of the detaining authority"

34. In light of the discussions aforesaid as also the law settled in the matter, we are of the considered opinion that the satisfaction of the detaining authority with regard to existence of reasons justifying the order of preventive detention against the petitioner suffers from lack of independent application of mind, which renders the subjective satisfaction of the authority vitiated in the eyes of law. The order of detention, therefore, cannot be sustained. Subsequent orders passed on the basis of such order, therefore, must also fail. Writ Petition No. 5 of 2022 is, therefore, allowed.

35. So far as the writ petition filed by petitioner Nikhil Kumar (Habeas Corpus Writ Petition No. 6 of 2022) is concerned, detention order refers to the facts about the detenue having been arrested on 19.5.2021 in Case Crime No. 291 of 2021, under Sections 147, 148, 149, 302, 504, 506, 34 IPC and Section 7 of the Criminal Law Amendment Act, Police Station Chandpur, District Bijnor as also his implication in Case Crime No. 292 of 2021, under Section 3/25 Arms Act and in Case Crime No. 374 of 2021, under Section 3(1) of U.P. Gangsters Act, Police Station Chandpur, District Bijnor. However, the grounds of detention merely refers to the fact that the petitioner Nikhil Kumar has applied for grant of bail in Case Crime No. 291 of 2021 alone. There is no reference of filing of any bail application in the grounds of detention in the other two cases i.e. Case Crime No. 292 of 2021 and Case Crime No. 374 of 2021. This important omission appears to be a direct consequence of failure contained in the recommendation of the sponsoring authority about non filing of bail application in Case Crime no. 292 of 2021 and Case Crime No. 374 of 2021. We are, therefore, of the view that the order of detention passed against the petitioner Nikhil Kumar also suffers from the same jurisdictional infirmity on account of which we have allowed the leading writ petition. The detention orders passed as against the petitioner Nikhil Kumar also stands quashed for the same reasons.

36. In the writ petition filed by petitioner Surendra Singh @ Shailendra Singh (Habeas Corpus Writ Petition No. 8 of 2022) detention order refers to the fact that the detenue has been arrested on 7.6.2021 in Case Crime No. 291 of 2021, under Sections 147, 148, 149, 302, 504, 506, 34 IPC and Section 7 of the Criminal Law Amendment Act, Police Station Chandpur, District Bijnor as also in Case Crime No. 332 of 2021, under Section 3/25 Arms Act, Police Station Chandpur, District Bijnor. Here also the grounds of detention merely refers to the fact that the petitioner Surendra Singh @ Shailendra Singh has applied for grant of bail in Case Crime No. 291 of 2021 alone. There is no reference of filing of any bail application in the grounds of detention in the other case i.e. Case Crime No. 332 of 2021. This important omission appears to be a direct consequence of failure in that regard contained in the recommendation of the sponsoring authority wherein also no fact about filing of bail application in Case Crime no. 332 of 2021 are recorded. We are, therefore, of the view that the order of detention passed against the petitioner Surendra Singh @ Shailendra Singh also suffers from the same jurisdictional infirmity on account of which we have allowed the leading writ petition. The detention orders passed as against the petitioner Surendra Singh @ Shailendra

Singh also stands quashed for the same reasons.

37. Since the writ petitions succeed on the first argument itself, we are not required to examine other grounds urged in support of the writ petition. This bunch of writ petitions, accordingly, is allowed. No order is, however, passed as to costs.

(2022)04ILR A667
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

P.I.L. No. 433 of 2022

Ram Prasad Rajouriya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Sanehi Yadav, Priyanka Yadav

Counsel for the Respondents:
Sri A.K. Roy Addl. C.S.C., Sri Krishna Kant Singh

A. Constitution of India, 1950 - Article 226 - Public Interest Litigation - embezzlement of Government money granted for the development of Gram-Panchayat-a committee was constituted to inquire into alleged embezzlement of funds by the Gram Pradhan-grievance raised is that no action has been taken-a writ petition filed by the petitioner earlier in which the same relief was claimed-the factum of filing the earlier writ petition has not been disclosed by the petitioner in the present petition-Anyone who takes recourse to method of suppression in a court of law, is in actuality, playing fraud with the court, and the maxim supressio veri, expression faisi, i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted-In the last 40 years, the values have gone down and now a litigants can go any extent to mislead the court-the petition is dismissed with cost.(Para 1 to 12)

The petition is dismissed. (E-6)

List of Cases cited:

1. Abhyudya Sanstha Vs U.O.I. (2011) 6 SCC 145

2. Hari Narain Vs Badri Das (1963) AIR SC 1558

3. G. Narayanaswamy Reddy Vs Govt. of Karn. (1991) 3 SCC 261

4. Dalip Singh Vs St. of U.P. (2010) 2 SCC 114

5. Moti Lal Songara Vs Prem Prakash @ Pappu & anr. (2013) 9 SCC 199

6. Amar Singh Vs U.O.I. & ors. (2011) 7 SCC 69

7. Kishore Samrite Vs St. of U.P.& ors., (2013) 2 SCC 398

8. ABCD Vs U.O.I .& ors. (2020) 2 SCC 52

9. Chandra Shashi Vs Anil Kumar Verma (1995) 1 SCC 421

10. K.D. Sharma Vs SAIL & ors. (2008) 12 SCC 481

11. Dhananjay Sharma Vs St. of Har. & ors. (1995) 3 SCC 757

(Delivered by Hon'ble Rajesh Bindal, C.J., & Hon'ble J.J. Munir, J.)

1. The present petition has been filed claiming to be in public interest praying for the following reliefs:

"(a) Issue a writ, order or direction in the nature of Mandamus commanding/directing the respondents

authority to recover the embezzled money from the respondents No.5 and 6.

(b) Issue a writ, order or direction in the nature of Mandamus commanding/directing the respondents authority to take suitable action against the respondents No.5 and 6 due to their illegal act in the embezzlement of Government money granted for the development of Gram Panchayat Barai Shahpur, Tehsil and Block Sikandra Rao, District Hathras.

(c) Issue a writ, order or direction in the nature of Mandamus commanding/directing the respondent No.2- District Magistrate, District Hathras to decide the representation dated 16.12.2019 filed by the petitioner (Annexure No.2 to the Public Litigation Petition)."

2. The learned counsel for the petitioner referred to an order passed by District Magistrate dated August 24, 2017 vide which a Committee was constituted to inquire into alleged embezzlement of funds by the Gram Pradhan. The grievance raised is that no action has been taken.

3. The learned counsel for respondent No.6 produced before us the order passed by this Court in Writ-C No.8261 of 2018, titled as Ram Prasad Rajouria v. State of U.P. and others filed by the petitioner earlier in which same relief was claimed. The aforesaid writ petition was dismissed on March 15, 2018. He submitted that the factum of filing of the aforesaid writ petition has not been disclosed by the petitioner in the present petition.

4. Finding himself to be in awkward situation, learned counsel for the petitioner submitted that he may be permitted to withdraw the present petition.

5. The issue regarding approaching the Court by concealing the facts has been examined by Hon'ble the Supreme Court on number of occasions and it has been opined that the same is polluting the stream of justice.

6. In **Abhyudya Sanstha Vs. Union of India, (2011) 6 SCC 145**, Hon'ble the Supreme Court, while declining relief to the petitioners therein, who did not approach the court with clean hands, opined as under :-

"18. ... In our view, the appellants deserve to be non suited because they have not approached the Court with clean hands. The plea of inadvertent mistake put forward by the learned senior counsel for the appellants and their submission that the Court may take lenient view and order regularisation of the admissions already made sounds attractive but does not merit acceptance. Each of the appellants consciously made a statement that it had been granted recognition by the NCTE, which necessarily implies that recognition was granted in terms of Section 14 of the Act read with Regulations 7 and 8 of the 2007 Regulations. Those managing the affairs of the appellants do not belong to the category of innocent, illiterate/uneducated persons, who are not conversant with the relevant statutory provisions and the court process. The very fact that each of the appellants had submitted LPASW No. 82/2019 Page 7 application in terms of Regulation 7 and made itself available for inspection by the team constituted by WRC, Bhopal shows that they were fully aware of the fact that they can get recognition only after fulfilling the conditions specified in the Act and the Regulations and that WRC, Bhopal had not granted recognition to them. Notwithstanding this, they made bold statement that they had been granted

recognition by the competent authority and thereby succeeded in persuading this Court to entertain the special leave petitions and pass interim orders. The minimum, which can be said about the appellants is that they have not approached the Court with clean hands and succeeded in polluting the stream of justice by making patently false statement. Therefore, they are not entitled to relief under Article 136 of the Constitution. This view finds support from plethora of precedents.

19. **In Hari Narain v. Badri Das AIR 1963 SC 1558, G. Narayanaswamy Reddy v. Govt. of Karnataka (1991) 3 SCC 261** and large number of other cases, this Court denied relief to the petitioner/appellant on the ground that he had not approached the Court with clean hands. In **Hari Narain v. Badri Das** (supra), the Court revoked the leave granted to the appellant and observed:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave made under Article 136 of the Constitution, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it LPASW No. 82/2019 Page 8 would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterises as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in such a case special leave granted to the appellant ought to be revoked."

20. In **G. Narayanaswamy Reddy v. Govt. of Karnataka's** case (supra), the Court while noticing the fact regarding the stay order passed by the High Court which prevented passing of the award by the Land Acquisition Officer within the prescribed time period was concealed and in the aforesaid context, it observed that:

"2. ... Curiously enough, there is no reference in the special leave petitions to any of the stay orders and we came to know about these orders only when the respondents appeared in response to the notice and filed their counter- affidavit. In our view, the said interim orders have a direct bearing on the question raised and the non-disclosure of the same certainly amounts to suppression of material facts. On this ground alone, the special leave petitions are liable to be rejected. It is well settled in law that the relief under Article 136 of the Constitution is discretionary and a petitioner who approaches this Court for such relief must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed. We accordingly dismiss the special leave petitions."

21. In **Dalip Singh v. State of U.P., (2010) 2 SCC 114**, Hon'ble the Supreme Court noticed the progressive decline in the values of life and observed:

"1. For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahinsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to

ingrain these values in their daily life. Truth constituted an integral part of the justice- delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final." (emphasis supplied)

7. In **Moti Lal Songara Vs. Prem Prakash @ Pappu and another (2013) 9 SCC 199**, Hon'ble the Supreme Court, considering the issue regarding concealment of facts before the Court, while observing that "court is not a laboratory where children come to play", opined as under:

"19. The second limb of the submission is whether in the obtaining factual matrix, the order passed by the High Court discharging the accused-respondent is justified in law. We have clearly stated that though the respondent was fully aware about the fact that charges had been framed against him by the learned trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge of the accused. Any one who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim supressio veri, expression faisi , i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. We are compelled to say so as there has been a calculated concealment of the fact before the revisional court. It can be stated with certitude that the accused- respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to play possum.

20. The High Court, as we have seen, applied the principle "when infrastructure collapses, the superstructure is bound to collapse". However, as the order has been obtained by practising fraud and suppressing material fact before a court of law to gain advantage, the said order cannot be allowed to stand." (emphasis supplied)

8. Similar view has been expressed in **Amar Singh v. Union of India and others, (2011)7 SCC 69 and Kishore Samrite v. State of Uttar Pradesh and others, (2013)2 SCC 398.**

9. In a recent judgment in **ABCD Vs. Union of India and others (2020) 2 SCC 52**, Hon'ble the Supreme Court in the matter where material facts had been concealed, while issuing notice to the petitioner therein, exercising its suo-motu contempt power, observed as under :

"15. Making a false statement on oath is an offence punishable under Section 181 of the IPC while furnishing false information with intent to cause public servant to use his lawful power to the injury of another person is punishable under Section 182 of the IPC. These offences by virtue of Section 195(1)(a)(i) of the Code can be taken cognizance of by any court only upon a proper complaint in writing as stated in said Section. In respect of matters coming under Section 195(1)(b)(i) of the Code, in Pushpadevi M. Jatia v. M.L. Wadhawan etc., (1987) 3 SCC 367 prosecution was directed to be launched after prima facie satisfaction was recorded by this Court.

16. It has also been laid down by this Court in **Chandra Shashi v. Anil Kumar Verma (1995) 1 SCC 421** that a person who makes an attempt to deceive the court, interferes with the administration of justice and can be held guilty of contempt of court. In that case a husband who had filed a fabricated document to oppose the prayer of his wife seeking transfer of matrimonial proceedings was found guilty of contempt of court and sentenced to two weeks imprisonment. It was observed as under:

"1. The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.

2. Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice.

* * *

14. The legal position thus is that if the publication be with intent to deceive the court or one made with an intention to defraud, the same would be contempt, as it would interfere with administration of justice. It would, in any case, tend to interfere with the same. This would definitely be so if a fabricated document is filed with the aforesaid mens rea. In the case at hand the fabricated document was apparently to deceive the court; the intention to defraud is writ large. Anil Kumar is, therefore, guilty of contempt."

17. In **K.D. Sharma Vs. Steel Authority of India Limited and others (2008) 12 SCC 481** it was observed:

"39. If the primary object as highlighted in Kensington Income Tax Commrs., (1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA) is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that

ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."

18. In **Dhananjay Sharma Vs. State of Haryana and others** (1995) 3 SCC 757 filing of a false affidavit was the basis for initiation of action in contempt jurisdiction and the concerned persons were punished."

10. It was held in the judgments referred to above that one of the two cherished basic values by Indian society for centuries is "satya" (truth) and the same has been put under the carpet by the petitioner. Truth constituted an integral part of the justice-delivery system in the pre-Independence era, however, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, the values have gone down and now a litigants can go to any extent to mislead the court. They have no respect for the truth. The principle has been evolved to meet the challenge posed by this new breed of litigants. Now it is well settled that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. Suppression of material facts from the court of law, is actually playing fraud with the court. The maxim supressio veri, expression faisi, i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted.

11. In view of the aforesaid authoritative pronouncements of law on the issue of concealment of facts by a litigant, if we allow the petitioner to withdraw the present petition even then we feel that he deserves to be burdened with cost.

12. The petition is, accordingly, dismissed with cost of ₹50,000/-. The cost shall be deposited with the Allahabad High Court Bar Association within a period of two months. In case of failure, the Bar Association shall be at liberty to move application in the present petition for recovery of the amount from the petitioner.

(2022)04ILR A672
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD16.03.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482 No.1395 of 2022

Pankaj Tyagi ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Sundeep Shukla

Counsel for the Respondents:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860-Sections 354, 452, 323, 504 & 506-quashing of charge-sheet and summoning order-statement of the victim has fully supported the prosecution case-cognizable offence is made out as per material available against the applicant-At this stage, the magistrate has to be satisfied whether there is sufficient ground for proceeding, court below is not required to go into the merit and demerit of the case-Genuineness or otherwise of the allegations cannot be determined at the stage of summoning of the accused-

Thus, the impugned criminal proceeding under the facts of the case cannot said to be an abuse of the process of law.(Para 1 to 36)

B. It is trite that the power of quashing should be exercised sparingly. exercise of jurisdiction under the inherent power u/s 482 of the code to have the complaint or charge-sheet quashed is an exception rather a rule and the case for quashing at the initial stage must have to be treated as rarest of rare so as not to scuttle the prosecution. The jurisdiction as such is rather limited and restricted and its undue expansion is neither practicable nor warranted.(Para 18 to 28)

The application is rejected. (E-6)

List of Cases cited:

1. St. of Har. Vs Bhajan Lal (1992) 51 SCC 335

2. Rupan Deol Bajal Vs Kanwar Pal Singh Gill (1995) 7 JT 299

3. St. of H.P. Vs Pirthi Chand & anr (1996) 2 SCC 37

4. St. of Bih. Vs Rajendra Agrawalla (1996) SCALE 1 394

5. CBI Vs Duncans Agra Industries Ltd. (1996) 5 SCC 592

6. Rajesh Bajaj Vs St. NCT of Delhi (1999) 3 SCC 259

7. Zandu Pharmaceuticals Works Ltd. Vs Mohd. Sharaful Haque & anr. (2005) 1 SCC 122

8. M/s Medchi Chemicals & Pharma P Ltd. Vs M/s Biological E. Ltd. & ors.. JT (2000) 2 SC 426

9. Md. Allauddin Khan Vs St. of Bih. (2019) 6 SCC 107

10. St. of M.P. Vs Yogendra Singh Jadon & anr. (2020) 12 SCC 588

11. Rajeev Kourav Vs Baisahab & ors. (2020) 3 SCC 317

12. Kaptan Singh Vs St. of U.P. & ors. (2021) AIR SC 3931

13. St. of Odisha Vs Pratima Mohanty etc. (2021) SCC Online SC 1222

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

1. Heard Mr Sundeep Shukla, learned counsel for the applicant and Shri Virendra Kumar Maurya, learned Additional Government Advocate assisted by Shri Prashant Kumar Singh, learned Brief Holder, representing the State of Uttar Pradesh and perused the record of the case.

2. By means of this application under Section 482 of the Code of Criminal Procedure (herein after referred to as "Cr.P.C."), the applicant has invoked the inherent jurisdiction of this Court for quashing the impugned charge sheet No. 263 of 2015 dated 09.07.2017, under Sections 354, 452, 323, 504, 506 IPC, cognizance and summoning order dated 17.7.2017 passed by the learned Judicial Magistrate-III, Meerut, order dated 25.10.2017 whereby the learned Magistrate issued bailable warrant as well as further proceedings of case No. 646 of 2014, pending in the court of Additional Chief Judicial Magistrate-V, Meerut.

3. Before considering the merits of the case, it would not be out of place to mention it here that in the instant case, the charge sheet was submitted way back on 09.07.2015, cognizance was taken thereon and summoning order was passed on 17.07.2015, which were challenged by the applicant before this Court by filing the instant application on 12.1.2022, i.e. after

about six and a half years. When, learned counsel for the applicant was confronted with the aforesaid delay in challenging the charge sheet, cognizance and summoning order, he submitted that the applicant was not aware about the initiation of the proceedings against him.

4. On a query by the Court that learned Magistrate in the order dated 25.10.2017 has specifically mentioned that "on the case being taken up, accused did not turn up, summon has already been served upon him, issue bailable warrant against him", learned counsel for the applicant has belied the order of the learned Magistrate by saying that aforesaid order has been passed by the learned Magistrate on the basis of conjecture and surmises. Averments to this effect has also been made by the learned counsel for the applicant in paragraphs 40, 41 and 42 to the affidavit filed in support of this application.

5. Such types of averments made by the applicant to explain the delay in filing this application are highly deplorable.

6. Now I proceed to consider the merit of the case.

7. The facts that formed the bedrock of this application in nutshell are that an application under Section 156(3) Cr.P.C. was moved by the victim on 01.09.2014 before the Judicial Magistrate-III, Meerut with the allegations that accused-Pankaj, who is the resident of the same village used to stalk her with bad intention and was in search of making sexual relations with the applicant-victim for the last one year. On 01.7.2014, the accused, with an intention to outrage her modesty, caught hold of her, but the matter was resolved by the police by putting pressure on the family of the victim. On 27.8.2014, when the victim was sleeping in her room, at about 11.00 PM, accused barged into her room, swooped her and tried to commit rape upon her forcibly. On the shrieks of the victim, her mother wake up and apprehended the accused, but by using force, abusing and assaulting her mother, he managed to escape by extending threat that if the victim does not make sexual relation with him, he will attack her with acid. The incident was witnessed in the light of inverter. The application further mentions that she has given information to the police on 28.8.2014 and also sent a letter to the Senior Superintendent of Police, Meerut on 30.8.2014, but since, no action was taken by the police, she has filed the application under Section 156(3) Cr.P.C. supported by her affidavit.

8. The aforesaid application was allowed by the Judicial Magistrate-III, Meerut vide order dated 26.9.2014 and SHO concerned was directed to lodge an FIR and investigate the matter.

9. In pursuance of the order of the Magistrate dated 26.9.2014, the FIR was lodged on 28.9.2014 at case crime No. 646 of 2014, under Sections 354, 376, 511, 504, 506, 323, 452 IPC, police station Kharkhauda, sub-district Sadar, district Meerut.

10. After lodging of the FIR, the law set into motion and investigation was carried out by the investigating officer and on culmination of investigation, the investigating officer submitted charge sheet against the applicant, on which cognizance was taken and accused-applicant was summoned, which is the subject matter of challenge in this application.

11. The main substratum of argument of learned counsel for the applicant is that

the first information report was lodged on the basis of application and order passed under Section 156(3) Cr.P.C. for the incident which took place on 27.08.2014 by one Koshika impersonating herself as Neha on the basis of false, frivolous and cooked up story, whereas Neha has left for her heavenly abode on 13.05.2008. In support of his submission, learned counsel for the applicant has relied upon an undated death certificate issued by the New Delhi Municipal Council to show that Km. Neha died on 13.5.2008 at All India Institute of Medical Sciences, New Delhi. Learned counsel for the applicant further submits that statements recorded under sections 161 and 164 Cr.P.C. are false and manipulated.

12. Learned counsel for the applicant lastly submitted that the applicant has been falsely implicated in this case and no offence whatsoever is made out against the applicant. Under the facts and circumstances of the case, impugned charge-sheet, cognizance order, summoning order and further proceedings initiated against the applicant are liable to be quashed by this Court.

13. Per contra, learned Additional Government Advocate representing the State submits that on 04.2.2022 when this case was taken up for the first time, on the submission advanced by the learned counsel for the applicant that the victim, who has lodged the application under Section 156(3) Cr.P.C. on 01.9.2014, has already died on 13.5.2008, State was directed to obtain instructions. On the basis of instructions, learned AGA submits that the death certificate produced by the learned counsel for the applicant is found fake and manipulated. Further, the applicant has never produced the said death certificate before the investigating officer during investigation to verify the truth or otherwise of the said certificate whereas the statement of the applicant was recorded by the investigating officer on 09.7.2015. To buttress his submission, learned Additional Government Advocate has produced before this Court death certificate of Km. Neha, issued by the Registrar, Birth and Death, Nagar Nigam, Meerut showing her death at Ring Road, Lohiya Nagar, Meerut on 24.9.2015. He has also produced a copy of paper cutting dated 25.9.2015 of Amar Ujala, Meerut Edition in which it was mentioned that Km. Neha died in road accident. Both the documents, produced by the learned Additional Government are kept on record and marked as "A".

14. Learned Additional Government Advocate further submits that statement of the victim under section 161 Cr.P.C. was recorded on 07.10.2014 and supplementary statement under section 161 Cr.P.C. on 09.7.2015, whereas her statement under Section 164 Cr.P.C. was recorded in the case diary on 10.10.2014. In her statements, both under Section 161 Cr.P.C. and 164 Cr.P.C., the victim has fully supported the prosecution case by giving vivid description of the occurrence.

15. Learned Additional Government Advocate also submits that the allegations made in the FIR as well as material against the applicant, as per prosecution case, the cognizable offence against the applicant is made out. The criminal proceedings against the applicant cannot said to be abuse of the process of the Court. Hence this application is liable to be rejected.

16. Guidelines with regard to the exercise of jurisdiction by the Court under section 482 Cr.P.C. have been laid down by Apex Court from time to time.

17. In ***State of Haryana Vs. Bhajan Lal***, 1992 (51) SCC 335, Apex Court laid down certain broad tests to exercise the inherent power or extraordinary power of the High court. On the cost of repetition it is not necessary to reiterate the guidelines. Suffice it to state that they are only illustrative. The High Court should sparingly and only in exceptional cases, in other words, in rarest of rare cases, and not merely because it would be appealable to the learned Judge, be inclined to exercise the power to quash the FIR/Charge sheet/complaint.

18. In **Rupan Deol Bajal Vs. Kanwar Pal Singh Gill, 1995 (7) JT 299**, the Apex Court reiterated the above view and held that when the complaint or charge sheet filed disclosed prima facie evidence, the court would not weigh at that stage and fine out whether offence could be made out.

19. In State of ***Himachal Pradesh Vs. Pirthi Chand and another***, 1996 (2) SCC 37, Supreme Court held thus:

"It is thus settled law that the exercise of inherent power of the High Court is an exceptional one. Great care should be taken by the High Court before embarking to scrutinise the FIR/charge-sheet/ complaint. In deciding whether the case is rarest of rare cases to scuttle the prosecution in its inception, it first has to get into the grip of the matter whether the allegations constitute the offence. It must be remembered that FIR is only an initiation to move the machinery and to investigate into cognizable offence. After the investigation is conducted and the charge-sheet is laid the prosecution produces the statements of the witnesses recorded under section 161 of the Code in support of the charge- sheet. At that stage it is not the function of the Court to weigh the pros and cons of the prosecution case or to consider necessity of strict compliance of the provisions which are considered mandatory and its effect of non-compliance. It would be done after the trial is concluded. The Court has to prima facie consider from the averments in the charge-sheet and the statements of witness on the record in support thereof whether Court could take cognizance of the offence, on that evidence and proceed further with the trial. If it reaches a conclusion that no cognizable offence is made out no further act could be done except to quash the charge-sheet. But only in exceptional cases, i.e., in rarest of rare cases of mala fide initiation of the proceedings to wreak private vengeance process of criminal is availed of in laying a complaint or FIR itself does not disclose at all any cognizable offence - the Court may embark upon the consideration thereof and exercise the power.

20. In ***State of Bihar Vs. Rajendra Agrawalla***, 1996 SCALE (1) 394, the Apex Court observed as under:

"It has been held by this Court in several cases that the inherent power of the court under Section 482 of the Code of Criminal Procedure should be very sparingly and cautiously used only when the court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent power can be exercised when the allegations in the First Information Report or the complaint together with the other materials collected during investigation taken at their face

value, do not constitute the offence alleged. At that stage it is not open for the court either to shift the evidence or appreciate the evidence and come to the conclusion that no prima facie case is made out."

21. These guidelines were reiterated by the Apex Court in **Central Bureau of Investigation Vs. Duncans Agra Industries Limited**, 1996 (5) SCC 592, **Rajesh Bajaj Vs. State NCT of Delhi**, 1999 (3) SCC 259 and **Zandu Pharmaceuticals Works Limited Vs. Mohd. Sharaful Haque and another** (2005) 1 SCC 122.

22. In **M/s Medchl Chemicals and Pharma P limited Vs. M/s Biological E. Limited and others**, JT 2000 (2) SC 426, Apex Court held thus:

" Exercise of jurisdiction under the inherent power as envisaged in Section 482 of the code to have the complaint or the charge sheet quashed is an exception rather a rule and the case for quashing at the initial stage must have to be treated as rarest of rare so as not to scuttle the prosecution. With the lodgment of First Information Report the ball is set to roll and thenceforth the law takes its own course and the investigation ensues in accordance with the provisions of law. The jurisdiction as such is rather limited and restricted and its undue expansion is neither practicable nor warranted."

23. In **Md. Allauddin Khan Vs. State of Bihar**, 2019 (6) SCC 107, the Magistrate took cognizance of the offence under Section 323, 379 read with Section 34 of the Indian Penal Code by holding that a prima facie case was made out against the respondents therein on the basis of allegations made in the complaint. Patna High Court set aside the order of Magistrate on appreciation of the evidence. The Apex Court, while setting aside the order of the Patna High Court, held thus:

"*in our view, the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C") because whether are are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. That stage is yet to come in this case."*

24. In **State of Madhya Pradesh Vs. Yogendra Singh Jadon and another**, (2020) 12 SCC 588, after the registration of FIR, a charge sheet under Section 420, 406, 409, 120-B IPC and 13(1)(d) and 13(2) of the Prevention of Corruption Act was filed. The Special Judge passed an order framing charges against Yogendra Singh Jadon and others. That order was challenged before the High Court by way of filing criminal revision. The High Court found that the offences under Sections 420 and 120-B IPC were not made out. The Apex Court while setting aside the order of the High Court held that the High Court has examined the entire issue as to whether the offence under Sections 420 and 120-B is made out or not at pre trial stage. The power under Section 482 of the code of Criminal Procedure cannot be exercised where the allegations are required to be proved in court of law.

25. The Apex Court in **Rajeev Kourav Vs. Baisahab and others**, (2020)3 SCC 317, the High Court of Madhya Pradesh quashed the criminal proceedings on the basis of assessment of statements of

the witnesses recorded under Section 161 Cr.P.C. The Apex Court set aside the order of the High Court by holding that statements of the witnesses recorded under Section 161 Cr.P.C. being wholly inadmissible in evidence cannot be taken into consideration by the Court, while adjudicating a petition filed under Section 482 of the Code.

26. In **Kaptan Singh Vs. State of Uttar Pradesh and others**, AIR 2021 SC 3931, the charge sheet was submitted by the investigating officer after recording the statement of the witnesses, statement of the complainant and collecting the evidence from the place of incident and taking statement of the independent witnesses and even statement of the accused persons. The cognizance of the offence was also taken by the learned Magistrate. The High Court has quashed the criminal proceedings for the offences under Sections 147, 148, 149, 406, 329 and 386 IPC initiated against the applicant.

27. The Apex Court while quashing the order of the Allahabad High Court, held that the High Court is not required to go into the merits of the allegations and /or to enter into the merits of the as if the High Court is exercising the appellate jurisdiction and /or conducting the trial. High Court has exceeded its jurisdiction in quashing the criminal proceedings in exercise of poowers under Section 482 Cr.P.C. The High Court has failed to appreciate and consider the fact that there are very serious triable issue/allegations which are required to be gone into and considered at the time of trial. The High Court has lost sight of crucial aspects which have emerged during the course of the investigation.

28. In **State of Odisha Vs. Pratima Mohanty etc**. , 2021 SCC Online SC 1222, Apex Court, while quashing the order of Odisha High Court, held thus:

"It is trite that the power of quashing should be exercised sparingly and with circumspection and in rate cases. As per settled proposition of law while examining an FIR/complaint quashing of which is sought, the court cannot embark upon any enquiry as to the reliability or genuineness of allegations made in the FIR/complaint. Quashing of a complaint/FIR should be an exception rather than an ordinary rule. Normally the criminal proceedings should not be quashed in exercise of powers under Section 482 Cr.P.C. when after a thorough investigation the charge sheet has been filed. At the stage of discharge and/or considering the application under Section 482 Cr.P.C. the courts are not required to go into the merits of the allegations and/or evidence in details as if conducting the mini trial. As held by this Court the powers under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the Court."

29. In view of the aforesaid pronouncements of the Apex Court, I have examined the matter in its totality and I find that the case of the applicant does not fall within the categories of rarest of rare cases. This Court is of the view that the appreciation of evidence is a function of the trial court and this Court in exercise of power under Section 482 Cr.P.C. cannot assume such jurisdiction and put to an end to the process of trial provided under the law.

30. It is well settled by the Apex Court in the aforementioned judgments that the power under Section 482 Cr.P.C. at pre-trial stage should not be used in a routine

manner, but it has to be used sparingly, only in such an appropriate cases, where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceedings or where allegations made in first information report or charge-sheet and the materials relied in support of thereof, taking on their face value and accepting in their entirety do not disclose the commission of any offence against the accused.

31. This Court is further of the view that the grounds taken in the application reveal that many of them relate to disputed question of fact, which cannot be adjudicated by this Court at the pre-trial stage, which can be more appropriately gone into by the trial court at the appropriate stage. The applicant has an alternative statutory remedy of moving discharge application at the appropriate stage.

32. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. At that stage the court below is not required to go into the merit and demerit of the case. Genuineness or otherwise of the allegations cannot be even determined at the stage of summoning the accused.

33. Having considered the facts, circumstances and nature of allegations against the applicant in the instant case, I am of the considered view that a prima facie cognizable offence is made out against the applicant. The impugned criminal proceeding under the facts of this case cannot said to be an abuse of the process of the Court.

34. In view of what has been indicated herein above, I am of the view that there is no good ground to invoke inherent power under Section 482 of the Code of Criminal Procedure by this Court.

35. Accordingly, the relief as sought by the applicant by means of the instant application is hereby refused.

36. This application under Section 482 of the Code of Criminal Procedure is accordingly rejected.

37. The trial court is directed to proceed against the applicant in accordance with law.

38. Office is directed to transmit a copy of this order to the learned Trial Court with a week.

(2022)04ILR A679
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.02.2022

BEFORE

THE HON'BLE AJIT SINGH, J.

Crl. Misc. Application U/s 482 No. 4483 of 2022

Vipin Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Omvir Singh Rajpoot

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

A. Criminal Law - Code of Criminal Procedure, 1973-Sections 482 & 128-quashing of the order of Family court-matrimonial dispute-maintenance awarded to the mother and daughter-applicant failed to comply the order-recovery warrant issued-in pursuance of recovery warrant the applicant was sent to jail-learned Principle judge, Family court has not followed the establish procedure u/s 421(1)(a) Cr.P.C. for issuance of recovery warrant in default of payment of arrears maintenance allowance within the time allowed by him-Magistrate has no jurisdiction to issue of warrant of arrest straight way against the person liable for payment of maintenance allowance-the impugned order is patently illegal and not warranted by law-Hence, set aside.(Para 1 to 13)

B. As per section 125(3) Cr.P.C. it is apparently clear that in the event of any failure on the part of any person to comply with an order to pay maintenance allowance, without sufficient cause, the Magistrate is empowered to issue warrant for levying the amount due in manner provided for levying fines for every breach of the order. Section 421 Cr.P.C. prescribes the manner for levying fine. The magistrate is empowered to issue distress warrant for the purpose of realisation of the amount, by attachment and sale of movable property belonging to the defaulter as contemplated under section 421 (1)(a) and without first sentencing the defaulter to imprisonment after execution of the distress warrant. (Para 10,11)

The application is allowed. (E-6)

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

1. Heard learned counsel for the applicant and learned A.G.A. for the State.

2. The applicant by means of this application under Section 482 Cr.P.C. has invoked the inherent jurisdiction of this Court with a prayer to quash the order dated 30.11.2021 passed by the Principal Judge, Family Court, Kasganj in Case No. 118 of 2020 (Smt. Kaushalya @ Kaushal vs. Vipin Kumar), under Section 128 Cr.P.C., P.S. Kasganj, district-Kasganj. A further prayer is that a direction be issued to the court below to release the applicant from jail forthwith.

3. It is submitted by learned counsel for the applicant that marriage between applicant and opposite party no. 2 was solemnized on 8th December, 2010. Out of the aforesaid wedlock, a baby girl was born. However, after some time, the relationship between the husband and wife became strained and incompatible. Thereafter the opposite party no. 2 has initiated several litigations against the applicant. In connection with the same, she along with her daughter filed an application under Section 125 Cr.P.C. before the Family Court, Kasganj, which was allowed by the Principal Judge, Family Court, Kasganj vide judgment and order dated 30.11.2021. It is also submitted that the applicant is a handicapped person, certificate whereof has been filed as Annexure-2 to the affidavit accompanying the application. Due to the reason he failed to comply with the order passed under Section 125(3) Cr.P.C. and the learned court below has issued the recovery warrant dated 8.10.2021, directing that the applicant shall pay a sum of Rs. 1,65,000/- (Rs. one lac sixty five thousand) to the opposite party no. 2 as maintenance w.e.f. 30.7.2017 to 19.1.2020 and in pursuance of recovery warrant the applicant was sent to jail. On 30.11.2021 the applicant was summoned by the court below and he was produced by the jail authority before the court blow and the court below had passed the order, while detaining the applicant in

jail for a period of one month and directed that during detention, the applicant shall pay a sum of Rs. 5,000/- per month to opposite party no. 2, fixing next date, i.e. 2012.2021, directing the Jail Superintendent to produce the applicant again on the next date fixed.

4. It is also submitted by learned counsel for the applicant that provisions of Section 125(3) Cr.P.C. specifically provides for issuance of a warrant for lavying the amount issued in the manner provided for lavying of fines. The learned court below has passed the order dated 30.11.2021 for detention of applicant in jail for one month without complying the provision contained in Section 125(3) Cr.P.C. and without imposing any fine, hence the impugned order dated 30.11.2021 is liable to be quashed. In support of his submissions, learned counsel for the applicant has placed reliance upon the following judgments of Gauhati High Court, Calcutta High Court and Punjab & Haryana High Court:

1. Hazi Abdul Khaleque vs. Mustt. Samsun Nehar, 1991 CriLJ, 1843;

2. Dipankar Banerjee vs. Tanuja Banerjee reported in 1998 CriLJ 907; and

3. Om Prakash @ Parkash vs. Vidya Devi reported in 1992 CrlLJ 658.

5. Per contra, learned A.G.A. for the State has opposed the submissions made by the learned counsel for the applicant by contending that that the applicant is a defaulter and has not paid any amount as awarded by the Family Court under order dated 30.7.2017 to opposite party no. as interim allowance. Therefore, the Family Court has rightly issued recovery warrant against the applicant for realization of the amount so due and there is no error in the order impugned.

6. I have considered the submissions made by the learned counsel for the parties and have gone through the record.

7. Before coming to the merits of the present case, it would be worthwhile to reproduce Sections 125 (3) and 421 Cr.P.C., which read as follows:

"125. Order for maintenance of wives, children and parents.

.....

If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made.

....."

"421. Warrant for levy of fine.

(1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter: Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such

warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.

8. The State Government may make rules regulating the manner In which warrants under clause (a) of sub- section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

9. Where the Court issues a warrant to the Collector under clause (b) of sub-section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law: Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

10. On a plain reading of sub-section (3) of Section 125 Cr.P.C., it is apparently clear that in the event of any failure on the part of any person to comply with an order to pay maintenance allowance, without sufficient cause, the Magistrate is empowered to issue warrant for levying the amount due in manner provided for levying of fines for every breach of the order. Section 421Cr.P.C. prescribes the manner for levying fine and clause (a) of sub-Section (1) of Section 421 provides for issuance of warrant for levy of the amount by attachment and sale of any movable property belonging to the offender. In other words, in the event of any failure without sufficient cause to comply with the order for maintenance allowance, the Magistrate is empowered to issue distress warrant for the purpose of realization of the amount, in respect of which default has been made, by attachment and sale of any movable property, that may seized in execution of such warrant. Sub-section (3) of Section 125 Cr.P.C. makes it further clear that the jurisdiction of the Magistrate for sentencing such person to imprisonment would arise only after the maintenance allowance, in whole or in part, remains unpaid after the maintenance allowance, in warrant. It is only after the sentence of imprisonment is awarded by the Magistrate under sub-section (3) of Section 125 that the occasion may arise for issuance of warrant of arrest for bringing the person concerned to Court for his committal to prison to serve out the sentence.

11. It is further apparent that the Magistrate has no jurisdiction to issue warrant of arrest straight way against the person liable for payment of maintenance allowance in the event of non-payment of maintenance allowance within the time fixed by the court without first levying the amount due as fine and without making any attempt for reaslization that fine in one or both the modes for recovery of that fine as provided for in clauses (a) or (b) of sub-Section (1) of Section 421 Cr.P.C. say by issuance of distress warrant for attachment and sale of movable property belonging to the defaulter as contemplated under Section 421 (1) (a) and without first sentencing the defaulter to imprisonment after the execution of the distress warrant.

12. In view of aforesaid, this Court finds that the Principal Judge, Family Court, Kasganj has not followed the establish procedure for issuance of recovery warrant in default of payment of arrears maintenance allowance within the time allowed by him in the execution case

concerned. The order directing issuance of warrant of arrest is patently illegal and not warranted by law. Order dated 30.11.2021 is hereby set aside. Let the Principal Judge pass a fresh order in the aforesaid execution cases filed by opposite party no.2 in light of the observations made herein above.

13. Subject to the observations made above, the present petition is allowed.`

(2022)04ILR A683
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.03.2022

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Appl. U/S 482 No. 10245 of 2021

Jatinder Pal Singh ...Applicant
Versus
M/S STATCON POWER CONTROLS LTD. & Dehli & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Varun Singh, Sri Divendu Tripathi, Sri Talha Abdul Rahman, Sri Santosh Kumar Tripathi

Counsel for the Respondents:
A.G.A., Sri S.K. Mishra

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Negotiable Instrument Act, 1881-Sections 138 & 142-quashing of summoning order-applicant is the Director of company-Two cheques have been issued by the company in favour of opposite party-both the cheques have dishonoured-Legal notices were issued to the applicant but they not complied with it, then a complaint was filed-the opposite party has not made any specific averment against the applicant as to the part played by him in the whole transaction-merely being a director in a company it is not sufficient to make the applicant liable u/s 141 of the NI Act-applicant was a nominee Director and who resigned-no specific averment that the applicant is involved in day-to-day affairs of the company-liability is cast on persons who may have something to do with the transaction complained of-the summoning order is illegal and cannot be sustained. (Para 1 to 12)

The application is allowed. (E-6)

List of Cases cited:

1. K. Srikanth Singh Vs North East Securities Ltd. (2007) 12 SCC 788

2. DMC Financial Services Ltd. Vs J. N . Sareen (2008) 8 SCC 1

3. Chintalapati Srinivasa Raju Vs SEBI (2018) 7 SCC 443

4. Pooja Ravinder Devidasani Vs St. of Mah. & anr .(2014) 16 SCC 1

5. SMS Pharmaceuticals Ltd. Vs Neta Bhalla & anr. (2005) 8 SCC 89

6. Srikanth Singh Vs North East Securities Ltd. (2007) 12 SCC 788

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Varun Singh, learned counsel for the applicant, Sri S.K. Mishra, learned counsel for the O.P. 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 for quashing the judgment and order dated 2.1.2021 passed by the Special Judge SC/ST (Prevention of Atrocities) Act, Gautam Budh Nagar in Criminal Revision No. 72 of 2019 and further to quash the summoning order dated 7.1.2014 passed by the learned A.C.J.M. IIIrd, Gautam Budh Nagar in Complaint

Case No. 1927 of 2013 (M/s Statcon Power Controls Ltd. Vs. M/s G.E.T. Power Ltd. & others) pending before the Court of Judicial Magistrate Additional Court No. 3, Gautam Budh Nagar, under section 138 r/w 142 of the N.I. Act.

3. The O.P. No. 2 filed a complaint alleging therein that complainant is engaged in business of manufacturing and trading in signaling equipments, industrial batteries and other equipments. The accused no. 1 is also a public limited company incorporated under the Companies Act, 1956 having its registered address at "Techpro Towers" Plot No. 11-A 17, 5th Cross Road, SIPCOT IT Park, Siruseri, Chennai-603103, Tamil Nadu and the other accused are the Directors/Executive Directors of the company/accused no. 1 and are responsible for the acts and deeds of the company/accused no. 1. The accused no. 1 has placed a purchase order bearing no. GET/11-009/12-13/362 dated 4th July, 2012 on the complainant at Administrative Office of the complainant at A-34, Sector-59, Gautam Budh Nagar, Noida-201301 Uttar Pradesh for the supply of two sets of Battery Bank, Charger along with accessories and the total amount of the abovementioned purchase order including taxes and duties was Rs. 4,58,42,880.00 (Rupees Four Crores Fifty Eight Lakhs Forty Two Thousand Eight Hundred Eighty only). The complainant supplied one set of battery bank along with its relevant accessories to the accused at their site on 25.4.2013 as per Purchase Order. The accused issued cheques bearing nos. 404847 and 404848 both dated 16.5.2013 for Rs. 1,00,00,000 each (Rupees One Crore each) drawn on Axis Bank Limited, Chennai in favour of the complainant towards the payment for goods supplied at their site. The complainant presented the said cheques with its Banker State Bank of India, Noida for realization of the amount of the said cheques. On 15th July, 2013 the cheque no. 404847 dated 16th May, 2013 for Rs. One Crore drawn on Axis Bank Ltd. Chennai has been deposited in bank by the complainant and the same has been presented on the banker of accused no. 1 through the complainant's banker namely State Bank of India, Noida and on presentation for payment the same has been dishonored on 16th July, 2013 with the remarks "Exceeds Arrangement". On 15th July, 2013 another cheque bearing no. 404848 dated 16th May, 2013 for Rs. One Crore drawn on Axis Bank Ltd. Chennai has been deposited in bank by the complainant and the same has been presented on banker of accused no. 1 through the complainant's banker namely State Bank of India, Noida and on presentation for payment the same has been dishonored on 16th July, 2013 with the remarks "Exceeds Arrangement". The complainant issued legal notice dated 24.7.2013 by Registered A.D. post demanding payment of the amount due under the said two cheques. The notices have been served on all the accused on 29.7.2013. Despite receipt of the legal notice they failed to pay the amount of the dishonored cheques within the stipulated time of 15 days. On the aforesaid complaint the learned Magistrate by the impugned order dated 7.1.2014 has summoned the applicant and other accused named in the complaint to face trial for the offence under section 138 N.I. Act. Aggrieved with the aforesaid summoning order the applicant filed a criminal revision no. 72 of 2019 which has been dismissed by Special Judge SC/ST Act vide judgment and order dated 2.1.2021.

4. The contentions of the learned counsel for the applicant are that the impugned order of summoning is a non

speaking order. The learned Magistrate has not taken notice of the fact that there was no specific averment in the complaint against the applicant. He also contended that applicant was only a nominee Director appointed on 24.4.2012 and the applicant resigned from the Board of Directors of O.P. No. 2 on 19.1.2014. The applicant is not involved in day to day affairs of the company, so he can not be held reliable for dishonour of any cheque issued by other Managing Directors. The applicant has not signed the dishonoured cheques on behalf of company nor he is authorized signatoree of the company. The O.P. No. 1 has merely implicated the applicant without assigning any specific role to the applicant in the execution of dishonour of the cheques with intention of harassing the applicant. The O.P. No. 1 has not made any specific averment against the applicant as to the part played by him in the whole transaction. It is further contended that merely being a Director in a company it is not sufficient to make the applicant liable under section 141 of the N.I. Act. For imputing liability on the applicant the O.P. No. 1 ought to have brought incontrovertible material on record to show that the applicant is incharge of and responsible for the conduct of affairs of the company. In the absence of such material and in the light of general averments the applicant can not be prosecuted. Learned counsel placed reliance on the following rulings on the aforesaid points:

1. K. Srikanth Singh V. North East Securities Limited (2007) 12 SCC 788

2. DMC Financial Services Limited V. J.N. Sareen reported as (2008) 8 SCC 1.

5. Learned counsel also submitted that proceedings under section 138 N.I. Act can not be proceeded against non Executive Directors. On this point he relied the following citations:

1. Chintalapati Srinivasa Raju V. Securities and Exchange Board of India, reported as (2018) 7 SCC 443.

2. Pooja Ravinder Devidasani Vs. State of Maharashtra & Anr., reported as (2014) 16 SCC 1.

6. Per contra; learned counsel for the O.P. No. 2 opposed the application and submitted that applilcant is a Director of company. Two cheques have been issued by the company in favour of O.P. No. 1. Both the cheques have dishonoured. Legal notices were issued to the applicant and other accused persons but they not complied with it, then a complaint was filed. Learned Magistrate being satisfied with the material on record has taken cognizance of the offence and has summoned the applicant and other accused. There is no illegality in the summoning order. The revision preferred by the applicant has also been dismissed on merits. The learned revisional court did not find any merit in it. Learned counsel also contended that the complaint was filed in the year 2014 and is lingering before the trial court since then. Only the applicant has put his appearance before the trial court. None of the remaining accused has appeared. He submitted that a direction be issued to the trial court to ensure the presence of the other accused persons and decide the case expeditiously.

7. It transpires from the material on record that applicant has been arrayed as an accused in the complaint being a Director of the company. In para no. 4 of the complaint there are general allegations that the accused no. 1 is also public limited company incorporated under the

Companies Act having its registered address at "Techpro Towers" Plot No. 11-A 17, 5th Cross Road, SIPCOT IT Park, Siruseri, Chennai and other accused are Directors/Executive Directors of the company/accused no. 1 and are responsible for the acts and deeds of the company/accused no. 1.

8. In **S.M.S. Pharmaceuticals Ltd. Vs. Neta Bhalla and another (2005) 8 Supreme Court Cases 89** the reference was made by a two judges bench for determination of the following questions by a larger bench.

"(a) (a) whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

(b) whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors of Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against. "

9. The Hon'ble Supreme Court in para 4 and 8 made the following observations:

"(4) In the present case, we are concerned with criminal liability on account of dishonour of cheque. It primarily falls on the drawer company and is extended to officers of the Company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a Company, extends criminal liability for dishonour of cheque to officers of the Company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are result of acts of others. Therefore, officers of a Company who are responsible for acts done in the name of the Company are sought to be made personally liable for acts which result in criminal action being taken against the Company. It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the Company for the conduct of business of the Company, as well as the Company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed

without their knowledge or that they had exercised all due diligence to prevent commission of the offence.

(8) The officers responsible for conducting affairs of companies are generally referred to as Directors, Managers, Secretaries, Managing Directors etc. What is required to be considered is: is it sufficient to simply state in a complaint that a particular person was a director of the Company at the time the offence was committed and nothing more is required to be said? For this, it may be worthwhile to notice the role of a director in a company. The word 'director' is defined in Section 2 (13) of the Companies Act, 1956 as under:

"director" includes any person occupying the position of director, by whatever name called" ;

There is a whole chapter in the Companies Act on directors, which is Chapter II. Sections 291 to 293 refer to powers of Board of Directors. A perusal of these provisions shows that what a Board of Directors is empowered to do in relation to a particular company depends upon the role and functions assigned to Directors as per the Memorandum and Articles of Association of the company. There is nothing which suggests that simply by being a director in a Company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the Company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of the Company who may be made responsible for day-to- day functions of the Company. These are matters which form part of resolutions of Board of Directors of a Company. Nothing is oral. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a Director in a company in order to illustrate the point that there is no magic as such in a particular word, be it Director, Manager or Secretary. It all depends upon respective roles assigned to the officers in a company. A company may have Managers or Secretaries for different departments, which means, it may have more than one Manager or Secretary. These officers may also be authorised to issue cheques under their signatures with respect to affairs of their respective departments. Will it be possible to prosecute a Secretary of Department-B regarding a cheque issued by the Secretary of Department-A which is dishonoured? The Secretary of Department-B may not be knowing anything about issuance of the cheque in question. Therefore, mere use of a particular designation of an officer without more, may not be enough by way of an averment in a complaint. When the requirement in Section 141, which extends the liability to officers of a company, is that such a person should be in charge of and responsible to the company for conduct of business of the company, how can a person be subjected to liability of criminal prosecution without it being averred in the complaint that he satisfies those requirements ? Not every person connected with a Company is made liable under Section 141. Liability is cast on persons who may have something to do with the transaction complained of. A person who is

in charge of and responsible for conduct of business of a Company would naturally know why the cheque in question was issued and why it got dishonoured."

10. Thereafter the Hon'ble Apex Court answered the questions in para 19 which is reproduced as below:

"In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

In case of ***Srikanth Singh Vs. North East Securities Limited (2007) 12 SCC 788*** *the Hon'ble Apex Court has held that for vicarious liability of Director of a company it must be pleaded and shown that the Director was responsible for the conduct of the business of the company at the time of commission of offence. Only being a Director is not enough to cast a criminal liability. Vicarious liability must be pleaded and proved and can not be merely inferred.*

10. It is clear from the perusal of the complaint that there is no specific averment that applicant is involved in day-to-day affairs of the company. There is only general allegation that applicant is a Director of the company. The documents filed by the applicant establishes that the applicant was a nominee Director and who has now resigned.

11. Considering the aforesaid facts and the law propounded on the point it is clear that in absence of specific allegations about the applicant he can not be prosecuted for any offence under section 138 N.I. Act. The learned Magistrate has failed to consider the matter properly. The order of summoning regarding applicant is unjust and illegal and can not be sustained.

12. Application U/s 482 Cr.P.C. is allowed and the order dated 2.1.2021

passed in Criminal Revision NO. 72 of 2019 and further the summoning order dated 7.1.2014 passed against the applicant-accused Jatinder Pal Singh are quashed.

(2022)04ILR A689
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application u/s 482 No. 28762 of 2021

Umesh Kumar & Anr. ...Applicants
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicants:
Sri Jaysingh Yadav

Counsel for the Opp. Parties:
A.G.A., Sri A. Kumar Srivastava

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860 - Section 406 - Dowry prohibition Act, 1961-Section 6-quashing of entire criminal proceedings-demand of Rs. 5 lac before the date of marriage, and did not return the amount already spent in rituals, ring ceremony-applicant filed false affidavit that the matter has been compromised and ready to return Rs. 2 lacs-applicant tried to misguide the Court, in fact, no compromise arrived between the parties-applicants have misused the process of law by filing application u/s 482 on false facts that the matter has been compromised-cost of Rs. 1 lac is imposed upon the applicants.(Para 1 to 28)

B. Apex Court held that no litigant can play "hide and seek" with the courts or adopt "pick and choose". To hold a writ of the court one should come with candid facts and clean breast. Suppression or concealment of material facts is forbidden to a litigant or even as a technique of advocacy. In such cases the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of Court for abusing the process of the court.(Para 14 to 26)

The application is dismissed. (E-6)

List of Cases cited:

1. Chandra Shashi Vs Anil Kumar Verma (1995) 1 SCC 21

2. Buddhi Kota Subbarai (Dr.) Vs K. Parasaran (1996) 5 SCC 530

3. Arunima Baruah Vs U.O.I. (2007) 6 SCC 120

4. Prestige Lights Ltd. Vs S.B.I. (2007) 8 SCC 499

5. K.D Sharma Vs SAIL & ors. (2008) 12 SCC 481

6. Dalip Singh Vs St. of U.P. & ors. (2010) 2 SCC 114

7. Amar Singh Vs U.O.I. (2011) 7 SCC 69

8. Kishore Samrite Vs St. of U.P. & ors. (2012) 10 SCALE 330

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

1. Heard Shri Jay Singh Yadav, learned counsel for the applicants, Shri Rabindra Kumar Singh, learned Additional Government Advocate representing the State and Shri Anil Kumar Srivastava, learned counsel appearing on behalf of opposite party No. 2 and perused the record of the case.

2. By means of this application under Section 482 of the Code of Criminal Procedure (herein after referred to as

"Cr.P.C.") the applicants have prayed for quashing of the entire criminal proceeding of complaint case No. 1749 of 2017 (Kamla Shankar Yadav Vs. Umesh Kumar Yadav and others), under Section 406 IPC and Section 6 of Dowry Prohibition Act, police station Handia, district Allahabad, pending in the court of Special Chief Judicial Magistrate, Allahabad on the basis of compromise arrived at between the parties.

3. The emanation of facts giving rise to the present application are that a complaint was filed on 28.8.2017 by the complainant Kamla Shanker Yadav arraigning therein as many as four accused namely Umesh Kumar Yadav, Mahesh Kumar Yadav, Gulab Devi and Phula Devi inter alia with the allegations that the marriage of her daughter namely Km. Jyoti Yadav was fixed with applicant No. 1, Umesh Kumar Yadav for 22.5.2017. Pre-marriage ceremonies, like *Goad Bharai* and *Bariksha* were held, in which Rs. 100,000/- was given to Mahesh Yadav, one gold ring and and sum of Rs. 11,000/- were given to Umesh Yadav. In addition thereof, money and clothes were also given to the persons attended the ceremonies. In the feast of *Goad Bharai*, Rs. 75,000/- was spent. It is further mentioned in the complaint that the complainant has made the bookings of all necessary things for which about Rs. 50,000/- was given as advance. On 09.5.2017, when the complainant went to the house of the accused for fixing the date of *Tilak* ceremony, they demanded Rs. 500,000/- (rupees five lac) in cash, a motorcycle and a gold chain. When the complainant along with his family members and relations went to the house of the accused on 10.5.2017, they abused them and done undignified behaviour with them and also refused for marriage, which was fixed for 22.5.2017.

4. After examining the complainant under Section 200 Cr.P.C. and witnesses Dharmendra Kumar and Manish Kumar under Section 202 Cr.P.C., the learned Magistrate vide order dated 20.9.2018 summoned the applicants to face trial.

5. Prior to lodging of the instant complaint, the complainant has also lodged a first information report against the accused-applicants at case crime No. 546 of 2017, under Sections 504, 506 IPC and ¾ of Dowry Prohibition Act, police station Handia, district Prayagraj almost on the same set of facts.

6. Being aggrieved and dissatisfied with the order of the learned Magistrate dated 20.9.2018 summoning the accused-applicants, the applicants have challenged the same by means of filing Application U/S 482 No. 2224 of 2019, which was disposed of by the coordinate Bench of this Court vide order dated 21.1.2019. The order reads as under:

"This Application under Section 482 Cr.P.C. has been filed with the prayer to quash further proceedings of complaint case no. 1749 of 2017 (Kamla Shankar Yadav Vs. Umesh Kumar Yadav and others), under Section 406 IPC and Section 6 of Dowry Prohibition Act, Police Station Handia, district Allahabad pending in the court of Special Chief Judicial Magistrate, Allahabad. Further prayer has been made to stay the effect and operation of the aforesaid order.

Heard learned counsel for the applicants and learned A.G.A.

Submission of learned counsel for the applicants is that summoning order was passed in the matter for the same set of facts for which FIR had already been

lodged in which investigation is going on. Thus summoning order is illegal.

Learned A.G.A. opposed the prayer.

Having heard learned counsel for the parties and keeping in view the provisions provided under Section 210 Cr.P.C. the application is disposed of at this stage itself with the direction to the applicants to move proper application before the Court concerned within 15 days from today ventilating all the facts, as has been raised in this application. If such application is moved, the court concerned is directed to decide the same within a period of one month thereafter. During the said period no coercive action shall be taken against the applicants.

With the aforesaid observations, the application is disposed of."

7. Pursuant to the order of this Court dated 21.1.2019, the applicant has moved the application before the court concerned, which is stated to be pending.

8. Now, the applicants have filed this second application with the prayer that entire criminal proceedings of complaint case No. 1749 of 2017 be quashed on the basis of compromise arrived at between the parties. The applicant No. 1, Umesh Kumar Yadav is the deponent of the instant case.

9. On 03.03.2022, when this case was taken up for the first time, a preliminary objection was raised by Shri Anil Kumar Srivastava, learned counsel appearing on behalf of the complainant that this is the second application U/s 482 Cr.P.C. on false facts as no compromise has taken place between the parties and averments made in this regard in the instant application are totally false and baseless. The Court passed the following order:

"On the matter being taken up, Shri Anil Srivastava, learned counsel appearing on behalf of the opposite party No. 2 submits that the instant application has been preferred by the applicants to quash the entire criminal proceedings initiated against them in pursuance of a compromise/settlement made between the parties concerned, whereas, no compromise has arrived at between the parties concerned. The averment in this regard is wholly false and against the evidence on record.

The aforesaid fact has not been disputed by the learned counsel for the applicants, who submits that the applicants are willing to settle the dispute.

On the request of learned counsel for the applicants, put up this case tomorrow i.e. 04.3.2022 as fresh to seek proper instructions in this regard."

10. On 04.3.2022, on the basis of instructions, learned counsel for the applicants apprised the Court that the applicants are ready to return the amount of Rs. 200,000/- (rupees two lac), which the complainant has incurred.

11. The Court passed the following order on 04.3.2022:

"Pursuant to order dated 03.3.2022, learned counsel for the applicants, upon instructions from the applicants, apprised the Court that the applicants are ready to return the amount of Rs. 200,000/- (rupees two lac only), which they have taken from opposite party No. 2.

Upon the said statement, Shri Anil Kumar Srivastava, learned counsel appearing on behalf of opposite party No. 2 submits that in case the entire amount paid by opposite party No. 2, the first informant is returned by the applicants, he has no

objection if the Court quashes the entire proceedings against the applicants.

Considering the aforesaid statement of learned counsel for the applicants as well as the undertakings tendered on behalf of the applicants before this Court, the applicants are directed to produce the bank draft of Rs. 2,00,000/- in favour of Kamla Shankar Yadav, opposite party No. 2 on the next date fixed in the matter.

Put up this case as fresh for further hearing on 15.3.2022."

12. On 15.3.2022, when the case was taken up Shri Jay Singh Yadav, learned counsel for the applicants has prayed for one more opportunity to comply with the order dated 04.3.2022. Learned counsel for the applicants upon instructions from the applicants further submitted that a draft of Rs. 200,000/- (rupees two lac only) as mentioned in the order dated 04.03.2022 shall be produced by the applicants on 28.3.2022 and the case was directed to be listed on 28.3.2022.

13. After the order of this Court dated 03.3.2022, the applicants kept on playing hide and seek with the court and tried to obtain interim order from this Court by hook or crook and when the applicants failed to achieve their nefarious design, on 28.3.2022, when the case was taken up Shri Jay Singh Yadav, learned counsel for the applicants submits that the applicants are not responding to his call and the Court may pass orders as it deems fit and proper in the facts and circumstances of the case.

14. Having heard the submissions of the learned counsel for the parties and examining the matter in its entirety, I am of the considered view that the applicants have approached this Court with unclean hands. By means of this application the applicants have tried to misguide this Court by stating that compromise has been arrived at between the parties, but the fact is that no compromise has been effected as stated by the learned counsel appearing on behalf of the complainant. In spite of the undertakings given by the learned counsel for the applicants, on the basis of the instructions of the applicants, it appears that the applicants have no respect to the orders of this Court.

15. Since, the applicants have not approached this Court with clean hands and filed false affidavit before this Court that the matter has been compromised, therefore, he does not deserve any indulgence by this Court.

16. The courts of law are meant for imparting justice between the parties. One, who comes to the court, must come with clean hands and no material facts should be concealed. I am constrained to hold that more often the process of the court is being abused by unscrupulous litigants to achieve their nefarious design. I have no hesitation in saying that a person, whose case is based on falsehood, has no right to approach the court. He/she can be summarily thrown out at any stage of the litigation. The judicial process cannot become an instrument of oppression or abuse or a means in the process of the Court to subvert justice, for the reason that the Court exercises its jurisdiction, only in furtherance of justice.

17. Time and again the issue of abuse of process of law has come up before the Supreme Court as well as High Courts. The Courts have, over the centuries, frowned upon litigants, who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts.

18. In **Chandra Shashi Vs. Anil Kumar Verma, (1995) 1 SCC 21**, Apex Court held as under:

"To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. People would have faith in courts when they would find that (truth alone triumphs) is an achievable aim there; or (it is virtue which ends in victory) is not only inscribed in emblem but really happens in the portals of courts"

19. In **Buddhi Kota Subbarai (Dr.) Vs. K. Parasaran, (1996) 5 SCC 530),** Apex Court held as under:

The course adopted by the applicant is impermissible and his application is based on misconception of law and facts. No litigant has a right to unlimited drought on the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived or frivolous petitions. After giving our careful consideration to the submissions made at the bar as well as those contained in the memorandum of the application, we are of the opinion that this application is misconceived, untenable and has no merits whatsoever. It is accordingly dismissed.

20. In **Arunima Baruah Vs. Union of India** (2007)6 SCC 120, Supreme Court held that it is trite law that to enable the Court to refuse to exercise its discretionary jurisdiction suppression must of material fact. Material fact would mean material for the purpose of determination of the lis. It was further held that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands.

21. In **Prestige Lights Limited Vs. State Bank of India** (2007)8 SCC 449, Apex Court held as under:

"It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

22. In **K.D Sharma Vs. Steel Authority of India Limited and others**, (2008)12 SCC481, Supreme Court held that no litigant can play "hide and seek" with the courts or adopt "pick and choose". To hold a writ of the court one should come with candid facts and clean breast. Suppression or concealment of material facts is forbidden to a litigant or even as a technique of advocacy. In such cases the Court is duty bound to discharge rule nisi and such applicant is required to be dealt

with for contempt of Court for abusing the process of the court.

23. Supreme Court in **Dalip Singh Vs. State of Uttar Pradesh and others**, (2010)2 SCC 114 came down heavily on unscrupulous litigants by holding that it is now well established that a litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

24. The Court held as under:

"For many centuries, Indian society cherished two basic values of life i.e., `Satya' (truth) and `Ahinsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

25. In **Amar Singh Vs. Union of India** (2011)7 SCC 69, Supreme Court held that Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case.

26. In **Kishore Samrite Vs. State of U.P. and others**, 2012 (10) SCALE 330, The Supreme Court held as under:

"31. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.

32. With the passage of time, it has been realized that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt

with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorized or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs."

27. Having considered the factual aspect of the case and the dictum of the Supreme Court, I am of the considered view that the applicants have misused the process of law by filing application under Section 482 Cr.P.C. on false facts that the matter has been compromised. Honesty, fairness, purity of mind should be of the highest order to approach the court, failing which the litigant should be shown the exit door at the earliest point of time.

28. In view of the verbose discussion, the application is dismissed with costs, which is quantified at Rs. 100,000/- (rupees one lac) to be deposited by the applicants within 45 days with the Registrar General of this Court, failing which the same shall be recovered from the applicants as arrears of land revenue. On depositing the said amount, Rs. 50,000/- (rupees fifty thousand only) shall be released in favour of the complainant/opposite party No. 2 and remaining Rs. 50,000/- (rupees fifty thousand only) shall be forwarded by the Registrar General of this Court to the account of Rajkiya Bal Greh Shishu, Allahabad being Account No. 3785336735, State Bank of India, Khuldabad Branch, Prayagraj, IFSC Code SBI N0002560, Micro Code 211002015, which shall be used for the welfare of the children.

29. Office is directed to place a copy of this order before the Registrar General of this Court for compliance.

(2022)04ILR A695
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2022

BEFORE

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

Writ-A No. 60201 of 2012

Damodar Das ...Petitioner
Versus
Ram Swaroop Ghura ...Respondents

Counsel for the Petitioner:
Sri A.N. Bhargava, Sri Arvind Srivastava, Sri Atul Dayal, Sri Pushkar Srivastava, Sri Ravindra Srivastava

Counsel for the Respondents:
Sri Pankaj Agarwal

A. Civil Law - Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) - Release Application u/s 21(1)(a) - Title dispute - it does not lie in the tenant's mouth to question the right of the landlord to seek release of the demised shop by importing a title dispute into proceedings for eviction - Held - there was no inter se dispute between the co-sharers as to which shop has fallen to whose share - rather the stand was that the demised shop has fallen to the share of the landlord in terms of a family settlement- approach of the Appellate Authority in holding against the landlord with reference to non-establishment of the factum of partition, cannot be countenanced (Para 18)

B. Civil Law - Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) - Release Application u/s 21(1)(a) - subsequent events can be taken note of in proceedings for release, where release proceedings had been pending for long - to shorten the litigation High court may itself decide the litigation (Para 27)

Prescribed Authority rightly on the basis of relevant evidence, recorded that the demised shop i.e. shop No.193 alone was available to the landlord to set up his independent business – Further subsequent event was that the original Tenant, passed away pending petition - all his heirs well settled in business and have a three-storeyed shop - Nothing placed on record to show that the tenant's heir have taken over his business in the demised shop - they would not suffer any hardship by an order of eviction. – High court directed the tenants to handover peaceful and vacant possession of the demised shop to the landlord

Allowed. (E-5)

List of Cases cited:-

1. Sajal Kumar Jauhari Vs District Judge, Ballia & ors. , 2016 SCC OnLine All 2541

2. Mohd. Ayub & anr. Vs Mukesh Chand, (2012) 2 SCC 155

3. Ram Kumari Barnwal Vs Ram Lakhan (Dead), 2007 (68) ALR 136

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

1. This is a writ petition by the landlord, who was successful in proceedings for release under Section 21(1)(a) of the U.P. Act No. 13 of 1972 (for short, 'the Act') before the Prescribed Authority, but failed before the Appellate Authority.

2. Damodar Das, the landlord filed for release of shop bearing No.193, situate at Mohalla Sarrafa Bazar, Jhansi, under Section 21(1)(a) of the Act, that was in the tenancy occupation of Ram Swaroop Ghura. The application was registered on the file of the Prescribed Authority/ Judge, Small Cause Court, Jhansi as P.A. Case No.63 of 2007.

3. The landlord's case in brief was that he is the owner and landlord of shop No.193 aforesaid (for short, 'the demised shop'). The demised shop had fallen to his share in a family settlement. Ram Swaroop Ghura, who shall hereinafter be referred to as 'the tenant', was in occupation thereof on a monthly rent of Rs.100/-. The tenancy commences on the 24th of each English Calendar month and ends on the 23rd following. The tenant has not paid rent since 25th January, 2000 and is in default. Separate proceedings are being taken on that ground. The landlord has no other shop available to him, except the demised shop. He needed the demised shop for his personal use and occupation. The landlord so far does business in the shop owned by his brother Bhagwat Prasad. The landlord's brother aforesaid is now asking him to separate and vacate his shop at the earliest. The landlord is a married man. He has a family comprising his wife and three children, whom he has to provide for. The landlord has no other shop available to him except the demised shop, whereas the tenant has another shop located at Bajaja Bazar, Jhansi. If the tenant is asked to vacate the demised shop, he would not suffer any hardship. The tenant seldom sits in the demised shop. For the most part, the shop is without business. It is on these allegations that the landlord prayed that the shop be released in his favour on the ground of his bona fide need.

4. The tenant filed a written statement, traversing the landlord's case. It

was asserted that the application for release has been made by the landlord in connivance with his brothers for the ulterior purpose of securing an enhancement of rent. The landlord has no need for the demised shop and is not without occupation. He has a prospering business in shop No.192, Sarrafa Bazar, Jhansi, which is a very big shop. In the said shop, the landlord sells herbs and medicines, besides dealing in supply of acid. No family partition between the landlord and his brothers has taken place. The brothers together have a number of shops available to them. Shop No.192 is in the exclusive occupation of the landlord, where he does business. In addition, the landlord utilizes his house bearing No.42/1, Gopal Nikhri, Gola Kunwa, Jhansi, where he does wholesale trade as well as retail in spices and dry fruits. The landlord does not need to do any other business nor has he got time to engage in other business. The landlord has constructed a big godown that is part of shop bearing No.192, where he stocks substantial quantity of goods. The landlord's brother, Bhagwat Prasad does not do business in shop No.192, but has his business under the name and style of Bahi Company. The other brothers of the landlord have their independent shops. The demised shop was earlier held by the tenant on a rent of Rs.17.50 per month, but later on the landlord and his brother got it increased to Rs.100/- per month and ever since, the tenant is paying the said rent to Bhagwat Prasad. Upon service of notice by the landlord to pay him rent, the tenant paid it to him, but later on the landlord refused. In consequence, the tenant has deposited rent under Section 30 of the Act before the Civil Judge (Jr. Div.), Jhansi.

5. It is also the tenant's case that he is a tenant in the demised shop for the past 70 years and has established business that commands goodwill. In the event, the tenant is evicted from the demised shop, his business would be ruined, besides the loss of goodwill. It is also the tenant's case that the landlord's grandmother, Smt. Chhita Bai had earlier instituted proceedings for release under Section 21(1)(a) of the Act, being Case No.95 of 1985. In the said case, the landlord's grandmother could not prove her case, but entered into a compromise, in consequence whereof, rent was increased from Rs.17.50 per month to Rs.100/-. The tenant also says that the disposition of the earlier case between the landlord's grandmother and himself as aforesaid works to bar the present proceedings as res judicata. There is a further pleading by the tenant to the effect that post institution of the present proceedings, he made efforts to search alternative accommodation, but despite substantial efforts, he did not find any vacant shop. It is also averred that there is no possibility of finding an alternative shop that would be within the financial capacity of the tenant to bear the burden of rent. It is also pleaded that by grant of the release application, the tenant would suffer greater hardship than that suffered by the landlord in the event of refusal.

6. In support of his case, the landlord filed his own affidavit besides those of his brothers Bhagwat Prasad and Rajesh. In addition, an affidavit of Santosh Kumar Patel, counter affidavits of the landlord Damodar Das bearing paper No.61A, 90C and 109A have also been filed. Along with the counter affidavit of Damodar Das, paper No.61A2, a photostat copy of Form-15 and a photostat copy of the registration certificate has been filed as Annexure B. Together with the affidavit of Damodar Das bearing paper No.90C2, a photostat copy of the registration from the

Commercial Tax Department and a photostat copy of the licence have also been annexed. A number of documents have also been filed, which includes money order receipts, telephone bills, electricity bills, besides bills from the water works, a certified copy of the sale deed, a photostat copy of the ration card, money order coupons, a photostat copy of the order passed in M.A. Case No.9 of 2003. There is a moreful and complete description of the evidence to be found in the impugned judgment, not necessitating further reference to a summary thereof.

7. Likewise, affidavits were filed on behalf of tenant, Ram Swaroop Ghura bearing paper no.24C2 and 27A2 with annexures being a photostat copy of the licence, money order receipts etc., a photostat copy of an affidavit of one Rahul Agarwal together with an annexed bill, an affidavit of Birjesh Kumar Vishwakarma bearing paper no.29A2, besides an affidavit from Ram Swaroop. Documents too have been filed on behalf of the tenant, that includes a certified copy of the Commission report bearing paper no. 32C1, a certified copy of the application giving rise to P.A. Case No.95 of 1985 being paper No.31C, a copy of the order passed in the case aforesaid, notices from the Sale Tax and the Labour Department, rent receipts and a copy of the notice bearing paper No. 98C1. Likewise, on behalf of the tenant, there is much evidence led, the details whereof find mention in a summary set out in the judgments of the Courts below. It does not require any further elucidation, except what is relevant and that would be noticed during the course of this judgment.

8. The Prescribed Authority allowed the application for release, holding that the issue raised about lack of proof of partition within the family and the demised shop falling to the landlord's share is something which was not open to the tenant to question, given the fact that there is no dispute about the partition between the co-shares-brothers. It was also held that the tenant had acknowledged the landlord and paid him rent, which he later on deposited in Court, pleading a case of refusal to receive rent. It was further held that the landlord's need was *bona fide* as that was the only shop available to him. The finding is based on an extensive survey of the shops available to the family and the position of their occupancy by various members/ brothers and nephews of the landlord. The case of the tenant that the landlord was doing business in shop No.192 exclusively and not along with his brother was discarded by the Prescribed Authority. Bona fide need was also found in favour of the landlord and against the tenant. The shop in Sarrafa Bazar (described elsewhere as Bajaja Bazar) was held to be one purchased in the name of the tenant's daughter-in-law, Smt. Karuna Devi, where the tenant's son was doing business in cloth, a finding based on some admission in the tenant's affidavit 27A2 and 76A2. Efforts made to search an alternative accommodation was not believed by the Prescribed Authority, as it was bereft of details about the efforts made.

9. The Prescribed Authority's judgment granting release on 22.09.2009, was reversed in appeal by the Appellate Authority by his judgment and order dated 09.08.2012, rendered in Rent Control Appeal No.15 of 2009. It is this judgment of the Appellate Authority/ Additional District Judge/ Special Judge (E.C. Act), Jhansi that the landlord has impugned in the present writ petition before us.

10. Heard Mr. Atul Dayal, learned Senior Advocate assisted by Mr. Ravindra Srivastava, learned Counsel for the landlord and Mr. Pankaj Agarwal, learned Counsel appearing on behalf of the tenant, now represented by his LRs.

11. It must be remarked here that the tenant Ram Swaroop Ghura, passed away pending this appeal and his heirs and LRs have been substituted, who are his son Sia Saran, his two daughters, Pista Devi and Meera Devi and the tenant's widow Prema Devi. The substitution was carried out in the year 2018 on the basis of an application made in the year 2016. The tenant died on 05.11.2015.

12. Before this Court, substantial affidavits have been exchanged, that is to say, the counter affidavit and the rejoinder affidavit dated 09.08.2015 and 20.08.2015. Both these affidavits relate to the time when the tenant Ram Swaroop Ghura was alive. There is no further material placed, on record on account of the event of Ghura's supervening death, about the affairs of the tenant's business in the hands of his heirs. It has not been indicated by any further affidavit whether the tenant's son, his widow or daughters are carrying on the tenant's business in the demised shop.

13. The Appellate Authority has held that the landlord has failed to prove that the demised shop, out of all the shops available to the co-sharers/ brothers, has been the subject matter of a family partition and fallen to his share. Thus, the Appellate Authority has virtually held that the landlord is not entitled to maintain the present release application for his *bona fide* need, because he has not been able to establish that he is exclusively the landlord vis-à-vis the demised shop. In reaching this conclusion of his, the Appellate Authority has gone into unnecessary details about the factum and the validity of a family partition as if it were a title matter between co-sharers. Admittedly, the demised shop, along with a number of others, belonged to the joint family, of which the landlord is a member. The Appellate Authority has held that the burden to prove the factum of partition lay upon the landlord. It has been remarked that though it has been asserted by the landlord that a family settlement has taken place, wherein the demised shop had fallen in his share, the landlord has not mentioned the date, month and year of the settlement. He has not produced any written document or contract evidencing the settlement or a decree of Court. It has then been observed that admittedly, the original owner and landlord of the demised shop was the landlord's grandmother, Chhita Bai, who had instituted proceedings for release against the tenant under Section 21(1)(a) of the Act vide Case No.95 of 1985. These proceedings ended in compromise with an increase in the rent to Rs.100/- per mensem. After Chhita Bai's death, her son Chhakilal would become the owner and the landlord.

14. The Appellate Authority has observed that there is no averment when Chhakilal passed away and also that in the landlord's affidavit paper No.61A, though it is said that the brothers have mutually partitioned the properties, it is not mentioned whether the settlement/ partition took place during the lifetime of their father or after his death. It has also been noticed that Bhagwat Prasad has stated in his affidavit paper No.62A that the landlord are five brothers, amongst whom a settlement by word of mouth took place during the lifetime of their father. But, he too does not mention when the father passed away. The

Appellate Authority has gone into what seems to be an irrelevant inquiry to say that if the family settlement took place during the father's lifetime, it is not shown or detailed, which property came to the father's share and which of it went to the brothers. The Appellate Authority has also noticed a document from the Commercial Tax Department dated 16.01.2009, which shows that shop No.192 was registered with them as a general merchant and pharmaceutical store in the name of Bhagwat Prasad, who held TIN number with reference to the said premises. It has been remarked that this document is one created during the pendency of litigation and, therefore, of no worth. Another document paper No.10A/5, a certified copy of an order by the Assistant Commissioner for the year 1981-82 has been taken note of by the Appellate Authority. Still another certified copy bearing paper No. 117C has been noticed, which shows that the shop bearing No.192 was registered since 24.09.1982 in the name of Bhagwat Prasad, the landlord's brother. It has been remarked that this document would show that Bhagwat Prasad was recorded with the Labour Department as the owner/ occupier of shop No.192 since the year 1982, but the Appellate Court has reasoned that the family settlement is said to have taken place prior to 1982, which would make it thirty years old.

15. It is then remarked that the landlord's grandmother had instituted proceedings against the tenant for release in the year 1985, which would show that until then, no partition had taken place, but with the Labour Department, the name of Bhagwat Prsad was registered as the occupier of shop No.192. It has been opined that there is no possibility of a partition by mutual settlement taking place between the brothers ante-dating the time that their grandmother, Smt. Chhita Bai instituted proceedings for release. The conclusions of the Prescribed Authority, based on separate registrations for the brothers in relation to different shops with the Labour Department and Commercial Tax Department to evidence a family settlement or partition, has been held to be flawed by the Appellate Authority on the aforesaid reasoning.

16. This Court must remark at once that the approach of the Appellate Authority is manifestly illegal and perverse. As already remarked, the Appellate Authority has looked into the issue of partition amongst the family members, or so as to speak, a family settlement bringing about an informal partition, as if he were seized of a title matter inter se the co-sharers, involving validity of the partition. The present case is one that is a proceeding for release based on the relationship of landlord and tenant. There is no quarrel about the fact that the tenant does not disown or renounce his character as such. He also does not say that it is not the landlord's family who are the owners and landlords of the demised shop. There is no evidence of an inter se dispute between the co-sharers as to which shop has fallen to whose share. Rather, out of the five brothers, the stand of three is on record in the form of affidavits, indicating that the demised shop has fallen to the share of the landlord in terms of a family settlement. Such family settlements are not very formal affairs and may be transactions continuing over a period of time, where different properties are divided mutually between the various co-sharers. The Prescribed Authority has rightly noted that the tenant too has admitted the fact that he paid rent to the landlord acting on his demand, which

shows that he was acknowledged to be the landlord. It is then remarked that the tenant has explained it by saying that a co-landlord is also entitled to receive rent and, therefore, he paid it to him. Later on, when the landlord refused, the tenant deposited it in Court. There is an essence, thus, no quarrel that it is the landlord's family who own the demised shop and now they say that it has been allotted in a family arrangement to the landlord. This fact, so long as there is no co-sharer disputing it, is not at all one that ought to be investigated in proceedings for release. The Appellate Authority ought not to have gone into a hairsplitting evaluation of evidence to determine the factum of partition for the limited purpose of the present proceedings. A landlord under the Act has been defined by Section 3(j) of the Act in the following terms:

"3**. Definition**.- In this Act, unless the context otherwise requires-

(j) "*landlord*", in relation to a building, means a person to whom its rent is or if the building, were let would be, payable, and includes, except in clause (g), the agent or attorney, of such person;"

17. Thus, if the landlord has been authorized by the other co-landlords to receive rent with a stipulation that the shop has been allotted to his share, there is no warrant for a Court seized of release proceedings to inquire virtually into the factum and legality of the partition, the manner in which the Appellate Authority has done. This is all the more so, as there is not a hint of an issue between the co-landlords/ co-owners about this arrangement/ family partition, where the demised shop has fallen to the landlord's share. In this connection, reference may be made to the decision in **Sajal Kumar Jauhari v. District Judge, Ballia and others, 2016 SCC OnLine All 2541.** In the said decision, though in the context of a partition brought about by a Civil Court decree passed in a partition suit, it was observed:

"**38**. The applicants/landlord have come out with the categorical submission that the accommodation which is described in schedule 2016_2_RCR_Rent_95_4.png of the release application came in their share by virtue ofthe Civil Court decree dated 7.9.2002 passed in a partition suit filed by the co-owners. No exception of it can be taken in a rent control proceeding either by the appellate court or by this court. Moreover in the additional written statement filed by the petitioner, there is no averment that the disputed accommodation is owned by the heirs of Gopal Das Mishra or the petitioner paid rent to Gopal Das Mishra or his heirs at any point of time. Admittedly the petitioners are occupying the disputed accommodation as tenant, they, therefore, cannot question the title of the co-owners without disclosing the name of the actual owner or the landlord. The petitioner cannot be allowed to challenge the Civil Court decree on the ground that it was obtained in a collusive suit. No other co-owner has come forward to object the release."

18. For the worst, assuming that no partition has taken place, it is not the case here that the property does not belong to the joint family comprising the five brothers or that the landlord is not one of the co-owners. If, therefore, for the need of the landlord, the other co-owners have stood by him and supported his case for release on the ground of bona fide need, it does not lie in the tenant's mouth to question the right of the landlord to seek

release of the demised shop by importing a title dispute into proceedings for eviction. The approach of the Appellate Authority in holding against the landlord with reference to non-establishment of the factum of partition, therefore, cannot be countenanced. The issue whether the tenant or his family members have acquired the shop within the municipality of Jhansi is really not of much consequence. The way the Prescribed Authority has approached the matter, it is evident that the tenant's son is doing business in a shop located in the Sarrafa Bazar, which is a three-storeyed shop purchased in the name of his wife. The Prescribed Authority has reasonably concluded that the tenant's son is a member of his family and it would lead to deemed vacancy generally, unless certain particular facts are proved. But this Court is not minded to go into those facts. Even if the tenant has no alternative shop in the municipality of Jhansi, it cannot stand to defeat the landlord's right to release if his case of a bona fide need is established.

19. So far as question of bona fide need is concerned, the Appellate Authority has remarked that the landlord has not mentioned in his application for release, the number of the shop wherein he does business along with his brother, Bhagwat Prasad, though he has said that Bhagwat Prasad has threatened him with dispossession. It has been remarked that the tenant has averred that the landlord carries on the business of a grocer and trade in acid in shop No.192, and besides that, also does wholesale trade and retail in spices and dry fruits from his house No.42/1, Gopal Nikhra, Gola Kunwa, Jhansi. It is remarked that in the later affidavit filed by the landlord, it has been accepted that he does joint business with his brother Bhagwat Prasad in shop No.192 and it is this shop which he is being asked to vacate by his brother, Bhagwat Prasad. About these allegations, the Appellate Authority has disbelieved paper No.109/4 dated 16.01.2009, which is a registration certificate issued by the Commercial Tax Department as a document created during litigation. The said document shows Bhagwat Prasad's name as the proprietor of the business in shop No.192. Another document, paper No.109/5, which has been issued by the Assistant Labour Commissioner and is a registration certificate of the year 1982 in the name of Bhagwat Prasad with reference to shop No.192, has been discarded by saying that at that time, the parties' grandmother, Smt. Chhita Bai was the owner and the landlord. It is very strained logic that these documents have been disbelieved to infer that Bhagwat Prasad does not do business in shop No.192.

20. It must be remarked that in a family, that has a number of young men needing employment, assignment of commercial premises is often informal to begin with, which later on is scripted and converted to a formal settlement and division. Assuming that in the year 1985, the landlord's grandmother was alive, the fact that his brother Bhagwat Prasad was recorded with the Assistant Labour Commissioner as the occupier of shop No.192 would show that the shop indeed is one where Bhagwat Prasad does business and not the landlord. The further finding recorded by the Appellate Authority that there are some receipts that show that the landlord does business in shop No.192 are no more than receipts of some transactions of purchase of goods. These receipts are not incompatible with the landlord's case of doing business in shop No.192 along with his brother.

21. The other facet on which the landlord's need has been held not to be genuine is the business and trade in spices and dry fruits done from the landlord's home. It is well settled that business done from home, under compelling circumstances, does not lead to effacement of bona fide need of the landlord for business premises. Of course, this is not to say that the landlord indeed does business from home, about which too, perverse conclusions have been drawn. Those conclusions are also based on some documents about purchase of goods relating to trade, where the landlord's address indicated is that of his home, situate in Nikhri Bazar, Gola Kunwa, Jhansi. It is again a perverse conclusion to draw that an address mentioned on some document of purchase of goods can lead to the inference about the premises being used for business.

22. A trader can purchase goods giving out his residential address for reason of convenience or any other exigency. On that basis alone, to infer that the residential premises are used for business purposes, is most illogical. The Prescribed Authority, on the other hand, has done a complete survey of the shops available to the family comprising the five brothers and the sons of Bhagwat Prasad, who are in the working age group. The complete availability of the shops with their location and the business done by the five brothers has been recorded by the Prescribed Authority to support his finding that the landlord has no other shop but the demised shop to establish his independent business in. The Prescribed Authority has also noted the fact that one of the brothers of the landlord, Arun Gupta is pursuing litigation to get his shop vacated. The Prescribed Authority has clearly found on the basis of relevant evidence, that the landlord's brother, Bhagwat Prasad carries on his business in shop No.192 and the demised shop i.e. shop No.193 alone is available to the landlord to set up his independent business.

23. It is well settled that every adult member of the family is entitled to establish his independent business and if the family have a property where that need can be satisfied, moreso if the particular member holds that property, it ought to be released in favour of that person, who does not have premises to establish and run his independent business. In this connection, reference may be made to the decision of the Supreme Court in **Mohd. Ayub and another v. Mukesh Chand, (2012) 2 SCC 155**, where it has been held:

"15. It is well-settled that the landlord's requirement need not be a dire necessity. The Court cannot direct the landlord to do a particular business or imagine that he could profitably do a particular business rather than the business he proposes to start. It was wrong on the part of the District Court to hold that the appellants' case that their sons want to start the general merchant business is pretence because they are dealing in eggs and it is not uncommon for a Muslim family to do the business of non-vegetarian food. It is for the landlord to decide which business he wants to do. The Court cannot advise him. Similarly, length of tenancy of the respondent in the circumstances of the case ought not to have weighed with the Courts below."

24. In the circumstances, this Court is of opinion that the Prescribed Authority has rightly found for the landlord on the issue of bona fide need and the Appellate Authority has disturbed that finding in

manifest error, doing injustice to the landlord.

25. The last issue that remains to be dealt with is about the comparative hardship. Much has been made for the fact that the tenant has attempted to search alternative accommodation, but could not find one. The Prescribed Authority has commented on the case of the tenant on this score that though there is an averment that the tenant has looked for alternative accommodation, no particulars about where, when and which premises were the subject matter of efforts by the tenant to secure on rent pending these release proceedings have been furnished. The Prescribed Authority thought that the averment is only a formality and this Court is of the same opinion. There are no two conclusions possible on this count.

26. Quite apart, some developments have taken place pending this petition. The tenant, who was an old man, has passed away pending this petition. The demised shop being a commercial accommodation, all his heirs have been impleaded. Now, his son has already been found to be well settled in business and he has a three-storeyed shop located in Sarrafa Bazar, Jhansi. He, therefore, would not suffer any hardship by an order of eviction. Nothing has been placed on record to show that the tenant's son or the other three heirs, that is to say, his two daughters and widow has taken over his business in the demised shop.

27. The principle, that subsequent events can be taken note of in proceedings for release, has the approval of the Supreme Court in **Ram Kumari Barnwal vs. Ram Lakhan (Dead), 2007 (68) ALR 13**6. In **Ram Kumari Barnwal** in the context of eschewing a course of remand, where release proceedings had been pending for long, it was observed by the Supreme Court about cognizance of subsequent events thus:

"**4.** Learned Counsel for the appellant submitted that the approach of the High Court is clearly erroneous. It is settled position in law that subsequent events can be taken note of. The High Court, even though referred to the relevance of the subsequent events erroneously came to the conclusion that even if the judgment and order passed by the Courts below are erroneous in law, the matter will have to be remanded to the Prescribed Authority. There is no such requirement in law. In fact, after noticing that the release application was filed about quarter of century back, it is really unfortunate that the High Court instead of deciding the matter dismissed the writ petition granting liberty to file fresh release application. In other words, instead of shortening litigation the High Court's order would mean unnecessary prolongation of litigation."

28. In the result, this petition **succeeds** and is **allowed with costs**. The impugned order passed by the Appellate Authority/ Additional District Judge/ Special Judge (E.C. Act), Jhansi in Rent Control Appeal No.15 of 2009 is hereby **quashed**. The order of the Prescribed Authority/ Judge, Small Cause Courts, Jhansi dated 22.09.2009 in P.A. Case No.63 of 2007 is **restored**. The tenant represented by his heirs, that is to say, respondent nos.1/1, 1/2, 1/3 and 1/4 to this petition shall handover vacant possession of the demised shop to the landlord within a period of three months of the date of this judgment, subject to the condition that they execute an undertaking with the Prescribed

Authority within a month carrying the following terms:

(i) The tenants shall handover peaceful and vacant possession of the demised shop to the landlord;

(ii) During the aforesaid period of time, the tenants will not sub-let the demised shop or permit any third person to occupy it; and,

(iii) During the aforesaid period of three months, the tenants shall not damage or disfigure the demised shop in any manner.

29. In the event an undertaking is not filed on affidavit within a month in the above terms, the release order passed by the Prescribed Authority shall become executable forthwith.

(2022)04ILR A705
APPEELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Special Appeal No. 89 of 2022

Smt. Kusumlata ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Rakesh Dubey, Sri Arvind Srivastava

Counsel for the Respondents:
C.S.C.

A. Civil Law – Essential Commodities Act, 1955 – Section 3 – UP Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 – Fair price licence – Compassionate appointment – Agent – Condition that the applicant must be resident of locality, imposed – Effect – GO dated 05.08.2019 – Term 'family include unmarried daughter, but not married daughter – Validity challenged on the basis of its being hit by Article 14 – Held, basic object and purpose of the aforesaid Control Order 2016 is the distribution of foodgrains and scheduled commodities in an area through agents for the benefit of people, particularly economically weaker section of the society – Held further, looking into the object and purpose of Public Distribution System, use of the words 'unmarried daughter' in the definition of the word 'family' given in the Government Order, 2019, is not discriminatory. (Para 12 and 14)

Special Appeal dismissed. (E-1)

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Jayant Banerji, J.)

1. Heard Sri Arvind Srivastava, learned counsel for the appellant-petitioner and Sri Girish Vishwakarma, learned standing counsel for the State-respondents.

2. This special appeal has been filed praying to set aside the judgment and order dated 29.11.2021 in Writ-C No.21935 of 2021 (Smt. Kusumlata vs. State of U.P. and 2 others) passed by the learned Single Judge.

3. The aforesaid writ petition was filed by the petitioner praying for the following relief:

*"(i) Issue a writ, order or direction in the nature of **Mandamus** commanding the respondent no. 2 S.D.M. Bharthana District Etawah to consider the claim of the petitioner for compassionate appointment of under the U.P. Essential Commodities Act (Rules and Distribution Order, 2016).*

(ii) Issue a writ, order or direction in nature of Mandamus directing the respondent no.2 to appoint the petitioner as dealer in place of her father at Newadi Khurd, Nyay Panchayat-Aheripur, Block-Maheva, Pargana- Bharthana, District Etawah under the dying in harness rule prescribed under U.P. Essential Commodities Act (Rules and Distribution Order, 2016)."

4. Learned counsel for the appellant-petitioner states that subsequently, by means of an amendment application, challenge to the constitutional validity of Clause IV(10) of the Government Order dated 05.08.2019 defining the word "family', was also made. By the impugned judgment, the learned Single Judge has dismissed the writ petition observing as under:

"32. But the present dispute is in regard to allotment of a dealership of fair price shop on the death of father of petitioner, who is married and residing at a different village. The authorities had not refused to grant dealership to the eligible dependents of the deceased Nekram. The argument raised by learned counsel as to legal representative as provided in Section 2 (II) of the Code of Civil Procedure which includes the petitioner does not have any relevance in present scenario as the existence of dealership arises out of an agreement between the parties. Once the agreement has come to an end on the death of Nekram the license can only be granted on fulfilling the conditions laid down in the Government Order dated 05.08.2019. Sub-clause 5 of Clause IV categorically provides that applicant has to be local resident.

33. The concept of allotting dealership to a local resident is firstly that he is acquainted with the most of the card holders as they are living in same village and secondly his availability in attending and running the fair price shop. The Government as well as the Apex Court have recognized that right to food is part of Article 21 of the Constitution. In case, dealership is given to an outsider who is unable to run the fair price shop due to his/her unavailability the very purpose for enacting the Act of 2013 and Control Order of 2016 would be rendered otiose.

34. That Sub-clause 5 of Clause IV of the government order of 2019 specifically provides that applicant should be a local resident. Petitioner is admittedly a resident of a different village, and not of the village where the fair price shop is to be allotted. The validity of the said condition of the government order has not been challenged in the writ petition, and only challenge has been made to declare the word "unmarried" as unconstitutional from the definition of family prescribed under Sub-clause 10 of Clause IV.

35. Once the government order specifically provides the applicant to be the resident of the same village where the shop has to be allotted, no such allotment can be made to an outsider. The argument of petitioner's counsel that married daughter should also be included in the definition of the word "family", in the present scenario cannot be accepted as the license is granted only on the fulfillment of the conditions prescribed under the government order of 2019. Petitioner being not able to fulfill the essential conditions cannot be granted such license.

36. More so, the Control Order of 2016 does not make any distinction between the sons and daughters of a license holder, as in case of Rule 2 (c) of the Dying-in-Harness Rules. The definition of family occurring in the Control Order of

2016 as well as the government order of 2019 embraces the word "dependant child", which also includes the dependant father and mother. Argument that married daughter had been excluded creates gender bias cannot be accepted, as the very purpose is the distribution of food grains to the card holders attached to the ration shop situated in village. Once the daughter of a licensee is married outside the village, she cannot continue to run the fair price shop and distribute ration. The sole purpose of enacting the Act of 2013 and the Control Order of 2016 is that the food reaches the last person of the society and a licensee being only an agent of the State through which the target is achieved by both the Central Government and the State Government.

37. Having considered the facts and circumstances of the case, this Court finds that no ground is made for declaring the word "unmarried" as unconstitutional from the definition of family provided under Sub-clause 10 of Clause IV of the Government Order dated 05.08.2019.

38. Writ petition fails and is hereby dismissed."

5. Learned counsel for the appellant petitioner submits that merely because the petitioner is a married daughter, she cannot be discriminated in the matter of allotment of Fair Price Shop. Such discrimination is hit by Article 14 of the Constitution of India. He relied upon a Division Bench judgment of this Court in Writ-C No.60881 of 2015 (Smt. Vimla Srivastava vs. State of U.P. and another) decided on 04.12.2015.

6. Learned standing counsel supports the impugned judgment.

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

8. The Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 (hereinafter referred to as "the Control Order, 2016') was framed by the State Government in exercise of powers conferred under Section 3 of the Essential Commodities Act, 1955 with the object of maintaining the supplies of foodgrains and other essential commodities and for securing its equitable distribution at fair prices under the targetted Public Distribution System. Clause 2(p) of the Control Order, 2016 defines the word "family' as under:

(p)	"Family" means group of following persons- - Head of the family - Husband/wife, including legally adopted children. - Adult children, who are fully dependent on the head of the family. - Unmarried, legally separated and widow daughters; and - Fully dependent mother/ Father, of the head of the family.

9. Clause 2(b) of the Control Order, 2016 defines the word "**agent**' to mean a person or cooperative society or a corporation of the State Government authorised to run a **Fair Price Shop** under the provisions of this Control Order. Clause 7 of the Control Order 2016 provides as under:

Appointment 7- (1) and regulation of fair price shops.-	*With a view to affecting fair distribution of*

	foodgrains and scheduled commodities the State Government shall issue directions under section-3 of the Act to such number of fair price shop in an area and in the manner as it deems fit.
(2)	*(i)- A fair price shop shall be run through such person and in such manner as the Collector, subject to the directions of the State Government may decide.* *(ii)- A person appointed to run a fair price shop under sub clause (I) shall act as the agent of the State Government.* *(iii)- 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 the fair price shop. as per the draft appended to this order before the competent authority prior to the coming with effect of the said appointment.*
(3)	*The Food Commissioner shall ensure that the number of ration card holders attached to a fair price shop are reasonable, the fair price shop is so located that the consumer or ration card holder does not have to face difficulty to reach the fair price shop and that proper coverage is ensured in hilly, desert,*

	tribal and such other areas difficult to access.
(4)	*The State Government shall fix an amount as the fair price shop owner's margin, which shall be periodically reviewed for ensuring sustained viability of the fair price shop operations.*
(5)	*The Food Commissioner shall put in place a mechanism to ensure the release of fair price shop owner's margin without any delay*
(6)	*The State Government shall allow sale of commodities other than the foodgrains and other scheduled commodities distributed under the Targeted Public Distribution System at the fair price shop to improve the viability of the fair price shop operations.*

10. In exercise of powers conferred under Clause-15 of the Control Order, 2016, the State Government issued a Government Order No.6/2019/1358/29-6-2019-162lk0/2001, dated 05.08.2019 (hereinafter referred to as "the Government Order, 2019') for selection of Fair Price Shops agents and reservation. Clause IV of the Government Order, 2019 provides for eligibility conditions for selection of Fair Price Shop agents in rural areas. Sub-Clause 5 of Clause IV provides that the applicant should be a resident of the locality. Sub-Clause 10 of Clause IV of the Government Order, 2019 reproduces the definition of the family given in the Control Order, 2016.

11. Clause 7- (1) of the Control Order, 2016 provides that with a view to affecting fair distribution of foodgrains and scheduled commodities, the State Government shall issue directions under Section-3 of the Act to such number of **fair price shop in an area** and in the manner as it deems fit. Sub-Clause 2(i)/(ii) of Clause 7 of the Control Order, 2016 provides that a fair price shop shall be run through such person and in such manner as the Collector, subject to directions of the State Government, may decide and a person appointed to run a fair price shop under sub-clause (1) **shall act as the Agent of the State Government.**

12. **Basic object** and purpose of the aforesaid Control Order 2016 is the **distribution of foodgrains and scheduled commodities in an area through agents for the benefit of people**, particularly economically weaker section of the society. Such agents are required to distribute allocated foodgrains under the targeted Public Distribution System to eligible house-holds in an area and for that purpose, an eligibility condition has been attached by sub-clause (5) of Clause IV of the Government Order, 2019 that an **applicant for fair price shop should be resident of the locality**, i.e. **the locality for which fair price shop has been created for fair distribution of foodgrains and essential commodities in that locality.**

13. As per own case of **the petitioner**, she was married long ago with one Sri Harnam Singh and **is resident of Village and Post Rajpur, Tehsil Chakarnagar, District Etawah** whereas the **Fair Price Shop in question is of Village Nivadi Khurd, Tehsil Khurd,** District Etawah. The agent of the aforesaid Fair Price Shop in question was the father of the petitioner, namely Sri Nekram who died on 15.02.2021 leaving behind his wife Smt. Suman Devi, sons namely Bhupendra Pratap Singh (date of birth 15.02.2000), Karvendra Pratap Singh (date of birth 06.07.2003) and Devendra Pratap Singh (date of birth 05.07.2006). The aforesaid wife of the deceased Fair Price Shop Agent applied for the Fair Price Shop in question but subsequently she moved an application dated 31.05.2021 that she is unable to run the Fair Price Shop and, therefore, it may be allotted to her daughter, i.e. the petitioner. The application of the aforesaid Suman Devi (wife of the deceased agent), was considered and it was rejected by the Committee headed by the S.D.M. Bharthana vide order dated 26.06.2021.

14. The facts as briefly mentioned above, clearly show that the petitioner is not eligible as she is not the resident of the locality of the Fair Price Shop in question. That apart, looking into the object and purpose of Public Distribution System, the definition of the word "family' as given in the Government Order, 2019 is neither arbitrary nor discriminatory. That apart, the aforesaid definition is merely reproduction of the definition of the word "family' given in the Control Order, 2016, which has not been challenged by the petitioner. The use of the words "unmarried daughter' in the definition of the word "family' given in the Government Order, 2019, is not discriminatory. The provisions of the Government Order, 2019 cannot be viewed or interpreted in the manner the provisions of The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 has been interpreted by Division Bench in the case of Smt. Vimla Srivastava (supra).

15. For all the reasons afore-stated, we do not find any illegality in the impugned order passed by the learned Single Judge. Neither the word "unmarried' used in the definition of the word "family' as defined under the Government Order, 2019 is discriminatory nor the petitioner is eligible for appointment as fair price shop agent inasmuch as she is not resident of the locality where the Fair Price Shop in question is established and thus, she does not even fulfil basic eligibility criteria provided in Clause IV(5) of the Government Order, 2019.

16. For all the reasons afore-stated, we do not find any merit in this special appeal. Consequently**, the Special Appeal is dismissed.**

(2022)04ILR A711
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIVEK VARMA, J.

Civil Misc. Review Application No. 93 of 2021
In Special Appeal No. 755 of 2019

Sonu Kumar Yadav ...Appellant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Appellant:
Sri Sudhakar Pandey

Counsel for the Opp. Parties:
C.S.C.

A. Practice and Procedure – Review – Scope of interference – Special appeal and writ petition arising out of claim for appointment on compassionate ground was dismissed on merit, review against which filed – Re-argument on the merit of the matter – Permissibility – Held, 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 (Para 5 and 11)

Review application dismissed. (E-1)

List of Cases cited :-

1. Thungabhadra Industries Ltd. Vs The Government of Andhra Pradesh; AIR 1964 SC 1372

2. Aribam Tuleshwar Sharma Vs Aribam Pishak Sharma; 1979 (4) SCC 389

3. Meera Bhanja Vs Nirmala Kumari Choudhury; AIR 1995 SC 455

4. Parsion Devi & ors. Vs Sumitri Devi & ors.; 1997 (8) SCC 715

5. Rajendra Kumar Vs Rambai; AIR 2003 SC 2095

6. Lily Thomas Vs U.O.I.; AIR 2000 SC 1650

7. Inderchand Jain Vs Motilal; (2009) 4 SCC 665

8. Kamlesh Verma Vs Mayawati & ors.; 2013 (8) SCC 320

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Vivek Varma, J.)

1. By way of this Review Application, applicant, Sonu Kumar Yadav, has sought review of the judgment and order dated 2.7.2019 passed by this Court (Coram: Justice Govind Mathur and Justice Vivek Verma) in Special Appeal No.755 of 2019 (Sonu Kumar Yadav Vs. State of U.P. and others).

2. Factual matrix of the case is that Sri Rajendra Prasad Yadav father of the appellant-petitioner while holding the post of Constable in Provincial Armed Constabulary (PAC) 37th Battalion, Kanpur availed five days emergency leave. He did not return to the duties after completion of leave period. Looking to the continuous unauthorized absence, a notice was issued to Sri Rajendra Prasad Yadav for initiating disciplinary action against him and he was placed under suspension under an order dated 30th August, 2005. Disciplinary proceedings too were initiated and by the order dated 15th May, 2006 he was dismissed from service.

3. A missing report was filed by the present appellant-petitioner at Police Station Kotwali Bansdeeh. A civil suit then was filed to have a declaratory decree relating to death of Sri Rajendra Prasad Yadav being not seen from a period of more than seven years. On having such declaration, the appellant-petitioner

submitted an application to the authority competent to have appointment on compassionate grounds. The application so submitted came to be rejected, hence, a petition for writ was filed which was dismissed. Against the dismissal of writ petition, special appeal was filed which was also came to be dismissed vide order dated 2.7.2019 which is under review before us.

4. It is submitted by learned counsel for the review-applicant that the Court has not properly appreciated the matter and judgment is not correct.

5. 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. The suspension was dated 30.8.2005. The deceased was dismissed from service. This fact would be relevant which has been minutely considered by the Division Bench of the this Court and, therefore, we find no reason to interfere in the judgment of the earlier Bench dated 2.7.2019.

6. 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."

7. 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 Appellate Court to correct all manner of errors committed by the Subordinate Court."

8. 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.

9. 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.

10. In **Rajendra Kumar Vs. Rambai, AIR 2003 SC 2095**, the 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."

11. 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.**

12. 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)*

13. 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 2.7.2019.

14. This review application is, therefore, dismissed.

(2022)04ILR A714
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Special Appeal No. 148 of 2022

Iqbal Khan ...Appellant
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Devesh Mishra, Sri Rishabh Kesarwani

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 – Rule 5 – Compassionate appointment – Object – Appointment to the post of Lab Assistant accepted – Claim for the post of Pharmacist was made after four years on the basis of qualification – Permissibility – Held, the object of compassionate appointment is to enable the family of the deceased - employee to tied over the sudden financial crisis due to death of the bread earner which has left the family in penury and without means of livelihood, it is an exception to the normal rule of public employment, it is a concession – Compassionate Appointment cannot be treated as a Bonanza – Principle laid down by Apex Court in Premlata's case that the dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post, relied upon. (Para 14 and 21)

Special Appeal dismissed. (E-1)

List of Cases cited :-

1. Hamza Haji Vs St. of Kerala; 2006 (7) SCC 416

2. Shiv Kumar Dubey & ors. Vs St. of U.P. & ors.; 2014(2) ADJ, 312

3. Civil Misc. Writ Petition No. 13102 of 2010; U.O.I. Vs Smt. Asha Mishra decided on 7.5.2010

4. Civil Appeal No. 897 of 2021; Central Coalfields Ltd. Through its Chairman &

Managing Director & ors. Vs Parden Oraon decided on 09.04.2021

5. V. Sivamurthy Vs St. of A.P.; (2008) 13 SCC 730

6. Umesh Kumar Nagpal Vs St. of Har.; (1994) 4 SCC 138

7. Haryana SEB Vs Hakim Singh; (1997) 8 SCC 85

8. Director of Education (Secondary) Vs Ankur Gupta; (2003) 7 SCC 704

9. F.C.I. Vs Ramkesh Yadav; (2007) 9 SCC 531

10. Indian Bank Vs Promila; (2020) 2 SCC 729

11. St. of U.P. Vs Pankaj Kumar Vishnoi; 2013 (11) SCC 178

12. N.C. Santosh Vs St. of Karnatka; (2020) 17 SCC 617

13. St. of H.P. Vs Shashi Kumar; (2019) 3 SCC 653

14. St. of Guj. Vs Arvind Kumar Tiwari; (2012) 9 SCC 545

15. MGB Gramin Bank Vs Chakrawarti Singh; (2014) 13 SCC 583

16. U.O.I. Vs P. Venktesh; (2019) 15 SCC 613

17. U.O.I.Vs V. R. Tripathi; (2019) 14 SCC 646

18. PNB Vs Ashwini Kumar Taneja; (2004) 7 SCC 265

19. St. of Chhatisgarh & ors. Vs Dhirjo Kumar Sengar; (2009) 13 SCC 600

20. Santosh Kumar Dubey Vs St. of U.P.; (2009) 6 SCC 481

21. Chief Commissioner, Central Excise & Customs, Lucknow & ors. Vs Prabhat Singh; (2012) 13 SCC 412

22. St. of U.P. Vs Pankaj Kumar Vishnoi; 2013(11) SCC 178

23. SAIL Vs Madhusudan; (2008) 15 SCC 560

24. SBI Vs Surya N. Tripathi; (2014) 15 SCC 739

25. General Manager (D & PB) & ors. Vs Kunti Tiwary and other; (2004)7 SCC 271

26. U.O.I. Vs Shashank Goswami; (2012) 11 SCC 307

27. Pepsu Road Transport Corporation Vs Satinder Kumar; 1995 Supp. (4) SCC 597

28. St. of Madhya Pradesh & ors. Vs Ramesh Kumar Sharma; (1994) Supp.(3) SCC 661

29. Civil Appeal No. 5122 of 2021; The Director of Treasuries in Karnataka & anr. Vs Somyashree, decided on 13.09.2021

30. Civil Appeal No. 6003 of 2021; The St. of U.P.& ors. Vs Premlata decided on 05.10.2021

31. Special Appeal No. 1601 of 2012; Navendra Kumar Upadhyay Vs St. of U.P. & ors. decided on 22.10.2021

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Jayant Banerji, J.)

1. Heard Sri Devesh Misra learned counsel for the appellant and Sri B.P. Singh Kachhawah, learned standing counsel for the State respondents.

Facts

2. This Special Appeal has been filed praying to set aside the judgment and order dated 18.07.2019, passed by the learned Single Judge in WRIT - A No. - 9064 of 2019 (Iqbal Khan Vs. State Of U.P. And 2 Others).

3. The impugned judgment and order dated 18.7.2019, passed by the learned Single Judge is reproduced below :-

"Petitioner had applied for compassionate appointment, consequent upon death of his father. An order was passed on 14.5.2015, declining appointment on the post of Pharmacist and offering him appointment on the post of Lab Attendant or any other post for which petitioner possess requisite qualification.

Pursuant to this direction, petitioner applied for the post of Lab Attendant and has been offered appointment also. Petitioner has been working since July, 2015. He has now approached this Court with the grievance that qualification for the post of Pharmacist had been amended and that amended rule had not been taken note of as per which he is eligible for appointment to the post of Pharmacist.

Learned Standing Counsel has obtained instructions, according to which, appointment on the post of Pharmacist is to be made through U.P. Subordinate Service Selection Commission and, therefore, in view of the provision contained in Rule 5 read with rule 3 of the U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as the 'Rules of 1974'), no compassionate appointment can be granted on such post. It is stated that the vacancies have otherwise been notified on the post of Pharmacist to the Selection Commission.

Rules of 1974 clearly provides that appointment can be offered only on a post for which recruitment is not required to be undertaken by the U.P. Subordinate Service Selection Commission.

Since post of Pharmacist is earmarked to the Commission for recruitment, the petitioner's claim for compassionate on it cannot be considered. The petitioner has been appointed on the post of Lab Attendant in July, 2015, and therefore, he has otherwise acquiesced to his appointment on the said post. There is no challenge laid to the order declining petitioner's claim on the post of Pharmacist. In that view of the matter, no relief can be granted to the petitioner. The writ petition is dismissed."

4. It is admitted to the petitioner that compassionate appointment was offered to him on 14.05.2019 and he accepted the offer and joined on the post of Lab Attendant. After about four years he filed the aforesaid writ petition claiming that he has the qualification for the post of Pharmacist and, therefore, a mandamus may be issued to the respondents to give appointment/absorb the petitioner on the post of Pharmacist in place of the post of Lab Attendant considering his qualification.

5. The aforesaid contention of the petitioner has been rejected by the impugned judgment and order passed by the learned single Judge on two grounds ***firstly*** the appointment on the post of Pharmacist is to be made through U.P. Subordinate Service Selection Commission which has been notified by the Commission for selection and ***secondly***, the petitioner has otherwise acquiesced to his appointment on the post of Lab Attendant.

6. Aggrieved with the aforesaid judgment passed by the learned Single Judge, the appellant has filed the present appeal.

Submissions

7. Learned counsel for the petitioner submits that as per Rule 5 of the U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as the 'Rules 1974') the appointment has to be given by the employer in accordance with the qualification of the candidate applying for compassionate appointment under Rules 1974. He further submits that even if the petitioner has accepted the appointment on the post of Lab Attendant under the Rules 1974 yet his claim for the post of

Pharmacist on the basis of qualification, can not be denied by the respondents.

8. Learned standing counsel supports the impugned judgment.

Discussion & Findings

9. We have carefully considered the submissions of learned counsels for the parties and perused the records of the writ petition.

Object and principles of Compassionate Appointment:-

10. The Apex Court in the case of ***Hamza Haji vs. State of Kerala*** reported in ***2006 (7) SCC 416*** in paragraphs 28 and 29 has observed as under: -

"In Hip Foong Hong vs. H. Neotia and Company (1918 Appeal Cases 888) the Privy Council held that if a judgment is affected by fraudulent conduct it must be set aside. In Rex vs. Recorder of Leicester (1947 (1) K B 726) it was held that a certiorari would lie to quash a judgment on the ground that it has been obtained by fraud. ***The basic principle obviously is that a party who had secured a judgment by fraud should not be enabled to enjoy the fruits thereof.*** *In this situation, the High Court in this case, could have clearly either quashed the decision of the Forest Tribunal in OA No.247 of 1979 or could have set aside its own judgment in MFA No.328 of 1981 dismissing the appeal from the decision of the Forest Tribunal at the stage of admission and vacated the order of the Forest Tribunal by allowing that appeal or could have exercised its jurisdiction as a court of record by invoking Article 215 of the Constitution to set at naught the decision obtained by the appellant by playing a fraud on the Forest Tribunal. The High Court has chosen to exercise its power as a court of record to nullify a decision procured by the* appellant by playing a fraud on the court. We see no objection to the course adopted by the High Court even assuming that we are inclined to exercise our jurisdiction under Article 136 of the Constitution of India at the behest of the appellant."

11. A Full Bench of this Court in the case of ***Shiv Kumar Dubey and others vs. State of U.P. and others***, **2014(2) ADJ, 312 (Para 29)**, considered various aspects relating to compassionate appointment and held as under :-

"We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. ***The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;***

(ii) ***There is no general or vested right to compassionate appointment****. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;*

(iii) ***The object and purpose of providing compassionate appointment is to enable the dependent members of the***

family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

(iv) ***In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;***

(v) ***Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist*** *and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;*

(vi) ***Rule 5*** *mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee.* ***The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;***

(vii) ***The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence.*** *It is for the State Government after considering all the facts to take an appropriate decision.* ***The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;***

(viii) ***Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority****. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family." (Emphasis supplied by us)*

12. In **Civil Misc. Writ Petition No. 13102 of 2010**, ***Union of India Vs. Smt. Asha Mishra***, decided on 7.5.2010, a Division Bench of this Court has observed as under: -

"The principles of consideration for compassionate appointment have been firmly settled and have been reiterated from time to time. ***Compassionate appointment is not a vested right or an alternate mode of employment.*** *It has to be considered and granted under the relevant rules.* ***The object of compassionate appointment is to tide over an immediate financial crisis. It is not a heritable right to be considered after an unreasonable period,*** *for the vacancies cannot be held up for long and that appointment should not ordinarily await the attainment of majority.* ***Where the family has survived for long, its circumstances must be seen before the competent authority may consider such appointment. It is not to be ordinarily granted, where a person died close to his retirement.*** *The Court, however, has emphasised time to time and more authoritatively in National Institute of Technology Vs. Neeraj Kumar Singh, (2007) 2 SCC 481 that such appointment can be granted only under a scheme.* ***It***

should not be considered after a long lapse of time."

13. The judgment in the case of ***Smt. Asha Mishra (supra)*** has also been taken notice by the Full Bench of this Court in ***Shiv Kumar Dubey (supra)*** reiterating the legal principles so mandated therein. Recently, the Apex Court in Civil Appeal No. 897 of 2021, in the matter of ***Central Coalfields Limited Through its Chairman an Managing Director and Ors. Vs. Parden Oraon*** decided on **09.04.2021, in paragraph 9** has observed as under:-

*"**9**. ... The application for compassionate appointment of the son was filed by the Respondent in the year 2013 which is more than 10 years after the Respondent's husband had gone missing. **As the object of compassionate appointment is for providing immediate succour to the family of a deceased employee, the Respondent's son is not entitled for compassionate appointment after the passage of a long period of time since his father has gone missing."***

14. The object of compassionate appointment is to enable the family of the deceased - employee to tied over the sudden financial crisis due to death of the bread earner which has left the family in penury and without means of livelihood, it is an exception to the normal rule of public employment, it is a concession; vide; **V. Sivamurthy vs. State of A.P., (2008) 13 SCC 730 (Paras 13-18), Umesh Kumar Nagpal vs. State of Haryana, (1994) 4 SCC 138 (Para-2), Haryana SEB vs. Hakim Singh, (1997) 8 SCC 85 at 87, Director of Education (Secondary) vs. Ankur Gupta, (2003) 7 SCC 704 (Para-6), Food Corporation of India vs. Ramkesh Yadav, (2007) 9 SCC 531 (Para.9), Indian Bank vs. Promila, (2020) 2 SCC 729, State of U.P. vs. Pankaj Kumar Vishnoi, 2013 (11) SCC 178 (Paras 11-15), N.C. Santosh vs. State of Karnatka (2020) 17 SCC 617 (Para 18), State of H.P. vs. Shashi Kumar, (2019) 3 SCC 653 (Para 18), State of Gujarat vs. Arvind Kumar Tiwari, (2012) 9 SCC 545 (Para-8), MGB Gramin Bank V. Chakrawarti Singh (2014) 13 SCC 583 (Para 6-9), Union of India vs. P. Venktesh (2019) 15 SCC 613 (Para.7), Union of India vs. V. R. Tripathi, (2019) 14 SCC 646 (Para 13).** The basic intention to grant compassionate appointment is that on the death of the employee concern his family is not deprived of the means of livelihood vide **PNB Vs. Ashwini Kumar Taneja, (2004) 7 SCC 265 (para 4). It can not be claimed by way of inheritance vide State of Chhatisgarh & others Vs. Dhirjo Kumar Sengar (2009) 13 SCC 600 (para 10 and 12). In Santosh Kumar Dubey Vs. State of U.P., (2009) 6 SCC 481 (para 11 & 12)**, the Apex Court held that **Compassionate Appointment can not be treated as a Bonanza.**

15. In **Chief Commissioner, Central Excise & Customs, Lucknow & others Vs. Prabhat Singh (2012) 13 SCC 412 (para 19),** Hon'ble Supreme Court has held that **it is not disbursement of gift**. It is not sympathy syndrome. In **State of U.P. Vs. Pankaj Kumar Vishnoi 2013(11) SCC 178 (paras 7,12,13 & 20)**. The Apex Court held that **it is meant to provide minimum relief for meeting immediate hardship to save the bereaved family** from sudden crisis due to death of sole bread winner. Similar view has been expressed in **SAIL Vs. Madhusudan (2008) 15 SCC 560 (para 15) and SBI Vs. Anju Jain (2008) 8SCC 475 (Para 33).**

16. In **SBI Vs. Surya N. Tripathi, (2014) 15 SCC 739 (paras 4,9),** the Apex

Court held that if employer finds that **Financial Arrangement** made for family subsequent to death of the employee is **adequate** members of the family can not insist for compassionate appointment.

17. In **General Manager (D & PB) and others Vs. Kunti Tiwary and other (2004)7 SCC 271 (Para 9),** Hon'ble Supreme Court held that the Division Bench erred in diluting the criteria of penury to one of "not very well-to-do.

18. In **Union of India Vs. Shashank Goswami, (2012) 11 SCC 307 (Paras 9, 10)** the Apex Court held that an applicant has no right to claim compassionate **appointment in a particular class or group. It is not for conferring status on the family. In Pepsu Road Transport Corporation Vs. Satinder Kumar, 1995 Supp. (4) SCC 597 (Para 6)** the Apex Court held that **while minimum qualification** for eligibility may be matriculation, generally graduate and even post graduate decree holders respond and offer themselves for clerical appointments. **Courts can not ignore this fact and direct that possession of minimum qualification alone would be sufficient**.

19. In **State of Madhya Pradesh & others VS. Ramesh Kumar Sharma (1994) Supp.(3) SCC 661**, the Apex Court held that a **candidate for compassionate appointment has no right to any particular post of choice**. He can only claim to be considered.

20. In the case of **The Director of Treasuries in Karnataka & Anr. vs. Somyashree, in Civil Appeal No.5122 of 2021, decided on 13.09.2021**, Hon'ble Supreme Court reiterated the object and principles of compassionate appointment, as under:

"7. While considering the submissions made on behalf of the rival parties a recent decision of this Court in the case of N.C. Santhosh (Supra) on the appointment on compassionate ground is required to be referred to. After considering catena of decisions of this Court on appointment on compassionate grounds it is observed and held that appointment to any public post in the service of the State has to be made on the basis of principles in accordance with Articles 14 and 16 of the Constitution of India and the compassionate appointment is an exception to the general rule. It is further observed that the dependent of the deceased Government employee are made eligible by virtue of the policy on compassionate appointment and they must fulfill the norms laid down by the State's policy. It is further observed and held that ***the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim of compassionate appointment.*** *A dependent of a government employee, in the absence of any vested right accruing on the death of the government employee, can only demand consideration of his/her application. It is further observed he/she is, however, entitled to seek consideration in accordance with the norms as applicable on the day of death of the Government employee. The law laid down by this Court in the aforesaid decision on grant of appointment on compassionate ground can be summarized as under:*

(i) that the compassionate appointment is an exception to the general rule;

(ii) that no aspirant has a right to compassionate appointment;

(iii) the appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 16 of the Constitution of India;

(iv) appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy and/or satisfaction of the eligibility criteria as per the policy;

(v) the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment.

8.....

8.1.....

8.2 Apart from the above one additional aspect needs to be noticed, which the High Court has failed to consider. It is to be noted that the deceased employee died on 25.03.2012. The respondent herein - original writ petitioner at that time was a married daughter. Her marriage was subsisting on the date of the death of the deceased i.e. on 25.03.2012. Immediately on the death of the deceased employee, the respondent initiated the divorced proceedings under Section 13B of the Hindu Marriage Act, 1955 on 12.09.2012 for decree of divorce by mutual consent. By Judgment dated 20.03.2013, the Learned Principal Civil Judge, Mandya granted the decree of divorce by mutual consent. That immediately on the very next day i.e. on 21.03.2013, the respondent herein on the basis of the decree of divorce by mutual consent applied for appointment on compassionate ground. ***The aforesaid chronology of dates and events would suggest that only for the purpose of getting appointment on compassionate ground the decree of divorce by mutual consent has been obtained. Otherwise, as a married daughter she was not entitled to the appointment on compassionate ground****. Therefore, looking to the aforesaid facts and circumstances of the case, otherwise also the High Court ought not to have directed the appellants to consider the application of the respondent herein for appointment on compassionate ground as ''divorced daughter'. This is one additional ground to reject the application of the respondent for appointment on compassionate ground."*

(Emphasis supplied by us)

21. In a most recent judgment in the case of **The State of Uttar Pradesh and others vs. Premlata in Civil Appeal No.6003 of 2021, decided on 05.10.2021**, Hon'ble Supreme Court considered the provisions of U.P. Rules 1974 and summarized the principles of compassionate appointment in the context of U.P. Rules, 1974, as under:

"9. As per the law laid down by this court in catena of decisions on the appointment on compassionate ground, for all the government vacancies equal opportunity should be provided to all aspirants as mandated under Article 14 and 16 of the Constitution. However, appointment on compassionate ground offered to a dependent of a deceased employee is an exception to the said norms. The compassionate ground is a concession and not a right.

9.1 In the case of State of Himachal Pradesh and Anr. vs. Shashi Kumar reported in (2019) 3 SCC 653, this court had an occasion to consider the object and purpose of appointment on compassionate ground and considered decision of this court in case of Govind Prakash Verma vs. LIC reported in (2005) 10 SCC 289, in

para 21 and 26, it is observed and held as under:-

"21. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289, has been considered subsequently in several decisions. But, before we advert to those decisions, it is necessary to note that the nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal v. State of Haryana [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930]. The principles which have been laid down in Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract: (Umesh Kumar Nagpal case [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] , SCC pp. 139-40, para 2)

"2. ... As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. ***Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post.*** *However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment.* ***The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis****. The object is not to give a member of such family a post much less a post for post held by the deceased.* ***What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family.*** *The posts in Classes III and IV are the lowest posts in nonmanual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and*

the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

"26. The judgment of a Bench of two Judges in Mumtaz Yunus Mulani v. State of Maharashtra [Mumtaz Yunus Mulani v. State of Maharashtra, (2008) 11 SCC 384 : (2008) 2 SCC (L&S) 1077] has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the scheme. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] has been duly considered, but the Court observed that it did not appear that the earlier binding precedents of this Court have been taken note of in that case."

10. Thus as per the law laid down by this court in the aforesaid decisions, compassionate appointment is an exception to the general rule of appointment in the public services and is in favour of the dependents of a deceased dying in harness and leaving his family in penury and without any means of livelihood, and in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give such family a post much less a post held by the deceased.

10.1 Applying the law laid down by this court in the aforesaid decisions and considering the observations made hereinabove and the object and purpose for which the appointment on compassionate ground is provided, the submissions on behalf of the respondent and the interpretation by the Division Bench of the High Court on ***Rule 5 of Rules 1974, is required to be considered.***

10.2 ***The Division Bench of the High Court in the present case has interpreted Rule 5 of Rules 1974 and has held that ''suitable post' under Rule 5 of the Rules 1974 would mean any post suitable to the qualification of the candidate irrespective of the post held by the deceased employee****. The aforesaid interpretation by the Division Bench of the High Court is just opposite to the object and purpose of granting the appointment on compassionate ground. ''****Suitable post' has to be considered, considering status/post held by the deceased employee and the educational qualification/eligibility criteria is required to be considered, considering the post held by the deceased employee and the suitability of the post is required to be considered vis a vis the post held by the deceased employee, otherwise there shall be no difference/distinction between the appointment on compassionate ground and the regular appointment.** *In a given case it may happen that the dependent of the deceased employee who has applied for appointment on compassionate ground is having the educational qualification of Class-II or Class-I post and the deceased employee was working on the post of Class/Grade IV and/or lower than the post applied, in that case the dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such*

higher post. The aforesaid shall be contrary to the object and purpose of grant of appointment on compassionate ground which as observed hereinabove is to enable the family to tide over the sudden crisis on the death of the bread earner. As observed above, appointment on compassionate ground is provided out of pure humanitarian consideration taking into consideration the fact that some source of livelihood is provided and family would be able to make both ends meet.

10.3 .....

11. In view of the above and for the reasons stated above, the Division Bench of the High Court has misinterpreted and misconstrued Rule 5 of the Rules 1974 and in observing and holding that the "suitable post' under Rule 5 of the Dying-In-Harness Rules 1974 would mean any post suitable to the qualification of the candidate and the appointment on compassionate ground is to be offered considering the educational qualification of the dependent. As observed hereinabove such an interpretation would defeat the object and purpose of appointment on compassionate ground.

(Emphasis supplied by us)

22. In the case of **Navendra Kumar Upadhyay Vs. State of U.P. and others (Special Appeal No.1601of 2012) decided on 22.10.2021**, a Division Bench of this Court considered in detail the principles and object of Compassionate appointment and concluded as under :-

35. We have discussed above in detail the case of the petitioner / appellant and the principles of law on compassionate appointment laid down by this Court and by Hon'ble Supreme Court, which are briefly summarized as under: -

(a) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only ***those situations which subserve the basic object and purpose which is sought to be achieved;***

(b) The object of compassionate appointment is to enable the family of the deceased - employee to tied over the sudden financial crisis due to death of the bread earner which has left the family in penury and without means of livelihood, it is an exception to the normal rule of public employment, it is a concession. The basic intention to grant compassionate appointment is that on the death of the employee, his family is not deprived of the means of livelihood. It can not be claimed by way of inheritance. ***Compassionate Appointment can not be treated as a Bonanza. It is not disbursement of gift****. It is not sympathy syndrome.* ***It is meant to provide minimum relief for meeting immediate hardship to save the bereaved family from sudden financial crisis due to death of sole bread winner.*** *If employer finds that Financial arrangement made for family subsequent to death of the employee is adequate members of the family can not insist for compassionate appointment.*

(c) ***Mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family.***

(d) ***In determining as to whether the family is in financial crisis, all relevant***

aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(e) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(f) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

(g) An applicant has no right to claim compassionate ***appointment in a particular class or group. It is not for conferring status on the family. A candidate for compassionate appointment has no right to any particular post of choice****. He can only claim to be considered.*

(h) The dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post.

(i) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family.

(j) ***The norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment.***

(k) ***Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. The whole object of granting compassionate employment is to enable the family to tide over the sudden financial crisis.***

(l) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

(m) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;

(n) The father of the petitioner died on 07.07.1991 when petitioner was aged about eight years. He applied for compassionate appointment sometime in the year 2006-07 and the District Basic Education Officer

granted appointment unauthorisedly, without grant of relaxation by the Competent Authority/ State Government. Thus, the petitioner unauthorisedly and in contravention of the government order, without relaxation of period for submission of application, obtained appointment on compassionate ground, which is nullity. Therefore, the appointing authority has lawfully cancelled the order of appointment of the petitioner. Hence impugned order of the learned Single Judge does not suffer from any manifest error of law.

23. In view of the law laid down by Hon'ble Supreme Court and this Court referred above, we do not find any error of law in the impugned Judgment. Hence, the Special Appeal is **dismissed.**

(2022)04ILR A726
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.04.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal No. 410 of 2021

State of U.P. & Ors. ...Appellants
Versus
Vijay Singh ...Respondent

Counsel for the Appellants:
C.S.C.

Counsel for the Respondent:
Bhanu Pratap Singh

A. Service Law – UP Police Service Rules, 2016 – Rule 16 – UP Government Servant Seniority Rules, 1991 – Rule 7 – Promotion to the post of Deputy Superintendent of Police – Combined Seniority List, preparation thereof – Dispute arise as to which rules apply – Rules of 2016 the Rules 1991 – Held, U.P. Government Service Seniority Rules, 1991 have been framed under Article 309 of the Constitution of India, thus will have full application for the purposes of determination of seniority on the post of Deputy Superintendent of Police, however, in the instant case the seniority on the post of Deputy Superintendent of Police or even on the post of Inspector (Civil Police) or on the post of Inspector (Armed Police) is not to be reckoned; rather what needs to be prepared is the 'combined seniority list' for the purposes of making promotions on the post of Deputy Superintendent of Police in terms of Rule 16 of the Rules of 2016 – Rule 7 of Rules of 1991 does not have any application for the purposes of preparation of the 'combined seniority list' as envisaged under Rule 16 of the Rules of 2016. (Para 34 and 37)

Special Appeal allowed. (E-1)

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

1. Heard Sri Amitabh Rai, learned Additional Chief Standing Counsel and Sri Mohit Jauhari, learned Standing Counsel representing the appellants-State authorities and Sri Bhanu Pratap Singh, learned counsel representing the respondent no.1.

2. The respondent nos. 2 and 3 are proforma respondents in this appeal, who despite notices having been issued did not put in their appearance in the writ petition before the learned Single Judge.

3. We have also perused the records available before us on this special appeal.

4. This special appeal filed under Chapter VIII, Rule V of the Rules of the

Court, lays a challenge to the judgment and order dated 22.09.2021 passed by the learned Single Judge whereby Writ Petition No. 34799 (SS) of 2019 filed by the petitioner-respondent no.1 has been allowed and the opposite parties therein have been directed to prepare a fresh joint seniority list of the Inspectors (Civil Police) and Inspectors (Armed Police)/Company Commanders in accordance with the provisions contained in Rule 7 of the U.P. Government Servant Seniority Rules, 1991 (hereinafter referred to as the ?Rules of 1991?) and, thus, to undertake the exercise of promotion to the post of Deputy Superintendent of Police.

5. Submission on behalf of learned counsel representing the appellants-State impeaching the judgment and order under appeal is that Rule 7 of the Rules of 1991 does not have any application so far as the preparation of joint seniority list for the purposes of making promotion to the post of Deputy Superintendent of Police is concerned and, as such, learned Single Judge while passing the judgment and order under appeal has clearly erred in law in directing preparation of the joint seniority list in terms of Rule 7 of the Rules of 1991. It has further been argued on behalf of the appellants-State authorities that as a matter of fact it is the Government Order dated 24th of July, 2003, prescription of which will govern the exercise of preparation of joint seniority list to be prepared for the purposes of making promotion to the post of Deputy Superintendent of Police. His further submission is that the Government Order dated 24th July, 2003 having been issued in exercise of powers vested in the State Government under Section 2 of the Police Act, 1861 (hereinafter referred to as the ?Act of 1861?) has statutory force and by ignoring the prescriptions available in the said Government Order, learned Single Judge has clearly erred.

6. On the other hand, Sri Bhanu Pratap Singh, learned counsel representing the respondent no.1 submits that in the facts and circumstances of the case as also in the light of the discussions made by learned Single Judge while passing the judgment and order under appeal, no interference in this special appeal is needed, which is liable to be dismissed at its threshold.

7. We have given our anxious consideration to the rival submissions made by learned counsel representing the respective parties.

8. After hearing the learned counsel appearing for the parties and going through the records available before us, the issue which emerges for consideration of the court is as to what is the procedure available for determination of joint seniority list as prescribed in Rule 16 of U.P. Police Service Rules, 2016 (hereinafter referred to as the ?Rules of 2016?) for the purposes of making promotion to the post of Deputy Superintendent of Police.

9. The case put forth by the petitioner-respondent no.1 in the writ petition before learned Single Judge was that he was appointed initially on the post of Sub-Inspector (Armed Police)/Company Commander on 11.11.1986 and thereafter he was promoted on regular basis to the post of Inspector (Armed Police)/Platoon Commander on 24.02.2014. It was pleaded by learned counsel for the petitioner before the learned Single Judge in the writ petition that one Ram Pal Singh was appointed in

the year 1990 i.e. four years after the appointment of respondent no.1-petitioner, on the post of Sub-Inspector (Civil Police) and subsequently he was promoted as Inspector (Civil Police) on 12.7.2013. Further case sought to be established by respondent no.1-petitioner before the learned Single Judge was that in July, 2019 a joint seniority list for the purposes of making promotion to the post of Deputy Superintendent of Police which comprised of the Inspectors (Armed Police)/Company Commanders and Inspectors (Civil Police), was prepared where the petitioner was placed below Ram Pal Singh though initial appointment on the post of Sub Inspector of the petitioner was made on 11.11.1986, whereas Ram Pal Singh was appointed initially on the post of Sub Inspector (Civil Police) after four years of his appointment. The respondent no.1-petitioner also pleaded before learned Single Judge with a view to consider the issue relating to the preparation of joint seniority list for the purposes of making promotions to the post of Deputy Superintendent of Police, a Two Members Committee was constituted which has submitted its report on 4.10.2019. According to the said report submitted by the Two Members Committee the joint seniority list was required to be prepared in terms of the provisions contained in Rule 7 of Rules of 1991. The report of the said Committee is on record as Annexure No.2 to the counter affidavit filed by the respondent no.1.

10. In view of the said submissions, prayer made in the writ petition by the respondent no.1 was to issue a direction to the State authorities to quash the joint seniority list issued vide letter dated 22.11.2019 and also the order dated 20.11.2019, whereby the claim of the respondent no.1-petitioner for placing him over and above Ram Pal Singh was rejected.

11. Learned Single Judge while allowing the writ petition by means of the judgment and order under appeal, dated 22.09.2021 has observed that the basis of the joint seniority list which was under challenge in the writ petition, is the Government Order dated 24.07.2003, however, as per the report submitted by the two members committee, dated 4.10.2019 the Government Order dated 24.07.2003 is non-existent and in view of the promulgation of Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Services Rules, 2015 and Uttar Pradesh (Pradeshik Armed Constabulary) Subordinate Officers Service Rules, 2015 the joint seniority list is to be prepared in accordance with Rule 7 of Rules of 1991. In view of the said observation, joint seniority list which was under challenge before learned Single Judge has been quashed and accordingly a direction has been issued to prepare a fresh joint seniority list in accordance with Rule 7 of Rules of 1991.

12. The issue which emerges, as observed above, for our consideration is, as to whether there is any procedure prescribed for the purposes of preparing the joint seniority list as envisaged in Rule 16 of the Rules of 2016 and as to whether while preparing the joint seniority list, which was under challenge before learned Single Judge, such prescription was followed or not.

13. The Rules of 2016 have been framed by the State Government in exercise of its powers conferred on it under Article 309 of the Constitution of India. Rule 5 of the Rules of 2016 provides that

there shall be two sources of recruitment to service in the Ordinary Grade. Fifty percent posts are to be filled in by way of direct recruitment through Public Service Commission on the basis of a competitive examination and fifty percent posts in the service in Ordinary Grade is to be filled in by promotion through U.P. Public Service Commission from amongst substantively appointed Inspectors of Civil Police and Inspectors of Armed Police, who have completed five years of service on the first day of their recruitment and are also confirmed in their respective posts. Rule 5 of the Rules of 2016 is quoted hereinunder:

?5. (1) Recruitment to the Service in the Ordinary Grade shall be made from the following sources :-

(i) Fifty percent by direct recruitment through the Commission on the basis of competitive examination.

NOTE-A Combined Competitive Examination is held by the Commission for recruitment to the Uttar Pradesh Civil Service (Executive Branch), Uttar Pradesh Police Service, Uttar Pradesh Finance and Accounts Service etc.

(ii) Fifty percent by promotion through the Commission from amongst substantively appointed Inspectors of Civil Police and Armed Police who have completed five years service as such on the first day of the year of recruitment and are also confirmed in the said Post:

Provided that two percent of the vacancies for a year of recruitment may be filled by out of turn promotion through the Commission on the specific recommendation of the Government from amongst such Police Inspectors/Company Commanders of Uttar Pradesh Police Force who have achieved the following awards :-

(a) After having been selected to the Indian team should have participated in World Championship, either in a team or individual event, which is recognised by the International Olympic Association and should have earned a Gold or Silver or Bronze Medal or up to the fourth place,

or

(b) After having been selected to the Indian team should have participated in Olympic Games which is recognised by the International Olympic Association and should have earned a Gold or Silver or Bronze Medal or up to the fourth place,

or

(c) After having been selected to the Indian team should have participated in Asian Games/ Asian Championship which is recognized by the International Olympic Association and should have earned a Gold or Silver Medal,

or

(d) If he/she has earned country's highest award or excellence in sports "Arjuna award"/ "Rajeev Gandhi Khel Ratna". If any Inspector of Civil Police or Armed Police qualifies the criterion laid down for promotion in such case then a proposal would be forwarded to the Government by the Director General of Police, Uttar Pradesh with clear recommendation and the out of turn promotion will be awarded by the State Government with the concurrence of the Commission. If such person or sufficient number of such persons are not available for out of turn promotion under this proviso, the remaining vacancies shall be filled in accordance with the general procedure prescribed in this rule.

(2) Recruitment to the posts in Senior Scale, Additional Superintendent of Police, Additional Superintendent of Police, Special Grade-11, Additional Superintendent of Police, Special Grade-I and Additional Superintendent of Police, Higher Grade shall be made by promotion

as per provisions of rule 17 of these rules.?

14. The procedure for recruitment by promotion to Ordinary Grade of service under the Rules of 2016 can be found in Rule 16 according to which recruitment by promotion is to be made on the basis of merit in accordance with the provisions contained in Uttar Pradesh Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970, as amended from time to time from amongst substantively appointed Inspectors of Civil Police and Armed Police as per their joint seniority list to be prepared by the Head of the Department. Rule 16 of the Rules of 2016 is also extracted hereinbelow.

"16. Recruitment by promotion to the Ordinary Grade shall be made on the basis of merit in accordance with the Uttar Pradesh Promotion by Selection in Consultation with Public Services Commission (Procedure) Rules, 1970, as amended from time to time, from amongst substantively appointed Inspectors of Civil Police and Armed Police as per their combined seniority list to be prepared by the Head of Department."

15. Thus, from a perusal of afore-quoted Rule 16 of the Rules of 2016 what we find is that the criteria for making promotion to the post of Deputy Superintendent of Police is the merit and recruitment by promotion is to be considered in terms of the procedure Rules 1970. The zone of consideration for the purposes of making promotion to the post of Deputy Superintendent of Police, according to Rule 16, comprises of the Inspectors of Civil Police and Inspectors Armed Police, that is to say those Sub-Inspectors who are initially appointed as Sub-Inspector (Civil Police) and also those Sub-Inspectors who are initially appointed as Sub Inspector (Armed Police)/Platoon Commander and are subsequently promoted to the post of Inspector (Civil Police) or Inspector (Armed Police)/Company Commander, as the case may be, are eligible to be considered for promotion provided they have put in five years of substantive service on their respective posts of Inspectors and are also confirmed in their respective posts.

16. Rule 16 of the Rules of 2016, thus, speaks about making promotions from combined seniority list to be prepared by the Head of the Department which shall comprise of Inspectors (Civil Police) and Inspectors (Armed Police). Thus there are two feeding cadres which from the the eligibility zone for making promotions to the posts of Deputy Superintendent of Police namely; (1) the cadre of Inspectors (Civil Police) and, (2) cadre of Inspectors (Armed Police)/Company Commander.

17. The Rules of 2016 do not contain any provision or prescription as to how the combined seniority list for the purposes of utilizing the same for making recruitment by way of promotion under the Rules of 2016 is to be prepared. As a matter of fact the phrase **'combined seniority list'** occurring in Rule 16 of Rules of 2016 is clearly a misnomer. The list which is mentioned in Rule 16, in fact, would be better described as eligibility list prepared for the purposes of making promotion to the post of Deputy Superintendent of Police which will include the eligible Inspectors coming from both the cadres, namely, Inspectors (Civil Police) and Inspectors (Armed Police). It cannot be termed to be a **'seniority list'** in the traditional sense of

the word; rather it is an eligibility list as observed above. At the cost of repetition, we may observe that the Rules of 2016 do not provide for any provision as to how the combined seniority list is to be prepared.

18. Thus, it is in this background that we are called uopn to consider the submissions made by learned counsel representing the appellants-State authorities and learned counsel representing the respondent no.1.

19. It has been argued by learned State Counsel representing the appellants that in absence of any statutory prescription available in the Rules of 2016 for the purposes of preparation of **'combined seniority list'** as envisaged in Rule 16, such combined seniority list is to be prepared as per the prescriptions available in the Government Order dated 24.07.2003. Submission is that the Government Order dated 24.07.2003 has statutory force as it is referable to the powers of the State Government available to it under Section 2 of the Act of 1861. In this view the submission is that the Government Order dated 24.07.2003 is not an ordinary executive circular or administrative order; rather it is a statutory instrument having been issued under Section 2 of the Act of 1861. Contention, thus, is that in absence of any prescription available in the Rules of 2016 for the purposes of preparation of **'combined seniority list'**, the said list is to be prepared in terms of the provisions available in Clause 9 of the Government Order dated 24.07.2003.

20. When we examine the said submission advanced by learned counsel appearing for the appellants-State authorities vis-a-vis the findings recorded by learned Single Judge in the judgment and order under appeal, what we find is that the learned Single Judge has observed that on promulgation of the 2015 Service Rules for both the cadres, the Government Order dated 24.07.2003 lost its existence and as such determination of combined seniority list is to be made in accordance with the provisions contained in Rule 7 of the Rules of 1991.

21. For reflecting upon the aforesaid issue, we need to consider the statutory prescriptions governing the conditions of service of members of both the cadres.

22. Prior to the year 2008, recruitment to the post of Sub Inspectors in both the cadres, namely, in the cadre of Civil Police as also in the cadre of Armed Police/P.A.C. used to be made in terms of certain government orders issued which were referable to Section 2 of the Act of 1861, however, in the year 2008, two sets of statutory rules were framed by the State Government which are known as (1) Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 and (2) Uttar Pradesh Pradeshik Armed Constabulary Subordinate Officers Service Rules, 2008. The first set of Rules relating to Sub-Inspectors and Inspectors in Civil Police were framed by the State Government in exercise of its powers conferred on it under Section 46 (3) and 46 (2) (c) read with Section 2 of the Act of 1861, whereas 2008 Service Rules relating to the Subordinate Officers of U.P. Armed Constabulary were made by the State Government in exercise of its powers conferred on it under Section 15 of United Provinces Pradeshik Armed Constabulary Act, 1948. Thus, these two sets of Rules framed in 2008 by the State Government are statutory in nature. The 2008 Service Rules pertaining to Sub-Inspectors and Inspectors (Civil Police)

were notified by the State Government on 02.12.2008. The said notification itself states that 2008 Service Rules were framed in supersession of all existing Rules. Similarly the 2008 Service Rules framed by the State Government in respect of the Sub-Inspectors and Inspectors pertaining to equivalent rank officers in the Armed Police/P.A.C. also provides that the said Rules were framed in supersession of all the then existing Rules. Thus, if we read the two notifications issued by the State Government both on 02.12.2008, whereby the two sets of aforesaid 2008 Service Rules were notified, what we find is that on promulgation of those Rules the earlier Rules stood issued in this behalf stood superseded.

23. Subsequently, in supersession of even 2008 Service Rules, the State Government promulgated Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Services Rules, 2015 which were notified in August 19, 2015. Similarly, for the purposes of governing the conditions of service of the Sub-Inspectors and Inspectors (Armed Police)/P.A.C., the State Government promulgated another set of Rules known as Uttar Pradesh (Pradeshik Armed Constabulary) Subordinate Officers Service Rules, 2015 which were notified on August 14, 2015.

24. In the instant case the appointment of the petitioner-respondent no. 1 was made in the year 1986 on the post of Sub-Inspector (Armed Police) and he was promoted to the post of Inspector (Armed Police) on 24.02.2014, whereas the combined seniority list for the purposes of Rule 16 of the Rules of 2016 has been prepared in the year 2019. Thus, so far as the determination of seniority on the post of Inspector separately these two separate cadres is concerned, the provisions of the aforementioned two sets of Service Rules, 2015 will have to be seen.

25. In the Service Rules, 2015 pertaining to Sub-Inspectors and Inspectors (Civil Police) the relevant provision relating to determination of seniority is available in Rule 22 of Rules of 2015. Similarly so far as the determination of seniority of Sub-Inspectors/Inspectors (Armed Police)/P.A.C. is concerned, the relevant Rule available in 2015 Rules and applicable to them is Rule 22.

26. We may make it clear that Rule 22 in both the aforesaid two sets of Rules 2015 does not anywhere speak that determination of seniority in the respective cadres shall be made in accordance with the provisions contained in Rules of 1991, which have been framed under Article 309 of the Constitution of India whereas the aforesaid two sets of Service Rules, 2015 were framed by the State Government by virtue of the powers conferred on its under the Police Act or the United Provinces Pradeshik Armed Constabulary Act, 1948.

27. However, what we further notice is that the Service Rules governing the conditions of service which will include the process of recruitment as well on the post of the Deputy Superintendent of Police have been framed by the State Government under Article 309 of the Constitution of India. The Rules of 2016 clearly do not make any mention that they were framed under the Police Act; rather the notification whereby the Rules of 2016 were notified makes it abundantly clear that the same have been framed by the State Government under the proviso appended to Article 309 of the Constitution of India. Thus, in our considered opinion, any prescription made

by the State Government by issuing an executive circular or order which owes its existence to either the Police Act or the P.A.C. Act, 1948 will have no application so far as the regulation of conditions of service of the cadre of Deputy Superintendent of Police is concerned.

28. Having observed as above, what we also notice is that though Rule 16 of the Rules of 2016 envisages preparation of a 'combined seniority list' for the purposes of making promotions to the post of Deputy Superintendent of Police, however, as to what will be the criteria for preparation of the said 'combined seniority list' is not provided in 2016 Rules. Learned State Counsel has also not been able to place any other Government Order, executive circular/statutory Rules which provide for any procedure or criteria for determining the 'combined seniority list' mentioned under Rule 16 of the Rules of 2016 except the Government Order dated 24.07.2003, which, admittedly, has been issued by the State Government under Section 2 of the Act of 1861.

29. An attempt has been made by the learned State Counsel to submit that in fact the entire police force is one having been created under the Police Act and existence of the entire Police Force including the Deputy Superintendent of Police can be traced in the provisions of Police Act and, as such, the Government Order dated 24.07.2003 will have application so far as the determination of 'combined seniority list' for the purposes of making the promotion to the post of Deputy Superintendent of Police is concerned.

30. In his submissions to the extent that entire police force is one, learned State Counsel may be correct, however, for regulating the conditions of service of Deputy Superintendent of Police, no Service Rules have been framed under the Police Act. The Service Rules regulating the conditions of service of the Sub-Inspectors and Inspectors both in Civil Police and Armed Police have been framed under the Police Act and the P.A.C. Act whereas the Rules governing the conditions of service including the recruitment on the post of the Deputy Superintendent of Police have been framed under Article 309 of the Constitution of India. The submission of learned State Counsel may have been correct, had the Rules regulating the conditions of service of Deputy Superintendent of Police been also framed under the Police Act.

31. As already observed above, there is no document on record, statutory or non-statutory, which can be said to throw some light as to how and on what criteria the 'combined seniority list' as envisaged in Rule 16 of the Rules of 2016 is to be prepared. There is no doubt to the submissions made by learned counsel representing the appellants that it is general law acceptable to all canons of service jurisprudence that the seniority of any government employee is to be reckoned from the date of his substantive appointment, however, for the purposes of preparing the 'combined seniority list' in terms of the requirement of Rule 16 of 2016 Rules no prescription is available. What we notice in this case is that the respondent no.1-petitioner was appointed on the post of Sub-Inspector four years ahead of the appointment of one Ram Pal Singh, who has been shown to be senior in the 'combined seniority list' which was under challenge before the learned Single Judge. Despite having been appointed on the initial post prior in time if a government

employee faces reduced chances of promotion, it may cause some heart burning. In this case the respondent no.1-petitioner was placed below an incumbent belonging to a different cadre who was appointed on the initial post after him which may give rise to some anomalous situation, however, all this lies in the realm of policy decision in respect of which is to be taken by the Government.

32. In the light of the discussions made above, what this court finds is that unless and until the State Government provides for some objective criteria for the purposes of preparing the 'combined seniority list' as envisaged in Rule 16 of the Rules of 2016, which can more appropriately be described as 'eligibility list for the purpose of promotion', there will always be chances of there being a grey area which may not be conducive to proper cadre management.

33. As far as the judgment rendered by learned Single Judge, which is under appeal herein is concerned, the learned Single Judge has though found that the Government Order dated 24.07.2003 is non-existent after promulgation of two sets of 2015 Service Rules, however, learned Single Judge has further proceeded to give a direction to prepare the joint seniority list in terms of Rule 7 of the Rules of 1991.

34. We are unable to agree with the said directions given by learned Single Judge vide judgment and order under challenge herein. U.P. Government Service Seniority Rules, 1991 have been framed under Article 309 of the Constitution of India, thus will have full application for the purposes of determination of seniority on the post of Deputy Superintendent of Police, however, in the instant case the seniority on the post of Deputy Superintendent of Police or even on the post of Inspector (Civil Police) or on the post of Inspector (Armed Police) is not to be reckoned; rather what needs to be prepared is the 'combined seniority list' for the purposes of making promotions on the post of Deputy Superintendent of Police in terms of Rule 16 of the Rules of 2016.

35. Rule 7 of Rules of 1991 is extracted hereinbelow:

"(7). Where according to the service rules, appointments are to be made only by promotion but from more than one feeding cadres, the seniority inter se of persons appointed on the result of any one selection shall be determined according to the date of the order of their substantive appointment in their respective feeding cadres.

Explanation:- Where the order of the substantive appointment in the feeding cadre 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 meant the date of issuance of the order:

Provided that where the pay scales of the feeding cadres are different, the persons promoted from the feeding cadre having higher pay scale shall be senior to the persons promoted from the feeding cadre having lower pay scale:

Provided further that the persons appointed on the result of a subsequent selection shall be junior to the persons appointed on the result of a previous selection.?

36. The afore-quoted Rule 7 of the Rules of 1991 provides for the procedure as to how the seniority is to be determined in a

situation where appointment on a particular post is made by promotion from several feeding cadres that is to say Rule 7 will have an application for the purposes of determination of seniority once the promotion from the feeding cadres is made. In this case Rule 7 of the Rules of 1991 will have application only once promotion to the post of Deputy Superintendent of Police is made from the two feeding cadres, namely the cadre of Inspectors (Civil Police) and the cadre of Inspectors (Armed Police) and thereafter seniority list is to be determined on the post of Deputy Superintendent of Police. Rule 7 is thus available and applicable for the purposes of determining the seniority once the promotion is made and not prior to that. The seniority list to be prepared under the Government Servant Seniority Rules is not to be confused by the 'combined seniority list' which phrase occurs in Rule 16 of the Rules of 2016.

37. In view of the aforesaid discussions, we are of the considered opinion that Rule 7 of Rules of 1991 does not have any application for the purposes of preparation of the 'combined seniority list' as envisaged under Rule 16 of the Rules of 2016.

38. For the reasons aforesaid, we are unable to agree with the judgment and order passed by learned Single Judge, dated 22.09.2021, in Writ Petition No.34799 (SS) of 2019.

39. The Special Appeal is, thus, **allowed** and the said judgment passed by learned Single Judge is hereby set aside.

40. We, however, while allowing the special appeal, also direct the State Government to consider framing of some objective criteria for the purposes of preparation of combined seniority list to be prepared as per the requirement of Rule 16 of the Rules of 2016 for making promotion to the Ordinary Grade of service as described in the Uttar Pradesh Police Service Rules, 2016. The said criteria shall be framed by the State Government within a period of two months from the date a certified copy of this order is furnished. The necessary exercise for promotion to the post of Deputy Superintendent of Police shall be undertaken thereafter.

41. There will be no order as to costs.

(2022)04ILR A735
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 2630 of 2020

Gaya Prasad Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Samir Sharma, Sri Ajay Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Awadhesh Kumar Saxena, Sri Avijit Saxena

A. Service Law – UP Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 1995 – Rules 3, 4 & 5 – Promotion – Adverse entry – Representation made against adverse entry – Statutory period of 172 was provided to take decision on such representation – Period of 172 days was expired on 09.11.2017, but no decision was taken on such representation – Other adverse entry stood expunged – Effect –

Held, statutory period of 172 days had expired on 09.11.2017, nothing restrained the then Departmental Promotion Committee that sat on 24.11.2017 from considering the candidature of the petitioner for promotion. (Para 14, 15 and 19)

B. Service Law – Constitution of India – Article 14 – Right to promotion – It's claim as the fundamental right – Consideration – Held, Article 14 of the Constitution provides for not only equality before law but also equal protection of laws – While right to promotion may not be fundamental right but right to be considered for promotion in accordance with service rules, is a fundamental right and any discrimination in such a matter would be hit by Article 14 of the Constitution of India – Maneka Gandhis's case and Ajay Kumar Shukla's case relied upon. (Para 20 and 23)

C. Service Jurisprudence – Contract of employment – Illegal denial of promotion – Consequential benefit – Entitlement – Held, in Service jurisprudence where we refer employer-employee relationship to be governed by contract of employment, it is embedded in such contract that all service benefits to which under his contract of employment and the relevant service rules, an employee is entitled, same shall be conferred upon him without discrimination – High court directed the Respondent to constitute a Departmental Promotion Committee to consider promotion of the petitioner w.e.f. the date juniors to the petitioner have been promoted, with all consequential benefits and pass orders accordingly. (Para 25 and 33)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Civil Appeal No. 5966 of 2021; Ajay Kumar Shukla & ors. Vs Arvind Rai & ors. decided on 08th December, 2021

2. Maneka Gandhi Vs U.O.I. & anr., AIR 1978 SC 597

3. U.P. St. Electricity Board & anr. Vs Kharak Singh & anr.

4. R.K.Singh Vs St. of U.P. & ors.

5. Ramesh Kumar Vs U.O.I. & ors.

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

1. Heard Sri Samir Sharma, learned counsel for the petitioner, Sri Avijit Saxena, learned Advocate holding brief of Sri A.K.Saxena, learned counsel for the respondent.

2. By means of present writ petition filed under Article 226 of the Constitution, petitioner has challenged the order dated 16th July, 2019 whereby his representation regarding claim for promotion from class IV post to class III post of book clerk has come to be disposed of rejecting his claim.

3. Assailing the above order impugned in the present petition, learned Senior Advocate has argued that on the date of the meeting of the Departmental Promotion Committee which was 24th November, 2017, there was no adverse entry in the character roll of the present petitioner and so he was eligible to be considered for promotion.

4. In support of his above argument, learned Senior Advocate submits that prior to year 2016-17 whatever adverse entries were awarded to the petitioner that had stood expunged vide orders dated 12th January 2016 and 26th December, 2016 respectively, and in so far as adverse entry of the year 2016 -17 is concerned, he had already represented against the same before the competent authority on 17.05.2017 and since no decision was taken by the competent authority within the period prescribed for disposal of the representation of the employee, the said entry under the

U.P.Government Servants(Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 1995 (hereinafter referred to as Rules, 1995), would loose its relevance and significance for the purposes of consideration of promotion under Rule 5 of the said Rues.

5. Learned counsel for the petitioner has taken the Court to the circular letter of the U.P. Transport Corporation , Lucknow dated 13th November, 1997, which records that Board of Directors of the Corporation in its 137th meeting dated 11.06.1996 had adopted the Rules, 1995. Thus argument is that once the rules have been made applicable to the employees of the U.P. Transport Corporation, representation made against the adverse entry was liable to be disposed of as per Rule 4 read with Rule, 5,6 and 7 of the aforesaid Rules.

6. It is submitted that Rule 5 provides that in the event representation against the adverse entry is not disposed of in accordance with law vide Rule 4, such report shall not be treated adverse for the purposes of promotion/crossing of efficiency bar/ or other service benefits to the concern employee.

7. Thus, submission of learned counsel for the petitioner is that adverse remarks / entries made in the year 2016-17 having been represented against and the said representation having not been disposed of in terms of Rule 4 of Rules, 1995, the claim for promotion of the petitioner could not have been ignored by the Departmental Promotion Committee while it considered the candidature of the employees for promotion from Class IV to Class III posts on 24.11.2017.

8. Mr. Sharma appearing for petitioner has also submitted that the order impugned has proceeded on the premise that 33 employees were in-excess of sanctioned posts and, therefore, consideration of petitioner's candidature would not be possible, which according to him, is absolutely misplaced and misconceived stand. He argues that seniority of the petitioner in the class IV cadre is not disputed and even in the year of promotion of 2017 persons junior to the petitioner have been promoted. He therefore, submits that had the petitioner's candidature been considered for promotion in time, he would have been placed above 33 marks of surplus employees in the book clerk's cadre.

9. Specific averments in support of the argument so above advanced, have been made in paragraph 21, 22, 23, 24, 25, 30, 31, 32, 34 and 39. The order expunging entries of the year 2014-15 and 2015-16 and again 2016-17 have been brought on record. Promotion orders giving promotion to the juniors have also been brought on record.

10. Learned counsel for the contesting respondent could not dispute the above submissions. Counter affidavit that has been filed does not contain any specific denial of what has been averred in paragraphs 21 and 22 of the writ petition with regard to the adverse entry and so far denial to paragraph 31 is concerned, he submits that 30 posts were held in-excess but the fact that 39 juniors to the petitioner have been promoted to the post of Clerk, has not been denied even while giving promotion to various class IV employees. One single tune that the respondents have been harping about is that there were adverse entries against he petitioner on

relevant dates of consideration but what would the effect if entries have been expunged, on this point the counter affidavit is silent.

11. The fact that 151 candidates who were junior to the petitioner have been promoted is also not specifically denied. The averments made in paragraph 34 that petitioner would be placed above Umesh Chandra Pandey at serial number 101 and thus would be falling within the sanctioned strength, is also not denied. Respondents have also not denied the circular letter-cum-order dated 13th November, 1997 adopting Rules 1995

12. After going through various documents brought on record, pleadings raised by the respective parties in the present case, I find the only issue to be adjudicated is as to whether petitioner's candidature was liable to be considered on 24.11.2017 .

13. In order to appreciate the controversy, it would be proper to produce Rules 3, 4 and 5 of 1995 Rules. These provisions are quoted as under:

3. Definitions. - *Unless there is anything repugnant in the subject or context, the expression-*

(a) "appropriate authority" means a person who is empowered by the Government to act as reporting authority, reviewing authority or accepting authority, as the case may be;

(b) "Constitution" means the Constitution of India;

(c) "Government" means the State Government of Uttar Pradesh;

(d) "Government Servant" means a person working on a post under the rule making powers of the Governor under the proviso to Article 309 of Constitution other than a post under control of the High Court;

(e) "report" means annual confidential report regarding the work, conduct and integrity of a Government Servant for each year recorded by an appropriate authority, who has seen the performance of the Government servant for not less than a continuous period of three months;

(f) "Secretariat" means the Secretariat of the Government;

(g) "Year" means a period of twelve months commencing from the first day of April of a calendar year.

4. Communication of adverse report and procedure for disposal of representation. - *(1) Where a report in respect of a Government Servant is adverse or critical, wholly or in part, hereinafter referred to as adverse report, the whole of the report shall be communicated in writing to the Government Servant concerned by the accepting authority or by an officer not below the rank of reporting authority nominated in this behalf by the accepting authority**, within a period of 45 days from the date of recording the report and a certificate to this effect shall be recorded in the report. (2) A Government Servant may, within a period of 45 days from the date of communication of adverse report under sub-rule (1), represent in writing directly and also through proper channel to the authority one rank above the accepting authority, hereinafter referred to as the competent authority, and if there is no competent authority, to the accepting authority itself, against the adverse report so communicated:** *Provided that if the competent authority or the accepting authority, as the case may be, is satisfied that the Government Servant concerned*

*had sufficient cause for not submitting the representation within the said period, he may allow a further period of 45 days for submission of such representation**. (3) The competent authority or accepting authority as the case may be, shall, within a period not exceeding one week from the date of receipt of the representation under sub-rule (2), transmit the representation to the appropriate authority, who has recorded the adverse report, for his comments, who shall, within a period not exceeding 45 days from the date of receipt of the representation, furnish his comments to the competent authority or the accepting authority as the case may be :** *Provided that no such comments shall be required if the appropriate authority has ceased to be in, or has retired from, the service or is under suspension before sending his comments. (4)* ***The competent authority or the accepting authority, as the case may be, shall, within a period of 120 days from the date of expiry of 45 days specified in sub-rule (3), consider the representation along with the comments of the appropriate authority, and if no comments have been received without waiting for the comments, and pass speaking orders-***

(a) rejecting the representation; or

(b) expunging the adverse report wholly or partly as he considers proper.

(5) Where the competent authority due to any administrative reasons, is unable to dispose of the representation within the period specified in sub-rule (4), he shall report in this regard to his higher authority, who shall pass such orders as he considers proper for ensuring disposal of the representation within the specified period. (6) An order passed under sub-rule (4) shall be communicated in writing to the Government Servant concerned. (7) Where an order expunging the adverse report is passed under sub-rule (4), the competent authority or the accepting authority as the case may be shall omit the report so expunged. (8) The order passed under sub-rule (4) shall be final. (9) Where any matter for-

(i) communication of an adverse report;

(ii) representation against an adverse report;

(iii) transmission of representation to the appropriate authority for his comments;

(iv) comments of the appropriate authority; or

(v) disposal of representation against an adverse report; is pending on the date of the commencement of these rules, such matters shall be dealt with and disposed of within the period prescribed therefor under this rule.

Explanation. - In computing the period prescribed under this rule for any matters specified in this sub-rule the period already expired on the date of the commencement of these rules shall not be taken into account.

5. Report not to be treated adverse**. - Except as provided in Rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Handbook Volume II, Parts II to IV.* ***Where an adverse report is not communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall not be treated adverse for the purposes of promotion, crossing of Efficiency Bar and other service matters of the Government Servant concerned.

(emphasis added)

14. From bare reading of the aforesaid Rules , it is clear that moment representation against the adverse entry awarded is made the appropriate authority shall forward the same to the higher

competent authority within 45 days alongwith his comments and upon receiving of the same within 120 days, the competent authority would either accept the comments so made or if no comment is made ,shall pass speaking order either rejecting the application or expunging the adverse entry.

15. Thus in any case, representation has to be disposed of within 165 days plus 7 days (period to forward representation) i.e. 72 days.

16. In this case admittedly representation was made on 22.5.2017 and that remained undisposed of admittedly until 24.11.2017. According to the relevant provisions (supra) the period is 172 days and so would expire on 09.11.2017.

17. Now it is necessary to examine that what will be the impact of such adverse entry in case Departmental Promotion Committee sits in the meanwhile and decides to consider the candidature of various candidates for promotion.

18. From the aforesaid Rule, it is clear that if representation remains undisposed of beyond the period prescribed for its disposal, then such adverse entry would not be a bar for the purposes of consideration for promotion.

19. Thus in my considered view since other past adverse entries had already stood expunged vide orders dated 12th January 2016 and 26.12.2016 and statutory period of 172 days had expired on 09.11.2017, nothing restrained the then Departmental Promotion Committee that sat on 24.11.2017 from considering the candidature of the petitioner for promotion. Admittedly persons junior to the petitioner have come to be promoted on 5.12.2017 as averred in paragraph 38 of the writ petition which has been very vaguely denied.

20. It is settled legal position that while right to promotion may not be fundamental right but right to be considered for promotion in accordance with service rules, is a fundamental right and any discrimination in such a matter would be hit by Article 14 of the Constitution of India. In a very recent judgment of the Supreme Court in the case of **Ajay Kumar Shukla and Others v. Arvind Rai and Others** in **Civil Appeal No. 5966 of 2021** and other connected matters decided on 08th December, 2021 the Court referred to a number of decisions on this point vide paragraph nos. 37, 38 and 39 These paragraphs run as under:

"37. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by K. Ramaswamy, J., in the case of Director, Lift Irrigation Corporation Ltd. and Others vs. Pravat Kiran Mohanty and Others6 in paragraph 4 of the report which is reproduced below:

"4... There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the corporation is in violation of the right of respondent/writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent/writ petitioner was unjustly denied of the same is obviously unjustified.

38. A Constitution Bench in case of Ajit Singh vs. State of Punjab7, laying

emphasis on Article 14 and Article 16(1) of the Constitution of India held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then there will be clear violation of his/her's fundamental right. ***Jagannadha Rao,J. speaking for himself and Anand, CJI., Venkataswami, Pattanaik, Kurdukar, JJ.,*** *observed the same as follows in paragraphs 21 and 22 and 27:*

"21: Articles 14 and 16(1): is right to be considered for promotion a fundamental right

22: Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".

It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right. "Promotion based on equal opportunity and seniority attached to such promotion are facets of fundamental right under Article 16(1)

xxxx xxxx xxxx xxxx xxxx

27. In our opinion, the above view expressed in Ashok Kumar Gupta and followed in Jagdish Lal and other cases, if it is intended to lay down that the right guarantee to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta right from 1950."

39. This Court in Major General H.M. Singh, VSM vs. UOI and Another 8 , again reiterated the legal position, i.e. right to be considered for promotion as a fundamental right enshrined under Article 14 and Article 16 of the Constitution of India. The relevant extract from paragraph 28 is reproduced below:

"28. The question that arises for consideration is, whether the non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The answer to the aforesaid query would be in the affirmative, subject to the condition that the respondents were desirous of filling the vacancy of Lieutenant-General, when

it became available on 1-1-2007. The factual position depicted in the counter-affidavit reveals that the respondents indeed were desirous of filling up the said vacancy. In the above view of the matter, if the appellant was the senior most serving Major-General eligible for consideration (which he undoubtedly was), he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view that it was in order to extend the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed extension in service on two occasions, firstly by the Presidential Order dated 29-2-2008, and thereafter, by a further Presidential Order dated 30-5-2008. The above orders clearly depict that the aforesaid extension in service was granted to the appellant for a period of three months (and for a further period of one month), or till the approval of the ACC, whichever is earlier. By the aforesaid orders, the respondents desired to treat the appellant justly, so as to enable him to acquire the honour of promotion to the rank of Lieutenant-General (in case the recommendation made in his favour by the Selection Board was approved by the Appointments Committee of the Cabinet, stands affirmed). The action of the authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant-General would have resulted in violation of his fundamental right under Article 14 of the Constitution of India. Such an action at the hands of the respondents would unquestionably have been arbitrary."

21. The Court in the above case though was considering the legality of the seniority list and if illegally prepared seniority list being against statute, continued, it would defeat a rightful claim of a candidate for promotion placing him under his juniors.

Speaking for the bench, his lordship Hon'ble Justice Vikram Nath vide paragraph 40 has observed thus:

"40. If the seniority list is allowed to be sustained then the engineers who are more meritorious in the Mechanical and Civil streams than the Junior Engineers of the Agricultural stream would be deprived of their right of being considered for promotion and in fact their right would accrue only after all the Junior Engineers of the Agricultural stream selected in the same selection are granted promotion. For these reasons also the seniority list in question must go."

22. Besides above, the Court is of the considered view that merely because there was excess number of booking clerks than the sanctioned posts, this by itself should not have been a ground to deny promotion to the petitioner when juniors to the petitioner had come to be promoted by the Departmental Promotion Committee vide its resolution dated 24.11.2017. Petitioner's candidature certainly fell within the zone of consideration of promotion on 24.11.2017 and the respondent seriously erred in law in ignoring the claim of the petitioner just because his representation against adverse entry had remained undisposed of. Thus the order impugned denying claim of promotion to the

petitioner is absolutely unsustainable and is vitiated for arbitrary and discriminatory approach of the authorities.

23. Article 14 of the Constitution provides for not only equality before law but also equal protection of laws. The fundamental right to be considered for promotion as discussed above indicates at ruling out any kind of approach by an employer that leads to discrimination. One must understand that not only by express act but even where by conduct discrimination crepts in, it is an arbitrariness on the part of employeer because whatever is arbitrary, discriminatory and unreasonable is violative of the Article 14 and 21 of the Constitution of India.

24. In the case of **Maneka Gandhi v. Union of India and Another, AIR 1978 SC 597** vide 56 the Constitution Bench has held thus:

"56. Now, the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this article ? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach._ No attempt should be made 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 imprisoned Within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E. P. Royappa v. State of Tamil Nadu & Another (1) namely, that "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". Article 14 strikes, at arbi- trariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be "'right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied. How far natural justice is air essential element of procedure established by law

25. In Service jurisprudence where we refer employer employee relationship to be governed by contract of employment, it is embedded in such contract that all service benefits to which under his contract of employment and the relevant service rules, an employee is entitled, same shall be conferred upon him without discrimination.

26. Every establishment, be it government or non government, runs on its workforce that are employed at various stages i.e. Labour , technical hand, office work, administration/management that form very important components of entire machinery like quartz in a watch that are though made of very common materials put

while placed under mechanical stress maintain a precise frequency standard. Those who run administration of an establishment are under an obligation to ensure that workforce is properly placed and taken good care of to get from them the maximum output. They are at the bottom but if duly raised looking to their eligibility and utility, these employees will give their maximum to the establishment. The success story of every establishment shows that it has been able to maintain high quality and standard of work.

27. Annual increments, increments on crossing the efficiency bar, Assured Career Progression and promotion are all aimed at maintaining the requisite vigour that would make establishments achieving their objectives with which that have come into existence. It is duty of those who are at highest echelon of the establishment to ensure that work force is not treated like a herd of sheep, instead it be duly treated and honoured as horsepower, necessary to make establishments move on. Stagnation, unnecessary harassment, discrimination if meted out to the employees forcing them to unnecessary litigation, the system will stand forced to bleed discontent and corruption. Employees if adopt such attitude and become indifferent, then top boses of the establishment are only to be blamed.

28. The petitioner in the present case has certainly been wholly illegally discriminated against for not being considered for promotion by the Departmental Promotion Committee while it considered promotion from Class IV posts to class III posts on 24.11.2017.

29. In the case of **U.P. State Electricity Board and Another v. Kharak Singh and Another, R.K.Singh v. State of U.P. and Others** and recently and in the case of **Ramesh Kumar v. Union of India and Others**, Supreme Court has considered the issue of giving consequential benefits to an employee who had been wholly illegally denied promotion and had been made junior to his juniors in the establishment for the fault of authorities.

30. Going through three judgments referred to hereinabove following three principles emerge:

a. adverse reports if are expunged or if not as per the rules, and the time has run out for affirming or rejecting the same by the authority as in the present case, the same shall not be a reason to deny promotion;

b. once adverse entry has come to be expunged may be from a subsequent date such employee would be entitled to service benefits w.e.f the date, it had become due; and

c. principle of "no work no pay" is not applicable in cases where an employee has been denied promotion for no fault of his own. So not only seniority has to be restored giving promotion to him from the date his juniors have been promoted with all consequential monetary benefits to which such employee would have been otherwise entitled, had he been promoted in time but also all other consequential benefits should be conferred with retrospective effect upon such an employee

31. In my considered view, aforesaid three principles enunciated in the judgments of the Supreme Court (supra) are fully attracted and applicable to the petitioner's case in hand.

32. In view of above, this petition succeeds and is allowed. The order dated 16.07.2019 passed by the Regional Manager, U.P. Transport Corporation, Kanpur, annexure 11 to the writ petition, is hereby quashed.

33. Respondent concerned is directed to constitute a Departmental Promotion Committee to consider promotion of the petitioner w.e.f. the date juniors to the petitioner have been promoted, with all consequential benefits and pass orders accordingly.

34. The above task as directed hereinabove, shall be accomplished by the concerned respondent authority within a period of two months from the date of production of certified copy of the order.

(2022)04ILR A745
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ-A No. 4183 of 2022

Pramod Kumar Shukla & Anr. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Satyam Pandey, Sri R.K. Ojha (Sr. Adv.)

Counsel for the Respondents:
C.S.C., Sri Manas Bhargava

A. Service Law – UP Lokayukta and Up-Lokayuktas Act, 1975 – Sections 12(4) & 17(2) – Recommendation for punishment – Jurisdiction of Lokayukta under the Act – Challenge to the recommendation of Lokayukta – Permissibility – Interference by the court, when warranted – Held, the Lokayukta has rightly recommended the punishment of the petitioners by passing the order dated 22.09.2021. No order or proceeding of the Lokayukta can be challenged, reviewed, canceled or questioned in any court unless it has been passed without jurisdiction. (Para 15)

B. Service – Departmental enquiry – Charge-sheet – Scope of interference by the court – Principle laid down – Held, the law is that the Courts are not to grant stay/quash the disciplinary proceedings nor they should go into the correctness or otherwise of the charges leveled in the charge-sheet and the departmental inquiry should be allowed to continue uninterrupted to come to its natural conclusion – In some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal – However, ordinarily the High Court should not interfere in such a matter.(Para 24 and 26)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Secretary, Ministry of Defence & ors. Vs Prabhash Chandra Mishra; (2012) 11 SCC 565

2. St. of U.P. Vs Shri Brahm Datt Sharma & anr.; AIR 1987 SC 943

3. St. of H.P. Vs B.C. Thakur; 1994 SCC (L&S)

4.U.O.I. Vs Ashok Kacker; 1995 Supp (1) SCC 180

5. Secretary to Government, Prohibition & Excise Department Vs L. Srinivasan; (1996) 3 SCC 157

6. St. of Orrisa & anr. Vs Sangram Keshari Misra & anr.; (2010) 13 SCC 311

7. U.O.I. & ors. Vs Upendra Singh; (1994) 3 SCC 357

8. U.O.I. & anr. Vs Kunisetty Satyanarayana; (2006) 12 SCC 28

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. R.K. Ojha, Senior Advocate assisted by Mr. Satyam Pandey, learned counsel for the petitioners, Mr. Manas Bhargava, learned counsel for the respondent no.2 and Mr. Aseem Mukherjee, learned Standing Counsel for the State-respondents.

2. This writ petition has been filed by the petitioners with the following prayer:-

"(A) Issue a writ, order or direction in nature of Certiorari quashing the impugned orders passed by the Lokayukt respondent no.2 dated 22.09.2021 (Annexure no.5 to this writ petition) and the charge sheet issued by the Additional Deputy Commissioner of Police, Headquarter Commissionerate, Kanpur Nagar respondent no.4 dated 22.01.2022 (Annexure no.6 to this writ petition).

(B) Issue a writ, order or direction in the nature of mandamus commanding and directing for restraining the respondent not to proceed in pursuance of the charge sheet dated 22.01.2022 issued on the basis of the order of the Lokayukt dated 2.09.2021.

(C) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents authority to not interfere in the peaceful working of the petitioners."

3. Learned counsel for the petitioners submits that the petitioner no.1, namely, Pramod Kumar Shukla was selected as Sub-Inspector in the year 1998 and, thereafter, was promoted as Inspector on 26.01.2015. The petitioner no.2, namely, Pramod Kumar Yadav was selected as Constable in the year 1998 and, thereafter, was promoted as Sub-Inspector in the year 2013. Both the petitioners have been performing their duties up to the satisfaction of their superior. He further submits that the petitioner nos.1&2 were posted as Inspector and Sub-Inpector in P.S.- Chakeri at the time when the incident in question took place. One Mr. Samar Singh moved an application before the Additional City Magistrate-II (hereinafter referred as ACM-II) on Tehsil Diwas on 03.04.2018 with respect to removal of certain articles like cattle etc. and animals lying in their property. Pursuant to which, the ACM-II directed Revenue Inspector to conduct an inquiry with the help of concerned Station House Officer (SHO) and do the needful. On the said direction, the Lekhpal of the area submitted a report dated 05.04.2018, on the basis of which Mr. Samar Singh moved another application on 10.04.2018, on which the ACM-II passed an order directing Inspector Chakeri to provide security force for removal of the illegal encroachment upon the property in question, in order to maintain peace. The Lekhpal as well as complainant Mr. Samer Singh went to the Inspector, i.e. petitioner no.1, who in turn directed to petitioner no.2 to provide necessary force. On the aforesaid direction, the petitioner no.2 visited at the spot with the requisite force and found that there was no disturbance, therefore, the petitioners did not do anything for removing the encroachment.

4. Learned counsel for the petitioners further submits that it was the duty of the Revenue Officer to perform the duty of removing the illegal encroachment upon the property in question and the petitioners have nothing to do with the aforesaid task. The petitioners were responsible for maintaining peace over the area and since no incident took place, therefore, it cannot

be said that the petitioners had not performed their duty.

5. Subsequently, the complainant/opposite party approached this Court by means of filing a writ petition bearing Writ-C No.15753 of 2018, which was dismissed by order dated 01.05.2018 with a direction to the petitioner therein to approach the Civil Court where the litigation in respect to the matter is already pending or move an application under Section 145 of Cr.P.C. In stead of proceeding as directed by the aforesaid order dated 01.05.2018, the opposite party moved an application before the Lokayukt, Lucknow, who proceeded as per the provision of Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975 (hereinafter referred as "the Act 1975").

6. Thereafter, on the complaint of Mr. Samar Singh, three members committee was constituted, which submitted its report on 22.11.2018. On the basis of which, notices were issued to the petitioners, who submitted their reply. Surprisingly, the Lokayukta, without noticing the fact that the petitioners have performed their duties maintaining peace pursuant to the order of ACM-II by providing requisite police force, passed the order dated 22.09.2021 recommending for awarding of major punishment to the petitioners. On the basis of the aforesaid recommendation, disciplinary proceedings has been initiated against the petitioners and the charge sheet has been given to them on 22.01.2022.

7. Learned counsel for the petitioners further submits that the order/direction of Lokayukta for awarding major punishment to the petitioners is not sustainable in the eyes of law as the Lokayukta can only recommend for punishment but cannot define as to what punishment has to be awarded. The order dated 22.09.2021 passed by the Lokayukta is patently erroneous, illegal and arbitrary as the same has been passed ignoring the fact that the petitioners have performed their duties of providing police force and maintaining peace over the area in question. The charge sheet so submitted is bad as the same has been submitted without considering the reply of the petitioners and is based on the recommendation of the Lokayukta, the report submitted by the Lekhpal as well as order of ACM-II. Hence the impugned orders 22.09.2021 and 22.01.2022 cannot sustained in the eyes of law, therefore, the same are liable to be set aside by this Court.

8. On the other hand, Mr. Manas Bhargava, learned counsel for the respondent no.2 submits that as per Section 12 of the Act, 1975, if, after investigation of any action in respect of any complaint involving a grievance has been made, the Lokayukta or an Up-Lokayukta is satisfied that such action has resulted in injustice or undue hardship to the complainant or any other person, he shall by a report in writing recommend to the public servant and the competent authority concerned that such injustice or undue hardship shall be remedied or redressed in such manner and within such time as may be specified in the report.

9. Mr. Bhargava further submits that if, after investigation of any action in respect of which a complaint involving an allegation has been made, the Lokayukta or an Up-Lokayukta is satisfied that such allegation can be substantiated either wholly or partly, he shall by report in writing communicate his findings and recommendation alongwith the relevant

documents, materials and other evidence to the competent authority. The competent authority shall examine the report so forwarded to it and intimate within three months of the date of receipt of the report, the Lokayukta or, as the case may be, the Up-Lokayukta, the action taken or proposed to be taken on the basis of the report. Section 12 (4) of the Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975 reads as under:-

"(4) The competent authority shall examine the report forwarded to it under sub-section (3) and intimate within three months of the date of receipt of the report, the Lokayukta or, as the case may be, the Up-Lokayukta, the action taken or proposed to be taken on the basis of the report."

In view of the aforesaid, the Lokayukta, in the present case, has recommended for punishment of the petitioners.

10. Mr. Bhargava further submits that as per Section 17(2) of the Act 1975, no proceedings of the Lokayukta or the Up-Lokayukta shall be held bad for want of form and except on the ground of jurisdiction, no proceedings or decision of the Lokayukta or the Up-Lokayukta shall be liable to be challenged, reviewed, quashed or called in question in any Court.

11. On the cumulative strength of the aforesaid, learned Standing Counsel as well as counsel for the respondent no.2 submits that the order passed by Lokayukta dated 22.09.2021 is only a recommendation, therefore, no interference is required by this Court and also the aforesaid order cannot be challenged as per Section 17(2) of the 1975 Act.

12. Apart from the above, learned Standing Counsel as well as counsel for the respondent no.2 submits that ordinarily a writ petition does not lie against a charge-sheet or show-cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person who has no jurisdiction to do so. In support of their submission, they relied upon the judgment of the Apex Court in the case of ***Secretary, Ministry of Defence & Others VS. Prabhash Chandra Mishra reported in (2012) 11 SCC, 565***. In view of the aforesaid, they submits that no interference is called for by this Court in exercise of powers under Article 226 of the Constitution of India. Hence, the present writ petition is liable to be dismissed. Hence, the present writ petition is liable to be quashed.

13. This Court has considered the submissions as urged by learned counsel for the parties as well as gone through the entire materials brought on record.

14. It would be relevant to refer Section 17 (2) of the Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975, which read as under:-

"17. Protection. -.....

(2) No proceedings of the Lokayukta or the Up-Lokayukta shall be held bad for want of form and except on the ground of jurisdiction, no proceedings or decision of the Lokayukta or the Up-Lokayukta shall be liable to be challenged, reviewed, quashed or called in question in any Court."

15. From perusal of the record it comes out that the Lokayukta has rightly

recommended the punishment of the petitioners by passing the order dated 22.09.2021. No order or proceeding of the Lokayukta can be challenged, reviewed, canceled or questioned in any court unless it has been passed without jurisdiction.

16. So far as challenge made by the learned counsel for the petitioners to the impugned charge-sheet is concerned, it is necessary for this Court to refer judgement of the Apex Court in the case of ***State of U.P. vs. Shri Brahm Datt Sharma and another [reported in AIR 1987 SC 943)***, wherein the Apex Court has held that when a show-cause notice was issued to a government servant under the statutory provisions calling upon him to show cause, ordinarily the government servant must place his case before the authority concerned by showing cause and the courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. The purpose of issuing show cause is to afford opportunity of hearing to the government servant and once cause is shown it is open to the Government to consider the matter in the light of the facts and submissions placed by the government servant and only thereafter a final decision in the matter could be taken. Interference by the Court before that stage would be premature.

17. The Apex Court in the case of ***State of H.P. Vs. B.C. Thakur reported in 1994 SCC (L&S)***, in paragraph nos. 3 and 4 has held as follows: -

"(3) HAVING heard learned counsel for the parties, we are satisfied that in the facts and circumstances of the case, the impugned order of the Tribunal quashing the order of respondents suspension does not call for any interference, even though the other part of the Tribunals order quashing the charge-sheet issued to the respondent cannot be sustained. The quashing of the charge-sheet by the Tribunal is not on the ground of want of authority to issue the charge-sheet or any other inherent defect therein. This being so, the question of going into the merits of the charges, which are yet to be investigated in the departmental proceedings, did not arise for consideration or adjudication by the Tribunal at this stage. This being so, the Tribunals order quashing the charge-sheet as well, on reaching the conclusion that the suspension order had to be set aside, is unwarranted. The respondent had been under suspension for nearly two years on the date of the Tribunals order and another year has elapsed since then. Setting aside the suspension order in this situation, particularly when no substantial progress in the disciplinary proceedings has been made as yet, does not, therefore, call for any interference.

(4) CONSEQUENTLY, the appeal is partly allowed to the extent that the Tribunals order quashing the charge-sheet issued to the respondent is set aside while the challenge to the quashing of the suspension order dated 10-5-1990 is rejected. No costs."

18. The Apex Court in the case of ***Union of India Vs. Ashok Kacker reported in 1995 Supp (1) SCC 180***, while hearing a matter where the employee had challenged the charge sheet, clearly held that the Tribunal entertained the application at a premature stage. It was observed as follows :-

".....In our opinion, this was not the stage at which the Tribunal ought to have entertained such an application for

quashing the charge-sheet and the appropriate course for the respondent to adopt is to file his reply to the charge-sheet and invite the decision of the disciplinary authority thereon. This being the stage at which the respondent had rushed to the Tribunal, we do not consider it necessary to require the Tribunal at this stage to examine any other point which may be available to the respondent or which may have been raised by him."

19. Again in the case of ***Secretary to Government, Prohibition & Excise Department Vs. L. Srinivasan, reported in (1996) 3 SCC 157***, the Apex Court set-aside the order of the Tribunal by which the departmental enquiry and the charge-sheet were quashed on the ground of delay in initiation of the disciplinary proceedings and it was observed as follows :-

"Order dated 12.11.1993 in Nos. Nos. 1702 of 1993 and 2206 of 1993 of the Tamil Nadu Administrative Tribunal, Madras is in question before us. The respondent while working as Assistant Section Officer, Home, Prohibition and Excise Department had been placed under suspension. Departmental inquiry is in process. We are informed that charge-sheet was laid for prosecution for the offences of embezzlement and fabrication of false records etc. and that the offences and the trial of the case is pending.

The Tribunal had set aside the departmental enquiry and quashed the charge on the ground of delay in initiation of disciplinary proceedings. In the nature of the charge, it would take a long time to detect embezzlement and fabrication of false records which should be done in secrecy. It is not necessary to go into the merits and record any finding on the charge levelled against the charged officer since any finding recorded by this Court would gravely prejudice the case of the parties at the enquiry and also at the trial. Therefore, we desist from expressing any opinion on merit or recording any of the contentions raised by the counsel on either side. Suffice it to state that the Administrative Tribunal has committed grossest error in its exercise of the judicial review. The member of the Administrative Tribunal appears to have no knowledge of the jurisprudence of the service law and exercised power as if he is an appellate forum dehors the limitation of judicial review. This is one such instance where a member had exceeded his power of judicial review in quashing the suspension order and charges even at the threshold. We are coming across such orders frequently putting heavy pressure on this Court to examine each case in detail. It is high time that it is remedied." (emphasis supplied)."

20. The Apex Court in the case of ***State of Orrisa and another vs. Sangram Keshari Misra and another [reported in (2010) 13 Supreme Court Cases 311***] in para 10 has opined as under:-

"10. Though there appears to be some merit in the said contentions of the first respondent, it is unnecessary to examine the correctness of these contentions as normally a charge-sheet is not quashed prior to the conducting of the enquiry on the ground that the facts stated in the charge are erroneous. It is well settled that the correctness or truth of the charge is the function of the disciplinary authority (vide Union of India v. Upendra Singh1 SCC p. 362, para 6). Therefore we reject the contention that the charge ought to have been quashed without reserving to the State to proceed in accordance with law."

21. The Hon'ble Apex Court in the case of ***Union of India and others vs. Upendra Singh [reported in (1994) 3 Supreme Court Cases 357***] in para 6 has held as under:-

"6. In the case of charges framed in a disciplinary inquiry the tribunal or court can interfere only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. At this stage, the tribunal has no jurisdiction to go into the correctness or truth of the charges. The tribunal cannot take over the functions of the disciplinary authority. The truth or otherwise of the charges is a matter for the disciplinary authority to go into. Indeed, even after the conclusion of the disciplinary proceedings, if the matter comes to court or tribunal, they have no jurisdiction to look into the truth of the charges or into the correctness of the findings recorded by the disciplinary authority or the appellate authority as the case may be. The function of the court/tribunal is one of judicial review, the parameters of which are repeatedly laid down by this Court. It would be sufficient to quote the decision in H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal v. Gopi Nath & Sons5. The Bench comprising M.N. Venkatachaliah, J. (as he then was) and A.M. Ahmadi, J., affirmed the principle thus : (SCC p. 317, para 8)

"Judicial review, it is trite, is not directed against the decision but is confined to the decision-making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorised by law to decide, a conclusion which is correct in the eyes of the Court. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself."

22. The Apex Court in the case of ***Secretary, Ministry of Defence and others vs. Prabhash Chandra Mirdha [reported in (2012) 11 Supreme Court Cases 565***] in para nos. 10 to 12 has opined as follows: -

"11. Ordinarily a writ application does not lie against a chargesheet or show cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person having no jurisdiction/competence to do so. A writ lies when some right of a party is infringed. In fact, chargesheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a chargesheet or show cause notice in disciplinary proceedings should not ordinarily be quashed by the Court. (Vide : State of U.P. Vs. Brahm Datt Sharma, AIR 1987 SC 943; Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh & Others, (1996) 1 SCC 327; Ulagappa & Ors. v. Div. Commr., Mysore & Ors., AIR 2000 SC 3603 (2); Special Director & Anr. Vs. Mohd. Ghulam Ghouse & Another , AIR 2004 SC 1467; and Union of India &

Another Vs. Kunisetty Satyanarayana, AIR 2007 SC 906).

12. In State of Orissa & Anr. v. Sangram Keshari Misra & Anr., (2010) 13 SCC 311, this Court held that normally a chargesheet is not quashed prior to the conclusion of the enquiry on the ground that the facts stated in the charge are erroneous for the reason that correctness or truth of the charge is the function of the disciplinary authority. (See also: Union of India & Ors., (1994) 3 SCC 357).

13. Thus, the law on the issue can be summarised to the effect that chargesheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the chargesheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings."

23. In the case of ***Union of India and another Vs. Kunisetty Satyanarayana, reported in (2006) 12 SCC 28***, Hon'ble the Supreme Court has held as under:-

"Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge sheet."

24. It was, therefore, emphasized by the Apex Court that even by way of final order the departmental enquiry or the charge-sheet could not have been quashed. The law on this point is that the Courts are, therefore, not to grant stay/quash the disciplinary proceedings nor they should go into the correctness or otherwise of the charges leveled in the charge-sheet and the departmental inquiry should be allowed to continue uninterrupted to come to its natural conclusion

25. In the case of charges framed in a disciplinary enquiry, the tribunal or Court can interfere only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. The tribunal or the Court cannot take over the functions of the disciplinary authority. The truth or otherwise of the charge is a matter for the disciplinary authority to go into. Indeed, even after the conclusion of their disciplinary proceedings, if the matter comes to court or tribunal, they have no jurisdiction to look into the truth of the charges or into the correctness of the findings recorded by the disciplinary authority or the appellate authority as the case may be.

26. From the aforesaid legal positions, it is clear that in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter.

27. In view of the aforesaid settled legal positions of the Apex Court which have been referred to above, this Court does not find any illegality or infirmity in

the impugned charge-sheet dated 22.01.2022 passed by respondent no.4 so as to warrant any interference by this Court in exercise of powers under Article 226 of the Constitution of India.

28. The present writ petition being devoid of merits and is accordingly **dismissed**.

29. However, it is provided that the departmental inquiry be initiated against the petitioners and brought to its logical end, strictly in accordance with law, keeping in view that the recommendation of Lokayukta is only to the extent of punishment to the petitioner as per law, at the earliest possible preferably within a period of three months from the date of production of a certified copy of this order before the disciplinary authority.

(2022)04ILR A753
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2021

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-A No. 18087 of 2021

Krishna Nand Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sandeep Kumar

Counsel for the Respondents:
C.S.C., Sri Anand Kumar Pandey

A. Service Law – Appointment on the post of Assistant Teacher – Complaint claiming the appointment as illegal appointment was made – Maintainability – Preliminary objection to the locus of complainant raised – Word 'Aggrieved person' defined – Held, the expression 'Aggrieved person' denotes an elastic and to extent, an elusive concept. It cannot be confined with the bounds of a rigid exact and comprehensive definition – No legal rights of the petitioner have been denied or deprived. He has not sustained any injury to any legal protected interest by payment of salary in favour of the respondent no. 6. Therefore he is not a 'person aggrieved' and he has no locus standi to challenge the payment of salary. (Para 14 and 15)

B. Service Law – Intermediate Education Act, 1921 – District Magistrate issued direction to the educational authorities – Power of District Magistrate challenged – Principle of no interference by the foreign authority laid down – Held, the District Magistrate is a foreign authority under the Scheme of the Act – District Magistrate has no authority under the Act, 1921 or Act No. 24 of 1971 to take a decision in respect of appointment or salary of teaching or non-teaching staff – If a statute impose a duty on an authority he must exercise that power independently and personally without any supervisory control of some other authority. Even a superior authority cannot interfere in his decision which he has to take personally. (Para 24, 26 and 33)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Jasbhai Motibhai Desai Vs Rashan Kumar reported in 1976 (1) SCC 671

2. Anirudhsinhji Karansinhji Jadeja Vs St. of Guj., (1995) 5 SCC 302.

3. Tarlochan Dev Sharma Vs St. of Pun.; (2001) 6 SCC 260

4. Purtabpore Co. Ltd. Vs Cane Commissioner of Bihar, (1969) 1 SCC 308

5. Joint Action Committee of Air Line Pilots' Association of India (A.L.P.A.I.) & ors. Vs. Director General of Civil Aviation & ors., (2011) 5 SCC 43

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

1. Heard counsel for the parties.

2. The petitioner has preferred the present petition inter-alia with the following prayer:-

"i) Issue a writ or direction or pass an order in the nature of MANDAMUS commanding the respondent no. 2 and 3 to pass an appropriate order on the complaint/representation dated 07.09.2021 submitted by the petitioner and take appropriate action against the guilty and take other measures as per the law, as early as possible and within such time frame, which this Hon'ble Court may deem fit and proper in the circumstances of the case;"

3. Facts in brief as contained in the present writ petition are that institution in question namely Jangli Baba Intermediate College Gadwar District Ballia is a recognized Intermediate College, the same is on the grant in aid list by the State Government and all the teachers and employees are getting their salary from the State Exchequer as per the provisions of the U.P. High Schools And Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971.

4. Certain post of Assistant Teachers fell vacant in the Institution in the year 1998. An application was submitted by the Committee of Management before the District Inspector of Schools seeking prior permission to fill up the vacant post.

5. Vide order dated 04.02.1998, the Joint Director of Education declined to give permission to fill up the post to the Committee of Management. Aggrieved against the aforesaid order passed by the Joint Director of Education, the Committee of Management filed a Writ Petition No.23443 of 1998 (C/M Jangali Baba Intermediate College Vs. State of U.P. and others) before this Court. The aforesaid writ petition was finally disposed of with a direction to the Director of Education, U.P. Lucknow to look into the matter and pass appropriate orders after taking into consideration the grievances of the petitioner and after providing opportunity of hearing within a period of one month. Pursuant to the aforesaid order, a decision has been taken by the Director of Education on 23.07.1998. By the aforesaid order, the Director of Education (Secondary) U.P. Lucknow rejected the claim set up by the Management. Thereafter another writ petition was filed by the respondent no.6 namely Ram Ji Singh before this Court in the year 1999 in which directions were given by this Court on 22.02.1999 by which District Inspector of Schools was directed to decide the matter in accordance with law. Pursuant to the order passed by this Court dated 22.2.1999, an order was passed by the District Inspector of Schools Ballia on 27.5.2003 by which financial approval was granted by him in respect of the payment of salary to the respondent no.6. Pursuant to the aforesaid order, the respondent no.6 was paid his salary for the month of May, 2003 to August, 2003. Thereafter another order was passed by him on 25.6.2005 by which petitioner started getting his salary regularly.

6. It is argued that against the aforesaid illegal payment, certain complaints were made before the Director of Education (Secondary) by one Rajesh Kumar Singh on 12.04.2007 but till date no decision has been taken on the same. After expiry of more than 14 years, a fresh complaint has been made by the present petitioner before the Director of Education

(Secondary) U.P. Lucknow 07.09.2021. In the aforesaid complaint, it is stated that the respondent no.6 is getting his salary without any legal basis. In this view of the matter, it is argued that mandamus be issued directing the educational authorities to pass appropriate orders on the complaint/representation of the petitioner dated 07.09.2021. It is further argued that another representation was submitted by the petitioner on the same date before the District Magistrate, Ballia. On the said representation, directions were issued by the District Magistrate, Ballia to the District Inspector of Schools, Ballia to inquire the matter and do the needful.

7. A preliminary objection has been raised by Shri Anand Kumar Pandey, learned counsel appearing on behalf of respondent no.6 that present petition is not at all maintainable in view of the fact that petitioner does not fall within the definition of person aggrieved. It is further argued that the respondent No.6 is getting his salary regularly since May, 2003 pursuant to the order passed by the District Inspector of Schools, Ballia and he is going to retire very soon. It is further argued that the order passed by the District Inspector of Schools, Ballia was never challenged by any person till date.

8. In response to the same it is argued by the counsel for the petitioner that present petition is fully maintainable under Article 226 of the Constitution of India due to the fact that:-

1. petitioner is a Citizen of India
2. Petitioner is a social worker and
3. Petitioner is tax payer.

9. When query was made by the Court that enquiring about the nature of social work which is undertaken by the petitioner, no suitable reply was provided. Apart from the same nothing has been stated in the writ petition that regarding the nature and extent of social work undertaken by the petitioner.

10. From perusal of the record, it is clear that financial approval was granted by the District Inspector of Schools, Ballia in favour of the respondent no. 6 initially on 27.05.2003 and thereafter on 25.06.2005 and since then the respondent No.6 is getting his salary from the State Exchequer.

11. It is further argued by the counsel for the respondent no. 6 that the age of respondent no.6 is about 62 years and he is going to be superannuated from school. It is further argued that no illegality or irregularity what so ever has been committed by the appointing authorities in respect of appointment of the respondent no.6. It is further argued that District Magistrate has absolutely no role what so ever to make any kind of inquiry in respect of appointment of teachers and employees in the educational institutions.

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

13. Insofar as the preliminary objection raised by the counsel for the respondent no.1 is concerned, the law has already been laid down by the Hon'ble Supreme Court in the case of ***Jasbhai Motibhai Desai Vs. Rashan Kumar*** reported in ***1976 (1) SCC 671.*** Insofar as the present petitioner is concerned, he is only a complainant and the complaint was first time filed by him in the year 2021 regarding payment of salary in favour of respondent No.6 since 2003. Nothing has been stated in the writ petition or the entire representation regarding delay in filing the

complaint by the petitioner against respondent No.6.

14. In paragraph 13 of the aforesaid judgement, the word "Aggrieved person" has been dealt with. It is stated that the expression "Aggrieved person" denotes an elastic and to extent, an elusive concept. It cannot be confined with the bounds of a rigid exact and comprehensive definition. Paragraph Nos.13 and 48 of the ***Jasbhai Motibhai Desai (supra)*** are reproduced below:-

"13. This takes us to the further question: Who is an "aggrieved person" and what are the qualifications requisite for such a status? The expression "aggrieved person" denotes an elastic, and, to an extent, an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. At best, its feature can be described a broad tentative manner. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest and the nature and extent of the prejudice or injury suffered by him. English Courts have sometimes put a restricted and sometimes a wide construction on the expression "aggrieved person". However, some general tests have been devised to ascertain whether an applicant is eligible for this category so as to have the necessary locus standi or 'standing' to invoke certiorari jurisdiction.

48. In the light of the above discussion, it is demonstrably clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully affect his title to something. He has not been subjected to a legal wrong. He has suffered no legal grievance. He has no legal peg for a justiciable claim to hang on. Therefore he is not a 'person aggrieved' and has no locus standi to challenge the grant of the No Objection Certificate."

15. It reveals from perusal of the record that no legal rights of the petitioner have been denied or deprived. He has not sustained any injury to any legal protected interest by payment of salary in favour of the respondent no.6. Therefore he is not a "person aggrieved" and he has no locus standi to challenge the payment of salary.

16. Apart from the same, it is clear from the record that no action has been taken by the petitioner from the year 2003 till 2021. When the respondent No.6 is going to retire after about 18 years, a compliant has been made and no explanation was given either in the writ petition or in the representation regarding delay in filing the complaint by the petitioner against respondent No.6.

17. Insofar as the complaint made by the petitioner before the District Magistrate is concerned, the instructions issued on the same day by him, i.e., on 07.09.2021.

18. The question, that calls for determination is as to whether the District Magistrate has any power to issue directions to Educational Authorities under Statutes, which are self-contained Act.

19. The issue in question has enormous practical implication. The institution is govern by the provisions of Intermediate Education Act, 1921 (hereinafter referred to as the Act), the

regulations framed thereunder and the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971.

20. I find it helpful to have a bird eye view of both the Acts to find out the true intention of the Legislature.

21. In the U.P. Intermediate Education Act,1921, various sections defines the authorities under the Act. Under section 2 (aaa) "Director" means the Director of Education, Uttar Pradesh and it includes an Additional Director of Education; 2 (dd) defines "Regional Deputy Director of Education" means the Deputy Director of Education in charge of a region and includes an officer authorized by the State Government to perform all or any of the duties of a Regional Deputy Director. The Superintendent and Invigilator are defined under section 2. Section 3 of the Act deals with the constitution of the Board. The Board comprises several officers such as Director , State Council of Educational Research and Training , Uttar Pradesh, Lucknow, Additional Director of Education, the Director, Bureau of Psychology, Allahabad one Professor of a Degree College, one Professor of a Engineering College, one Professor of Agricultural University,one Professor of Medical College (all nominated by the State Government), Head of Institution, Teachers, Principal etc. It is aforesaid persons who constitute the Board, the District Magistrate is not even an ex officio member.

22. Section 7 of the Act enumerates various powers of the Board. Section 9 (4) of the Act enjoins that the State Government shall have power to issue directions in case where in its opinion immediate action is required. Section 16- D envisages that the Director has the authority to make inspection of any recognised institution and if he finds certain defects mentioned under the section, he may point out the same to the committee of management to remove such defects, failing which a penal action of appointment of a authorised controller can be taken by the State Government, (ii) of subsection 3 of 16-D provides that if a non-teaching staff is appointed in contravention of the provisions of this Act or the regulations it may be one of the ground for appointment of the Authorized Controller.

23. From the detail procedure provided under 16 -D of the Act it emerges that the Director can only send report to the State Government, whereupon the State Government after affording opportunity to the concerned institution passes the order of appointment of the authorised controller or if it is satisfied that the cause shown by the institution is sufficient it may drop the proceedings.

24. A close look at the gamut of the Scheme of the Act instantly brings out that the District Magistrate is a foreign authority under the Scheme. There is no reference of the District Magistrate in the entire Scheme of the Act.

25. In case the institution receives aid out of the State Fund the provisions of the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1971 (hereinafter referred to Act No. 24 of 1971), a close look at the Scheme of the said Act No. 24 of 1971 also establishes that like U.P. Intermediate Education Act, 1921 under this Act also the District Magistrate has not been assigned any role.

The Regional Deputy Director of Education and the District Inspector of Schools are authorities to pass orders/directions against the erring managements. The order passed by those authorities are appealable; under section 7 and under section 8 revision lies to the State Government. Again in this Act also there is no reference of the District Magistrate under any provisions of the Act.

26. Keeping the above Statutory provisions in the mind I am driven to the conclusion that the District Magistrate has no authority under the Act,1921 or Act No.24 of 1971 to take a decision in respect of appointment or salary of teaching or non-teaching staff.

27. ***Professor De Smith, in his Principles of Judicial Review 1999 Edition, page 240*** has aptly said :-

"an authority entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person. In at least two Commonwealth cases, licensing bodies were found to have taken decision on the instructions of the heads of government who were prompted by extraneous motives. But, as less colourful cases illustrate, it is enough to show that a decision which ought to have been based on the exercise of independent judgment was dictated by those not entrusted with the power to decide, although it remains a question of fact whether the repository of discretion abdicated it in the face of external pressure."

28. ***Professor Wade in his Administrative Law***, 7th Edition has dealt with "***Surrender, Abdication, Dictation" and "Power in the wrong hands***" in the following words :-

"*Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them....*

Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise...."

29. This paragraph of Professor Wade has been applied by the Supreme Court in the case of ***Anirudhsinhji Karansinhji Jadeja v. State of Gujarat, (1995) 5 SCC 302***.

30. The said judgment has been followed by the Supreme Court in the case of ***Tarlochan Dev Sharma v. State of Punjab, (2001) 6 SCC 260*** in following terms:-

"16.....No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In Anirudhsinhji Jadeja this Court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion; discretion exercised

under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this Court in Purtabpore Co. Ltd are instructive and apposite. Executive Officers may in exercise of their statutory discretion take into account considerations of public policy and in some context, policy of a Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for instructions by a superior to bind them. As already stated, we are not recording, for want of adequate material, any positive finding that the impugned order was passed at the behest of or dictated by someone else than its author. Yet we have no hesitation in holding that the impugned order betrays utter non-application of mind to the facts of the case and the relevant law. The manner in which the power under Section 22 has been exercised by the competent authority is suggestive of betrayal of the confidence which the State Government reposed in the Principal Secretary in conferring upon him the exercise of drastic power like removal of President of a Municipality under Section 22 of the Act. To say the least, what has been done is not what is expected to be done by a senior official like the Principal Secretary of a wing of the State Government. We leave it at that and say no more on this issue."

31. In the case of ***Purtabpore Co. Ltd. v. Cane Commissioner of Bihar, (1969) 1 SCC 308*** the matter was in respect of exercise of power by the Cane Commissioner under the provisions of Sugar Cane (Control) Order,1966. Clause 6 of the order enjoins the Cane Commissioner to reserve the area in favour of the sugar mill subject to fulfillment of the certain conditions made under the statutory provisions. The Chief Minister of the State issued direction to the Cane Commissioner to divide the reserved area into two portions and allot one portion to the Sugar Mill/respondent no.5 therein. The Cane Commissioner in compliance of the direction of the Chief Minister divided the reserved area into two portion. The order of the Cane Commissioner was challenged on the ground that the Cane Commissioner without application of mind had carried out the directions of the Chief Minister, thus he had abdicated his authority under the Act. The Supreme Court set aside the order of the Cane Commissioner on the ground that Clause 6 (1) is a statutory power and the said Clause empowers the Commissioner alone to take the decision in the light of the Scheme of the Statutory provisions. The Supreme Court held that Clause 6 (1) is a Statutory power and he alone could have exercised that power. The Supreme Court further observed while exercising that power the Commissioner cannot abdicate his responsibility in favour of the State Government or the Chief Minister. The Court expressed its displeasure and observed that it was not proper for the Chief Minister to have interfere with the functions of the Cane Commissioner.

32. The Hon'ble Apex Court in ***re: Joint Action Committee of Air Line Pilots' Association of India (A.L.P.A.I.) and others v. Director General of Civil Aviation and others, (2011) 5 SCC 435*** vide paras 26 and 27 has considered the controversy relating to competence of passing any order and held that only the competent authority can pass such orders.

8. The paras 26 and 27 are reproduced herein under:

"26. The contention was raised before the High Court that the Circular dated 29.5.2008 has been issued by the authority having no competence, thus cannot be enforced. It is a settled legal proposition that the authority which has been conferred with the competence under the statute alone can pass the order. No other person, even a superior authority, can interfere, with the functioning of the Statutory Authority. In a democratic set up like ours, persons occupying key positions are not supposed to mortgage their discretion, volition and decision making authority and be prepared to give way to carry out commands having no sanctity in law. Thus, if any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal. (Vide: Purtabpur Co. Ltd. v. Cane Commissioner of Bihar, Chandrika Jha v. State of Bihar, Tarlochan Dev. Sharma v. State of Punjab and Manohar Lal v. Ugrasen).

27. Similar view has been reiterated by this Court in Commissioner of Police, Bombay v. Gordhandas Bhanji, Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Pradesh Kamalia and Pancham Chand and others v. State of Himachal observing. that an authority vested with the power to act under the statute alone should exercise its discretion following the procedure prescribed therein and interference on the part of any authority upon whom the statute does not confer any jurisdiction, is wholly unwarranted in law. It violates the constitutional scheme."

(Emphasis supplied)

33. The principle which can be discerned from the above mentioned judgments of the Supreme Court is that if a statute impose a duty on an authority he must exercise that power independently and personally without any supervisory control of some other authority. Even a superior authority cannot interfere in his decision which he has to take personally. And he should not be guided by any other person/authority.

34. In the above facts and circumstances, the District Magistrate has no absolutely power to interfere in the matter in any way and he is restrained to do anything further in the matter.

35. In view of the above discussion, this Court is of the opinion that the present petition lacks merits and same is liable to be dismissed with costs.

36. Accordingly, the present writ petition is dismissed with costs.

(2022)04ILR A760
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.04.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Writ-A No. 21121 of 2020

Murad Ahsan ...Petitioner

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
Shireesh Kumar

Counsel for the Respondent:
C.S.C.

A. Service Law – UP Public Service (Tribunal) Act, 1976 – Section 4 – UP Government Servant (Discipline and Appeal) Rules, 1999 – Rule 14 –Reference petition against award of punishment of

censure entry before the Tribunal – Filed beyond limitation of one year – Maintainability challenged – Computation of limitation – Memorial before the Governor was filed – Claim to treat such memorial as an alternative remedy for computation of limitation was made – Held, memorial before his Excellency the Governor, is no remedy available to the petitioner under the Rules, 1999, as remedy for his grievance – Reference application was barred by limitation, therefore, it was not maintainable – High Court upheld the Tribunal's order. (Para 11 and 17)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. W.P. No. 444 (SB) of 2015; Vivekanand Singh & anr. Vs St. of U.P. & anr. decided on 29.05.2015

2. Karnataka Power Corp. Ltd. Vs K. Thangappan; (2006) 4 SCC 322

3. Director General of Police, Central Reserve Police Force, New Delhi & ors. Vs P.M. Ramalingam; (2009) 1 SCC 193

(Delivered by Hon'ble Brij Raj Singh, J.)

1. The petitioner has challenged the judgment and order dated 13.10.2020 passed by the Uttar Pradesh State Public Services Tribunal, Lucknow and further prayer is made to quash the order dated 03.04.2018, which is the punishment order of censure entry.

2. It is also mentioned that this punishment order was challenged before the U.P. State Public Services Tribunal, Lucknow (hereinafter referred to as "the Tribunal") and the Tribunal has dismissed the reference on the ground of limitation.

3. Brief facts of the case are that the petitioner was initially appointed on the post of Assistant Engineer after qualifying the regular selection procedure for appointment and joined his services on 27.08.1997. The disciplinary enquiry was instituted against the petitioner vide order dated 24.07.2017 and a charge sheet was issued. The petitioner submitted reply of the said charge sheet dated 16.08.2017 by denying all the charges. After conducting the enquiry by the Enquiry Officer, the order of punishment of censure entry was passed on 03.04.2018.

4. Aggrieved with punishment order dated 03.04.2018, the petitioner submitted a memorial before his Excellency, the Governor on 04.07.2018 and thereafter he sent reminder on 28.01.2020. The petitioner being aggrieved with the punishment order dated 03.04.2018 instituted a Reference Application No.331 of 2020 before the Tribunal. The reference was admitted on 04.03.2020, however, no detailed order was passed regarding the admission simply notices were issued to the opposite parties and reference was admitted. The application for interim relief was heard by the Tribunal on 25.08.2020 and thereafter the application for interim relief was objected by the State and objection was filed on 18.09.2020 on the question of maintainability of the reference application. The State had taken objection against the application for condonation of delay and it was pleaded on behalf of the State that petition was not maintainable as reference was time barred. The Tribunal initially heard the matter on 18.09.2020 on the point of maintainability and the reference was dismissed as not maintainable by the impugned judgment dated 13.10.2020 and observation was made that reference was time barred. Being aggrieved against the order dated 13.10.2020 the writ petition has preferred.

5. Sri Shireesh Kumar, learned counsel for the petitioner has made submission that the arguments were heard on the application for interim relief and not on the point of maintainability of the reference application. He has further submitted that the reference petition was already admitted by the order dated 04.03.2020 and the objection against the interim relief submitted by the opposite party could not have been considered for deciding the reference application on the ground of maintainability.

6. Learned counsel for the petitioner has further submitted that Section 5 (1) (b) (ii) provides for computing the period of limitation and according to this, in computing the period of limitation the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with rules or orders regulating his conditions of service and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded.

7. Learned counsel for the petitioner has further submitted that Section 4 (7) introduced vide U.P. Act No.5 of 2000 provides that for the purposes of sub-sections (5) and (6) any remedy available to the public servant by way of submission of a memorial to the Governor or to any other functionary shall not be deemed to be one of the remedies, which are available unless the public servant had elected to submit such memorial. The petitioner has submitted that undisputedly he has availed the remedy of memorial before his Excellency the Governor and no decision on it has been communicated to him till date.

8. Heard Sri Shireesh Kumar, learned counsel for the petitioner, learned Standing Counsel for the State-respondent and perused the judgment of the U.P. State Public Services Tribunal, Lucknow.

9. After looking into the record, it is found that the punishment order of censure entry was awarded on 03.04.2018. The petitioner filed memorial before his Excellency the Governor on 04.07.2018 and thereafter, he sent reminder on 28.01.2020. Sub-section (5), (6) and (7) of Section 4 of the U.P. Public Service (Tribunal) Act, 1976 (hereinafter referred to as the "Act, 1976") is quoted below:-

"(5) The Tribunal shall not ordinarily admit a reference unless it is satisfied that the public servant has availed of all the remedies available to him under the relevant service rules, regulations or contract as to redressal of grievances.

(6) For the purpose of Sub-Section (5) a public servant shall be deemed to have availed of all the remedies available to him if a final order has been made by the State Government, an authority or officer thereof or other person competent to pass such order under such rules or regulations or contract rejecting any appeal preferred or representation made by such public servant in connection with the grievance:

Provided that where no final order is made by the State Government, authority officer or other person competent to pass such order with regard to the appeal preferred or representation made by such public servant within six months from the date on which such appeal was preferred or representation was made, the public servant may, by a written notice by

registered post require such competent authority to pass the order and if the order is not passed within one month of the service of such notice, the public servant shall be deemed to have availed of all the remedies available to him

(7) For the purpose of sub-section (5) and (6) any remedy available to the public servant by way of submission of a memorial to the Governor or to any other functionary shall not be deemed to be one of the remedies, which are available unless the public servant had elected to submit such memorial."

10. Sub Section 6 clearly indicates that for the purpose of sub-section (5) a public servant shall be deemed to have availed of all the remedies available to him if a final order has been made by the State Government, an authority or Officer thereof or other person competent to pass such order under such rules or regulations or contract rejecting any appeal preferred or representation made by such public servant in connection with the grievance. In case of the petitioner, against the punishment order dated 03.04.2018 no remedy was available to the petitioner except review as provided in Rule 14 of U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "the Rules, 1999") .

11. There is no provision of memorial before his Excellency the Governor, which was availed by the petitioner. As per his case, the proviso of sub-section (7) of Section 4 is also relevant wherein it is provided that for the purpose of sub-sections (5) and (6) any remedy available to the public servant by way of submission of a memorial to the Governor or to any other functionary shall not be deemed to be one of the remedies. It is thus clear that memorial before his Excellency the Governor, is no remedy available to the petitioner under the Rules, 1999, as remedy for his grievance.

12. Section 5 (1) (b) (i) and (ii) of the Act, 1976, are also relevant and the same are quoted below:-

"[(b) The provisions of the Limitation Act, 1963 (Act 36 of 1963) shall mutatis mutandis apply to reference under Section 4 as if a reference were a suit filed in civil court so, however, that-

(i) Notwithstanding the period of limitation prescribed in the Schedule to the said Act, the period of limitation for such reference shall be one year;

(ii)-- in computing the period of limitation the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded:

Provided that any reference for which the period of limitation prescribed by the Limitation Act, 1963 is more than one year, a reference under Section 4 may be made within the period prescribed by the Act, or within one year next after the commencement of the Uttar Pradesh Public Services (Tribunals) (Amendment) act, 1985 whichever period expires earlier:

Provided further that nothing in this clause as substituted by the Uttar Pradesh Public Services (Tribunal) (Amendment) Act, 1985, shall affect any references made

before and pending at the commencement of the said Act."

13. The period of limitation for reference is one year prescribed in the Schedule of the Act. Section 5 (ii) clearly putting bar for the remedy of memorial to the Governor wherein it is provided that in computing the period of limitation the period beginning with date on which the public servant makes a representation or prefers an appeal, revision, or any other petition after not being a memorial to the Governor was in accordance with law or orders regulating his condition of service and nothing with the date on which such public servant has knowledge of final orders passed on such representation, appeal, revision or petition as the case may be shall be excluded.

14. In the case of ***Vivekanand Singh and another Vs. State of U.P. and another in W.P. No.444 (SB) of 2015*** decided on 29.05.2015, provisions of Section 5 (1) (b) (i) of the Tribunal Act, 1976, has been considered. Learned Tribunal has recorded finding relying upon exposition of law, in para 6 of the judgment by observing that the petitioner should have filed claim petition on the expiry of six months from the date of filing of appeal on 09.09.2008. The limitation period for filing claim petition, after lapse of six months, has expired on 08.03.2009. The petitioner filed the claim petition on 20.12.2010, which was highly time barred. The present case is also highly time barred as the impugned punishment order was passed on 03.04.2018 and claim petition was filed on 04.03.2020.

15. On the point of limitation, Hon'ble Apex Court in the case of ***Karnataka Power Corpn. Ltd. v. K. Thangappan,*** reported in ***(2006) 4 SCC 322***, has held in para 6, 7 and 10 as under:-

*"**6**. Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out inDurga Prashad v. Chief Controller of Imports and Exports [(1969) 1 SCC 185 : AIR 1970 SC 769] . Of course, the discretion has to be exercised judicially and reasonably.*

***7**. What was stated in this regard by Sir Barnes Peacock in Lindsay Petroleum Co.v. Prosper Armstrong Hurd [(1874) 5 PC 221 : 22 WR 492] (PC at p. 239) was approved by this Court in Moon Mills Ltd. v. M.R. Meher [AIR 1967 SC 1450] and Maharashtra SRTC v. Shri Balwant Regular Motor Service [(1969) 1 SCR 808 : AIR 1969 SC 329] . Sir Barnes had stated:*

"Now, the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument

against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy."

***10**. It has been pointed out by this Court in a number of cases that representations would not be adequate explanation to take care of delay. This was first stated in K.V. Rajalakshmiah Setty v. State of Mysore [(1967) 2 SCR 70 : AIR 1967 SC 993] . This was reiterated in Rabindranath Bose case [(1970) 1 SCC 84 : AIR 1970 SC 470] by stating that there is a limit to the time which can be considered reasonable for making representations and if the Government had turned down one representation the making of another representation on similar lines will not explain the delay. In State of Orissa v. Pyarimohan Samantaray [(1977) 3 SCC 396 : 1977 SCC (L&S) 424 : AIR 1976 SC 2617] making of repeated representations was not regarded as satisfactory explanation of the delay. In that case the petition had been dismissed for delay alone. (See State of Orissa v. Arun Kumar Patnaik [(1976) 3 SCC 579 : 1976 SCC (L&S) 468 : AIR 1976 SC 1639] also.)"*

16. We are of the view that the cause of action shall be taken to arise not from the date of the original adverse order but on the date when the order of the higher authority where a statutory remedy is provided entertaining the appeal or representation is made and where no such order is made, though the remedy has been availed of, a six months' period from the date of preferring of the appeal or making of the representation shall be taken to be the date when cause of action shall be taken to have first arisen. We, however, make it clear that this principle may not be applicable when the remedy availed of has not been provided by law. Repeated unsuccessful representations not provided by law are not governed by this principle.

17. In the present case, it is found that the petitioner had no statutory remedy rather he preferred memorial to his Excellency the Governor. We, therefore, uphold the order of the Tribunal and the reference application was barred by limitation, therefore, it was not maintainable. The petitioner has submitted that the reference was admitted on 04.03.2020, therefore, the question of maintainability was not open. We are unable to persuade ourselves with the said argument because the point of maintainability has to be decided by reasoned and speaking order which has been done by the Tribunal. The order of admission dated 04.03.2020 was simplicitor order but the point in issue was not decided by reasoned and speaking order. Hon'ble the Supreme Court in the case of ***Director General of Police, Central Reserve Police Force, New Delhi and others Vs. P.M. Ramalingam, (2009) 1 SCC 193*** has observed in para 9 that without deciding the question of maintainability of review petition, the interim order could not have been passed. Para 9 of the said judgment is quoted below:-

*"**9**. As rightly submitted by learned counsel for the appellants, the High Court could not have passed the interim order*

which virtually means allowing the review petition, without deciding the question of maintainability of the review petition. Such a course is not permissible in law."

18. In the present case, it is pointed out here that the petitioner was present during hearing of the application for interim relief that is why the State has taken objection regarding maintainability of the reference application we hold that reference petition was not maintainable as on the ground of limitation, therefore, on the application for interim relief question of maintainability was rightly considered by the Tribunal.

19. In view of the aforesaid legal discussion, we are unable to persuade ourselves to the arguments advanced by learned counsel for the petitioner. The writ petition is dismissed accordingly.

20. No order as to costs.

(2022)04ILR A766
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ-C No. 1214 of 2022

I.I.T. Kanpur ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rohan Gupta

Counsel for the Respondents:
A.S.G.I., Sri Brijesh Kumar, Sri Vivek Kumar Singh, Sri P.H. Vashishth, Sri B.P. Singh (Senior Adv.)

A. Civil Law - Labor Law - Industrial Disputes Act, 1947 - Section 10 (1) - Reference of disputes to Tribunals - question of making or refusing to make a reference for adjudication is the discretion of the Government - power to make a reference is an administrative power - when the Government decides to make Reference, an industrial dispute between the employer and his employees, must either exists or is apprehended - Government has to keep in mind as to whether the industrial dispute is still existing or live dispute and has not become a stale claim - No reference is contemplated when the dispute is not an industrial dispute, or industrial dispute no longer exists or is not apprehended, or where industrial dispute is already adjudicated or in respect of which there is an agreement or a settlement between the parties or where the industry in question is no longer in existence (Para 24)

B. Civil Law - Labor Law - Industrial Disputes Act, 1947 - Section 10 (1) - Reference of disputes to Tribunals - Constitution of India, Article 226 - Quashing of Reference - High Court has jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute in existence or apprehended on the date of reference for adjudication.

As a rule, writ court does not interfere with a reference order for the reason of such order being purely administrative - Such orders, only set in motion, the adjudicatory procedure by making the reference - writ Court does not readily quash such administrative orders & thereby prevent/injunct the Industrial Tribunal to enter into adjudication of the industrial dispute, at the initial stage as it does not cause any prejudice to any party - parties are at liberty to raise all defence before the Labour Court - However there is no embargo on the writ Court to quash a wholly inappropriate or undesirable or invalid reference order, in case no industrial dispute exists - it must be seen as to whether there exist an industrial dispute before the same may be referred to adjudication - High Court has

jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute in existence or apprehended on the date of reference for adjudication. (16, 17, 18, 19)

Facts - Appropriate government referred for adjudication the question as to whether termination of the services of workman is legal and justified - respondent workman had earlier filed writ petition against dispensation of his service - his writ petition was dismissed on merits - rights of the respondent workman stood adjudicated finally, upon dismissal of intra-Court appeal - Such a reference, if allowed, to exist may give rise to two eventualities - One, the Labour Court may plainly follow the earlier adjudication made by this Court. In that case, reference made would be futile - If the Labour Court chose to take a different view than recorded by the writ Court such adjudication or award would be in teeth of the adjudication of writ court - that award would be defective in jurisdiction - In fact, no industrial dispute exists, as on date (Para 35)

Allowed. (E-5)

List of Cases cited:-

1. Nedungadi Bank Ltd. Vs K.P. Madhavankutty & ors., (2000) 2 SCC 455

2. U.P. State Road Transport Corpn. Vs Babu Ram, (2006) 5 SCC 433

3. Director, Food and Supplies, Punjab & anr., (2007) 5 SCC 727

4. Shashi Prabha Vs Deputy Director of Consolidation Budaun & ors; Writ – B No. 42060 of 2015; 13.05.2020

5. M/s IRCON International Ltd. through Chairman & Managing Director Vs Bipin & ors., 2018 (157) FLR 825

6. Management of the Express Newspapers (P) Ltd., Madras Vs Workers & ors., AIR 1963 SC 569

7. Western India Match Co. Ltd. Vs Western India Match Co. Workers Union & ors., (1970) 1 SCC 225

8. National Engineering Industries Ltd. Vs St. of Raj. & ors., (2000) 1 SCC 371

9. Sapan Kumar Pandit Vs U.P. State Electricity Boad & ors., (2001) 6 SCC 222

10.Prabhakar Vs Joint Director, Sericulture Department & anr., (2015) 15 SCC 1

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Rohan Gupta, learned counsel for the petitioner; Sri B.P. Singh, learned Senior Advocate, assisted by Sri P.H. Vashishth, learned counsel appearing for respondent no.4 and; Sri Brijesh Kumar, learned counsel appearing for respondent nos. 1, 2 and 3.

2. Present writ petition has been filed against the order of the Deputy Chief Labour Commissioner (Central), Kanpur dated 26.10.2021 whereby the said authority has acted in exercise of its powers under Section 10(1)(d) of the Industrial Disputes Act, 1947 (hereinafter referred to as the 'Act') and referred the following dispute for adjudication to the Central Government Industrial Tribunal-cum-Labour Court, Kanpur.

"Whether the action of management of Indian Institute of Technology, Kanpur in terminating the services of Shri Ghanshyam Pandey S/O Late Udai Shanker Pandey, Clerk-cum-Typist w.e.f. 09.07.1989, is Legal and justified ? If not, to what relief the workman is entitled to and from which date ?"

3. Learned counsel for the petitioner would submit, the respondent workman was engaged as a temporary Lower Division Clerk at the petitioner institution on 09.01.1987 for a fixed term of one year

on fixed payment of Rs. 600/- per month. That engagement made against the specified project was later renewed against another project w.e.f. 09.01.1988 to 08.01.1989, against revised fixed payment of Rs. 650/- per month. Later, that engagement was extended and it lasted till 08.07.1989, against fixed payment of Rs. 1000/- per month. It is not in dispute that respondent no.4/workman did not work for any length of time, in any capacity since 09.07.1989. In that regard, the said respondent workman had first approached this Court in Civil Misc. Writ Petition No. 12415 of 1989 (Ghanshyam Pandey Vs. Director, Indian Institute of Technology, Kanpur & Anr.) seeking following relief:

"(i) to issue a writ, order or direction in the nature of mandamus directing the respondents not to dispense with the service of the petitioner as Lower Division Clerk and pay the regular salary of Lower Division Clerk as admissible in law."

That writ petition was filed on 04.07.1989. However, on 20.10.1989, an amendment application was filed whereby the following relief was also added by way of amendment:

"(iv) to issue a suitable writ, directions or order commanding the respondents to treat the petitioner in their employment as if he has not been kept out of employment since 08.07.1989 and also to pay him full wages from 08.07.1989 to the date of his reinstatement together with continuity of service."

4. After exchange of affidavits, the aforesaid writ petition was decided by judgement dated 05.12.1998. Therein, this Court reached the following conclusions:

(i) the appointment letter relied upon by the petitioner dated 09.01.1987 (copy Annexure CA-1 of the counter affidavit) made it clear that it was a temporary engagement against consolidated payment of Rs. 600/- per month;

(ii) the engagement could be discontinued without notice; .

(iii) the respondent workman could be transferred to any other project etc.; .

(iv) the engagement was on a temporary basis for a fixed period;

(v) the respondent workman had applied for regular appointment subsequent to his aforesaid engagement against advertisement no. 3/87 dated 06.02.1987. However, he was unsuccessful;

(vi) the claim of violation of Section 25F of the Act or 6N of the U.P. Act was unfounded. The respondent workman was found to have been engaged purely on ad hoc/temporary basis for a fixed term, for project work by the research and development department, of the petitioner institution;

(vii) upon perusal of the minutes of the selection committee (with respect to the advertisement dated 06.02.1987), referred to above, the Writ Court found, the respondent workman was not entitled to any benefit, against plea of certain other junior workman (being continued in engagement), as he had worked on temporary basis or daily-wage basis under a project for a fixed term. The distinction of status and source of salary payment of two types of employees was also considered. The writ petition was dismissed.

5. Against the above order, the respondent workman preferred intra-court appeal being Special Appeal No. 1024 of 2001, which was also dismissed by order dated 11.09.2006. A review petition was filed by the respondent workman. In that

supplementary affidavit appears to have been filed (copy Annexure RA-4 of the Rejoinder Affidavit). By means of paragraph nos. 8 and 9 of that affidavit, the respondent workman again set up a plea of having been appointed against a regular post.

6. The review petition was also rejected by order dated 11.01.2011 passed by the Division Bench of this Court. It reads as below:

"*The review application was earlier dismissed on 24.10.2009, as the Court found it infructuous in spite of recalling the same. Now, none appears on behalf of the appellant in spite of repeated calls.*

Therefore, there is no other alternative before us but to refuse to modify the order passed by the Division Bench of this Court presided by one of us (Hon'ble Amitava Lala, J.) on 11.9.2006. The order is as follows:-

"Upon hearing learned counsel appearing for the parties, we do not find any justification to keep the special appeal pending and is disposed of in view of the reasons given herein below. The dispute is mainly with regard to the fact whether the petitioner was appointed in a sanctioned post and subsequently transferred to a project or he was appointed in a project, which will be completed by the efflux of time.

Upon going through the record we find that the petitioner's/appellant's appointment was in the project. Therefore, we do not find any merit to justify to pass any favourable order in favour of the petitioner. Having so the Special Appeal stands dismissed.

However, no order is passed as to costs."

We do not find any merit in the review application.

Therefore, the review application is dismissed on merit, however, without imposing any cost."

7. The matter rested there for about nine years. Thereafter, the respondent workman moved an application seeking reference of industrial dispute. The said application is dated 25.06.2020. In that application, by means of paragraph no.3 it was stated, the petitioner had been regularly selected on the post of LDC-cum-typist on 09.01.1987. Further, on 18.07.2016, he realised, many persons who were appointed with the petitioner and some who were junior to him, had been given permanent status and would also get retiral benefit. Therefore, it was further alleged that the affidavits filed by the petitioner establishment in the earlier writ petition were false. Last, violation of Section 25F, 25G, 25H and 25T of the Act, was pleaded.

8. On its part, the petitioner establishment objected to the reference sought, relying on the earlier decision of this Court. In such circumstances, the impugned reference has arisen.

9. Learned counsel for the petitioner would submit, though the power to make a reference is an administrative power yet, there must be seen to exist an industrial dispute before the same may be referred to adjudication. In the instant case, the respondent workman had approached this Court by means of an earlier writ petition being Civil Misc. Writ Petition No. 12415 of 1989. Therein (upon amendment), he sought relief against dispensation of service and further sought, positive directions for payment of regular salary together with backwages upon reinstatement after 08.07.1989. That writ petition was

dismissed on merits and not on account of alternative remedy. The rights of the respondent workman stood determined and adjudicated finally, upon dismissal of intra-Court appeal.

10. Upon firm adjudication made by this Court, the dispute espoused by the respondent workman stood decided. In fact, upon that adjudication it had to be recognized that there did not exist/survive any industrial dispute. In this regard, reliance has been placed on a decision of three-Judge bench of the Supreme Court in **Nedungadi Bank Ltd. Vs K.P. Madhavankutty & Ors., (2000) 2 SCC 455; U.P. State Road Transport Corpn. Vs. Babu Ram, (2006) 5 SCC 433 and; Director, Food and Supplies, Punjab & Anr., (2007) 5 SCC 727.**

11. In short, it has been submitted, it is not the issue of delay in raising the dispute but non-existence thereof that warrants interference by this Court, in exercise of extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

12. The writ petition has been vehemently opposed by learned Senior Advocate appearing for the respondent. He would submit, it is wrong to say that the respondent workman was first engaged in the year 1987. Referring to the passages of the earlier decision of the learned single-Judge in Civil Misc Writ Petition No.12415 of 1989, it has been shown, the respondent workman had been engaged even prior to 1987 though not against any permanent post or regular sanctioned post. Then, much emphasis has been laid on the appointment letter dated 09.01.1987 issued to the respondent workman, to submit the said respondent workman had been engaged after following due selection process for a regular post. For ready reference, the said letter is extracted herein below :

"INDIAN INSTITUTE OF TECHNOLOGY KANPUR RESEARCH & DEVELOPMENT OFFICE

Dr R N Biswas IIT Post Office
IIT Post Office Kanpur - 208016
Dean, Research & Development
Kanpur-208016

No.RD/A-10/85-86/1535
Date : Jan.09.1987
Mr. G Pandey
C/C Mr SD Singh
Nankari
IIT, Kanpur

Dear Mr Pandey,

This has reference to your application for the post of LDC-CUM-TYPIST out of the R & D Funds.

I am glad to inform you that it has been decided to appoint you on the post of LDC-CUM-TYPIST in the Project No.DOE/EE(KRS)/86-87/55 on a consolidated salary of 600/- per month for a period of one year with effect from the date of your joining on the following terms and conditions.

The appointment is purely temporary and is subject to termination without notice. You may be transferred to any other project or deputed to any section of the Institute for assisting the work pertaining to R & D Office.

You will be entitled to Casual Leave and Annual Leave as admissible under rules.

Yours sincerely
Sd/-

B N Biswas"

13. Then, referring to the new facts brought by means of the reference application (noted above), as part of his submissions, it has been stated, the plea of violation of Sections 25F, 25G, 25H and 25T of the Act first became available to the respondent workman only in the year 2016 and not before. Till then, the respondent workman was labouring under a mistaken impression of fact due to concealment of correct facts by the petitioner institution. Therefore, adjudication is sought on such new facts with respect to rights not adjudicated in the writ petition. The reference order must survive.

14. Second, it has been stated, the conduct of the petitioner had been fraudulent in not disclosing the correct status of the respondent workman's engagement, at the relevant time. Since that status was concealed from the Court in the earlier adjudication made by it, the judgement obtained by the petitioner was based on fraud practised by it. Therefore, the same is stated to be of no legal consequence. In that, reliance has been placed on a decision of the learned Single Judge of this Court in **Writ - B No. 42060 of 2015 (Shashi Prabha Vs. Deputy Director of Consolidation Budaun & 3 Ors.), decided on 13.05.2020**.

15. Third, it has been submitted, the delay in approaching the Labour Court may never defeat the reference. In the first place, the writ Court may remain disinclined to interfere with the reference order at the initial stage as it does not cause any prejudice to any party. The petitioner would be at liberty to raise all active defence before the Labour Court including as to any prejudice caused owing to the conduct of the respondent workman. If such plea is established, the relief claimed by the respondent workman may be modified appropriately, by the Tribunal. Here, reliance has been placed on another decision of the learned single Judge in **M/s IRCON International Ltd. through Chairman & Managing Director Vs. Bipin & Ors., 2018 (157) FLR 825.**

16. Having heard learned counsel for the parties and having perused the record, in the first place, there can be no dispute to the approach to be adopted by the writ Court in such matters. As a rule, the writ court does not interfere with a reference order for the reason of such order being purely administrative. Such orders, only set in motion, the adjudicatory procedure by making the reference and thus conferring the jurisdiction on the Labour Court to deal with it. Only thereafter, the parties enter into contest by filing their respective Written Statement and Replication statement; issues are framed; evidence led; parties are heard and; award pronounced.

17. Second, again by way of general rule, the writ Court does not readily quash such administrative orders and thereby prevent/injunct the Industrial Tribunal to enter into adjudication of the industrial dispute being claimed to exist, the reference order arises belatedly i.e. after efflux of (what may prima facie appear to be), reasonable time, it is a clearly recognized principle that the Labour Court may at the time of granting relief mould the relief looking into the delay and prejudice it may have caused to the employer.

18. Third, it is also a fact that industrial law is a piece of welfare legislation - to protect the rights of the weaker of the two parties.

19. That said, there is no embargo on the writ Court to quash a wholly inappropriate or undesirable or invalid reference order, in case no industrial dispute exists. The rule referred to above is a rule of self restraint, exercised by the writ Court. It exists in the interest of justice.

20. In **Management of the Express Newspapers (P) Ltd., Madras Vs. Workers & Ors., AIR 1963 SC 569**, it was observed as below:

*"**10**. The true legal position in regard to the jurisdiction of the High Court to entertain the appellant's petition even at the initial stage of the proceedings proposed to be taken before the Industrial Tribunal, is not in dispute. If the action taken by the appellant is not a lockout but is a closure, bona fide and genuine, the dispute which the respondents may raise in respect of such a closure is not an industrial dispute at all. On the other hand, if, in fact and in substance, it is a lockout, but the said action has adopted the disguise of a closure, and a dispute is raised in respect of such an action, it would be an industrial dispute which industrial adjudication is competent to deal with. The appellant contends that what it has done is a closure and so, the dispute in respect of it cannot be validly referred for adjudication by an Industrial Tribunal. There is no doubt that in law, the appellant is entitled to move the High Court even at the initial stage and seek to satisfy it that the dispute is not an industrial dispute and so, the Industrial Tribunal has no jurisdiction to embark upon the proposed enquiry.*

11. There is also no doubt that the proceedings before the Industrial Tribunal are in the nature of quasi-judicial proceedings and in respect of them a writ of certiorari can issue in a proper case. If the Industrial Tribunal proceeds to assume jurisdiction over a non-industrial dispute, that can be successfully challenged before the High Court by a petition for an appropriate writ, and the power of the High Court to issue an appropriate writ in that behalf cannot be questioned.

15. The High Court undoubtedly has jurisdiction to ask the Industrial Tribunal to stay its hands and to embark upon the preliminary enquiry itself. The jurisdiction of the High Court to adopt this course cannot be, and is indeed not disputed. But would it be proper for the High Court to adopt such a course unless the ends of justice seem to make is necessary to do so? Normally, the questions of fact, though they may be jurisdictional facts the decision of which depends upon the appreciation of evidence, should be left to be tried by the Special Tribunals constituted for that purpose. If and after the Special Tribunals try the preliminary issue in respect of such jurisdictional facts, it would be, open to the aggrieved party to take that matter before the High Court by a writ petition and ask for an appropriate writ. Speaking generally, it would not be proper or appropriate that the initial jurisdiction of the Special Tribunal to deal with these jurisdictional facts should be circumvented and the decision of such a preliminary issue brought before a High Court in its writ jurisdiction. We wish to point out that in making these observations, we do not propose to lay down any fixed or inflexible Rule; whether or not even the preliminary facts should be tried by a High Court in a writ petition, must naturally depend upon the circumstances of each case and upon the nature of the preliminary issue raised between the parties. Having regard to the circumstances of the present dispute, we think the court of appeal was right in taking the view that the preliminary issue

should more appropriately be dealt with by the Tribunal. The Appeal court has made it clear that any party who feels aggrieved by the finding of the Tribunal on this preliminary issue may move the High Court in accordance with law. Therefore, we are not prepared to accept Mr Sastri's argument that the Appeal court was wrong in reversing the conclusion of the trial Judge insofar as the trial Judge proceeded to deal with the question as to whether the action of the appellant was a closure or a lockout."

(emphasis supplied)

21. In **Western India Match Co. Ltd. Vs. Western India Match Co. Workers Union & Ors., (1970) 1 SCC 225**, while upholding the reference made, of an industrial dispute, the Supreme Court observed has under:

"8. From the words used in Section 4(k) of the Act there can be no doubt that the legislature has left the question of making or refusing to make a reference for adjudication to the discretion of the Government. But the discretion is neither unfettered nor arbitrary for the section clearly provides that there must exist an industrial dispute as defined by the Act or such a dispute must be apprehended when the Government decides to refer it for adjudication. No reference thus can be made unless at the time when the Government decides to make it an industrial dispute between the employer and his employees either exists or is apprehended. Therefore, the expression ''at any time', though seemingly without any limits, is governed by the context in which it appears. Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through and the conciliation officer has made a failure report. But the Government need not wait until such a procedure has been completed. In an urgent case, it can "at any time' i.e. even when such proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression "at any time' thus takes in such cases as where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed. As already stated, the expression "at any time' in the context in which it is used postulates that a reference can only be made if an industrial dispute exists or is apprehended. No reference is contemplated by the section when the dispute is not an industrial dispute, or even if it is so, it no longer exists or is not apprehended, for instance, where it is already adjudicated or in respect of which there is an agreement or a settlement between the parties or where the industry in question is no longer in existence."

(emphasis supplied)

22. Then, in **Nedungadi Bank Ltd. Vs. K.P. Madhavankutty & Ors., (2000) 2 SCC 455,** the Supreme Court cautioned - the power to refer an industrial dispute should not be exercised in a mechanical manner. It may not be exercised to revive a settled matter. It was thus held:

"6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of

the order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was ex facie bad and incompetent.

7. In the present appeal it is not the case of the respondent that the disciplinary proceedings, which resulted in his dismissal, were in any way illegal or there was even any irregularity. He availed his remedy of appeal under the rules governing his conditions of service. It could not be said that in the circumstances an industrial dispute did arise or was even apprehended after a lapse of about seven years of the dismissal of the respondent. Whenever a workman raises some dispute it does not become an industrial dispute and the appropriate Government cannot in a mechanical fashion make the reference of the alleged dispute terming it as an industrial dispute. The Central Government lacked power to make reference both on the ground of delay in invoking the power under Section 10 of the Act and there being no industrial dispute existing or even apprehended. The purpose of reference is to keep industrial peace in an establishment. The present reference is destructive to the industrial peace and defeats the very object and purpose of the Act. The Bank was justified in thus moving the High Court seeking an order to quash the reference in question.

(emphasis supplied)

23. Again, in **National Engineering Industries Ltd. Vs. State of Rajasthan & Ors., (2000) 1 SCC 371**, the Supreme Court observed:

"24. It will be thus seen that the High Court has jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute and none apprehended which could be the subject-matter of reference for adjudication to the Industrial Tribunal under Section 10 of the Act. Here it is a question of jurisdiction of the Industrial Tribunal, which could be examined by the High Court in its writ jurisdiction. It is the existence of the Industrial Tribunal (sic dispute) which would clothe the appropriate Government with power to make the reference and the Industrial Tribunal to adjudicate it. If there is no industrial dispute in existence or apprehended the appropriate Government lacks power to make any reference."

(emphasis supplied)

24. Later still, in **Sapan Kumar Pandit Vs. U.P. State Electricity Boad & Ors., (2001) 6 SCC 222** the following conclusion was reached by the Supreme Court, against exercise of administrative power - to refer a non-existent industrial dispute.

"8. The above section is almost in tune with Section 10 of the Industrial Disputes

Act, 1947, and the difference between these two provisions does not relate to the points at issue in this case. Though no time-limit is fixed for making the reference for a dispute for adjudication, could any State Government revive a dispute which had submerged in stupor by long lapse of time and rekindle by making a reference of it to adjudication? The words "at any time' as used in the section are prima facie indicator to a period without boundary. But such an interpretation making the power unending would be pedantic. There is inherent evidence in this sub-section itself to indicate that the time has some circumscription. The words "where the Government is of opinion that any industrial dispute exists or is apprehended' have to be read in conjunction with the words "at any time'. They are, in a way, complementary to each other. The Government's power to refer an industrial dispute for adjudication has thus one limitation of time and that is, it can be done only so long as the dispute exists. In other words, the period envisaged by the enduring expression "at any time' terminates with the eclipse of the industrial dispute. It, therefore, means that if the dispute existed on the day when the reference was made by the Government, it is idle (sic ideal) to ascertain the number of years which elapsed since the commencement of the dispute to determine whether the delay would have extinguished the power of the Government to make the reference.

9. Hence the real test is, was the industrial dispute in existence on the date of reference for adjudication? If the answer is in the negative then the Government's power to make a reference would have extinguished. On the other hand, if the answer is in positive terms the Government could have exercised the power whatever be the range of the period which elapsed since the inception of the dispute. That apart, a decision of the Government in this regard cannot be listed (sic) on the possibility of what another party would think, whether any dispute existed or not. The section indicates that if in the opinion of the Government the dispute existed then the Government could make the reference. The only authority which can form such an opinion is the Government. If the Government decides to make the reference, there is a presumption that in the opinion of the Government, there existed such a dispute."

(emphasis supplied)

25. Most of the above decisions were then noticed in **Prabhakar Vs Joint Director, Sericulture Department & Anr., (2015) 15 SCC 1.** Thereafter, the Supreme Court concluded as below:

"28. The aforesaid case law depicts the following:

28.1. The law of limitation does not apply to the proceedings under the Industrial Disputes Act, 1947.

28.2. The words "at any time" used in Section 10 would support that there is no period of limitation in making an order of reference.

28.3. At the same time, the appropriate Government has to keep in mind as to whether the dispute is still existing or live dispute and has not become a stale claim and if that is so, the reference can be refused.

28.4. Whether dispute is alive or it has become stale/non-existent at the time when the workman approaches the appropriate Government is an aspect which would depend upon the facts and circumstances of each case and there cannot be any hard-

and-fast rule regarding the time for making the order of reference."

(emphasis supplied)

26. Therefore, it becomes necessary to examine, if the relief sought through the impugned reference, is beyond the scope of powers of the appropriate government as may call for any interference by this Court. As discussed above, a reference may be made only where a live industrial dispute exists. If the dispute is non-existent, the appropriate government would also remain within its authority to decline such reference.

27. In the present case, what has been referred for adjudication by the appropriate government is the question of termination of service claimed by the respondent workman on the post of clerk/typist w.e.f. 09.07.1989. In itself, it does suggest - an industrial dispute exists, inasmuch as the petitioner does not dispute the fact, it had engaged the respondent workman. As to the status and the rights arising therefrom, the parties are at variance. However, the basic fact of engagement made is undisputed.

28. Yet, purely on account of the earlier decision of this Court in Civil Misc. Writ Petition No. 12415 of 1989, it is also clear that the respondent workman had not only approached this Court with respect to that dispute arising from such engagement but that he had claimed relief effectively to challenge his disengagement from 09.07.1989 onwards. He had further sought relief in the nature of reinstatement with full backwages. This much is clear from bare perusal of the prayer made in the writ petition.

29. As to the adjudication made by this Court, as noted above (in the arguments advanced by learned counsel for the petitioner), it is also clear, this Court had reached fact conclusions that the respondent-workman had been engaged on temporary/fixed term post against projects only, on fixed payment basis. The respondent workman could not establish any better rights at that stage though, he did refer to his original appointment letter (the contents of which have been extracted above). Then, the Court specifically repelled the claim made by the respondent workman of having worked for 240 days in one calendar year. It negated the claim made under Section 25F of the Act or Section 6N of the U.P. Act. As a contract employee for fixed term on fixed payment, the respondent workman was found ineligible to such a claim. Then, as to the further fact that the persons appointed alongwith and junior to the respondent workman had been continued in service and granted regularization etc., again, this Court considered that issue and decided it against the respondent workman. That conclusion had been reached on the reasoning that different employees were engaged on two different status - one by the institute i.e. main establishment drawing salary from the (budgeted) funds of the institute and, the other against research projects that derived independent funding from other sources, made available from time to time. The respondent workman having been engaged for project work only, the plea set up were negated.

30. The respondent workman was not satisfied with the decision of the learned single-Judge. He carried the matter to the division bench in an intra-court appeal. That was also dismissed. The review petition filed thereafter was also dismissed. No further challenge was raised. Nine years passed. In the application filed by the

respondent workman, seeking reference, besides the fact no other question had been raised as may be found not covered by the earlier decision of this Court, no fact pleading had arisen before the Court, as may create any doubt as to the completeness of the findings recorded by the writ Court.

31. Merely because the document in the shape of regularization of certain employees may have come to the hands of the respondent workman, it would not amount to a fresh dispute having arisen. If at all, such documents are relevant, the remedy available to the respondent workman would lie elsewhere. However, no industrial dispute survived upon the decision of the learned single-Judge as affirmed by the division bench. It attained finality.

32. The plea of fraud set up by the respondent workman does not merit acceptance. It is a plea of convenience rather than one of conviction. It has been raised to create a technical exception to the otherwise binding adjudication by this Court. Merely because fraud may be alleged, the effective adjudication made does not get annulled, therefore. It is only upon fraud being established as a fact, its effect may be examined in subsequent proceedings. At present, it cannot be said on the strength of the document procured by the respondent workman that any fraud had been committed. In view of difference in nature of engagement and status of petitioner viz-a-viz other employees of the petitioner; the plea of fraud is far fetched and unreal.

33. What was pleaded by the respondent workman (in the earlier petition) was replied to by the petitioner (in the present petition) - by means of Counter Affidavit. If the respondent workman was so aggrieved, he ought to have filed an application in those proceedings, at that stage, to compel the present petitioner to produce any particular document. That not done, sweeping adverse inference sought to be invoked by the respondent workman is not available, at this belated stage. In any case, as noted above, the information received by the respondent workman under Right to Information Act does not give rise to any new fact or plea.

34. The status of the respondent workman having been unequivocally adjudicated - as a temporary employee engaged on fixed term, against fixed payment, against a project requirement, the same does not loose its binding force because, while making the selection, the petitioner may have followed a procedure akin to that usually followed in regular selection against a sanctioned post. It is a matter of policy that any employer may follow while engaging fresh hands. Merely because an employer such as the present petitioner chose to follow the procedure similar to that followed for regular appointment against sanctioned posts, while engaging temporary hands for fixed term, no better status or rights could ever arose to the respondent workman, for that reason.

35. Therefore, there is no doubt that the adjudication made by the writ Court on the earlier occasion covered within its sweep, the entire scope of reference now sought by means of the impugned order. The reference/administrative order cannot seek to undo the judicial pronouncement made by the Court. Such a reference, if allowed, to exist may only give rise to two fact eventualities. One, the Labour Court

may plainly follow the earlier adjudication made by this Court. In that case, reference made would be futile. If the Labour Court were to chose to take a different view in face of the findings recorded by the writ Court (that have attained finality), such adjudication or award would remain in the teeth of the adjudication of this Court. Therefore, that award would remain inherently defective in jurisdiction as may never be allowed to stand upon adherence to principle of judicial discipline. In fact, no industrial dispute exists, as on date.

36. Accordingly, the present writ petition is **allowed**. The reference order is quashed. No order as to costs, as the matter pertains to a workman.

(2022)04ILR A778
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PRAKASH PADIA, J.

Writ-C No. 1279 of 2022

Pramod Kumar Gupta & Ors. ...Petitioners
Versus
N.H.A.I. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ganesh Pandey, Sri Vipin Kumar Tiwari

Counsel for the Respondents:
Sri Neeraj Dube, Sri A.K. Roy, Addl. C.S.C.

(A) Civil Law - National Highways Act, 1956 - Section 3A - notification - Power to acquire land ,etc. , Section 3D - Declaration of acquisition - whenever there is conflict between public interest and private interest, the former must prevail - Courts are not equipped to comment upon the viability and feasibility of a particular project - projects of public importance should not be halted as the same would be against the larger public interest - constitutional courts should weigh public interest vis-à-vis private interest, while exercising its discretionary powers under Article 226.(Para -6, 7,8)

Petitioners few of the land owners - land acquired for widening of road - project of National Highways not be put on hold - grievance raised only by small set of affected persons - objections filed by petitioners - against the acquisition of their land - rejected - ground raised for challenging impugned order - term 'technical' not defined in the impugned order - hence petition.(Para - 1,2,6,)

HELD:-Petitioners do not deserve any relief as widening of National Highway is a project of national importance and larger public interest. Challenge to the acquisition has been made by a small set of persons affected by acquisition. Project cannot be put on hold as any road is to be constructed as per alighment which cannot possibly be changed at one particular spot. (Para - 9)

Writ Petition dismissed. (E-7)

List of Cases cited: -

1. Ramniklal N. Bhutta & anr. Vs St. of Mah. & ors., AIR 1997 SC 1236

2. Pratibha Nema & ors. Vs St. of M.P. & ors., AIR 2003 SC 3140

3. Jaipur Metro Rail Corp. Ltd. Vs Alok Kotahwala & ors., AIR 2013 CC 754

(Delivered by Hon'ble Rajesh Bindal, C.J. & Hon'ble Prakash Padia, J.)

1. Challenge in the present writ petition is to the order dated December 6, 2021 passed by the respondent No.2 vide which the objections filed by the petitioners against the acquisition of their land were rejected. The aforesaid order was passed in view of the direction issued by this Court in

Writ-C No.23630 of 2020, titled as Pramod Kumar Gupta and others v. Union of India and others, decided on January 20, 2021.

2. The ground raised for challenging the aforesaid order is that the term 'technical' was not defined in the impugned order. Further, the acquisition of the land for widening of the portion of the National Highway No.24 (Hapur-Moradabad Section), has been made one side of the road only whereas it should have been made both sides equally. In case, such process is followed, the petitioners will save part of their land from acquisition and will be able to earn their livelihood therefrom. It was further submitted that instead of widening of road, construction of elevated road on the spot may be more economical. Hence, the respondents should have explored that option as well.

3. On the other hand, learned counsel for the respondents submitted that in view of the direction issued by this Court, the objections filed by the petitioners were considered. As alignment of road, construction and widening thereof are highly technical, especially with reference to National Highways, number of aspects are to be taken care of. The process of acquisition of the land is started only after examining all the aspects in detail. In the case in hand, all aspects were examined and the acquisition of the land was finalised. The idea being floated by the petitioners that acquisition of the land should be made on both sides of the road equally, is totally misconceived for the reason that in that situation much more persons than the present petitioners will be affected. It is not for the petitioners to decide whether existing road is to be widened or the elevated road is to be constructed. In any case, construction of elevated road is not as cheaper as is sought to be suggested by the petitioners. The widening of portion of National Highway No.24 is being made to take care of the increase in traffic on road and creation of infrastructure. Though land of several persons has been acquired in the process of widening of road, however, it is only few persons, who are making objections, otherwise majority of them have no objection.

4. After hearing the learned counsel for the parties, we do not find any reason to interfere in the present writ petition. As is apparent from the record, the notification under Section 3A of the National Highways Act, 1956 (hereinafter referred to as "the Act") was issued on October 12, 2020. As informed by the learned counsel for the respondents, the notification under Section 3D of the Act was also issued on March 12, 2021. The petitioners had earlier filed Writ-C No.23630 of 2020. The same was disposed of on January 20, 2021. A perusal of the order dated January 20, 2021 passed by this Court shows that prayer made was for quashing of the notification under Section 3A of the Act. The only grievance raised therein was that the objections of the petitioners to the acquisition had not been considered. The aforesaid writ petition was disposed of, directing the Authority concerned to consider the objections filed by the petitioners. However, the Special Land Acquisition Officer, instead of considering the objections himself, had referred the matter to the Project Director, National Highways Authority, Moradabad vide order dated February 12, 2021. Aggrieved against that order, the petitioners again filed Writ-C No.14166 of 2021, titled as Pramod Kumar Gupta and others v. National Highways Authority of India and others. The same was allowed on

July 1, 2021 by setting aside the order passed by the Special Land Acquisition Officer dated February 12, 2021, with direction to decide the objections afresh. It is in pursuance thereof that the impugned order has been passed by the Special Land Acquisition Officer.

5. The acquisition in hand is for the purpose of widening of the portion of National Highway No.24 (Hapur-Moradabad Section). A perusal of the impugned order shows that in terms of the direction issued by this Court, opinion of the expert was taken and it was found that the acquisition of land for widening of portion of National Highway No.24 is perfect when considered on its technical aspects. The argument raised by the petitioners that instead of widening of existing road, elevated road may be constructed, was also considered and rejected for the reason that the same will involve huge expenditure.

6. The direction issued by this Court in Writ-C No.14166 of 2021 filed by the petitioners was for consideration of their objections against the acquisition of their land. However, the Competent Authority found that before acquisition of the land for widening of the portion of National Highway No.24, all technical aspects were considered and it was found to be more feasible to acquire the land on one side of the road only. Even otherwise, acquisition of land for widening of an existing road on both sides of the road would disturb large number of persons as compared to one side. In any case, widening of road in the present case is to cater to the ever growing need of traffic on the road, to create infrastructure and check accidents. The petitioners are few of the land owners whose land has been acquired for widening of road. The project of the National Highways should not be put on hold on account of the grievance sought to be raised only by small set of affected persons. Through the action of the respondents for widening of National Highway No.24, the larger public interest will be served and the same will override the personal interest of the petitioners. It is well settled that whenever there is conflict between public interest and private interest, the former must prevail. In the case in hand, larger public interest certainly weighs in favour of creation of infrastructure even if there is some technical defect, though not.

7. It will be apt to note that the National Highways Authority of India is a professionally managed statutory body at the national level having expertise in the field of development and maintenance of National Highways. Before construction of new highways or widening and developing the existing highways, detailed project reports are prepared keeping in view the relevant factors including intensity of heavy vehicular traffic and larger public interest. The Courts are not equipped to comment upon the viability and feasibility of a particular project and whether a particular alignment is good or there can be better option. In such matters, the scope of judicial review is very limited.

8. Hon'ble the Supreme Court has time and again opined that projects of public importance should not be halted as the same would be against the larger public interest and the constitutional courts should weigh public interest vis-à-vis private interest, while exercising its discretion. The view could very well be gathered from the judgments of Hon'ble the Supreme Court in **Ramniklal N. Bhutta and another Vs. State of Maharashtra and others**,

reported as AIR 1997 SC 1236, **Pratibha Nema and others Vs. State of M.P. and others**, reported as AIR 2003 SC 3140. The same view has been expressed by Rajasthan High Court in **Jaipur Metro Rail Corporation Limited Vs. Alok Kotahwala and others**, reported as AIR 2013 CC 754. Relevant extracts from the aforesaid judgments are reproduced hereunder:

i) Ramniklal N. Bhutta's case:

"10. Before parting with this case, we think it necessary to make a few observations relevant to land acquisition proceedings. Our country is now launched upon an ambitious programme of all round economic advancement to make our economy competitive in the world market. We are anxious to attract foreign direct investment to the maximum extent. We propose to compete with China economically. We wish to attain the pace of progress achieved by some of the Asian countries, referred to as "Asian tigers", e.g., South Korea, Taiwan and Singapore. It is, however, recognised on all hands that the infrastructure necessary for sustaining such a pace of progress is woefully lacking in our country. The means of transportation, power and communications are in dire need of substantial improvement, expansion and modernisation. These things very often call for acquisition of land and that too without any delay. It is, however, natural that in most of these cases, the persons affected challenge the acquisition proceedings in Courts. These challenges are generally in the shape of writ petitions filed in High Courts. Invariably, stay of acquisition is asked for and in some cases, orders by way of stay or injunction are also made. Whatever may have been the practices in the past, a time has come where the Courts should keep the larger public interest in mind while exercising their power of granting stay/injunction. The power under Article 226 is discretionary. It will be exercised only in furtherance of interests of justice and not merely on the making out of a legal point. And in the matter of land acquisition for public purposes, the interests of justice and the public interest coalesce. They are very often one and the same. Even in a Civil Suit, granting of injunction or other similar orders, more particularly of an interlocutory nature, is equally discretionary. The courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226 - indeed any of their discretionary powers. It may even be open to the High Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirement that the persons interested shall also be entitled to a particular amount of damages to be awarded as a lump sum or calculated at a certain percentage of compensation payable. There are many ways of affording appropriate relief and redressing a wrong; quashing the acquisition proceeding is not the only mode of redress. To wit, it is ultimately a matter of balancing the competing interests. Beyond this, it is neither possible nor advisable to say. We hope and trust that these considerations will be duly borne in mind by the Courts while dealing with challenges to acquisition proceedings." (sic) (emphasis supplied)

ii) Pratibha Nema's case:

"38. When no prejudice has been demonstrated nor could be reasonably inferred, it would be unjust and inappropriate to strike down the Notification under Section 4(1) on the basis

of a nebulous plea, in exercise of writ jurisdiction under Article 226. Even assuming that there is some ambiguity in particularizing the public purpose and the possibility of doubt cannot be ruled out, the constitutional Courts in exercise of jurisdiction under Article 226 or 136 should not, as a matter of course, deal a lethal blow to the entire proceedings based on the theoretical or hypothetical grievance of the petitioner. It would be sound exercise of discretion to intervene when a real and substantial grievance is made out, the non-redressal of which would cause prejudice and injustice to the aggrieved party. Vagueness of the public purpose, especially, in a matter like this where it is possible to take two views, is not something which affects the jurisdiction and it would, therefore, be proper to bear in mind the considerations of prejudice and injustice."

iii) Jaipur Metro Rail Corporation Limited's case:

"31. With respect to ecological balance, there has to be sustainable development and such projects of immense public importance cannot he halted. It is not the case that requisite permissions from the Central Government and the State Government have not been obtained, thus, objections were flimsy. In other petitions also pertaining to the same Project, this Court has held that such project of immense public importance should not be put to halt. Thus, flimsy and untenable objections were raised, which have been rightly rejected after due application of mind.

x x x x

48. On merits, we find the order of interim stay passed by the single Bench to be untenable, thus, we have no hesitation in setting aside the same. Suffice it to observe that in such cases of public importance of Metro Rail Project, there should not be any interim stay, rather an effort should be made to decide the matter finally at an early date. Staying the land acquisition proceedings is not appropriate and would be against the larger public interest involved in such projects. Thus, relying upon the decision in the case of Ramniklal N. Bhutta (supra), we hold that in the matter of immense public importance like the present one, the power to grant interim stay under Article 226 of the Constitution should not be exercised in the normal course."

9. If considered in the light of the ennunciation of law as referred to above, in our opinion, the petitioners do not deserve any relief as widening of National Highway is a project of national importance and larger public interest. The challenge to the acquisition has been made by a small set of persons affected by acquisition. The project cannot be put on hold as any road is to be constructed as per alighment which cannot possibly be changed at one particular spot.

10. For the reasons mentioned above, we do not find any merit in the present petition. The same is, accordingly, dismissed.

(2022)04ILR A782
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.04.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 1843 of 2022

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

Counsel for the Petitioner:

Girish Chandra Verma, Manvendra Singh

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India, 1950 - Article 226, 243-F, 243-K, 243-O - U.P. Panchayat Raj Act, 1947 - Sections 5A, 5A(a), 6A, 9A, 12-C, 11B, 11D, 12A & 12BB - Election of Gram Pradhan – petitioner moved Application (U/s 5A) - for disqualifying the election of respondent no. 5 being under age - once the election starts & culminated – the only remedy is available to file an election petition – hence writ petition dismissed. (Para – 30, 33, 36)

Writ Petition dismissed. (E-11)

List of Cases cited: -

1. Andhra Pradesh St. Financial Corporation Vs GAR Re-Rolling Mills & ors.(AIR 1994 SC 2151),

2. Mohd. Yunus Vs St. of UP & ors.(WP (MS) No. 14674/2021, decided on Dt. 15.07.2021),

3. Srimati Sarita Devi Vs St. of UP & ors.(CMWP No. 56318/2010 decided Dt. 28.10.2010),

4. Smt. Shyam Dulari Devi Vs St. of UP – AIR 2005 Allahabad 388)

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Shri Girish Chandra Verma, Advocate assisted by Shri Vinay Kumar Verma, learned counsel for the petitioner and Shri Devansh Bhardwaj, learned Additional Chief Standing Counsel for the State.

2. The present petition has been filed alleging that respondent no.5 has been illegally elected as Gram Pradhan. It is stated that notification for holding election of Gram Pradhans in the State of U.P. was issued by the Election Commission in the year 2021 fixing various dates for the proposed election. The election was scheduled to be held on 19.04.2021. It is stated that the petitioner as well as other contesting candidates filed their nominations for election of Gram Panchayat - Poore Dhadhu. Respondent no.5 also filed his nomination for contesting the election of Gram Panchayat on 07.04.2021. The said application was appended with an affidavit dated 06.04.2021 wherein respondent no.5 had indicated his age as 21 years, however, as per the school records, the date of birth of respondent no.5 is 14.09.2000 and thus, respondent no.5 was not aged 21 years on the date of election, however, the nomination of respondent no.5 was accepted by Assistant District Election Officer.

3. It is further on record that the petitioner and 12 other candidates contested the election and respondent no.5 was declared elected. In short, the submission is that respondent no.5 could not have participated in the election as he was under age and thus, his election was bad in law. It is argued that the acceptance of his nomination form was clearly erroneous.

4. The present petition has been filed with the following two prayers:

"i. issue a writ, order or direction in the nature of mandamus commanding the opposite parties no.2 to 4 to declare the election of the opposite party no.5 for the post of Gram Pradhan Gram Panchayat - Poore Dhadhu held on 19.04.2021 is void ab initio as the opposite party no.5 was disqualified.

ii. issue a writ, order or direction in the nature of mandamus commanding the opposite parties no.2 & 3 to refer the objection/application filed by the petitioner

U/S 5-A, 9-A, red with Article 243-F of the Constitution of India Us 6-A to the prescribed authority for disposal of the same. Further directions are to be issued to the opposite party no.4 who is the prescribed authority for taking decision expeditiously within the time fix by this Hon'ble Court."

5. At the very outset, learned counsel for the petitioner argues that he is not pressing the writ petition insofar as it relates to prayer no.1 and confines his prayer to prayer no.2 made in the writ petition.

6. Learned counsel for the petitioner argues that Article 243K of the Constitution of India provides for election of the Panchayats to be held under the superintendence, direction and control of the State Election Commission. In terms of the mandate casted by the Constitution, specific provisions have been incorporated under the U.P. Panchayat Raj Act (hereinafter referred to as 'the Act') of elections to the Panchayats as detailed in Chapter II A and III-A of the Act.

7. He places reliance on Section 5A of the said Act to impress this Court that the persons as defined under Section 5A are disqualified for being chosen as a Pradhan or a Member of the Gram Panchayat and the proviso to Section 5A(a) of the Act specifically provides that a person would be disqualified if he has not attained the age of 21 years.

8. Learned counsel for the petitioner further places reliance on Section 6A of the Act, which confers the power on the prescribed authority to decide any question, which arises out of a contention that the person has incurred disqualification to be elected as a Pradhan or a Member of the Gram Panchayat.

9. In the light of the mandate of Section 6A of the Act, it is argued that the petitioner had filed an appropriate application after the election was over and in terms of the mandate of Section 6A of the Act, the matter is to be decided by the prescribed authority, which is not being done.

10. Learned counsel for the petitioner has drawn my attention to the provisions of Section 9A of the Act, which provides for the persons who are eligible to vote and tried to impress that the person who has not completed the age of 21 years is neither eligible to vote nor can be said to be qualified to be elected as a Member of office bearer of the Gram Panchayat.

11. He has also drawn my attention to Article 243F of the Constitution of India to argue that the person who has applied for being elected as a Member of the Gram Panchayat would be disqualified if he has not attained the age of 21 years. The petitioner places reliance on Annexure - 2, the form filled by respondent no.5, to argue that respondent no.5 had deliberately not disclosed his date of birth in the said form.

12. Learned Additional Chief Standing Counsel on the other hand places reliance on Section 12C of the Act to argue that all the questions pertaining to the election can be questioned by presenting an application to the authority and challenging the election.

13. Learned Additional Chief Standing Counsel further argues that even in terms of the mandate of Article 243O, there is a specific bar to challenge any

election except by an election petition to be presented before such an authority, as may be provided for under the law. Thus, in the light of the said, he argues that the petitioner for the relief claimed is liable to be dismissed.

14. In rejoinder the learned counsel for the petitioner argues that specific mandate of the provisions of Section 5A, Section 6A and Section 9A confer a mandatory obligation upon the prescribed to decide the question pertaining to disqualification. He argues that although the remedy of challenging the application is available under Section 12C of the Act, the petitioner has two remedies and he has the right to elect one of the said remedies and the petitioner has chosen to approach the prescribed authority by filing the application, which he bound to decide in terms of the mandate of Section 6A of the Act.

15. It is argued that the petitioner has a right to elect a remedy that he chooses to, wherever two remedies are provided in any statute. In support of the said argument, he places reliance on the judgment of the Hon'ble Supreme Court in the case of ***Andhra Pradhesh State Financial Corporation v. GAR Re-Rolling Mills & Ors. - AIR 1994 SC 2151*** wherein the Hon'ble Supreme Court had considered the powers of the Financial Corporation constituted under the State Financial Corporation Act, 1951 in respect of their remedies available for recovery of the dues under Sections 29 & 31 and in view of that context, the Hon'ble Supreme Court had ordered that both the remedies were available and it was upon the Financial Corporation to have elected either of the said remedies.

16. He further places reliance on the judgment of this Court Dated 15.07.2021 rendered in ***Writ Petition No.14674 (MS) of 2021 (Mohammad Yunus v. State of U.P. & Ors.)*** wherein this Court had permitted the petitioner therein to file an appropriate application and the prescribed authority was directed to take a decision thereupon in terms of Section 6A of the Act.

17. He further places reliance on the judgment of this Court in the case of ***Srimati Sarita Devi v. State of U.P. & Ors. - Civil Misc. Writ Petition No.56318 of 2010*** decided on 28.10.2010 wherein this Court was considering the issue as to whether shiksha mitra would fall within the definition of a person holding the office of profit.

18. He lastly relies upon the judgment of this court in the case of ***Smt. Shyam Dulari Devi v. State of U.P. - AIR 2005 Allahabad 388*** wherein this Court had held that such disputes pertaining to the election can be raised only by filing an election petition under Section 12C of the Act.

19. In the light of the submissions made at the Bar, this Court is to consider whether the prayer made by the petitioner for directing the prescribed authority to decide the objections filed under Section 5A of the Act is to be granted more so in view of the fact that the elections have already come to an end.

20. The documents on record bears that the election petition has already been filed, although not by the petitioner by a third person namely Mahendra Kumar, which is pending consideration.

21. Before adverting to the disputes raised in the present petition, it is essential to see the scheme of Chapter - II A and IIIA of the Act.

22. Chapter II A of the act provides for disqualification of members of gram panchayat and electoral rolls, etc.

23. Section 5A elaborates the disqualifications elaborated for persons desirous of being chosen as pradhan or a member of gram panchayat. Section 5A(a) is quoted hereinbelow:

*"**5-A. Disqualification of membership** - A person shall be disqualified for being chosen as, and for being, the pradhan or a member of a Gram Panchayat, if he -*

(a) is so disqualified by or under any law for the time being in force for the purposes of elections to the State Legislature;

Provided that no person shall be disqualified on the ground that he is less than 25 years of age, if he has attained the age of 21 years

....."

24. Section 6A of the Act confers the powers on the prescribed authority to decide any challenge regarding disqualification incurred under Section 5A. Section 6A reads as under:

*"**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 qu3stion 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."*

25. Section 9 of the said chapter mandates for preparation of electoral roll for each territorial constituencies.

26. Chapter III A was inserted in the Act by virtue of amending Act No 9 of 1994 and provides for Pradhan and elaborates the manner of electing the Pradhan.

27. Section 11B of the Act provides for election of Pradhan. Section 11D of the Act makes certain further prohibitions in respect of the persons who are seeking election as a Pradhan. Section 12A of the Act provides for the manner of election to the office of Pradhan or a Member of Gram Panchayat and provides that they shall be elected through a secret ballot. Section 12BB confers the power of superintendence of election on the State Election Commission and Section 12C of the Act specifically provides for challenge to the person appointed as Pradhan or a Member of Gram Panchayat and specifically prohibits that the same shall not be called in question except by an application presented to such authority within such time and the manner as may be prescribed on the grounds as laid down under Section 12C of the Act.

Section 12C of the Act is quoted herein below:

*"**12-C. Application for questioning the elections** - (1) The election of a person as Pradhan or as member of a Gram Panchayat 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) 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 of any person whomsoever, with the object, directly, or indirectly of inducing -

(a) a person to stand or not to stand as, or 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 ex-communication 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 or 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 generality of the powers to be prescribed under subsection (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 re-hearing 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."

28. From the scheme of the two chapters that is Chapter II A and Chapter III A it is clear that the Chapter II A of the Act can be termed as a step prior to holding of the elections and provides for disqualification under Section 5A in respect of persons who are desirous of being chosen as Pradhan or a Member of Gram Panchayat with powers being conferred on prescribed authority for deciding any question pertaining to disqualification under Section 6 A. whereas Chapter III A provides for manner of holding elections.

29. In the light of the scheme of two chapters as elaborated above, the submission of counsel for the petitioner cannot be accepted as it would provide for incongruity in between the two remedies provided under the two chapters.

30. Scheme of Chapter II A is clear and makes provisions for decision on all the disputes, which arise prior to election being held, in terms of the mandate of Section 6A of the Act whereas in terms of Chapter III-A, once the election process starts and culminates, the challenge to the election can be done only by virtue of preferring an election petition under Section 12C of the Act, to clarify, the powers exercised by prescribed authority prior to holding of the elections pertaining to disqualifications are to be decided in terms of the mandate of Section 6A of the Act, however, once the election process starts any challenge to the election can take place only by filing an election petition under Section 12C of the Act.

31. If the submission of learned counsel for the petitioner is accepted to the effect that two remedies are available to any person to challenge the election it would result in incongruities, which on the face of the scheme of the Act does not appear to be acceptable. It is well settled that any interpretation which results in absurdities and does not lead to harmonious interpretation is to be avoided.

32. The interpretation as recorded above is also in consonance with the mandate of Article 243O of the Constitution of India. Any other interpretation especially interpretation as argued by counsel for the petitioner would be clearly in conflict with mandate of Article 243O of the Constitution of India.

33. The other submission of counsel for the petitioner that neither now he is a

stop from filing an election petition as being beyond limitation and thus the petitioner's application under Section 5A of the Act should be decided, cannot be accepted in view of the findings recorded by me hereinabove to the effect that the only recourse available after the elections are held is to file an election petition as prescribed under Section 12C of the Act.

34. The judgment in the case of *Mohammad Yunus (supra)* does not consider the scheme of the Act and intent of Section 12C of the Act and Article 243O of the Constitution of India, thus, the same cannot benefit the petitioner in any manner.

35. The judgment in the case of *Srimati Sarita Devi (supra*) also does not go into the question of available forum for challenging the election and only decides the issue of "office of profit" and thus would not have any bearing on the present case.

36. The judgment in the case of *Smt. Shyam Dulari Devi (supra*) although does not consider the issue of Chapter II-A and Chapter III-A in detail, however, notices the bar created by virtue of Article 243O of the Constitution of India and Section 12C of the Act and unequivocally holds that the remedy is preferring election petition under Section 12C of the Act when the occasion to challenge the election arises.

37. The judgment in the case of *Andhra Pradesh State Financial Corporation (supra*) will not have any bearing on the case inasmuch as the remedies available under the Act are twofold; one which arise prior to holding of the election and second which is provided for after the elections are held. Thus, the two remedies do not operate simultaneously and in the same sphere, as such, the said judgment has no applicability in the present case.

38. In view of the findings as recorded above and considering the scheme of the Act, the relief as pressed by the counsel for the petitioner cannot be granted. The petition lacks merit and is accordingly dismissed.

(2022)04ILR A789
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.04.2022

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ-C No. 2095 of 2022

Smt. Fatma Kubra ...Petitioner
Versus
Addl. Commissioner Administration Ayodhya & Ors. ...Respondents

Counsel for the Petitioner:
Amitesh Pratap Singh, Meera Jain

Counsel for the Respondents:
C.S.C., Aftab Ahmad, Mohan Singh, Yogesh Singh

A. Civil Law - U.P. Zamindari Abolition & Land Reforms Act, 1950 – Section 143 - Scope of power - in exercise of power u/s 143, the Sub-Divisional Officer can only give a declaration that the land, of which a declaration is sought, is being used for purposes other than agriculture but it do not give a right to the Sub-Divisional Officer to delete the names of the recorded tenure-holders or to change the land use in such a manner that it can be recorded as an 'abadi' land in Category 6(2) (Para 25, 35)

B. Civil Law -U.P. Zamindari Abolition & Land Reforms Act, 1950 – Section 143 -

Use of holding for industrial or residential purposes - Locus - an application seeking declaration in terms of Section 143 can only be moved by recorded tenureholder - a person who is not recorded as a tenure-holder is not entitled to move an application u/s 143 of the U.P.Z.A. & L.R. Act (Para 19)

C. Civil Law -U.P. Zamindari Abolition & L Land Reforms Act, 1950 – Section 143 - Recall - Ex-parte order - Application for recall by third party - If an order is passed behind the back of the person, who is recorded tenure-holder, such person has a right to file an application for recall to set aside such order, if injustice is caused to him - Even in the absence of any express provision having regard to the principles of natural justice, the courts will have ample jurisdiction to set aside an ex parte decree (Para 32, 33)

D. Constitution of India, 1950 - Article 226 - Writ - if by quashing of an illegal order, another illegality revives in that eventuality, the Court should not interfere with such orders under the writ jurisdiction - If justice becomes the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law (Para 27)

Dismissed. (E-5)

List of Cases cited:

1. Wasim Raza Khan. Vs Board of Revenue, 2014 (123) RD 107

2.Indrapal Singh Vs The Deputy Director of Consolidation, Kheri & Anr 2019 (37) LCD 1233

3. Ram Prakash Agarwal & anr. Vs Gopi Krishan & ors., 2013 (31) LCD 881

4. M/s. Ratna Sugar Mills Co. Ltd. Vs St. of U.P. & ors., AIR 1966 Alld 34

5. Rabindra Singh Vs Financial Commissioner, Cooperation, Punjab & ors., (2008) 7 SCC 663

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

1. Heard Shri Amitesh Pratap Singh, learned counsel for the petitioner, learned standing counsel for the State-respondents, Shri Mohan Singh, learned counsel for the respondent No.3, Shri Aftab Ahmad, learned counsel for the respondent No.11 and Shri Yogesh Singh, learned counsel for the respondent No.5.

2. Learned counsel for the petitioner has filed a supplementary affidavit after serving a copy thereof on the learned counsel for the State-respondents as well as the private-respondents, which is taken on record.

3. With the consent of the learned counsel for the parties, the matter is being disposed of at the admission stage itself.

4. Under challenge is the order dated 02.03.2022 passed by the Additional Commissioner, Administration, Ayodhya Division, Ayodhya, whereby the revision of the petitioner has been dismissed and the order dated 02.06.2010 passed by the Sub-Divisional Officer, Jalalpur, District Ambedkar Nagar has been upheld.

5. In order to appreciate the controversy involved, certain facts giving rise to the instant petition are being noticed hereinafter, first.

6. The petitioner Smt. Fatma Kubra initially moved an application before the Sub-Divisional Officer, under Section 143 of the U.P. Z.A. & L.R. Act, wherein it was stated that the petitioner has a house constructed over Gata No.1210(M) measuring 0.006 hectares, situate at Wajidpur Town, Pargana Surhurpur, Tehsil Jalalpur, District Amebedkar Nagar, apart

from the house, the petitioner also has a shop constructed over the land wherein she is residing along with her family. It was prayed that the Gata No.1210(M) has been divided amongst the family members and she has received her share and on her share, she has raised construction. Since, the land is being used for purposes other than agriculture, accordingly, the land may be declared as 'abadi'. The said application has been brought on record as Annexure No.3.

7. Initially on the application moved by the petitioner, a report was called for which was filed on 30.01.2004. Upon an inspection made by Naib Tehsildar, it was found that Plot No.1210(M) was recorded in the revenue records in the name of Mehandi Hasan, Murtaza Husain, Raza Husain and Abdul Hasan. Upon an inspection, it was found that the aforesaid Plot No.1210(M) had constructions and the tenure holders had raised residential construction, which was in the shape of 'abadi' and it was also proposed in the report that the land can be recorded under the Category 6(2) as 'abadi'.

8. Considering the aforesaid report, the Sub-Divisional Officer by means of the order dated 31.03.2006 held that Gata No.1210(M) measuring 0.003 hectares which is recorded in the name of Mehandi Hasan and others and is in the shape of an 'abadi' house, the same may be placed in Category 6(2) as 'abadi' after deleting the names of the other co-tenure holders.

9. This order dated 31.03.2006 became the subject matter of controversy inasmuch as Mohasin Raza, Kalbe Husain, Murtaza Husain, Zafar Husain and Dawar Husain filed a revision against the order dated 31.03.2006 whereas simultaneously Abdul Hasan, the respondent No.5 moved an application for recall of the order dated 31.03.2006. The memo of revision preferred by the some of the tenure holders as mentioned above has been brought on record as Annexure No.7 while the application for recall moved by the respondent No.5 has been brought on record as Annexure No.8. Thus, it would be seen against the order dated 31.03.2006 two proceedings were initiated, one for recall by the respondent No.5 and the other was a revision preferred by the other tenure holders.

10. During pendency of the revision preferred, by few of the tenure holders, the application for recall was considered and heard by the Sub-Divisional Officer concerned and the said order dated 31.03.2006 was set aside by means of the order dated 02.06.2010. While passing of the order dated 02.06.2010, the Sub-Divisional Officer passed an order that the names of the co-tenure holders be recorded and it be declared that the land in question is being used for purposes other than the agriculture. In view of the order passed on 02.06.2010, the revision which was preferred by some of the tenure-holders also came to be dismissed by means of the order dated 14.02.2022 on the ground that since the order dated 31.03.2006 already stands recalled, therefore, the revision had been rendered infructuous. The order dated 14.02.2022 dismissing the revision No.962/2008-09 preferred by some of the tenure-holders has been brought on record along with the supplementary affidavit filed by the petitioner today.

11. Being aggrieved against the order dated 02.06.2010, the petitioner preferred a revision which was dismissed by means of

the order dated 02.03.2022. thus, these two orders dated 02.06.2010 and 02.03.2022 are under challenged before this Court.

12. The submission of the learned counsel for the petitioner is that once the order dated 31.03.2006 had been passed by the Sub-Divisional Officer against which some of the tenure-holders had filed a revision bearing No.962/2008-09 and in such circumstances, the Sub-Divisional Officer concerned did not have right to recall the order and as such the order dated 02.06.2010 was without jurisdiction.

13. It is further urged that the revisional Court has also committed manifest error in failing to consider this aspect of the matter and by rejecting. Thus, the issue involved requires indulgence of this Court.

14. Learned counsel for the private-respondents Shri Aftab Ahmad and Shri Yogesh Singh have raised an issue that the instant petition is not maintainable at the behest of the petitioner. It is submitted by Shri Aftab Ahmad that the petitioner, who is not recorded tenure-holder was not entitled to move an application under Section 143 of the U.P.Z.A. & L.R. Act inasmuch as such application seeking declaration in terms of Section 143 of the U.P.Z.A. & L.R. Act can only be moved by recorded tenure-holder. It is further urged that in exercise of powers under Section 143 of the U.P.Z.A. & L.R. Act, the Sub-Divisional Officer concerned can only give a declaration after complying with the necessary formalities and compliance of Rules that the land of which a declaration is sought is being used for purposes other than agriculture. It is further urged that in terms of Section 143 of the U.P.Z.A. & L.R. Act, the consequences of an order passed under Section 143 of the U.P.Z.A. & L.R. Act has been provided but nevertheless it cannot give a right to the Sub-Divisional Officer to delete the names of the tenure-holders or to change the land use in such a manner that it can be recorded as an 'abadi' land in Category 6(2). It is thus, urged that the initiation of proceedings at the behest of the petitioner was completely without jurisdiction including the order passed by the Sub-Divisional Officer dated 31.03.2006. Moreover, the said recorded tenure-holders were not impleaded and as soon as they became aware, an application for recall came to be filed. Once set of tenure-holders preferred revision which remained pending before the revisional authority, however, during pendency of the said revision, since, the order dated 31.03.2006 was recalled, there was no requirement for any further adjudication in the revision which came to be dismissed as having become infructuous by means of the order dated 14.02.2022.

15. Learned counsel, for the other set of tenure-holders, Shri Yogesh Singh has further taken the arguments forward on behalf of the private-respondents to submit that the petitioner has also not approached the Court with clean hands inasmuch as in the application seeking declaration under Section 143 of the U.P.Z.A. & L.R. Act she has stated in Paragraph-5 that she is residing in the said house and she has received the area in terms of settlement and has raised constructions. It is urged that while filing the writ petition, the petitioner became aware of the fact that she was not entitled to move an application in the first place as she was not recorded tenure-holder. She has sought to be improved her case as in paragraph 5 of the writ petition, it has been stated that the husband of the petitioner is of unsound mind, therefore, in

the capacity of legal guardian of her husband, the petitioner had moved an application under Section 143 of the U.P.Z.A. & L.R. Act.

16. It is further urged that insofar as the family settlement/agreement is concerned, the same has also not been brought on record and it was not open for the petitioner to have instituted the petition before the Sub-Divisional Officer and now once the order dated 02.06.2010 has been passed, which has been duly implemented and actually restores the position by declaring the land of Gata No.1210(M) situate in Gram Wajidpur as being used for purposes other than agriculture including incorporating the names of the remaining tenure-holders. Thus, substantial justice has been done and even what has been sought by the petitioner seeking declaration has been allowed, consequently, the petitioner does not have a right to assail the order in the writ petition.

17. The Court has considered the rival submissions and also perused the material on record.

18. The emphasis laid by the learned counsel for the petitioner while pressing the petition is that against the order dated 31.03.2006, once a revision was pending before the revisional authority, the Sub-Divisional Officer did not have powers to recall the order dated 31.03.2006. However, the aforesaid submissions does not impress the Court for the following reason contained herein.

19. At the very outset, it will be relevant to notice that an application under Section 143 of the U.P.Z.A. & L.R. Act can only be filed by the recorded tenure-holder. For ready reference, Section 143 of the U.P.Z.A. & L.R. Act is being reproduced hereinafter:-

"143. Use of holding for industrial or residential purposes*. - [(1) Where a [bhumidhar with transferable rights] uses his holding or part thereof for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector-in-charge of the sub-division may, suo motu or on an application, after making such enquiry as may be prescribed, make a declaration to that effect.*

(1-A) Where a declaration under sub-section (1) has to be made in respect of a part of the holding the Assistant Collector-in-charge of the sub-divisions may in the manner prescribed demarcate such part for the purposes of such declaration.]

(2) Upon the grant of the declaration mentioned in sub-section (1) the provisions of this chapter (other than this section) shall cease to apply to the [bhumidhar with transferable rights] with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject.

[(3) Where a bhumidhar with transferable rights has been granted, before or after the commencement of the Uttar Pradesh Land Laws (Amendment) Act, 1978, any loan by the Uttar Pradesh Financial Corporation or by any other Corporation owned or controlled by the State Government, on the security of any land held by such bhumidhar, the provisions of this Chapter (other than this section) shall cease to apply to such bhumidhar with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject.]"

20. From the perusal of the aforesaid, it would be clear that it is only a recorded bhumidhar, who can make the said application. Moreover, from the reading of sub-section (2) of Section 143 of the U.P.Z.A. & L.R. Act it indicates the consequence of the declaration as made in sub-section (1) is that the provisions of the Chapter-VIII of the U.P.Z.A. & L.R. Act shall cease to apply to the bhumidhar with transferable rights and in respect to such land and he shall be governed in the matter of devolution of interest in the land by personal law to which he is subjected to.

21. Thus, it is clear that apparently the initiation of the provisions at the behest of the petitioner was incorrect. Moreover, she did not have a right to move an application in the first place and what is most strange that the Sub-Divisional Officer in its order dated 31.03.2006 directed that the names of the recorded tenure-holders to be deleted and the land be recorded as 'abadi' under Category 6(2). This kind of a direction in the order, in proceedings under Section 143 of the U.P.Z.A. & L.R. is not known in law. This exercise of jurisdiction by the Sub-Divisional Officer was patently erroneous and without jurisdiction.

22. It is not disputed by the learned counsel for the petitioner that while passing the order the other tenure-holders were not impleaded nor they were heard. This being the situation where the tenure-holders, who had been recorded in the revenue records suddenly find that their names have been deleted in proceedings under Section 143 of the U.P.Z.A. & L.R. definitely had a right to make an application for recall. One set of tenure-holders also filed a revision bearing No.962/2008-09. It is also not disputed by the learned counsel for the petitioner that during pendency of this revision, there was no interim order which prevented the Sub-Divisional Officer concerned to adjudicate the application for recall on merits.

23. It is only once the order dated 02.06.2010 was passed that the petitioner preferred a revision which finally came to be decided by means of the order dated 02.03.2022. In the aforesaid backdrop, it cannot be said that the order impugned dated 02.06.2010 was bad for want of jurisdiction. The revisional Court has also considered the issue appropriately and taking the overall view has maintained the order dated 02.06.2010. This exercise of jurisdiction by the revisional Court does not call for any interference.

24. Learned counsel for the petitioner could not point out the illegality in the orders especially when the order dated 02.06.2010 was in accordance with law having restored the names of the recorded tenure-holders and also directed that the land in question be recorded in appropriate column as being used for purposes other than agriculture.

25. Learned counsel for the petitioner could not give any explanation as to how in a proceeding under Section 143 of the U.P.Z.A. & L.R., could the Sub-Divisional Officer order deletion of the names of tenure-holders and direct the land in question be recorded as 'abadi'. Thus, this Court finds that the order passed by the Sub-Divisional Officer is legally unsustainable.

26. There is another aspect of this matter, which may be noticed that in case if the order dated 02.06.2010 is interfered with naturally it will have the effect of reviving the order dated 31.03.2006.

27. It is now well settled that under writ jurisdiction, the Court will not exercise its powers to interfere in an order and set it aside by an order, the ultimate effect of which would be to revive or give rise to another illegal order.

28. The Court is fortified in its view in light of the decision in the case of ***Wasim Raza Khan v. Board of Revenue, 2014 (123) RD 107***, wherein it has been held as under:-

"14. In view of the aforesaid legal position, if the order dated 15.7.2013 is interfered with and quashed, another illegal order dated 30.4.2010 would revive. It is settled that if by quashing of an illegal order, another illegality revives in that eventuality, the Court should not interfere with such orders under the writ jurisdiction.

15. The view taken by me finds support from the judgments of the Apex Court in Gadde Venkateswara Rao Vs Government of Andhra Pradesh & Ors. AIR 1966 SC 828, Champalal Binani Vs. CIT, West Bengal AIR 1970 SC 645, Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar & Ors. AIR 1999 SC 3609, Mallikarjuna Mudhagal Nagappa & Ors. Vs. State of Karnataka & Ors. AIR 2000 SC 2976, Chandra Singh Vs State of Rajasthan, AIR

7 2003 SC 2889, S.D.S. Shipping Pvt. Ltd. Vs. Jay Container Services Co. Pvt. Ltd. & Ors. 2003 (4) Supreme 44, State of Uttaranchal & Anr. Vs. Ajit Singh Bhola & Anr. (2004) 6 SCC 800 and State of Orissa & Anr. Vs Mamata Mohanty, (2011) 3 SCC 436."

29. In ***Indrapal Singh v. The Deputy Director of Consolidation, Kheri and another, 2019 (37) LCD 1233***, a Coordinate Bench of this Court held as under:-

"21. The jurisdiction vested in this Court under Articles 226 and 227 of the Constitution of India is to advance justice and not to thwart it. The purpose and object to exercise such a prerogative and discretionary jurisdiction is to ensure that no injustice is caused. Hon'ble Supreme Court in the case of Roshan Deen vs. Preeti Lal, reported in [(2002) 1 SCC 100] has categorically held that "If justice becomes the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law".

22. Para 12 of the judgment in the case of Roshan Deen (supra) is relevant to be quoted herein, which is extracted hereunder:

"We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned single Judge in a case where judicial mind would be tempted to utilize all possible legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non-suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Article 226 and 227 of the Constitution is to advance justice and not to thwart it [vide State of U.P. v. District Judge, Unnao, (AIR 1984 SC 1401)]. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on

account of any erroneous interpretation of law. If justice became the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law." (Emphasis supplied by the Court)"

30. Thus, in view of what has been discussed herein, this Court is completely satisfied that there is no error in either the order dated 02.06.2010 passed by the respondent No.2 which has been confirmed in revision vide order dated 02.03.2022 passed by the respondent No.1, which has been impugned in the instant petition. Learned counsel for the petitioner also could not satisfy as to how the initiation of the proceedings at the behest of the petitioner, who is not a recorded tenure-holder, could have been entertained and as to how and under what provisions, the Sub-Divisional Officer passed the order dated 31.03.2006.

31. Learned counsel for the petitioner has relied upon a decision of the Apex Court in ***Ram Prakash Agarwal and another v. Gopi Krishan and others, 2013 (31) LCD 881***, wherein relying upon Paragraph-16, it has been urged by the learned counsel for the petitioner that once the proceedings stood concluded by the Court of first instance an application for recall by third party was not maintainable. He has also relied upon a decision in the case of ***M/s. Ratna Sugar Mills Co. Ltd. v. State of U.P. & Ors., AIR 1966 Alld 34.***

32. Insofar as the **Ram Prakash Agarwal's case (supra)** is concerned, the same has no applicability in the present facts and circumstances of the case inasmuch as in the present case, the application under Section 143 of the U.P.Z.A. & L.R. was preferred by the petitioner on incorrect facts. Even treating the application on its face value, the same could not have been entertained by the Sub Divisional Officer concerned as the petitioner was not recorded tenure-holder and even otherwise the order which has been passed behind the back of the person, who was recorded tenure-holder, who has a right to file an application for recall to set aside the injustice which was done by the order dated 31.03.2006.

33. For the aforesaid reasons, the decision of Ram Prakash Agarwal (supra) does not come to the rescue of the petitioner.

34. Moreover, in ***Rabindra Singh v. Financial Commissioner, Cooperation, Punjab and others, (2008) 7 SCC 663***, the Apex Court held as under:-

"19. A defendant in a suit has more than one remedy as regards setting aside of an ex parte decree. He can file an application for setting aside the ex parte decree; file a suit stating that service of notice was fraudulently suppressed; prefer an appeal and file an application for review.

20. In Bhanu Kumar Jain v. Archana Kumar [(2005) 1 SCC 787] this Court held : (SCC p. 797, para 26)

"26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order

passed by the appellate court, having regard to Explanation I appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."

21. What matters for exercise of jurisdiction is the source of power and not the failure to mention the correct provisions of law. Even in the absence of any express provision having regard to the principles of natural justice in such a proceeding, the courts will have ample jurisdiction to set aside an ex parte decree, subject of course to the statutory interdict."

35. Thus, taking a holistic view, this Court finds that the Sub-Divisional Officer had erred in deleting the names of private-respondents/tenure holders and also to declare the land in question as 'abadi' vide order dated 31.03.2006. Moreover, in absence of any stay order passed in revision even if the Sub-Divisional Officer passed orders on merits on recall application, the same cannot be said to be faulty. Even otherwise by means of the order dated 02.06.2010 the declaration has been granted as sought by the petitioner and the deletion of names of other tenure-holders has also been rectified which is an outcome of sound exercise of jurisdiction by the Sub-Divisional Officer and this order dated 02.06.2010 has been affirmed in revision which requires no interfere.

36. In view of the aforesaid, the petition is completely devoid of merits and is accordingly **dismissed**. In the facts and circumstances, there shall be no order as to costs.

(2022)04ILR A797
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 14.02.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ-C No. 2528 of 2022

Sidharth Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nipun Singh

Counsel for the Respondents:
Sri A.K. Roy (Addl. C.S.C.), Sri M.J. Akhtar, Sri P.K. Shukla

Civil Law – Constitution of India, 1950 - Article 226, - Land Acquisition Act, 1894 - Being predecessor-in-interest of deceased land owner - after more than 40 to 50 years petitioner are claiming compensation - on account of possession of their land taken by the St. Govt. way back in the year 1970 – no issue raised by the then owner or petitioners at any stage – belated claim rejected – Writ Petition – relying on the judgement of Hon'ble Apex Court's in case of 'St. of Maharashtra Vs Digambar' petitioners are not entitle to any relief.(Para – 5, 7)

Writ Petition Dismissed. (E-11)

List of Cases cited: -

1. St. of Mah. Vs Digambar (AIR 1995 SC 1991)

2. Dharmbir & ors.Vs St. of Hary. & ors.(CWP No. 4790 of 2015 Decided on Dt. 03.09.2015)

(Delivered by Hon'ble Rajesh Bindal, C.J. , & Hon'ble Piyush Agrawal, J.)

1. Challenge in the present petition is to the order dated November 19, 2020 vide which the claim of the petitioners for

payment of compensation on account of alleged occupation of the land owned by the predecessors-in-interest of the petitioners, by the State was rejected.

2. It is the case of the petitioners that Late Bireshwari Prasad Narayan Singh, their predecessor-in-interest, was owner of the land. However, he had gone abroad more than 40 years back and settled there. The petitioners are living in India. They are stated to be settled in Bengaluru. They took note of the land only after the death of Late Bireshwari Prasad Narayan Singh on May 16, 2014. The claim is that the land having been taken by the State without acquisition, they are entitled to receive compensation.

3. On the other hand, the stand taken by learned counsel for respondents no. 1 to 5 is that the possession of the land was taken partially by U.P. Jal Nigam, partially by Vidyut Vitaran Khand and partially by Nagar Palika Parishad and land in question was acquired way back in 1970, and, now after more than 50 years the petitioners are not entitled for any relief. In support of his arguments, reliance has been placed on the decision of Hon'ble the Supreme Court in **State of Maharastra Vs. Digambar, AIR 1995 SC 1991**. Reliance is also placed on a Division Bench judgment of Punjab and Haryana High Court in **CWP No.4790 of 2015, Dharambir and others Versus State of Haryana and others**, decided on 3.9.2015.

4. After giving our thoughtful considerations to the submissions made by the learned counsel for the parties, we find that the writ petition is completely devoid of any merit and thus, the same deserves to be dismissed for the following reasons:

5. Issue regarding delay in filing petition for similar relief came up for consideration before Hon'ble the Supreme Court in **Digambar's case (supra)** where the allegation was that some land owned by the parties there was utilized in the year 1971-72 without acquisition, but the writ petition was filed claiming compensation in the year 1991. The same was dismissed on account of delay and laches as the land owners therein had failed to explain the delay of 20 years in filing the petition. The judgment of Bombay High Court was reversed where it had directed for grant of compensation. The relevant part thereof is extracted below:

"25. In our view, the above allegation in no way sufficient to hold that the writ petitioner (respondent here) has explained properly and satisfactorily the undue delay of 20 years which had occurred between the alleged taking of possession of his land and the date of filing of writ petition in the High court. We cannot overlook the fact that it is easy to make such kind of allegations against anybody that too against the State. When such general allegation is made against a State in relation to an event said to have occurred 20 years earlier, and the State's non-compliance with petitioners demands, State may not at all be in a position to dispute such allegation, having regard to the manner in which it is required to carry on its governmental functions. Undue delay of 20 years on the part of the writ petitioner, in invoking the High Court's extraordinary jurisdiction under Article 226 of the Constitution for grant of compensation to his land alleged to have been taken by the Government agencies, would suggest that his land was not taken at all, or if it had been taken it could not have been taken without his consent or if it was taken against his consent he had

acquiesced in such taking and waived his right to take compensation for it." (emphasis supplied)

6. Similar issue came up for consideration before the Division Bench of this Court in **Dharambir's case (supra)** wherein the writ petitioner claiming compensation for alleged utilisation of land for construction of irrigation channel in the year 1953, filed in the year 2015 after 60 years was dismissed. It was observed therein that post independence there being few options form irrigation available, the inhabitants of the villages used to offer land to the State free of cost for providing infrastructural facilities such as construction of minor or road. Source of irrigation was more valuable than the value of land at that time, as it provided source of livelihood.

7. After hearing learned counsel for the parties and taking the above authorities into account, in our opinion, the petitioners are not entitled to any relief. The stand taken by the respondents is that possession of the land was taken about 40-50 years back and no issue was raised by the then owner or the petitioners at any stage, except the representation dated March 8, 2018. The land was earlier recorded in the name of the deceased Bireshwari Prasad Narayan Singh, who admittedly expired on May 16, 2014. It is not in dispute that the petitioners are living in Bengaluru, though it is claimed that Late Bireshwari Prasad Narayan Singh was living abroad.

8. Moreover, at this stage, after 50 years, no records will be available to justify any action. The petitioners had approached the authorities as well as this Court after huge delay.

9. For the reasons mentioned above, in our opinion, no case is made out for interference in the present writ petition for award of compensation to petitioners. The writ petition is, accordingly, dismissed.

(2022)04ILR A799
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PRAKASH PADIA, J.

Writ-C No. 5256 of 2020

M/s Rai Bharat Das & Brothers & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Adarsh Bhushan, Sri Saurabh Srivastava, Sri Madan Lal Srivastava

Counsel for the Respondents:
Sri Alok Kmar Singh (S.C.).

Civil Law - Mines And Minerals (Development And Regulation) Act, 1957; Section 8A (Ins. w.e.f. 12-1-2015) – In view of Section 8A w.e.f. 12-1-2015 all mining leases shall be granted for the period of fifty years – However Section 8A (9) provides provisions of s. 8A shall not apply to a mining lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, for which renewal has been rejected, or which has been determined, or lapsed - lease of the petitioners expired on January 17, 2013 - provisions of Section 8-A of the 1957 Act came into force on January 12, 2015 - Held - petitioners could not get their lease, which had already expired, revived - any leaseholder having suffered lapse, would be dis-entitled to any benefit of the amended provisions of the 1957 Act

because of the express exclusion contemplated in Section 8-A (9) of the 1957 Act

Dismissed. (E-5)

List of Cases cited :

Common Cause Vs U.O.I. & ors., (2016) 11 SCC 455

(Delivered by Hon'ble Rajesh Bindal, C.J, & Hon'ble Prakash Padia, J.)

1. The present writ petition has been filed impugning the orders dated September 3, 2019 and September 7, 2019 passed by respondent Nos. 1 and 3 respectively, vide which the claim of the petitioners for extension of lease beyond 40 years till 50 years, was rejected.

2. Learned counsel for the petitioners submitted that the petitioners were granted mining lease of silika sand on January 18, 1973 for a period of 20 years. It expired on January 17, 1993. They applied for renewal thereof well within time in terms of Rule 24-A of the Mineral Concession Rules, 1960 (hereinafter referred to as 'the 1960 Rules'). There was deemed renewal of petitioners' lease for another period of 20 years. It was to expire on January 17, 2013. Well before expiry of the aforesaid lease period, the petitioners filed application for second renewal thereof. While referring to the provisions of Section 8-A of the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter referred to as 'the 1957 Act'), which was inserted in the 1957 Act with effect from January 12, 2015 and relying upon a judgement of Hon'ble the Supreme Court in **Common Cause Vs. Union of India and others, (2016) 11 SCC 455**, the petitioners sought to claim that they were entitled to renewal of lease for a period of 10 years. The claim of the petitioners was rejected.

3. The argument of learned counsel for the petitioners is based on the observation made by Hon'ble the Supreme Court in Paragraph 37.5 in **Common Cause's case (supra)** which, according to him, provides for renewal of the lease after the amendment in the 1957 Act with effect from January 12, 2015.

4. After hearing learned counsel for the petitioners, we do not find any merit in the submissions made. The petitioners were entitled to renewal of their lease in the year 1993 in terms of the provision existing at that time. The same was renewed and expired on January 17, 2013. No provision was referred to, which provided automatic second renewal of the lease. In fact, admittedly, the lease of the petitioners expired on January 17, 2013. They never raised any grievance, either before the expiry thereof or subsequent thereto, about disposal of the application filed by the petitioners for renewal of lease. What is evident from the record is that after the judgement of Hon'ble the Supreme Court in **Common Cause (supra)**, the petitioners again filed application for renewal of their lease. The impugned order has been passed thereon.

5. Considering the facts of the present case where the lease of the petitioners expired on January 17, 2013 and the provisions of Section 8-A of the 1957 Act having come into force on January 12, 2015, in our opinion, the petitioners could not have got their lease, which had already expired, revived. The judgement of Hon'ble the Supreme Court does not come to their rescue in terms of the observation made in the last paragraph thereof which provides

that any leaseholder having suffered lapse, would be dis-entitled to any benefit of the amended provisions of the 1957 Act because of the express exclusion contemplated in Section 8-A (9) of the 1957 Act.

6. For the reasons mentioned above, we do not find any merit in the present writ petition.

7. The writ petition is, accordingly, **dismissed**.

(2022)04ILR A801
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ-C No. 5317 of 2022

Oriental Insurance Co. Ltd. ...Petitioner
Versus
Smt. Kuntesh & Ors. ...Respondents

Counsel for the Petitioner:
Sri Parv Agarwal

Counsel for the Respondents:
C.S.C., Sri Satya Deo Ojha

A. Civil Law – Insurance – Interpretation - if the words used in the Insurance Policy give rise to two alternative interpretations, one in favour of the petitioner-insurer and the other in favour of the insured, the rule of Contra Proferentum would apply & the interpretation, which is against the person/insurer, drafting the words or expressions, applies - Insurance Policy is a contract entered into between the petitioner-insurer & the State Government - Though it has been reached in furtherance of the Government Policy yet, its terms were drafted by the petitioner-insurer - It is those terms that bind it. (Para 46)

B. Civil Law - Insurance - Group Personal Accident Insurance Policy - *Mukhyamantri Kisan Evam Sarvhit Bima Yojna* - Issue - Whether all and/or any bread winner (of an eligible family) were insured under the Insurance Policy, or the 'Mukhiya'/head of the family or the sole bread winner of the eligible family alone was insured - Held - it is the risk/contingency of loss of life of either the 'Mukhiya / head of the family' or a bread winner (described as 'Roti Arjak / bread earner') that is insured - intent of the Government Policy was to insure all adult active members of an eligible family who may have had an earning - coverage clause under the Insurance Policy read with the Government Policy is to allow for coverage of each adult earning hand of an eligible family (below 70 years of age), including its 'Mukhiya / head of the family' - fact that he may or may not be the sole bread winner, to a lesser or greater extent, would not be relevant. - in the unfortunate occurrence of more than one death during the policy period, the insurer may be exposed to honour only the first claim per eligible family (Para 47, 50, 52, 53)

In a road accident one Rahul Kumar, aged above 18 years, died - father of the Rahul Kumar namely Rajkumar was the 'Mukhiya / head of his family' & was alive on the date of the accident and he had an earning - At the time of death Rahul Kumar was engaged in agricultural activity, though along with his father - His mother made a claim for payment of Rs. 5 lacs under the Insurance Policy - It was repudiated by the petitioner-insurer for the reason the 'Mukhiya / head of the family' (of the deceased), i.e. father of the deceased Rahul Kumar, was alive on the date of death of Rahul Kumar - Claimant Preferred claim petition before the Permanent Lok Adalat - petitioner-insurer directed to pay Rs. 5 lacs to the claimant - Argument of insurer was that coverage was singular & It was extended only to the 'Mukhiya / head of the family' who would have been the bread winner of his family - Held - Rahul was a

person covered under the Insurance Policy as a bread winner of his family - Since Rahul Kumar died during his father's lifetime and the claim there from arose first, the Permanent Lok Adalat has not committed any error in allowing the same - challenge raised in the writ petition is found lacking in merit.

Disposed Off. (E-5)

List of Cases cited:-

1. The Oriental Insurance Company Ltd Vs St. of U.P. & ors. Writ – C No. 6995 of 2022

2. Vania Silk Mills Ltd. Vs CIT, AIR 1991 SC 2104

3. Glynn Vs Margetson, (1893) A.C. 351

4. Investors Compensation Scheme Ltd. Vs West Bromwich Building Society, (1998) 1 WLR 896

5. South East Asia Marine Engineering & Constructions Ltd. Vs Oil India Ltd., AIR 2020 SC 2323

6. M.O.H. Uduman & ors. Vs M.O.H. Aslum, AIR 1991 SC 1020

7. M/S Sha Moolchand Kesarimull Vs. M/S Associated Agencies, AIR 1942 Mad 139

8. General Assurance Society Ltd. Vs. Chandumull Jain & Anr., AIR 1966 SC 1644

9. Manmohan Nanda Vs. United India Assurance Co. Ltd. & anr., 2021 SCC Online SC 1181

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. The present and the connected matters involve a common question of law. The facts are not in dispute. Accordingly, these petitions have been heard together. Upon hearing, other petitions have been de-tagged owing to other issues found involved in those cases, requiring affidavits. However, all counsel (for the respective parties), were heard, on the following common question of law.

"Whether all and/or any bread winner (of an eligible family) were insured under the Insurance Policy, or the 'Mukhiya'/head of the family or the sole bread winner of the eligible family alone was insured?"

2. Heard Sri Parv Agarwal, Sri Pawan Kumar Singh, Sri Komal Mehrotra and Sri Ajay Singh, learned counsel for the petitioner - insurance company (appearing in different petitions); Sri Satya Deo Ojha and Sri Vidya Kant Shukla, learned counsel for the respondent-claimant (appearing in different petitions), on the common question of law, noted above.

3. Present writ petition has been filed by the insurance company against the order dated 24.08.2021, passed by the Permanent Lok Adalat, Muzaffarnagar, in Claim Petition - Case No. 191 of 2020 (Smt. Kuntesh Vs. Oriental Insurance Co. Ltd. & Ors.). Earlier, the petitioner-insurer had repudiated the claim made by the respondent-claimant. Presently, the claim petition instituted with respect to the tailor-made Group Personal Accident Insurance Policy (hereinafter referred to as the Insurance Policy) has been allowed. The Insurance Policy was taken out by the State of U.P., with the petitioner-insurer, pursuant to a Memorandum of Understanding (M.O.U. in short) dated 14.09.2016 (as amended), entered into between the State Government and the petitioner insurer (hereinafter referred to as the Agreement), to implement the State Government's welfare policy measure - the 'Mukhyamantri Kisan Evam Sarvhit Bima Yojna' (hereinafter referred to as the Government Policy). Earlier, it was known as the 'Samajvadi Kisan Evam Sarvhit

Bima Yojna', for the term 14.09.2018 to 13.09.2019.

4. Further, the answer to the question of law noted above involves interpretation of the Insurance Policy and the Government Policy, already on record. The parties do not intend to file counter affidavits (to this writ petition). Accordingly, with the consent of parties, this case has been heard finally, at fresh stage. In other matters, affidavits have been called, owing to other issues involved.

5. Briefly, on 14.10.2018, a road accident took place. Therein, Rahul Kumar S/o Smt. Kuntesh/respondent no.1 suffered grievous injuries. He died. His mother/respondent no.1 made a claim for payment of Rs. 5 lacs under the Insurance Policy. It was repudiated by the petitioner-insurer, on 28.11.2019 on account of delay and also for the reason the '*Mukhiya* / head of the family' (of the deceased), i.e. father of the deceased Rahul Kumar, namely, Raj Kumar was alive on the date of death of Rahul Kumar.

6. Being aggrieved, respondent no.1 preferred the claim petition before the Permanent Lok Adalat being PLA Case No. 191 of 2020. After efforts to conciliate failed, the Permanent Lok Adalat proceeded to adjudicate the dispute. Accordingly, it has framed the impugned award dated 24.08.2021. Thereby, the petitioner-insurer has been directed to pay Rs. 5 lacs to the claimant-respondent under the Insurance Policy, within a period of three months from the date of award. Failing that, interest @ 6% (from the date of presentation of the claim petition to the date of actual payment), has been awarded. The objection as to delay was decided against the petitioner-insurer since the claim was made within 30 days from the end of the policy term. No challenge has been pressed to that finding reached (by the Permanent Lok Adalat), in this writ petition.

7. Learned counsel for the petitioner have vehemently urged - the coverage under the Insurance Policy was to a pre-identified, single family member. The risk covered was accidental loss of life of the '*Mukhiya* / head of the eligible family' who would have been the *'Roti Arjak'* - bread earner (winner), of such family. On him, his family would have been wholly dependent, for its economic needs. No other risk - of accidental loss of life (of any other member of such family), was insured. Even if such other member may have had an income, he was not insured against accidental loss of life. Any other interpretation would violate the single person coverage (against accidental loss of life) offered by the Insurance Policy taken out by the State Government and the Agreement reached between the insurer and the State Government. The only contingencies involving other family members of the eligible family could arise in case(s) of accidental injury suffered or complete dependency of 'Mukhiya / head of the family' on his son. In those contingencies, the petitioner-insurer would be liable to the extent agreed.

8. In support of their submissions, learned counsel for the petitioner have extensively referred to the Insurance Policy and the Agreement/MOU dated 14.09.2016 (as amended from time to time) entered between the Oriental Insurance Company and the Governor of U.P. Those documents have been annexed to **Writ - C No. 6995 of**

2022 (The Oriental Insurance Company Ltd vs. State of U.P. & 2 Ors.). The same have been read in this proceeding.

9. Thus, reference has been made to the gross premium - Rs. 54,03,58,132.00 paid by the State Government to cover the risk of accidental loss of life - of an estimated 29,39,000 citizens (of the districts included in and collectively described as Meerut Cluster of the State of Uttar Pradesh), for the policy term 14.09.2018 to 13.09.2019. Relying on Clause 4 of the Insurance Policy, it has been urged, the total number of eligible families in Meerut Cluster was first estimated at 29,39,000. Therefore, exactly that many lives/risk to life were insured, assuming one *'Mukhiya'/ 'Roti Arjak'* i.e. head-of-family/bread winner, per eligible family. Clause 5 of the Insurance Policy clearly makes applicable the terms of the MOU dated 14.09.2016, entered between the Governor and the Oriental Insurance Company.

10. Referring to the Agreement as last amended on 13.09.2018, it has been submitted, different premium amounts were worked out for different Clusters (of districts) of the State, depending upon estimated number of eligible families residing in each Cluster. Thus, Clause 1 of the Agreement reads as below:

"1. Insurance Company i.e. The Oriental Insurance Company Limited undertakes that it shall provide services for the implementation of Mukhyamantri Kisan and Sarvhit Bima Yojna as per the conditions laid in para (e & f) as mentioned above for below cluster(s)

S No	***Cluster***	***Annual Premium Amount Inclusive of all taxes, applicable duties and other charges (in INR)***
1	*Agra*	*Rs. 105,93,81,344 (One Hundred Five crores Ninety Three lacs Eighty One Thousand Three hundred fourty Four) Only*
2	*Meerut*	*Rs. 54,03,58,132 (Fifty four crores Three lacs Fifty Eight Thousand One hundred Thirty two) Only*
3	*Bareilly*	*Rs. 74,22,45,091 (Seventy Four crores Twenty Two lacs Forty Five Thousand Ninety One) Only*
4	*Kanpur*	*Rs. 76,09,84,705 (Seventy Six crores Nine lacs Eighty Four Thousand Seven hundred Five) Only*
5	*Basti*	*Rs. 25,74,05,500 (Twenty Five crores Seventy Four lacs FiveForty Five Thousand Ninety One) Only Thousand Five hundred) Only*

11. Also, reference was made to Clause 3 of the Agreement. It contains the text of the 'Mukhyamantri Kisan Evam Sarvhit Bima Yojna' (as amended) / Government Policy. The opening clause of the Government Policy recites its object. It reads:

"योजना का उद्देश्य विभिन्न प्रकार की अनिश्चित दुर्भाग्यपूर्ण घटनायें जिससे परिवार के मुखिया की मृत्यु हो सकती है/ विकलांग बना

सकती है जो पूरे परिवार के लिये असुरक्षा /विपत्तियां ला सकती है, की सहायता हेतु।"

(emphasis supplied)

12. Next, Clause 1 of the Insurance Policy taken out pursuant to the aforesaid Government Policy reads:

"Personal Accident Insurance benefit up to a maximum of INR 5 lakhs to the Head of the Family/Bread Earner (Policy holder) of the covered family."

(emphasis supplied)

13. Also, Clause 4 of the Insurance Policy reads:

"Estimated number of families for this cluster are 29,39,000 for Meerut, Gautam Budh Nagar, Baghpat, Ghaziabad, Hapur, Moradabad-Amroha, Rampur, Bijnour, Saharanpur,-Muzaffarnagar, Shamli, Sambhal."

(emphasis supplied)

14. Thus, it has been submitted, the insurance cover provided to the State Government under the Insurance Policy was to cover the risk of accidental loss of life of 29,39,000 'Mukhiya' / respective heads of families of the most vulnerable and therefore eligible families, in Meerut cluster, against payment of premium, Rs. 54,03,58,132/-. That is clear from the object clause of the Government Policy. It covered the risk of accidental death of the "*Mukhiya* / head of the eligible family', alone.

15. Learned counsel for the petitioner would further submit, the word *'Roti Arjak* / bread winner' (in English), appears only by way of clarification made i.e. '*Mukhiya* / head of the family' would be the bread winner for the purpose of coverage offered under the Insurance Policy. Only, in case of such person being aged more than 70 years on the date of commencement of the Insurance Policy, his son (unmarried or married), on whom he may be wholly dependent, would become the person insured under the Insurance Policy, to the exclusion of the '*Mukhiya* / head of the family', himself. As to the other persons or family members, coverage of accidental injury was provided, under Clause 2 of the Insurance Policy, only. It reads:

"Post accidental medical treatment benefits on floater basis shall be provided to Head of the Family/ Bread Earner/ family members as follow:

a) Primary medical treatment benefit (on need basis) up to a maximum of INR 25,000/- (INR Twenty Five Thousand). b) Medical treatment benefit up to a maximum of INR 2,50,000/- (Two Lakh Fifty, Thousand) (inclusive of primary medical treatment benefits of INR 25,000, wherever applicable).

c) On need basis, artificial limb replacement up to a maximum of INR 1,00,000 (One Lakh).

The aforementioned amount of INR 2.5 Lakhs for Maximum Accidental Medical treatment cover is inclusive of primary medical treatment benefits of INR 25,000, wherever applicable and exclusive of maximum of INR 1 Lakh for artificial limb, as the case may be."

(emphasis supplied)

16. Also, the clauses pertaining to "Parivar Aachhadan' i.e. Eligible Family and "Bima Aavran Ki Avadhi' i.e. Period of Insurance Cover, of the Government Policy read as below:

*" **परिवार आच्छादन** - आच्छादित परिवार का मुखिया / रोटी अर्जक (बीमा धारक) रू0*

5.00 लाख तक का व्यक्तिगत दुर्घटना बीमा लाभ एवं मुखिया/ रोटी अर्जक / परिवार के सदस्य दुर्घटना के उपरान्त रू० 25,000 तक प्राथमिक चिकित्सा एवं रू0 2.25 लाख तक वृहद्ध चिकित्सा लाभ तथा आवश्यकतानुसार अधिकतम रू० 1.00 लाख तक का कृत्रिम अंग प्राप्त कर सकेंगे।

बीमा आवरण की अवधि *- बीमा आवरण की अवधि संस्थागत वित्त, बीमा एवं वाह्य सहायतित परियोजना महानिदेशालय, उ0प्र0 एवं बीमा कम्पनी के मध्य मेमोरेण्डम आफ अण्डरस्टैंडिंग (एम0ओ०यू०) हस्ताक्षरित होने की तिथि से एक वर्ष के लिए मान्य होगी तदोपरान्तु इसे वर्षवार बढ़ाया जायेगा। यह योजना 03 वर्ष + 03 वर्ष से अधिक नहीं होगी।"*

(emphasis supplied)

17. Sub-clause (2) of the Clause - "Yojana Ki Visheshtaayein' i.e. Special Features of the Policy, reads as below:

"व्यक्तिगत दुर्घटना बीमा - परिवार के मुखिया / रोटी अर्जक की दुर्घटना में मृत्यु / स्थाई पूर्ण विकलांगता / स्थायी और लाईलाज पागलपन / कुल दो अंगों के स्थायी नुकसान / दोनों आंखों में स्थायी दृष्टि का नुकसान / एक अंग और एक आंख की दृष्टि का स्थायी नुकसान / वाक् का स्थायी नुकसान / निचले जबड़े की पूरी हानि/ चबाने की स्थिति का स्थायी नुकसान पर बीमित राशि रू0 5.00 लाख, दोनों कानों से बहरेपन की स्थिति में बीमित राशि रू0 5.00 लाख का 75 प्रतिशत तथा एक अंग का स्थायी नुकसान या एक आंख की दृष्टि हानि के स्थायी नुकसान पर बीमित राशि रू0 5.00 लाख का 50 प्रतिशत लाभ दिया जायेगा ।"

18. It is undisputed - the father of the Rahul Kumar namely Rajkumar was the "Mukhiya / head of his family'. He had an earning. He was alive on the date of the road accident suffered by Rahul Kumar, on 14.10.2018. Therefore, the petitioner-insurer claims, insurance claim made, on the death of Rahul Kumar, was ineligible (under the Insurance Policy read with the Government Policy). The fact - later, during the term of the Insurance Policy, Rajkumar also suffered an accidental death, would make no difference to the ineligibility of the claim arising on the prior death of Rahul Kumar.

19. In short, the petitioner-insurer has invoked the principle - a stipulation in the Insurance Policy may be interpreted upon a complete reading of that contract. A contract is not to be read as a statute but as a whole document, in the context of the general object for which it was executed. Therefore, laying heavy emphasis on the 'Object' clause of the Government Policy and the 'Coverage' clause of the Insurance Policy, it has been vehemently urged, the coverage was singular. It was extended only to the "Mukhiya / head of the family' who would have been the bread winner of his family.

20. Sri Parv Agarwal has placed reliance on a decision of the Supreme Court in **Vania Silk Mills Ltd. Vs CIT, AIR 1991 SC 2104**, to suggest, ordinary, popular and natural meaning is to be given to the word *'Mukhiya'*, used both under the Insurance Policy and the Government Policy.

21. Sri Pawan Kumar Singh has referred to **Glynn Vs. Margetson, (1893) A.C. 351**, to submit, all provisions of a contract should be read together. The intent of the parties to the contract must be clearly understood, therefrom. Only then a clear

picture may emerge as to the true interpretation of the contract. Contrary to the purpose of the contract (thus determined), an inconsistent word or provision may be rejected, in entirety. Relying on **Investors Compensation Scheme Ltd. Vs. West Bromwich Building Society, (1998) 1 WLR 896**, he would submit (as per his written note) - the following five principles are useful to interpret contracts, exist :

"1. Contextual approach to interpretation

(i) Interpretation is the ascertainment of the meaning of the document to the reasonable person having all the background knowledge which would be reasonably available to the parties in the circumstances

2. Wide scope of background knowledge

(i) Relevant background knowledge of the includes "absolutely anything" which would have affected the understanding of the reasonable man

3. Pre-contractual negotiations are inadmissible

(i) Previous negotiations of the parties and their declarations of subjective intent are inadmissible as background

(ii) The only exception is in an action for rectification

This distinction is made for practical policy of reducing litigation time and costs

4. Substitution of words and syntax

(i) The background circumstances "may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax."

(ii) Meaning is contextual not literal

5. Business common sense

(i) The natural and ordinary meaning must yield to business common sense if it flouts it

(ii) However, there is the presumption that people do not easily make linguistic mistakes

(iii) The natural and ordinary meaning is not unhelpful when words have not been used in a natural and ordinary way"

22. Then, reliance has been placed on the following two decisions of the Supreme Court and a decision of the Madras High Court to submit, the coverage granted to the 'Mukhiya' may not be enlarged as it would conflict with the policy terms:

(i) South East Asia Marine Engineering & Constructions Ltd. Vs. Oil India Ltd., AIR 2020 SC 2323

(ii) M.O.H. Uduman & Ors. Vs. M.O.H. Aslum, AIR 1991 SC 1020

(iii) M/S Sha Moolchand Kesarimull Vs. M/S Associated Agencies, AIR 1942 Mad 139

23. Contesting the above, learned counsel for the claimant-respondents submits, the Insurance Policy was taken out by the State Government, to fulfil welfare objective. It covers both, the head of every eligible family as also every bread earner of every eligible family. Thus, they have relied on the eligibility-clause under the Insurance Policy and also the eligibility / 'Patrata' clause under the Government Policy (with reference to the other stipulations contained therein). It has been submitted, there is no exclusion made and there is no intent emerging from the reading of any of the clauses of the Insurance Policy or the Government Policy as may restrict the coverage under the

Insurance Policy to a single person, namely, the "Mukhiya' who may or may not be the sole bread winner of the eligible family. For ready reference, Eligibility clause of the Insurance Policy reads as below:

"ELIGIBILITY CLAUSE - All farmers of Uttar Pradesh (without any Income limit), Landless farmers, those related to Agriculture related activities, (Fishery, milk producing, pig farming, goat farming, Bee keeping etc.) nomadic/ roaming families, businessmen (who are not covered under any other Governmental Scheme), forest workers, retailers, Rickshaw pullers, porters and those engaged in other activities who are residents of rural or urban areas whose annual income is less than INR 75,000/- and age limit in between 18 to 70 years shall be eligible for this Scheme. During the currency of the Scheme, If a person attains the age of 18 years or a person crosses the age of 70 years, that person shall also be covered."

(emphasis supplied)

24. Also, the Eligibility clause of the Government Policy reads as below:

"पात्रता- उत्तर प्रदेश राज्य के समस्त कृषक (असीमित आय सीमा) भूमिहीन कृषक, कृषि से संबंधित क्रियाकलाप करने वाले, (मत्स्य पालक, दुग्ध उत्पादक, सूकर पालक, चकरी पालक मधुमक्खी पालक इत्यादि) घुमन्तू परिवार, व्यापारी (जो कि किसी शासन योजना से आच्छादित नही 8). पन श्रमिक, दुकानदार, फुटकर कार्य करने वाले, रिक्शा चालक, कुली एवं अन्य कार्य करने वाले ग्रामीण क्षेत्रों अथवा शहरी क्षेत्रों के निवासी जिनकी पारिवारिक आय रू० 75.000/- प्रति वर्ष से कम हो एवं जिनकी आयु 18 वर्ष से 76 वर्ष के मध्य है पात्र होंगे। इसमें राज्य सरकार एवं भारत सरकार तथा राज्य एवं केन्द्र सरकार के पी०एस०यू० के वित्तीय सहायता प्राप्त संस्थानों के निजी क्षेत्र के तथा स्वशासी निकायों / सार्वजनिक उपक्रमों / निगमों / बोर्ड एवं प्राधिकरणों के कर्मचारी जो किसी बीमा कम्पनी की बीमा योजना से लाभान्वित हो रहे हैं, शामिल नहीं होंगे। बीमा आवरण की अवधि में 18 वर्ष की आयु पूर्ण करने वाले उक्त सभी योजना के अन्तर्गत पात्रता की परिधि में आयेगे। इसी प्रकार बीमा आवरण अवधि में 70 वर्ष पूर्ण हो जाने पर उक्त सभी पात्रता श्रेणी में माने जायेगें।

कृषक - कृषक का तात्पर्य राजस्व अभिलेखों अर्थात खतौनी में दर्ज खातेदार / सहखातेदार से है, जिसकी आयु न्यूनतम 18 वर्ष तथा अधिकतम 70 वर्ष हो ।

. भूमिहीन कृषक एवं कृषि से संबंधित कियाकलाप - ऐसे ग्रामीण भूमिहीन परिवार जो प्रत्यक्ष या अप्रत्यक्ष रूप से कृषि कार्य से जुड़े हुए हों।

अन्य - कृषकों के अतिरिक्त जिनकी आयु 18 वर्ष से 70 वर्ष के मध्य है तथा पारिवारिक आय रू० 75,000/- प्रति वर्ष से कम हो योजनान्तर्गत पात्र होंगे। इसमें राज्य सरकार एवं भारत सरकार तथा राज्य एवं केन्द्र सरकार के पी०एस०यू० के, वित्तीय सहायता प्राप्त संस्थानों के निजी क्षेत्र के तथा स्वशासी निकायों / सार्वजनिक उपक्रमों/निगमों/ बोर्ड एवं प्राधिकरणों के कर्मचारी जो किसी बीमा कम्पनी की बीमा योजना से लाभान्वित हो रहे हैं, शामिल नहीं होंगे। प्रदेश सरकार के किसी भी विभाग द्वारा संचालित किसी भी दुर्घटना बीमा योजना में आच्छादित लाभार्थी मुख्यमंत्रीकिसान एवं सर्वहित बीमा योजना के लिए पात्र नहीं होंगें।"

(emphasis supplied)

25. Thus, it has been submitted, the insurance company had taken a heavy premium to cover the risk of accidental loss of life - to the most vulnerable and the weakest in the economic ladder of our

society. Each *'Roti Arjak* / bread earner' of an eligible family, stood insured under the Insurance Policy, read with the Government Policy. The petitioner insurer has repudiated its liability on a fallacious ground of single risk coverage, that too to a "*Mukhiya* / head of the family'. The coverage was, clearly plural.

26. Having heard learned counsel for the parties and perused the record, there can be no dispute to the fact that the occurrence (of accidental death of Rahul Kumar on 14.10.2018), fell within the contingencies covered by the Insurance Policy. It is also not in dispute that the total family income (of the family to which Rahul Kumar belonged), did not exceed Rs. 75,000/- per annum and that he was more than 18 years, but less than 70 years of age on the date of occurrence of his accidental death. To that extent, there is no dispute.

27. In absence of person identification or name specification made while providing for the risk cover under the Insurance Policy, a dispute exists - which lives of an eligible family or contingencies faced by an eligible family would be covered and which would be not ?

28. Since the Insurance Policy and the Government Policy do not offer a direct answer to that issue, the terms and conditions of the Insurance Policy, the Government Policy (that has been made part of the Insurance Policy), and the Agreement would have to be examined in entirety to determine the same. To that extent, the principle being invoked by learned counsel for the petitioner is true and correct.

29. Examined in that light, first, under Clause 1 of the Insurance Policy, coverage of personal accidental death insurance benefit, Rs. 5,00,000/- was provided to the '*Mukhiya* / head of the family / bread winner of an eligible family'. The person/s covered has/have been described as "Policy holder". It also cannot be denied, in that policy document, a clear reference exists - to the number of estimated persons covered, being 29,39,000, in the Meerut Cluster.

30. Then, in the eligibility clause of the Insurance Policy, persons engaged in various activities/vocations, whether residing in urban or rural areas were covered. First, all farmers (without income ceiling) were covered. Second, all landless labourers; all types of nomadic families; businessmen (not covered under any other government schemes); forest workers; retailers; rickshaw pullers; porters; etc. were covered, subject to their annual family income being less than Rs. 75,000/-.

31. Then, by way of general exceptions, that eligibility was made subject to age limit 18 to 70 years (of the insured person), provided further, if the insured person attained the age of 18 years or crossed the age of 70 years during the currency of the insurance term, he would still be covered thereunder. Further, by way of specific exclusion, the Insurance Policy provided as below:

EXCLUSIONS- Employees of Central Government, State Government, Public Sector Units (PSU) of Central Government or State Government, Financially aided Organizations, Private Sector, Autonomous Bodies/ Public Undertakings/ Corporations Boards and Authorities who are covered under any insurance scheme shall not be covered under the Samajwadi Kisan & Sarvhit Bima Yojna Scheme.

EXCLUSIONS- Any beneficiary who is covered under any accidental Insurance scheme operated by any of the department of State Government shall not be eligible under the Samajwadi Kisan & Sarvhit Bima Yojna Scheme.

(emphasis supplied)

32. Similar clauses existed under the Government Policy, as well. Thus, it appears, the two documents are not conflicted. The Government Policy was framed earlier. Against that, the petitioner insurer was selected, through open tender process. The agreed premium was paid by the State Government and Insurance Policy taken out, by it. In such facts, the above two documents do not attempt to cover two different risks or contingencies. In fact, largely, one is the reflection of the other. The choice of exact words and elaborations made apart, per se, no clause has been shown to exist in either document that may conflict with any clause contained in the other. Then, Clause 5 of the Insurance Policy makes the Agreement (of which the Government Policy is a part), a part of the Insurance Policy.

33. Undisputedly, the risk of an accidental injury, was insured to the "head of the family" or "bread winner" and other members of an eligible family. While providing for that contingency and cover against accidental injury, the Insurance Policy did not specifically or by direct reference made, provide for coverage of risk to life against accidental death, of all or any other family member/s. Thus, exclusion is claimed to arise on a comparative reading of the relevant Clauses of the Insurance Policy. Yet, no contrary intention is expressed in the Government Policy or the Agreement.

34. Then, the opening Clause of the Government Policy discloses its object. It was to provide financial assistance to the eligible families against *"Asuraksha/Vippatti'* i.e. insecurity/ calamity arising from the sudden accidental death of the "Mukhiya' i.e. the head of an eligible family.

35. At the same time, in the very next Clause, while providing for eligibility, that Government Policy includes within the sweep of the Insurance Policy, all members of eligible families. It includes citizens from all walks of life, subject to specific general exclusions, noted above.

36. The term "*Mukhiya* / head of the family' is not a term defined, either under the Government Policy or under the Insurance Policy. It is also not a term defined by legislature. Primarily, it is a social construct. Commonly, the eldest member of any family is described as its "Mukhiya'. The Government Policy is progressive inasmuch as it has used the term "Mukhiya / head of the family', in a more gender plural sense by using the words male/female.

37. If the intent of the Government Policy and, therefore, if the coverage under the Insurance Policy were to be confined to the '*Mukhiya*' only, there would have arisen no need to mention *"Roti Arjak* / bread earner'. The fact that such terms had been used by adding "/' (stroke) after the word "*Mukhiya*', indicates the intent to cover either the head of the family, or its bread winner, during the term of the Insurance Policy - from 14.09.2018 to 13.09.2019. Clause 3 of the Insurance Policy reads as under :

"3. Below individuals shall be considered as family members under the Samajwadi Kisan & Sarvhit Bima Yojna Scheme:

a) Head of the Family/Bread earner (Male/Female)

b) Husband/Wife of Head of the Family/Bread earner

c) Unmarried daughter

d) Dependent son

e) Dependent parents of unmarried son (where unmarried person is Head of the Family/Bread Earner)

f) Dependent parents of Head of the Family/Bread Earner (only in cases where husband is the Head of the Family)

Note: Parents of wife shall not be covered."

(emphasis supplied)

38. Then, the clause pertaining to "Parivar Nirdharan' contained in the Government Policy reads as below:

*"**परिवार निर्धारण** -परिवार के अन्तर्गत परिवार का मुखिया/रोटी अर्जक (पुरुष /स्त्री) उसकी पत्नी/पति, अविवाहित पुत्री, आश्रित पुत्र, मुखिया पति एवं अविवाहित पुरुष के आश्रित माता-पिता बीमा का लाभ प्राप्त करने हेतु आवृत्त होगें।"*

(emphasis supplied)

39. Thus, for the purpose of determining the family members/persons insured under the Insurance Policy, the '*Mukhiya* / head of the family' could be both - the person insured as also a beneficiary. As '*Mukhiya* / bread winner', such person was included as family member under Clause 3(a) of the Insurance Policy. He would be the 'policy holder'. At the same time if such person's unmarried or married son was a bread earner, such person though 'Mukhiya' would be a beneficiary, in case of occurrence of death of such married son [under Clause 3(e) & 3(f) of the Insurance Policy], subject to him being dependent on his son, now described as 'Head of the family / Bread Earner'.

40. Therefore, the Insurance Policy does seek to insure the risk to life of a person other than a '*Mukhiya* / head of the family' also, in certain situations. In absence of the words "*Ek Matra*"/ sole prefixed to the phrase *"Roti Arjak* / bread earner' and in absence of any exclusion clause to oust a claim of a partly dependent 'Mukhiya', in the case of death of his married or unmarried son, it is to be seen if by use of word 'dependent' under Clause 3(e) and 3(f) of the Insurance Policy, only non-earning '*Mukhiya* / head of the family', may become a beneficiary in the event of death of their earning son (married or unmarried).

41. While the Insurance Policy is silent in that regard, the object clause of the Government Policy makes it plain that the object was to take out an Insurance Policy to provide for vital aid to the financially most vulnerable and exposed families who may be faced with *'Asuraksha / Vippati'* i.e. insecurity / calamity upon occurrence of accidental death of its 'Mukhiya' or 'Bread Earner'. A minimum amount of money as may help them avoid destitution, upon the loss of vital minimum earning was sought to be provided, to an eligible family, to address the insecurity or extreme hardship arising upon being faced with the calamity of death taking away the hope of minimum means to survive.

42. The Eligibility clause under the Government Policy, includes all citizens from different walks of life engaged in different professions and vocations,

residing in different parts of the State. It includes all farmers (irrespective of their annual earning) and, others having family income less than Rs. 206/- per day (Rs. 75,000 / 365 days). Also, the insured "Mukhiya / head of the family / Roti Arjak / bread earner' could be a person in the age bracket of 18 years to 70 years. It is apparent that the intent of the Government Policy was to insure all adult active members of an eligible family who may have had an earning.

43. Thus, a person below 18 years of age was treated to be ineligible. He would remain not - insured on deemed basis, though such person (in a given unfortunate situation), may have been the sole bread winner of his family. Correspondingly, any person above 70 years of age was treated to be the person not insured as he was deemed to be not contributing economically to his family.

44. Therefore, there may be no dispute to rejection of a claim made on occurrence of death of a person below 18 years of age or above 70 years of age. There, upon fiction introduced, the dead would not be of a person insured. Yet, a conflict would arise if interpretation made by learned counsel for the insurer is accepted with respect to a person aged below 70 years of age who may be the eldest member of an eligible family and who may (speaking hypothetically), be earning a frugal sum of say Rs. 24,000/- per annum. In that case, such a person would be included under the cover of the Insurance Policy in his capacity as "*Mukhiya*'. Yet, as a beneficiary he would be ineligible to claim insurance money if his unmarried son (who may have been earning Rs. 50,000/- per annum), died an accidental death. It would be so because according to learned counsel for the petitioner-insurer, the claimant would not be wholly dependent on his son. At the same he would be eligible if his earning were nil.

45. The test of full dependency neither appears to exist under the Insurance Policy or the Government Policy or the Agreement nor it may be practicable to satisfy. Also, if strictly applied it may allow any and every such claim to be defeated upon the insurer being able to satisfy that the '*Mukhiya*' / parent of the head of the family had earned, say Rs. 100/- per month, through any manual labour performed. That result would be plainly absurd. The Insurance Policy may not be interpreted to include and exclude the same person from the scope of insurance/beneficiary, simultaneously. Clearly, an ambiguity exists.

46. Undeniably, the Insurance Policy is a contract entered into between the petitioner-insurer & the State Government. Though it has been reached in furtherance of the Government Policy yet, its terms were drafted by the petitioner-insurer. It is those terms that bind it. Therefore, if the words used in the Insurance Policy give rise to two alternative interpretations, one in favour of the petitioner-insurer and the other in favour of the insured, the rule of Contra Preferentum would apply. It thus commends to the Court to read the words *'Roti Arjak* / bread earner', used in the coverage Clause (1) of the Insurance Policy to include all bread winners of an eligible family. Similarly the word 'dependent' used in 'Family Composition' - clause (3) of that policy includes partial dependency and/or inter-dependency. To that extent, those words have to be read against the petitioner-insurer as it was itself the

draftsman of the Insurance Policy. Unless read in that manner, the core objective of the Insurance Policy - to preserve the most vulnerable lives of our society, would fail. In **General Assurance Society Ltd. Vs. Chandumull Jain & Anr., AIR 1966 SC 1644** a Constitution Bench of the Supreme Court noted the applicability of rule Contra Preferentum, to insurance contracts. The said rule has been applied by the Supreme Court, recently, in **Manmohan Nanda Vs. United India Assurance Co. Ltd. & Anr., 2021 SCC Online SC 1181**.

47. Clearly, it is the risk/contingency of loss of life of either the "*Mukhiya* / head of the family' or a bread winner (described as "Roti Arjak / bread earner') that is insured. The object of that coverage is not simple life insurance, but, to prevent extreme destitution described under the Government Policy as *'Asuraksha / Vippati'*. It would be unreasonable to conclude that the coverage is to be confined to the "*Mukhiya* / head of the family who is the sole *"Roti Arjak* / bread winner of the family'. A parent who may be dependent either, wholly or in part. In that case his earning son/s may also stand insured against risk of loss of life to the extent they would both be contributing to the minimal earnings of their family.

48. In absence of any specific exclusion under the Insurance Policy, there is no inherent logic to exclude the unfortunate occurrence of accidental death of any bread winner i.e. *"Roti Arjak* / bread earner' (as described under Insurance Policy) from the cover of insurance. Here, the underlying object of the policy must be given primacy. It is to offer minimal succour to the poorest of the poor i.e. families having income less than Rs.75,000/- per annum and who may suffer further hardship upon being confronted with more cruel and merciless circumstance of occurrence of sudden death of any adult earning member.

49. It has to be remembered, in that extreme circumstance, each grain would go to make the smallest of small bread needed to keep the hope of life alive for the eligible family, as a unit. It is not uncommon that amongst the poorest of the poor, every hand whether tender and under age or withered and frail, upon hard labour performed, makes vital and decisive contribution to prepare the daily bread / 'Roti'. It is those unfortunate families that fall within the sweep of the Insurance Policy and the Government Policy.

50. At Rs. 206/- per day, the eligible family may barely have enough to keep its life boat afloat, if no illness or other such circumstance cuts a hole in that. In the precarious financial situation such as that (of an eligible family having annual income of less than Rs. 75,000/- i.e. Rs. 206/- per day), no earning member of that family, including its '*Mukhiya* / head of the family' whether the eldest member of the family or the one with highest earning would be financially independent. He alongwith all earning members of his family would remain financially inter-dependent on each earning hand of that family. Hence, the word 'dependent' used in Clause 3(e) and 3(f) of the Insurance Policy only refers to a condition of joint living and not of complete loss of earning, suffered by the eligible family.

51. Thus, the principle being invoked by learned counsel for the petitioner - of 'main'/'sole' bread winner or of 'wholly/solely dependent' is unreal and artificial. If applied it would lead to absurd

results. Looked through the eyes of the beneficiary, it may appear a bourgeois construct. It would stand in direct conflict to the socialistic soul of our Constitution. In that circumstance, the principle - each drop fills the bucket is more appropriate and apt. There, may not arise any surplus to such family and all money earned by different hands may, at best, be just enough. Each rupee or each hand full of grain earned would be equally valuable. It is impossible to differentiate between hands when each brings only a handful. In such an unfortunate and extreme circumstance, the concept of 'wholly dependent' is purely academic and a thought that may lead to absurd results. It is therefore, rejected.

52. Therefore, the only reasonable construction that may be given to the coverage clause under the Insurance Policy read with the Government Policy is to allow for coverage of each adult earning hand of an eligible family (below 70 years of age), including its "Mukhiya / head of the family'. The fact that he may or may not be the sole bread winner, to a lesser or greater extent, would not be relevant. The eligibility would be subject to the general exclusions provided under the Insurance Policy, noted above.

53. That said, in the unfortunate occurrence of more than one death during the policy period, the insurer may be exposed to honour only the first claim per eligible family. It is so because as noted above, the 'Object' and 'Eligibility' clauses of the Government Policy and the Insurance Policy contemplate insurance coverage to overcome destitution described as *'Asuraksha / Vippati'* arising from the death of an earning hand. Second, the coverage of life was provided (under the Insurance Policy) to an estimated 2939000 persons being the exact number of eligible families estimated and as recorded in Clause 4 of the Insurance Policy, against accidental loss of life of an earning member, as may plunge the family income below Rs. 206/- per day. That is the level of family income that the Government Policy (that is part of the Insurance Policy) recognised, both as the money required to survive and also as a factor to identify the beneficiaries who need the insurance cover to sustain basic human existence. The quantum of compensation is also equal to about 6-7 years of that minimum income support.

54. Further, in absence of any clause, words and expressions used, either under the Insurance Policy or the Government Policy to provide individual coverage to all bread winners, in an eligible family, it appears, during the policy term from 14.09.2018 to 13.09.2019, death of only one earning member of an eligible family would stand covered. The stroke - '/' mark placed between the words 'head of the family' & 'Bread Earner' under Clause 1 i.e. coverage clause of the Insurance Policy also suggests the same intent. To that extent, the submission of learned counsel for the petitioner carries weight. The object was to provide minimum and immediate succour to eligible family and not to compensate for all losses of lives suffered, by an eligible family, in one policy term. If accepted, that may amount to re-writing the contract which the Courts may not do.

55. Insofar as the present case is concerned, at the time of death of Rahul Kumar, he was found to be engaged in agricultural activity, though along with his father. The Permanent Lok Adalat has found, the deceased was also engaged in some manual labour drawing earning

therefrom. That finding is not perverse. Undisputedly, he was more than 18 years of age during the policy term. Therefore, he was a person covered under the Insurance Policy as a bread winner of his family though he may not have been its "Mukhiya'. He was a bachelor, contributing to his family's meagre income below Rs. 75,000/- per annum.

56. To that extent his entire family including his father Rajkumar would have been partly dependent (on deemed basis), on his frugal material contributions, as a means of their daily survival, as a unit. To that extent, his father Raj Kumar would also have been partly-dependent on him. Since Rahul Kumar died during his father's lifetime and the claim therefrom arose first, the Permanent Lok Adalat has not committed any error in allowing the same. The challenge raised in the writ petition is found lacking in merit. Sri Ojha has also stated, similar claim made upon the death of Rajkumar was rejected by the Permanent Lok Adalat. It has attained finality.

57. It is however provided, in the event, petitioner pays up the awarded amount within a further period of one month from today, the petitioner would not be liable to pay any interest. If however such payment is not made within the time thus extended, the petitioner shall remain exposed to interest liability provided under the impugned award.

58. With the aforesaid observations, present petition stands **disposed of**.

(2022)04ILR A815
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ-C No. 5791 of 2022

Smt. Saavan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishal Tandon

Counsel for the Respondents:
C.S.C., Pankaj Kumar Gupta

(A) Civil Law – Constitution of India, 1950 - Article 226, - U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 - Clause 13, 13(1), 13(3) - On complainant made by petitioner - Fair Price Shop Agreement of respondent agent - first cancelled - later on restored by virtue of order passed in Appeal filed by License holder (Agent) – being aggrieved Complainant (Petitioner) filed present writ petition – no locus - complainant has no right of Appeal – writ petition dismissed. (Para – 33, 34, 35)

(B) Civil Law – Constitution of India, 1950 - Article 226, - U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 - Clause 13, 13(1), 13(3) - Word & Phrases – difference between a ***'Aggrieved person'*** **or '*Person aggrieved'* – a person who is wrongly deprived of his entitlement which he has legally entitled or whose right have been prejudice by such order – complainant is not that person – he is a 'person annoyed' not an 'aggrieved person'.** (Para – 34, 35)

(C) Civil Law – Constitution of India, 1950 - Article 226, - U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 - Clause 13, 13(1), 13(3) - A **beneficiary - has only right to receive essential commodities – he cannot choose his fair price shop Agency.**(Para – 35)

Writ Petition Dismissed. (E-11)

List of Cases cited: -

1. Smt. Farzana Vs St. of UP & ors.(2018 (7) ADJ 767),

2. Ram Surat Mishra Vs St. of UP (2016 (6) ADJ 503 (FB) (LB)),

3. Commissioner of Trade Tax UP Vs Associated Distributors Ltd. (2008 Vol. 7 SCC 709),

4. Akhlaq Vs St. of UP & ors.(Writ – C No. 43188/2017 decided on 05.02.2019),

5. Smt. Muneeta Vs St. of UP & ors.(Writ – C No. 21915/2019 decided on 06.02.2020),

6. Ashfaq Vs St. of UP & ors.(2008 (4) ADJ 416),

7. Dharam Raj Vs St. of UP & ors.(2009 (77) ALR 564),

8. Sriram Prasad & anr. Vs St. of UP & ors.(2016 (3) ALJ 308),

9. Neeraj Kumar Mishra Vs Dy. Commissioner (Food) Region Allahabad & ors.(2017 (3) ADJ 834),

10. Gram Vikash Sewa Samiti Vs St. of UP & ors.(Writ – C No. 19941/2018 decided on 30.08.2018),

11. M/s Park Leather Industry (P) Ltd. & anr. Vs St. of UP & ors.(2001 (3) SCC 135),

12. Smt. Shahjanah Baigam Vs District Magistrate Udham Singh Nagar & ors.(AIR 2017 Uttrakhand 200),

13. Ram Rati & ors.Vs Gram Samaj Jehwa & ors.(AIR 1974 (All) 106),

14. Yogendra Singh Vs St. of UP & ors.(Misc. Single No. 23298/2016 decided on 27.09.2016.

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Vishal Tandon learned counsel for the petitioner, Ms. Archana Tyagi learned Additional Chief Standing Counsel for the State respondents and Sri Pankaj Kumar Gupta learned counsel for the Gaon Sabha.

2. Present writ petition has been filed against the order dated 28.12.2021 passed by the Additional Commissioner (Judicial) Aligarh Division, Aligarh. whereby the said authority has allowed Appeal No. 00288 of 2021 (Sarvesh Vs. State of U.P.). It has set aside the order dated 25.1.2021, passed by the SDM, Jalesar and restored the fair price shop agreement of respondent No.4.

3. At the outset, a preliminary objection has been raised by learned Additional Chief Standing Counsel and learned counsel for the Gaon Sabha, to the maintainability of the present petition. It has been thus submitted; the petitioner was the complainant before the licensing authority; acting on his complaint, proceedings were initiated by the competent authority against the original fair price shop agent - Sarvesh/respondent No.4; thereafter, the fair price shop agreement of the said respondent was cancelled on 25.1.2021; the said respondent preferred Second Appeal No. 00288 of 2021; it has been allowed. Therefore, the petitioner - who was merely the complainant, has no locus to maintain the present writ petition.

4. Meeting that preliminary objection, learned counsel for the petitioner has placed heavy reliance on Clause-13 of the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 (hereinafter referred to as 'the Control Order'). Relying on the Hindi version of clause 13(1) of the Control Order, it has been vehemently urged, the right of appeal has been created by the

Control Order against an order of "Bahali' i.e. restoration of a fair price shop agreement, besides creating a right of appeal against an order of suspension and cancellation of a fair price agreement. In support of such submission, learned counsel for the petitioner has relied on a decision of a learned Single Judge of this Court in **Smt. Farzana Vs. State of U.P. and Others, 2018(7) ADJ 767**, to contend, in case of ambiguity in the English version of a Notification or statute etc., the Hindi version of the same may be looked into and relied to cure that ambiguity. In the same vein, reliance has also been placed on a Full Bench decision of this Court in **Ram Surat Mishra Vs. State of U.P., 2013(6) ADJ 503 (FB)(LB)**. Reliance has also been placed on a decision of the Supreme Court in the case of **Commissioner of Trade Tax Uttar Pradesh Vs. Associated Distributors Limited, (2008) 7 SCC 709**.

5. By way of second limb to his submission, learned counsel for the petitioner would submit, in any case, the law that existed earlier - giving the complainant no right of appeal against an order or restoration of fair price shop, is no longer good law, in view of statutory change made by the Control Order. Thus, referring to clause 13(3) of the Control Order, it has been submitted, the right of appeal has been given to 'any person aggrieved'. Earlier, the right of appeal was conferred exclusively on the fair price shop agent and on no other person. Therefore, the remedy of appeal has now been made available to a larger body of individuals who may be aggrieved by an order of "Bahali'/restoration, suspension or cancellation of a fair price shop agreement. Clearly, the complainant who may have brought evidence before the licensing authority and/or the appeal authority - against an erring fair price shop agent was a person having a grievance against the fair price shop agent. Therefore, he would be a person aggrieved by the order granting restoration of fair price shop agreement. Such view is stated to have been taken by a learned Single Judge of this Court in **Akhlaq Vs. State of U.P. and Others, Writ-C No. 43188 of 2017 decided on 05.2.2019** and **Smt. Muneeta Vs. State of U.P. and Others, Writ-C No. 21915 of 2019, decided on 06.2.2020**.

6. Last, it has also been submitted, the appeal authority has grossly erred in allowing the appeal on merits. The only defect noted by it was with respect to procedural compliance. If the enquiry report had not been confronted to the private respondent, the only course open to the appeal authority was to remit the matter to the original authority or to entertain the matter on merits itself and, pass a reasoned order, thereafter.

7. On the other hand, vehemently opposing the petition, learned Additional Chief Standing Counsel and the learned counsel for the Gaon Sabha have submitted, it is no longer res integra that a complainant has no right of appeal. Consequently, he can never claim to be a person aggrieved by the order passed by the appeal authority. In that regard, reliance has been first placed on a decision of a learned Single Judge of this Court in **Ashfaq Vs. State of U.P. and Others, 2008(4) ADJ 416**. Then, reliance has been placed on a decision of the Division Bench of this Court in **Dharam Raj Vs. State of U.P. Through District Magistrate and Others, 2009(77) ALR 564**. Doubt, if any, in that regard is stated to have been removed by a further decision of the learned Single Judge in the case of **Sriram Prasad and another**

Vs. State of U.P. and 3 Others, (2016) 3 ALJ 308 and Neeraj Kumar Mishra Vs. Dy. Commissioner (Food) Region Allahabad and Others, 2017(3) ADJ 834 and Gram Vikash Sewa Samiti Vs. State of U.P. and 4 Others, Writ-C No. 19941 of 2018, decided on 30.8.2018. Thus, it has been submitted, the decision of the learned Single Judge referred to and relied upon by learned counsel for the petitioner in the cases of **Akhlaq (supra)** and **Smt. Muneeta (supra**) are *per incuriam*. Those decisions have not considered the binding ratio of the division bench decision in **Dharam Raj (supra**). As to the distinction attempted by learned counsel for the petitioner, based on the difference of language used in the English and Hindi versions of the Control Order, it has been submitted, the Hindi version of the official legislative publication, be it an Act, Notification etc., may be relied only in the event of an ambiguity arising upon reading of such publication in English itself.

8. Thus, reliance has been placed on a decision of the Supreme Court in **M/s Park Leather Industry (P) Ltd and Another Vs. State of U.P. and Others, (2001) 3 SCC 135** as also a division bench decision of the Uttarakhand High Court in **Smt. Shahjahan Baigam Vs. District Magistrate Udham Singh Nagar and Others, AIR 2017 Uttarakhand 200**. To that extent the decision of the learned single-Judge in the case of **Smt. Farzana (supra**) is described as not laying down the correct law.

9. Having heard learned counsel for the parties and having perused the record, in the first place, it would be appropriate to quote and compare the provisions of Clause 13 of the Control Order, as published in the English and Hindi. They read as below:

Clause 13 of the Control Order	
English	Hindi
Appeal.-(1) Appeal in relation to action or subject covered under the National Food Security Act, 2013 and rules framed under it shall lie before the authority mentioned in sub-clause (10) of Clause 11 of this order but appeal against appointment, suspension and cancellation of fair price shop by the competent authority shall lie before the Divisional Commissioner.	13. अपील- (1) राष्ट्रीय खाद्य सुरक्षा अधिनियम, 2013 और उसके अधीन बनायी गयी नियमावलो के अधीन आच्छादित कार्यवाई या विषय के सम्बन्ध में इस आदेश के खण्ड 11 के उपखण्ड (10) में उल्लिखित प्राधिकारी के समक्ष अपील की जायेगी, किन्तु सक्षम प्राधिकारी द्वारा उचित मूल्य की दुकान की बहाली, निलम्बन और निरस्तीकरण के विरुद्ध सम्भागीय आयुक्त के समक्ष अपील की जायेगी।
(2) Any person aggrieved by an order of the Designated Authority denying the issue or renewal of a ration card or cancellation of the ration card under the National Food Security Act, 2013 may appeal to the Appellate Authority within thirty days of the date of receipt of the order.	(2) राष्ट्रीय खाद्य सुरक्षा अधिनियम, 2013 के अधीन किसी राशन कार्ड को जारी करने या नवीकरण करने से इन्कार या राशन कार्ड का निरस्तीकरण करने से सम्बन्धित पदाभिहित अधिकारी के आदेश द्वारा व्यथित कोई व्यक्ति आदेश की

	प्राप्ति के दिनांक के तीस दिनों के भीतर अपीलीय प्राधिकारी को अपील कर सकता है।
[(3) Any person aggrieved by an order of the Competent Authority denying the issue or renewal of the agreement to the fair price shop owner, suspension or cancellation of the agreement may appeal to the Appellate Authority namely the Divisional Commissioner or the Divisional Additional Commissioner, Joint Commissioner/Deputy Commissioner (Food) authorized by him in writing to hear and dispose appeal within thirty days of the date of receipt of the order and the Appellate Authority shall, as far as practicable, dispose the appeal within a period of sixty days: *Provided that once an appeal has been disposed of by the Appellate Authority, the time for issue or renewal of the agreement of the fair price shop owner by the Competent authority referred to in sub-Clause (9) of Clause 10 shall begin from the date of decision of the Appellate Authority on the appeal.]* *Provided further that an appeal pending before an Appellate Authority appointed under the Uttar Pradesh Schedule Commodities Distribution Order, 2004 shall be disposed of by such authority as if this Order had not been made.*	(3) उचित मूल्य की दुकान स्वामी को अनुबन्ध जारी करने या नवीकरण करने, अनुबन्ध को निलम्बित या रद्द करने हेतु सक्षम प्राधिकारी के किसी आदेश द्वारा व्यथित कोई व्यक्ति अपीलीय प्राधिकारी अर्थात् सम्भागीय आयुक्त या सम्भागीय अपर आयुक्त या उसके द्वारा लिखित रूप में अपील की सुनवाई और निपटान के लिए प्राधिकृत संयुक्त आयुक्त/उपायुक्त (खाद्य) के आदेश प्राप्त होने की तारीख से तीस दिन के भीतर अपील कर सकेगा तथा अपीलीय प्राधिकारी, जहाँ तक व्यवहार्य है, साठ दिन के भीतर अपील का निपटान करेगा: परन्तु यह कि अपीलीय अधिकारी द्वारा एक बार अपील का निपटान किए जाने पर खण्ड-10 के उपखण्ड (9) में निर्दिष्ट सक्षम प्राधिकारी द्वारा उचित मूल्य की दुकान स्वामी का अनुबन्ध जारी करने या उसका नवीकरण करने का समय अपील प्राधिकारी द्वारा अपीलीय पर विनिश्चय की तारीख से प्रारम्भ होगा : परन्तु यह और कि उत्तर प्रदेश अनुसूची वस्तु वितरण आदेश, 2004 के अधीन नियुक्त किसी अपीलीय प्राधिकारी के सम्मुख लम्बित किसी अपील का निपटान ऐसे प्राधिकारी द्वारा किया जायेगा मानो यह आदेश न किया गया हो।]
(4) No appeal shall be disposed of unless the aggrieved person has been given a reasonable opportunity of being heard.	(4) किसी अपील का निपटान तब तक नहीं किया जाएगा जब तक कि व्यथित किसी व्यक्ति को सुने जाने का उचित अवसर न दिया गया हो।
(5) Pending the disposal of an appeal, the Appellate	(5) अपीलीय प्राधिकारी, किसी अपील के निपटान

Authority may direct that the order under appeal shall not take effect for such period as the authority may consider necessary for giving a reasonable opportunity to the other party under sub-clause (4) or until the appeal is disposed or, whichever is earlier.	के लम्बित होने पर यह निदेश दे सकेगा कि अपील के अधीन आदेश उस अवधि के लिए प्रभावी नहीं होगा, जो प्राधिकारी उपखण्ड-(4) के अधीन अन्य पक्षकार को सुने जाने का उचित अवसर प्रदान करने के लिए आवश्यक समझे या जब तक कि अपील का निपटारा न हो जाए, इसमें से जो भी पूर्वोत्तर हो।

10. The dispute in the present case revolves around interpretation to be given to Clause 13(1) of the Control Order. Admittedly, there is no ambiguity or discrepancy arising from reading of the Hindi and/or English versions of Clause 13(3) of the Control Order.

11. Read in entirety, Clause 13(1) of the Control Order seeks to provide for two different forums of appeal. In the first place, a forum of appeal has been provided in relation to action or subject matter covered under the National Food Security Act 2013 and the Rules framed thereunder. That forum of appeal has been provided before the Officer appointed or designated as the District Grievance Redressal Officer under the U.P. Food Security Rules, 2015. In that regard, the description of Clause 11(10) of the Control Order [in Clause 13(1)] appears to suffer from an apparent typographical/print error. There is no Clause 11(10) of the Control Order. That appeal forum appears to exist under Clause 9(10) of the Control Order. The other forum of appeal created is with respect to orders against appointment, suspension and cancellation of fair price shop agreement, described in the Hindi version of the Control Order as "Bahali'; "Nilamban' and "Nirastikaran'. That appeal forum has been created before the Divisional Commissioner.

12. By very nature, different rights are to be contested before the two different forums provided under Clause 13(1) of the Control Order. Before the first forum, the rights of the beneficiaries are to be contested with respect to issuance of ration cards etc. Before the other/second forum, the rights with respect to the fair price shop agency alone are to be contested. On a plain reading of Clause 13(1) of the Control Order (either in English or Hindi), there appears no legislative intent to confer a right of appeal on any person. The said Clause only speaks of appeal forums, with respect to two entirely different rights, vested in two entirely different class of citizens.

13. It may have been another case if Clause 13(1) existed without Clause 13(3) of the Control Order. That situation may have been akin to the one that existed under the earlier Control Order dated 03.07.1990. Under Clause 11 thereof, it was not specified, to whom the right of appeal was granted. For ready reference, Clause 11 of that Government Order is quoted below:

"जिलाधिकारी द्वारा दुकान नियुक्ति/निलंबन/निरस्तीकरण/नवीनीकरण न करने संबंधी पारित आदेश के विरुद्ध अपील संबंधित की जाएगी। इन मामलों में द्वितीय अपील की वयवस्था नहीं होगी।"

14. However, in the present case, Clause 13(3) of the Control Order specifically provides such right of appeal to 'any person aggrieved' against an order of the competent authority. That right of appeal has been given with respect to orders of denial or renewal of agreement to a fair price shop owner or an order of suspension or an order of cancellation of agreement of fair price shop. No other or further order has been made appealable. Thus, an order of revocation of suspension of a fair price shop agreement is not made appealable under Clause 13 (3) of the Control Order.

15. Other than that, the said sub-clause provides for period of limitation to avail that right of appeal, being 30 days from the date of receipt of the order passed by the competent authority. Then sub-clause 4 of the said Clause 13 of the Control Order further stipulates, no appeal (filed under Clause 13) shall be decided unless 'aggrieved person' has been given reasonable opportunity of being heard. Last, sub-clause 5 grants power to the Appeal Authority, to grant stay, pending an appeal.

16. Examined in that light, the first issue that may be dealt with is the interpretation to be given to Clause 13(1) of the Control Order in that it describes the nature of orders that may be appealed before the Divisional Commissioner. If the Hindi version of the Control Order were to be read to confer a right of appeal against an order of revocation of a suspension order, a conflict would arise between Clause 13(1) and 13(3) of the Control Order with respect to the right of appeal given against certain orders passed by the Competent Authority. While sub-clause (1) would provide for a forum of appeal against such order, sub-clause (3) would restrict/prevent filing of such appeal. A court may never read a statute in a manner as may give rise to a conflict between two provisions of the same enactment, existing for the same purpose.

17. While the English version of Clause 13(1) of the Control Order uses the words 'appointment', 'suspension' and 'cancellation', the Hindi version chooses to use the words *'bahaali*', '*nilamban*' and, '*nirastikaran*' to describe the nature of orders against which appeal may lie to the Divisional Commissioner. There is no dispute between the parties that the word suspension translates accurately to the word '*Nilamban*' and the word cancellation translates accurately to the word '*Nirastikaran*'. The parties are at variance as to the meaning to be given to the word 'appointment' as compared to the word '*Bahaali*' used in the Hindi version under Clause 13(1) of the Control Order.

18. Appointment of a fair price shop agent is an executive act. The selected/preferred applicant enters into an agreement with the respondent State authorities to run the designated fair price shop agency. Under Section 16 of the U.P. General Clauses Act, 1904, the power to appoint includes the power to suspend, dismiss, remove etc. On the other hand, "*Bahaali*' is a Hindi word only. It means and refers to an act of restoration or revival of a thing, arrangement, status, right etc. It is always used with reference to what existed before - that which had been interrupted or obstructed or removed or changed or replaced, immediately before it was restored or revived. Therefore, the genus is "appointment', "*Bahaali*' i.e., restoration or revival, is a species. Therefore, appointment would always

include "*Bahaali*', yet *''Bahaali*' does not include original appointment made.

19. Therefore, "*Bahaali*' may arise only in the event of a pre-existing fair price shop agreement - because of revocation of the earlier order of suspension passed by the Competent Authority. The event of revocation of a suspension order (passed earlier) may be described as ''*Bahaali*'. If the word appointment appearing in Clause 13(1) of the Control Order is read to include "*Bahali*', necessarily, clear conflict would emerge from a plain reading of the English and the Hindi versions of Clause 13 (1) of the Control Order.

20. On the other hand, it may be noted here itself, a plain reading of the English version of the Control Order gives rise to no ambiguity. For any ambiguity to exist, it must be first inferred by the Court that there are plural interpretation/meaning possible or permissible to be given to the language used by the legislature. If only one meaning can be inferred from the reading of the statute and the legislative Act remains functional on that reading, the Court may never explore a possibility of, or cull out an ambiguity in the legislative enactment. In that case, the interpretative exercise must remain simple and clear to read the intent of the legislature from the plain meaning of the words chosen by it. No other intendment is to be searched where the words used by the legislature offer a unique or clear grammatical and functional sense. No unworkability may ever be claimed because the legislature did not provide a right of appeal against an order of revocation of suspension order. It is so because appeal is a creature of statutes and not an inherent right.

21. Even in the Full Bench decision of this Court in **Ram Rati & Ors. Gram Samaj, Jehwa & Ors., AIR 1974 (All) 106** referred to in **Smt. Farzana (supra)**, the question framed was as below:

"Whether it will be a sound rule of interpretation or construction of Statutes that if there appears to be some doubt or ambiguity in the authorized text in English language of an Act enacted in Hindi by the Legislature of Uttar Pradesh, then for resolving the ambiguity or doubt and for ascertaining the correct meaning thereof, reference can be made to the corresponding Hindi text and reliance placed thereon?"

22. Having considered the submissions advanced, the Full Bench observed as below:

10. We may, at the very outset, mention that if the distinction between "conflict" in the Hindi text and the authoritative text in English and "ambiguity or doubt" in the authoritative text in English is kept in mind, the apparent conflict in the decisions of this Court will disappear. A "conflict" between the Hindi text and the authoritative English text is different from a "doubt or ambiguity" in the authoritative English, text. There will be conflict between the provisions of the two texts when it is not possible to reconcile or harmonize them and then the question will arise as to which of the two shall prevail. Such a conflict does not by itself result in a "doubt or ambiguity" in the authoritative English text. The principles applicable to the resolution of "conflict" are not applicable to the resolution of "doubt or ambiguity". The normal rules of interpretation of statutes will have to be applied in the case of "doubt or ambiguity" in any provision of the authoritative English text.

17. We are, therefore, of opinion that where there is some doubt or ambiguity in any provision in the authoritative English

text, it is permissible to look into the Hindi text to remove the doubt or ambiguity. We accordingly answer the question referred to this Bench in the affirmative."
(emphasis supplied)

23. Then, in **M/s Park Leather Industry (P) Ltd (supra**) the issue was resolved thus:

"Of course an English version is simultaneously published. Undoubtedly, if there is conflict between the two then the English version would prevail. However, if there is no conflict then one can always have assistance of the Hindi version in order to find out whether the word used in English includes a particular item or not. In the Hindi version the word used is "Chamra". There can be no dispute that the term "Chamra" would include "leather" in all its forms.

In this view of the matter the appeal stands dismissed. There will, however, be no order as to costs."

24. In face of the above dictum of the Supreme Court and of the seven- Judge Full Bench decision of this Court, the following ratio in **Ram Surat Mishra (supra)** runs contrary to that binding law. Therein, it has been observed as below:

"Since the official language of the State of U.P., has been declared Hindi Devnagri script in pursuance of power conferred by Article 345 of the Constitution, and the original bill passed by the Legislature is also in Hindi, in the event of conflict between Hindi and English version, the Hindi version of the statute shall prevail over the English version. The English version of the statutory provisions are mere translation of the Hindi version. Since entire proceeding of State Legislature is executed in Hindi and notifications are issued accordingly, the English version is mere translation of Hindi version. Therefore, in the event of language conflict, the Hindi version of statutory notification shall prevail over the English version."

25. As to **Associated Distributors Limited (supra),** it was observed as under:

"It is pertinent to mention here that the official language of the State of Uttar Pradesh is Hindi. If any difference is found between the notifications in English and Hindi, the notification issued in Hindi will be applicable. On the said notification, the courts have decided that confectionery comes within sweets (mithai) and sweetmeat, but it has not been mentioned that bubblegum comes within the category of a sweet."

26. It may be noted, in that decision, the Supreme Court did not consider the issue of conflict between the official English and Hindi versions of legislative publications rather, that ratio arose upon a "difference' noted in those publications. A difference may give rise to both, ambiguity and conflict. In so far as the Supreme Court has not spoken any further, it must be assumed, it had applied the rule - rely on the Hindi text to cure the ambiguity, only. Any other reading of that decision of the Supreme Court would create a conflict between two decisions of the Supreme Court. The real issue was as has been noted in the opening passage of judgement.

27. Therefore, the true rule to be applied remains one, being - in case the English version of the legislative publication, read on its own offers any ambiguity or doubt, its Hindi version may be read to cure that ambiguity, and no

further. If however, no ambiguity emerges from a plain reading of the English version of the legislative publication, then, despite any conflict arising on a comparative reading of the English and Hindi version of the same legislative publication, its English version would prevail. That is the only consistent ratio pronounced and consistently applied by the Supreme Court and the larger Full Bench of this Court.

28. Thus, with all respects, I am unable to subscribe to the view taken by the learned single-Judge in **Smt. Farzana (supra).** That view appears to have arisen contrary to the binding decision of the Supreme Court and the seven-Judge Full Bench decision of this Court. Therefore, I also do not find it necessary to refer the matter to a larger bench strength.

29. Being bound by the dictum of the Supreme Court and the Full Bench of this Court, the true meaning to be given to the Clause 13(1) of the Control Order is found to be a one contained in the English version of the Control Order. Consequently, the word '*Bahaali'* used in the Hindi version of the Control Order being in conflict with the world "appointment' used in the English version of that Control Order must and would necessarily, be read as 'appointment' only. No right of appeal has been granted (under that clause of the Control Order), against an order of revival or restoration of a fair price shop agreement. That beside the reason, Clause 13(1) of the Control Order only provides a forum of appeal but does not seek to create a right of appeal. Thus, provisions of Clause 13 (1) and 13 (3) of the Control Order are found to be wholly consistent to each other.

30. Consequently, Clause 13(1) of the Control Order does not grant a right of appeal, to any person, against any order contrary to such right provided under Clause 13(3) of the Control Order. Clause 13 (1) only refers to the nature of orders made appealable by referring to their genus - appointment, suspension, and cancellation whereas Clause 13(3) of the Control Order refers to the species of such orders, made appealable, by any person who may be aggrieved by such order/s. Thus, both - denial of issuance and denial of renewal of a fair price shop agreement, have been made appealable. However, other types of appointments such as revocation of suspension have not been made appealable.

31. As to the right of appeal to be availed, the same has been granted only to any 'aggrieved person'. As to the true meaning to be given to the words 'aggrieved person' (synonymous to "person aggrieved'), there is a consistent line of decisions. While the decision in the case of **Ashfaq (supra**) may no longer be good law in view of the changed provision of the Control Order viz-a-viz the right of appeal given to 'any person aggrieved' yet, that inherent principle in the earlier Control Order/s survives. Specifically, to the interpretation to be given to the word 'person aggrieved', I am bound by the dictum of the division bench of this Court in **Dharam Raj (supra**). In that case, the fair price shop agreement of the original agent was first suspended but later restored. Against such order, the writ petition had been filed by the complainant. The observations made in that decision are pertinent to the dispute at hand. Mainly, in paragraph nos.9, 10, 12 and 17, it was observed as below:

"9. As evident from narration of the facts given above, it is evident that the petitioner was one of the complainants in

the complaint made against the respondent no. 4 on 12.13.2008. The action has since been taken on the complaint so made by the petitioner and others against the respondent no. 4, and fine of Rs. 5,000/-has been imposed.

10. In the circumstances, the petitioner cannot have any grievance in the matter, and he is not an aggrieved person, rather he is a person annoyed.

12. According to our opinion a "person aggrieved", means a person who is wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal in convenience. "Person aggrieved" means a person who is injured or he is adversely affected in a legal sense.

17. The view taken by us that the petitioner is not a person aggrieved, thus he has no locus standi to file the present writ petition thereby challenging the order dated 16.3.2009 passed by Sub-Divisional Magistrate, Jal Singh Pur, District Sultanpur is also supported by the decision of this Court in the case of Suresh Singh v. Commissioner, Muradabad Division,7 where it was held that in an inquiry under section 95 (g) of the V.P. Panchayat Raj Act, 947, the complainant who was Vp-Pradhan could be a witness in an inquiry but had no locus standi to approach this Court against the order of the State authorities, for the reasons that none of his personal statutory right are affected."

32. The issue was then dealt with elaborately by a learned single-Judge of this Court in **Sriram Prasad (supra)** wherein besides the following the division bench decision in **Dharam Raj (supra**), the learned Single Judge made pertinent observation as below:

"The meaning of the expression person aggrieved will have to be ascertained with reference to the purpose and the provisions of the statute. One of the meanings is that person will be held to be aggrieved by a decision if that decision is materially adverse to him. The restricted meaning of the expression requires denial or deprivation of legal rights. A more legal approach is required in the background of statutes which do not deal with the property rights but deal with professional misconduct and morality. (Refer-Bar Council of Maharashtra v. M.V.Dabholkar, (1975) 2 SCC 702, 710-11, paras 27 & 28).

Broadly, speaking a party or a person is aggrieved by a decision when, it only operates directly and injuriously upon his personal, pecuniary and proprietary rights (Corpus Juris Seundem. Edn. 1, Vol.IV, p.356, as referred in Kalva Sudhakar Reddy v.Mandala Sudhakar Reddy, AIR 2005 AP 45,49 para 10) The expression 'person aggrieved' means a person who has suffered a legal grievance ie a person against whom a decision has been pronounced which has lawfully deprived him of something or wrongfully refused him something. The petitioner is not an aggrieved person by merely filing a complaint. The order of revocation of cancellation of fair price shop license do not affect him in any manner.

The Division Bench in Dharam Raj Versus State of U.P. and others, 2010 (2) AWC 1878 (LB), held that the petition on behalf of the complainant against the licensee of fair price shop is not maintainable against the final order passed by the competent authority as the complainant cannot be said to have any grievance in the matter being not an aggrieved person rather is a person annoyed.

Recently Supreme Court in Ravi Yashwant Bhoir versus District Collector, Raigad and others (2012) 4 SCC 407 was dealing with the removal of the President of Uran Municipal Council under the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. The ex-President was the complainant, the Court was of the opinion that the complainant cannot be party to the lis as he could not claim the status of an adversarial litigant. The relevant extract is as follows:

"58. Shri Chintaman Raghunath Gharat, Ex-President was the complainant, thus, at the most, he could lead the evidence as a witness. He could not claim the status of an adversial litigant. The complainant cannot be the party to the lis. A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, a person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eyes of law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called damnum sine injuria.

59. The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis. A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a stat pro ratione valuntas reasons i.e. a claim devoid of reasons.

60. Under the garb of being necessary party, a person cannot be permined to make a case as that of general public interest. A person having a remote interest cannot be permitted to become a party in the lis, as the person wants to become a party in a case, has to establish that he has a proprietary a right which has been or is threatened to be violated, for the reason that a legal injury creates a remedial right in the injured person. A person cannot be heard as a party unless he answers the description of aggrieved party. (Vide: Adi Pherozshah Gandhi v. H.M. Seerval, Advocate General of Maharashtra, AIR 1971 SC 385; Jasbihai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed & Ors, AIR 1976 SC 578; Maharaj Singh v. State of Uttar Pradesh & Ors, AIR 1976 SC 2602; Ghulam Qadir x. Special Tribunal & Ors., (2002) 1 SCC 33; and Kabushiki Kanha Toshiba v. Tosiba Appliances Company & Ors, (2008) 10 SCC 766). The High Court failed to appreciate that it was a case of political rivalry. The case of the appellant has not been considered in correct perspective at all."

Similarly, the Supreme Court in Ayaaubkhan Noorkhan Pathan versus State of Maharashtra and others (2013) 4 SCC 465, 466 was dealing with the issue of caste certificate being challenged by a person who did not belong to the reserved category. The Apex Court imposed exemplary cost of one lakh upon the stranger to the lis as he abused the process of the Court to harass the appellant.

The Court held as follows:

"9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. A writ petition under Article 226 of the

Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the Authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that, the relief prayed for must be one to enforce a legal right. In fact, the existence of such right, is the foundation of the esercise of the said jurisdiction by the Court. The legal right that can be enforced must antinarily be the right of the appellant hutself, who complains of infraction of soch right and approaches the Court for relief as regards the same. (Vide State of Orissa v. Madan Gopal Runga, Allt 1952 SC 12; Saghir Ahmad & Anr: v. State of UP, AIR 1954 SC 728; Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal & On, AIR 1962 SC 1044; Rajendra Singh v. State of Madhya Pradesh, AIR 1996 SC 2736 and Tamilnad Mercantile Bank Shareholders Welfare Association (2) v. S.C Sekar & Ors. (2009) 2 SCC 784).

10.A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury, a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardised. (Vide: Shanti Kumar R. Chanji v. Home Insurance Co. of New York, AIR 1974 SC 1719; and State of Rajasthan & Ors. v. Union of India & Ors., AIR 1977 SC 1361)."

A Division Bench in Amin Khan versus State of U.P and others 2008(2) AWC 2002: (2008) 2 UPLBEC 1256 was of the opinion that a complainant had no locus to challenge the order of the District Magistrate withdrawing the administrative and financial powers of the Pradhan. The Court placed reliance upon Suresh Singh's case (Supra) as well as Smt. Kesari Devi versus State of U.P & others 2005(4) AWC 3563.

This Court in Ram Baran Versus State of U.P. and others, 2010(2) AWC 1947 (LB), again reiterated the principle that a complainant would have no locus to maintain the petition against the final order passed by the District Magistrate pursuant to direction in a petition under Article 226 of the Constitution against the Pradhan.

In the case of R. v. London Country Keepers of the peace of Justice, (1890) 25 Qbd 357, the Court held:

"A person who cannot succeed in getting a conviction against another may be annoyed by the said findings. He may also feel that what he thought to be a breach of law was wrongly held to be not a breach of law by the Magistrate.

He thus may be said to be a person annoyed but not a person aggrieved, entitle to prefer an appeal against such order."

The petitioner complainant shall have an opportunity during the course of regular enquiry to lead oral and documentary evidence if provided under the rules, but would have no locus to assail the final order passed by the authority on the complaint."

33. Similar view was taken by another learned single-Judge of this Court in **Neeraj Kumar Mishra (supra)** and by yet another learned single-Judge of this Court in **Gram Vikash Sewa Samiti (supra**).

34. In view of that law laid down by the Supreme Court as applied by the division bench of this Court and a long line of decisions (of learned single-Judge bench), the observations made to the contrary in **Akhlaq (supra**) and **Smt. Muneeta (supra**) giving the right of appeal to the complainant is clearly contrary to the binding principle and reasoning on that issue. In the context of disputes involving revocation of suspension of a fair price shop agreement, a "aggrieved person' or "person aggrieved' must be a person whose rights have been prejudiced by such order. Clearly, the present petitioner/complainant is not that person.

35. As held in **Ashfaq (supra),** the beneficiary cannot be a 'person aggrieved'. He only has right to receive essential commodities food grains, fuel, etc. on assured basis. However, he cannot choose his fair price shop agency. The difference between the 'person aggrieved' and a 'person annoyed' was also noted by the division bench of this Court in **Dharam Raj (supra**). Though, a complainant may qualify as a 'person annoyed', yet, he may never be a 'person aggrieved' (by an order passed in favour of the private respondent). Consequently, the petitioner could neither have filed an appeal and he has no locus to maintain the present petition.

36. What then survives for consideration is - if the Court may offer any consideration in such matters. Here, another learned Single Judge of this Court in **Yogendra Singh Vs. State of U.P. & Ors., Misc. Single No. 23298 of 2016**, vide order 27.9.2016, allowed such petition. However, it was not by way of right given to the complainant, rather, in that case, interference was made more by way of *suo moto* exercise of extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, on the intimation received by the petitioner who also happened to be the complainant. Therefore, the ratio in that case only provides for an exception rather than a rule to be applied in such cases.

37. Also, it cannot be overlooked, it stands generally recognized that the State Government and/or the Gaon Sabha are the collective bodies entrusted and interested in the enforcement of the rights of the beneficiaries for whose benefit the fair price shop machinery exists. They may, if not satisfied with the order of the appeal authority, approach this Court, in appropriate case. Leaving that right intact, no interference is warranted at the instance of the present petitioner, in the instant case. The objection being raised as to the procedure adopted may not allow the Court to create a locus with the present petitioner to maintain the present writ petition. It is also not a ground as may commend to the Court to set aside the fair price shop arrangement, for that reason alone. Sufficient punishment appears to have been dealt out to the private respondent by suspension served out. It is expected, the said respondent would conduct his activity in accordance with law or face fresh suspension proceedings, in face of fresh breach.

38. Consequently, leaving that course open, the writ petition is **dismissed**.

No order as to costs

(2022)04ILR A829
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.04.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-C No. 7909 of 2016

Mohd. Qasim Khan & Anr. ...Petitioners
Versus
Chief Controlling Revenue Auth. & Ors. ...Respondents

Counsel for the Petitioners:
Uma Shankar Sahai, Deo Prakash Srivastava, Priti Saxena

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India, - Article 226 - Indian Stamp Act, - Section 47 A (3) - U.P. Stamp (Valuation of Property) Rules, 1997 – Rules 3, 6 & 7 – Sale deeds executed in year 2008 – instruments are undervalued – spot inspection carried in year 2008 - Revenue authorities while determining the stamp duty duly considered the correct market value, nature and use of the property – Notice issued – objection - notice barred by limitation – not considered - Statutory Appeal – writ petition - notices served upon the petitioner possible only in the year 2014 - doesn't means proceeding initiated only in 2014 – writ petition dismissed.(Para – 19, 20, 21)

Writ Petition Dismissed. (E-11)

List of Cases cited: -

1. Sudama Vs Chief Controlling Revenue Authority UP Allahabad & ors.(Writ – C No. 19334/1998,

2. Rakesh Chandra Mittal & ors.Vs St. of UP & anr. (2004 (5) AWC 3952),

3. Smt. Sushila Verma Vs St. of UP & ors.(2006 (2) AWC 1492),

4. Nar Singh Das Agrawal Vs Chief Controlling Revenue Authority, BoR, & ors. (2007 (1) AWC 727),

5. Aniruddha Kumar Ashwini Kumar Vs Chief Controlling Revenue Authority, BoR, & ors. (2000 (3) AWC 2587),

6. Prakashwati Vs Chief Controlling Revenue Authority, BoR, & ors. (1996 AWC 1331),

7. Neelu Chopra & ors.Vs St. of UP & ors.(2008 (6) ALJ 507),

8. Smt. Pushpa Sareen Vs St. of UP & ors.(2015 (33) LCD 1575),

9. Shakeel Ahmad Vs Additional Commissioner, Judicial, Faizabad, 2019 (37) LCD 2423),

10. Wassi Ur Rehman & anr. Vs Commissioner Moradabad Division & ors.(Writ – C No. 47533/2010 decided on 26.02.2015).

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

1. Heard learned counsel for the petitioner and the learned Standing Counsel appearing on behalf of the State Respondents.

2. It is the case of the petitioners that the petitioners had bought two plots of land situated in Village Obri Deeh, Pargana Sadaullah Nagar, Tehsil Utraula, District Balrampur through sale deed dated 17.03.2008 from One Shri Ahmad Rasheed. Plot No. 1697 admeasuring 0.2390 hectares was bought for total sale consideration of Rs. 1,75,000/- only, Plot No. 1696 admeasuring as 0.2390 hectares was also purchased which is adjacent land through sale deed dated 05.03.2008, for a sale consideration of Rs. 1,75,000/- from the same vendor i.e. Shri Ahmad Rasheed.

No notice was ever served upon the petitioner for initiation of proceedings under Section 47A (3) of the Stamp Act till 2014. After six years from the date of the sale deed i.e. on 15.11.2014, the Assistant Commissioner (Stamp), Balrampur with reference to a letter dated 20.10.2014 sent by the District Collector carried out the spot inspection of the land in question and submitted his report. The petitioner having been issued notice for the first time after the report dated 15.11.2014 submitted his objections, but the same were not considered.

3. It has been submitted that in the impugned order mention has wrongly been made that the proceedings were initiated on the report of the Sub-Registrar, Utraula dated 18.03.2008 which was approved by the Assistant Inspector General (Registration) on 19.03.2008. Fraudulent order sheet were prepared in the Court of opposite party no.3 i.e. Collector, Balrampur showing that on 30.05.2008, the case was put up for orders and date fixed for 02.07.2008 for service of notice. Thereafter, 77 dates had been fixed from 20.08.2008 till 10.02.2014 but no report regarding service of notice on the petitioners was submitted then on 10.03.2014 an order was passed fixing 28.04.2014 for arguments. On 19.05.2014, an order was passed for issuance of notice to the petitioner again and date of 16.06.2014 was fixed. It was for the first time after such date was fixed that notice was issued to the petitioners. The petitioners put in appearance on 23.01.2014 and sought time for filing objections. Time was granted and date of 08.09.2014 was fixed for filing objections. The petitioners filed their objections on 20.09.2014 alongwith an application for spot inspection to be done. Spot inspection was not done and a fraudulent report submitted on 15.11.2014 on the basis of which the impugned order was passed.

4. Learned counsel for the petitioner had submitted that under Section 47A of the Stamp Act, if an instrument is undervalued immediately after presentation of such instrument and before accepting it for registration, the Registrar/Registering Officer shall require the person liable to pay stamp duty, to pay deficient stamp duty and on failure to do so return the instrument for presenting again. Under Section 47A (3) of the Act the Collector may, Suo motu, or on a reference from any Court or from the Commissioner of Stamps, or an Additional Commissioner of Stamps, or a Deputy Commissioner of Stamps, or an Assistant Commissioner of Stamps, or any officer authorised by the State Government in that behalf, initiate proceedings with respect to deficiency in payment of stamp within four years from the date of registration of any instrument, and examine the instrument with regard to correctness of the market value of the property and if, after such examination he has reason to believe that the market value of the such property has not been truly set forth in the instrument, he may determine the market value of the duty payable thereon.

5. It has been submitted that under the Proviso of Section 47A(3), an action can be initiated even after a lapse of four years from the date of registration of instrument, but prior permission of the State Government is required. No prior permission has been taken, but the sale deed executed in March, 2008 have been questioned by means of notice issued in November, 2014.

6. It has also been argued that under Section 47-A of the Stamp Act the

Collector must first find out the correct market value of the property and to determine the same he must carrt out an inquiry, which should be in accordance with Rule 7 of the U. P. Stamp (Valuation of Property) Rules, 1997, which requires that on receipt of reference, or where the action is proposed to be taken Suo Motu under Section 47-A, the Collector shall issue notice to the parties to the instrument to show cause within thirty days of the receipt of such notice and he may admit oral and documentary evidence, if any, produced by the parties to the instrument and to satisfy himself as to the correctness of the market value of the property call for any information from any public office or authority or may inspect the property after due notice to the parties, and after considering the representation of the parties, he shall determine the market value of the property and the duty payable thereon. If such market value is found to be undervalued and the instrument not duly stamped, necessary action can be taken in respect of the same according to the relevant provisions of the Act.

7. It has been submitted on the basis of the pleadings on record that two agricultural plots No. 1696 and 1697 admeasuing .02390 hectares each, were bought by the petitioners, for agricultural purposes at the rate of Rs. 1,75,000/- each as sale consideration. On the date of sale deed, the Collector's Circle Rate list of 2008 was applicable. The petitioners paid 25% extra because the land in question was in the vicinity of Abadi and 25% more also because the land is question was situated on a Link road. The total valuation having been calculated by the petitioners on the basis of Collectors Circle Rate list of 2008, the stamp duty at the rate of 8% on total valuation was paid and also Registration fee. The petitioners having paid additional stamp duty to the extent of 25% + 25 %, there was no deliberate under valuation of the instrument. The petitioners' objections regarding the land being agricultural in nature were ignored only because the land was situated adjacent to the Link road and commercial establishments for example a mobile talkies, which was disfunctional was found to be existing on an adjacent plot of land. The inspection having been done after six years of the date of sale deed was vitiated. Initially Circle Rate of Rs. 3,500/- for commercial land was proposed to be levied, but later on land having been determined as residential, Rs.2,200/- per sqare meter was determined as the market value/circle rate on the basis of which deficiency in stamp duty of Rs. 3,94,640/- + a 10% penalty thereon of Rs. 39,464/- was determined with liability to pay simple interest at the Rate of 1.5% per month till the date of actual payment. Aggrieved by the order dated 27.04.2015, the petitioner filed Stamp Appeal No. 72 of 2015-16 and also Stamp Appeal No. 73 of 2015-16. The petitioners raised all grounds regarding delayed initiation of proceedings as also wrong determination of value of land, but the Chief Controller Revenue Authority, Board of Revenue decided the Appeal on irrelevant considerations, holding that the land in question had been surrounded by Commercial premises for example a road, a playground, a girls school and a mobile talkies.

8. It has been submitted by the petitioners that after the Appeal was rejected on 17.02.2016, this Court pleased to pass an Interim Order on 02.05.2016 that in case, the petitioners deposited a further sum of Rs. 1,00,000/- in addition to the 1/3 statutory amount already deposited for admission of Appeal, the recovery

proceedings against the petitioners shall remained stayed. The petitioners have complied with such order and have deposited the amount as a result, further recovery proceedings have remained stayed.

9. Learned counsel for the State Respondents has pointed out from the order impugned that the sale deed were executed with respect to two plots of land in March, 2008 and on 18 March, 2018 itself, an on the Spot Inspection was carried out by the Assistant Commissioner and a Report submitted regarding under valuation of the property. On the said Report a Reference was made to the Collector. Notices were issued to the petitioners and after such notices were served the petitioners' appeared and filed objections saying that the property in question was inspected without associating them with such inspection. On the basis of such objections, the Collector issued a letter on 20.10.2014 to the Assistant Commissioner (Stamp), Balrampur for carrying out on the spot inspection alongwith family members of the petitioners and in their presence. Consequently, the Assistant Commissioner(Stamp) carried out the spot inspection on 13.11.2014 and submitted his report on 15.11.2014 which was filed as Annexure-4 to the petition. With respect to Plot No. 1696 admeasuring 0.239 hectares, the sale had been carried out showing agricultural rates of Rs.9,00,000/- per hectares, the Circle Rate at the time of such sale for commercial land was Rs.3,500/- per square meter. In the Circle Rate list at serial no.16 mention was made of location of land near either a State or District or painted Link road or Kharanja Marg and accordingly, 70% or 50% or 25 % or 15% respectively of additional value was to be fixed. The land in question i.e. Plot No. 1696 was situated adjacent to a painted road and also near Abadi and just adjacent to such land was a touring Talkies, though disfunctional. The land being discovered to be commercial in nature in the initial on the spot inspection carried out on 08.07.2008 reference of which has been made in the Report dated 15.04.2008 it had correctly been valued it on commercial rate of Rs.3,500/- per square meter.

10. Similarly, Plot No. 1697 was situated next to the same painted Link road and a playground was situated towards south and west of the plot, and a Stage was also constructed for holding of public functions towards south of such plot, and towards north was the building of the old touring Talkies, which was now disfunctional. The land being situated in the midst of Abadi and no agricultural activities having been carried out either on the said plots of land or on adjacent and surroundings plots of land, and a girl school situated next to it, it could not be said that the land in question was agricultural, therefore, the agricultural rate of Rs.9,00,000/- per hectare was wrongly mentioned in the sale deed. The commercial rate of 2008 circle list was Rs.3,500/- per square meter and residential rate was Rs.2,200/- per square meter. It was proposed to impose residential rate of Rs. 2,200/- per square meter instead of the initial proposal of imposing commercial rate of Rs.3,500/- per square meter in the report dated 15.11.2014.

11. Learned counsel for the petitioner has placed reliance upon judgment rendered by a Coordinate Bench of this Court in the case of ***Sudama vs. Chief Controlling Revenue Authority U.P. Allahabad & Others*** in Writ C No.-19334 of 1998 where this Court relied upon a

Division Bench judgement in ***Rakesh Chandra Mittal and Others Vs. State of U.P. and Another, 2004 (5) AWC 3952*** that where no finding had been returned with regard to the exact situation of land and the inspection was done by the Tehsildar after more than three and a half year for the execution of sale deed the market value determination much later on, on the basis of any subsequent improvement or change in nature or user of land resulting in enhanced market value cannot be taken into account. Value of the property on the date of the execution of the documents alone can be considered for the purpose of determination of proper stamp duty.

12. The Coordinate Bench has also placed reliance upon the judgment render in ***Smt. Sushila Verma Vs. State of U.P. and Others, 2006 (2) AWC 1492*** and ***Nar Singh Das Agrawal Vs. Chief Controlling Revenue Authority, Board of Revenue, Allahabad and Others , 2007 (1) AWC 727*** where market value of agricultural land was held to be on the basis of per hectare and not on basis of Circle Rates for residential plots determined on per square meter basis. Just because the land in question was situated next to a road, it could not be inferred that it was commercial in nature. The Court observed on the basis of the facts of the particular case in Sudama (Supra) that merely because the land in dispute was 20 meters distant from the residential area will not convert the land from agricultural to residential or commercial land. The Court had set aside the order passed by the Additional District Magistrate (Finance & Revenue) and had remitted the matter for fresh consideration.

13. The learned counsel for the petitioners has also placed reliance upon the judgement passed by the Coordinate Bench of this Court in the case of ***Aniruddha Kumar and Ashwini Kumar Vs. Chief Controlling Revenue Authority, 2000 (3) AWC 2587*** and Paragraph 19, 20 and 21 thereof, wherein the Court had observed that market value is to be determined on the basis of value that would satisfy the vendor, therefore, the question of future potential cannot be a factor for determining the market value of such land for the purpose of stamp duty payable under the Stamp Act. The vendee pays the price that satisfying the vendor and on the utility of the land as on the date of transfer by the vendor and as such the land was an agricultural land, it has to be treated as such and the valuation has to be done accordingly. Whether in future the purchaser puts to the land into residential use or changes the character is immaterial for the payment of stamp duty.

14. The Court had placed reliance upon ***Prakashwati Vs. Chief Controlling Revenue Authority, Board of Revenue, Allahabad, 1996 AWC 1331*** whether the Supreme Court had held that situation of a property in an area close to a decent colony could not by itself make it a part thereof, and it should not be a factor for approach of the authority in determining the market value.

15. The learned counsel for the petitioner has also placed reliance judgment rendered by the Division Bench of this Court in ***Neelu Chopra & Others vs. State of U.P. and Others, 2008 (6) ALJ 507*** and paragraph 9, 10 and 11 thereof which refers to limitation under Section 47-A (3) of the Act for impounding an instrument or initiation of proceedings of recovery of deficiency in stamp duty saying that four years period has to be completed from the date of registration of the instrument. In the

said case, notice was issued on 26.03.1991 though sale deed was registered on 31.12.1984 i.e. after more than six years from the date of execution of the instrument. The Court did not find the explanation given by the opposite parties in the counter affidavit for initiation of proceedings beyond the limitation of four years as sufficient and had quashed the proceedings.

16. Learned Standing Counsel on the other hand, on the basis of judgment rendered by the Full Bench of this Court in ***Smt. Pushpa Sareen Vs. State of U. P. and Others, 2015 (33) LCD 1575*** has argued that the question with regard to correct valuation of property only on the assumption that the same is likely to be used for commercial purpose or presumed future prospective use of the land, was considered including the question of declaration under Section 143 of the U.P.Z.A.L.R. Act and in the absence thereof a presumption arising in favour of the party that the land was used for agricultural purposes. The Full Bench observed that the power under Section 47-A was to be used by the Collector to determine the correct "market value" of the property and the Collector has the power to fix valuation of the plot taking into account the future prospective use of the land. It held that stamp duty is a levy which is imposed not on the transaction but on the instrument. The Court observed that its attention had been drawn to certain judgements of Single Judges of the Court which had taken the view that the market value of the land could not be determined with reference of the land to which the buyers intends to put it in the future. However, the Court observed that the power under Section 47-A is for the Collector to determine the actual market value of the property, he is not bound either by the value as described in the instrument or for that matter the value as discernible on the basis of the rules. It observed in paragraphs 27, 28 and 29 thus:-

"27. The true test for determination by the Collector is the market value of the property on the date of the instrument because, under the provisions of the Act, every instrument is required to be stamped before or at the time of execution. In making that determination, the Collector has to be mindful of the fact that the market value of the property may vary from I on to location and is dependent upon a large number of circumstances having a bearing on the comparative advantages or disadvantages of the land as well as the use to which the land can be put on the date of the execution of the instrument.

28. Undoubtedly, the Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date. The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. This potential has to be assessed with reference to the date of the execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto. Again the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has

been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land.

29. The fact that the land was put to a particular use, say for instance a commercial purpose at a later point in time, may not be a relevant criterion for deciding the value for the purpose of stamp duty, as held by the Supreme Court in State of U.P. and others v. Ambrish Tandon and another, (2012) 5 SCC 566, This is because the nature of the user is relateable to the date of purchase which is relevant for the purpose of computing the stamp duty. Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser."

17. Learned counsel for the State Respondents has also placed reliance upon judgement rendered by Coordinate Bench of this Court in ***Shakeel Ahmad Vs. Additional Commissioner, Judicial, Faizabad, 2019 (37) LCD 2423*** whether this Court had considered the judgement rendered by the Full Bench in ***Smt. Pushpa Sareen(Supra)*** and observed in paragraphs 11, 12 and 13 thus:

"*11. It is no doubt true that several Division Benches of this Court before the Full Bench decision in the case of Pushpa Sareen (supra) was rendered on 12.2.2015, had held that future potential for residential or commercial use of the property cannot lead to a presumption that the sale deed has been deliberately undervalued, if the land in question continues to be recorded as agricultural land and no declaration under Section 143 of U.P.Z.A. and L.R. Act for change of land user has been made by the competent authority. However, even from a perusal of the Full Bench rendered by this Court on several questions referred by the Chief Controlling Revenue Authority to it, it is apparent that the Full Bench while answering the second question i.e. whether the Collector, Stamps has power to fix the valuation of a plot on the assumption that the same is likely to be used for commercial purposes, and whether the presumed future prospective use of the land can be a criterion for valuation by the Collector?, has observed in Paragraph nos.20 to 29 of the decision that a Collector under the second clause of Section 47-A of the Act is empowered to determine the market value of the property. The Collector in making that determination is not bound either by the value as described in the instrument or for that matter, the value as discernible (circle rate), as an obligation is cast upon the Collector to properly ascertain the true value of the property for which, conveyance has been registered and he is not bound by*

the apparent tenor of the instrument. He can even decide the real nature of the transaction and value of such property, ignoring apparent mention therein of its nature either as a lease deed, sale deed or a partnership deed. The Collector can look into the material placed before him and even conduct an enquiry to ascertain what is the likely value of such property in the area surrounding the property in question. If such enquiry gives him material to test, prima facie, whether the description of valuation in an instrument is proper or not, he may issue notice and thereafter, hear the parties and then pass appropriate orders. The Collector while determining the true value of an instrument may also look into the circle rate, but the circle rate does not take away the right of a person to show that the property in question is correctly valued as he gets an opportunity in case of under valuation to prove it before the Collector after reference is made.

12. The determination may be made on the basis of the market value of the property on the date of the instrument and the Collector should be mindful of the fact that the market value of the property may vary from location to location and is dependent upon a large number of circumstances having a bearing on the comparative advantages or disadvantages of the land as well as the use of the land to which, the land can be put on the date of execution of the instrument. However, the Collector cannot launch upon a speculative enquiry about the prospective use to which, the land may be put to use at an uncertain future date, but the market value of the property can be determined with reference to the use to which the land is capable reasonably of being put to use immediately or in the proximate future. "The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. This potential has to be assessed with reference to the date of execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto. Again, the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land."

13. In Para-28 of the judgment, the Hon'ble Full Bench has referred to the judgment rendered by the Supreme Court in the case of State of U.P. and others v. Ambrish Tandon and another, (2012) 5 SCC 566, and has observed that where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they

would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser."

18. Learned counsel for the State Respondent has pointed out from the counter affidavit, a judgement rendered by a Coordinate Bench of this Court in ***Wassi Ur Rehman and another Vs. Commissioner Moradabad Division and Others*** in Writ C. No. 47533 of 2010 decided on 26.02.2015 wherein the Coordinate Bench had considered earlier judgements rendered by the Coordinate Bench and had observed that the person presenting the instrument is required to disclose the nature of economic activity, industrial development, if any, prevailing in the locality where the property is situated and and to mention any other special feature affecting the value of the property as per Rule 3 and Rule 6 of the Stamp Rules, 1997. The Court observed that the land being only 720 square meter (in the instant case land is around 2,093 square meter) it was highly unlikely that such land was to be used for agricultural purposes the petitioner had not filed any exemplar to show that agricultural activity is the predominant activity in the vicinity where the property was situated. Merely, because the property was recorded as agricultural property and no declaration under Section 143 of the U.P.Z.A.L.R. Act was made, it could not be said that the property did not have commercial potential on the date of execution of sale deed.

19. In some and substance the view that has now been crystallized after the decision of the Full Bench of this Court is that it is for the Collector to determine the correct market value of the land not on the basis of any declaration under Section 143 of the U.P.Z.A.L.R. Act but on the basis of nature and use of the property as actually determined on the spot, coupled with the predominant activity in the locality where the property is situated.

20. This Court having considered the judgements rendered by the Coordinate Bench and also by the Full Bench of this Court finds from a perusal of this sale deed filed as Annexure to the petitions that the land in question was not bought for the purpose of carrying out agricultural activity, it had been bought for commercial purposes. With regard to the specific plea raised by the petitioner that no notice was ever served upon him and therefore it can be presumed that proceedings were initiated only in 2014 and thus barred by limitation, this Court has found, perusal of pleadings on record including the orders impugned, and the report dated 15.11.2014, that the proceedings were initiated on the basis of an on spot inspection carried out on 08.04.2008, the reference itself was made on 15.04.2008. Just because the petitioner avoided service till 2014, it cannot be said that the proceedings were initiated in 2014.

21. The petitioner has not disputed in his petitions the actual location of the plots in question and on the spot inspection report which was carried out in his presence on 15.11.2014. The land being commercial in nature. This Court found no good ground to show interference in the orders impugned.

22. These petitions stand ***dismissed.***

23. No order as to costs.

(2022)04ILR A838
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCNOW 04.04.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 11395 of 2017

Sec. Sadhan Sahkari Samiti Ltd. & Ors. ...Petitioners
Versus
Presiding Officer Labour Court, Faizabad & Anr. ...Respondents

Counsel for the Petitioners:
Saryu Prasad Tiwari

Counsel for the Respondents:
C.S.C., Shobh Nath Pandey

Civil Law – Constitution of India, 1950 - Article 226, - Payment of Wages Act, - U.P. Industrial Dispute Act, 1947 - Sections 2 (K) & 33(C)(2), - U.P. Cooperative Societies Act - Section 70 - Petitioner filed application before the prescribed Authority under payment of wages Act - for payment of difference of wages - Award was passed & get finality when awarded amount was paid - respondent preferred an application before the Labour Court as Industrial Dispute - impugned order was passed - it is a settled law that in case of a dispute between the cooperative societies and its members, Labour court would not have its jurisdiction - impugned order suffers with lack of jurisdiction – writ petition allowed – impugned order set aside.

Writ Petition allowed. (E-11)

List of Cases cited: -

1. Ghaziabad Zila Sahkari Bank Ltd. Additional Labour Commissioner & ors.(2007 Vol. 11 SCC 756),

2. Prabhu Dayal Vs Sahkari Samiti Mujuri Vikas Khand & ors.(2008 Vol. 4 SCC 34),

3. K. A. Annamma Vs Secretary, Cochin cooperative Hospital Society Ltd. (2018 Vol. 2 SCC 729),

4. Bangalore Water Supply and Sewerage Board Vs A. Rajappa & ors.(AIR 1978 SC 548) ,

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard learned counsel for the petitioner and Sri Shobh Nath Pandey, the counsel appearing on behalf of the respondents.

2. The present petition has been filed challenging the order dated 17.04.2017 passed by the labour court in exercise of the powers under section 33(C)(2) of the U.P. Industrial Disputes Act, 1947.

3. The facts, in brief, are that the respondent claiming himself to be employed with the petitioner filed an application under the Payment of Wages Act alleging that the wages paid to the petitioner were less than the wages to which the petitioner was entitled and by means of the order dated 29.03.2004, the authority under the payment of wages act determined that the petitioner was paid wages less by Rs.1077/- and accepted the contention of the respondent for payment of difference of payment of wages for the period December 2001 to April 2002 and thus passed an award directing the petitioner to pay the amount of Rs.21,740/-. The said award was never challenged and the admitted position as of now is that the petitioner has been paid the amount as awarded by the prescribed authority under the Payment of Wages Act. After the said award, the respondent preferred an application under section 33(C)(2) of the Industrial Disputes Act claiming that once the wages were determined by means of the order dated 29.03.2004, for the subsequent

period also, the respondent has not been paid wages of which he was entitled. Based upon the said application, an order was passed holding that the respondent was entitled to difference of payment of wages for the period December 2001 up to June 2006 (fifty five months) and the same were quantified and awarded at Rs.59,235/- with a further penalty of Rs.59,235/- was also imposed and the petitioners were directed to pay a total amount of Rs.1,18,470/- to the respondent. The said order is under challenge in the present proceedings.

4. The counsel for the petitioner argues that the order passed in exercise of powers under section 33(C)(2) of the Act is bad in law inasmuch as the award in favour of the respondent dated 29.03.2004 had quantified the dues payable to the respondent at Rs.21,740/-, the authority under section 33(C)(2) could not have determined the amount allegedly due by the respondent for the period other than claimed leading to passing of the award dated 29.03.2004. It is further argues that the respondent had drawn the bills for payment of his dues and after he was terminated, the respondent preferred the application. In fact the respondent challenged the termination order by filing a writ petition before this court, which was dismissed directing the respondent to prefer a claim under section 70 of the U.P. Cooperative Societies Act. It is stated that the respondent did not file any proceedings under section 70 of the U.P. Cooperative Societies Act and instead filed an application under section 33 (C) (2) of the Act, which has been allowed. He further argues that although the authority under the Payment of Wages Act, had the power to pass an award, however, the labour court does not have any jurisdiction to entertain any dispute in between the Cooperative Society and its Members except by way of invoking the procedure as prescribed under Section 70 of the U.P. Cooperative Societies Act.

5. Learned counsel for the petitioner places reliance on the judgment of the Supreme Court in the case of **Ghaziabad Zila Sahkari Bank Ltd. vs. Additional Labour Commissioner and others; 2007 (11) SCC 756** as well as the judgment of the Supreme Court in the case of **Prabhu Dayal vs. Sadhan Sahkari Samiti Mujuri Vikas Khand, Paniyara and others; 2008 (4) SCC 34**. In the light of the said judgments, he argues that the labour court did not have the jurisdiction, as such, the order deserves to be set aside.

6. The counsel for the respondent, on the other hand, tries to justify the order by arguing that once the prescribed authority under the Payment of Wages Act had quantified the salary payable to the respondent, only for the purposes of computing the benefits, the relief as availed by the respondent was available under section 33(C)(2) of the Industrial Disputes Act. He further argues that the question of labour court having jurisdiction was considered by the Supreme Court in the case of **K.A. Annamma vs. Secretary, Cochin Cooperative Hospital Society Limited; 2018 (2) SCC 729**. He also places reliance on the judgment of the Supreme Court in the case of **Bangalore Water Supply and Sewerage Board vs. A. Rajappa and others; AIR 1978 Supreme Court 548**. In the light of the above two judgments, the counsel for the respondent argues that the petition is liable to be dismissed as the respondent was vigilant over his rights to approach the labour court for payment of his dues. He also argues that after the judgment of the

Supreme Court in the case of **Bangalore Water Supply (supra),** a Cooperative Society would also fall within the definition of the 'industry'.

7. The counsel for the petitioner argues that the judgment of the Supreme Court in the case of **K.A. Annamma (supra)** does not take into consideration the earlier judgments of the Supreme Court in the case of **Ghaziabad Zila Sahkari Bank Ltd. (supra) and Prabhu Dayal (supra)** and the same being rendered in the facts arising out of the Kerala Cooperative Society Act would not be applicable to the present case.

8. In the light of the arguments raised at the bar, this court is to decide whether the labour court was justified in exercise of the powers under section 33(C)(2) of the Industrial Disputes Act to have passed the order as has been done by means of the present order, impugned in the present writ petition.

9. What emerges from the pleadings is that by means of an award dated 29.03.2014, the prescribed authority under the Payment of Wages Act had quantified the payments to the respondent for the period December 2001 to April 2002 at Rs.21,740/-. No other proceedings were ever initiated under the Payment of Wages Act by the respondent. The respondent approached the labour court by filing an application under section 33(C)(2) and on which the labour court assessed the amount payable for the period 2001 up to 2006.

10. The first argument as to whether the labour court has jurisdiction for passing the order has been squarely concluded by the Supreme Court in the case of **Ghaziabad Zila Sahkari Bank Ltd. (supra) followed by Prabhu Dayal's case (supra)** to hold that the remedy in case of a dispute in between the cooperative society and its members would be under section 70 of the Cooperative Societies Act and the labour court would not have the jurisdiction. Relevant paragraph of the said judgment holds as under :

"Alongwith the appeal, some appointment orders have been filed as annexures. The appointment order clearly says that the services were governed by the Service Regulations, 1975 and the bye-laws of the bank. It is relevant to mention here that the services of the employees of the Bank are governed by service regulations 1975 framed under the Act of 1965, which provides complete machinery and adjudication. Moreover, the provisions under Section 70 of the U.P. Cooperative Societies Act, 1965 is elaborate in this regard, which provides complete machinery that if there is any dispute between the employers and the employees of the Cooperative Society, the matter shall be referred to the Arbitrator as provided under Section 70 of the U.P. Cooperative Societies Act, 1965. Section 70 of the U.P. Cooperative Societies Act and Section 64 of the M.P. Cooperative Societies Act are pari materia and this Court in the matter of R. C. Tewari vs. M.P. State Cooperative Marketing Federation Ltd. 1997 (5) SCC 125 held that the Labour Court and Industrial Laws are not applicable where complete machinery has been provided under the provisions of the Cooperative Societies Act and in such view of the matter the Learned Additional Labour Commissioner U.P. has no jurisdiction to pass orders in the nature it has been passed."

11. The said judgments were rendered while interpreting the provisions of the U.P. Industrial Disputes Act and the U.P.

Cooperative Societies Act would thus be binding on this court. The judgment in the case of **K.A. Annamma (supra)** does not take into consideration the earlier judgments of the Supreme Court in the case of **Ghaziabad Zila Sahkari Bank Ltd. (supra)** and in the case of **Prabhu Dayal (supra)** and the same is also rendered in the context of the provisions of Kerala Cooperative Societies Act.

12. Thus, in the facts of the present case, the law as propounded by the Supreme Court in the case of **Ghaziabad Zila Sahkari Bank Ltd. (supra**) would hold the field.

13. The issue with regard to the cooperative society being an 'industry' as defined under section 2(k) of the Industrial Disputes Act were neither raised before the labour court nor contested.

14. In the light of the said, I am of the firm view that the labour court has erred in passing the award for the period 2001 up to 2006. There being no dispute that the award dated 29.03.2004 has already been satisfied, the order dated 17.04.2017 is not sustainable and is set aside.

15. The writ petition stands disposed off in terms of the said order.

(2022)04ILR A841
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.04.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 13574 of 2018
alongwith other connected matters

U.P. Civil Secretariat Primary Co-Operative Bank Ltd. Lko ...Petitioner
Versus
U.P. Co-Operative Tribunal Lko & Ors. ...Respondents

Counsel for the Petitioner:
Vinod Kumar Singh

Counsel for the Respondents:
C.S.C., Anurag Srivastava, Rakesh Srivastava

Civil Law – Constitution of India, 1950 - Article 226, - U.P. Co-Operative Societies Act, 1965 – Sections 3, 3(2), 66, 68 & 68(2): - Registrar - Surcharge - Primary Co-operative Societies - Complaint received alleging irregularities committed by the employees & members of Committee of Management – an investigating committee was constituted – prima facie certain irregularities were revealed – impugned proceeding as well as order passed by Joint Registrar/Additional Commissioner & Additional Registrar Co-operative – appeals before Tribunal – tribunal set aside impugned orders same to be without jurisdiction – writ petition – the powers can be exercise only by the person upon whom the powers are delegated specifically - It is well established that the court cannot read a statutory provisions contrary to its language unless the same is prohibited under the Act or has the potential to lead to absurd results – matter remanded back to tribunal to decide the matter afresh.

(Para- 26, 29, 32).

Writ Petition Allowed. (E-11)

List of Cases cited: -

1. Ravi Pratap Srivastava & ors.Vs Co-operative Tribunal, U.P., Lucknow & ors.(Misc. Single No.1712 of 2010 decided on dated 09.04.2010),

2. Sultana Begum Vs Prem Chand Jain, (1997) 1 SCC 373),

3. Maya Mathew Vs St. of Kerala & ors., (2010) 4 SCC 498),

4. Commercial Tax Officer, Rajasthan Vs M/s Binani Cements Ltd. & anr., (2014) 8 SCC 319)

5. St. of Kerala Vs P.B. Sourabhan & ors., (2016) 4 SCC 102),

6. Smt. Lilawati & ors. Vs U.P. Co-operative Tribunal, Lucknow & ors., 2020 (3) ADJ 622),

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Vinod Kumar Singh, learned Counsel for the petitioner as well as Sri Pankaj Srivastava along with Sri Shashank Bhasim, learned Counsel appearing on behalf of the State and Sri Rakesh Srivastava, learned Counsel appearing on behalf of the respondent no.5 in leading Writ-C No.13574 of 2018.

2. All the petitions arise out of a common order, as such, the same are being decided by means of this common judgment.

3. For the sake of brevity, the facts as emerge from Writ-C No.13574 of 2018 are being recorded.

4. By means of the present writ petitions, the petitioners have challenged the judgment and order dated 21.03.2018 passed by the U.P. Co-operative Tribunal, Lucknow (hereinafter referred to as "the Tribunal"), whereby the appeals preferred against the order dated 23.01.2017 have been allowed.

5. The facts in brief are that in the year 2013, a complaint was received alleging irregularities committed by the employees as well as the members of the Committee of Management of the U.P. Civil Secretariat Primary Co-operative Bank Limited, on which, initially a Committee was constituted under Section 66 of the U.P. Co-operative Societies Act, 1965 (in short "the 1965 Act") and the matter was got investigated. It is stated that *prima facie*, certain irregularities were revealed. The proceedings were instituted under Section 68(2) of the 1965 Act. After hearing the parties, an order came to be passed under Section 68(2) on 23.01.2017 by an officer designated as the Joint Commissioner and Joint Registrar/ Additional Commissioner and Additional Registrar Co-operative.

6. Aggrieved against the said order, the persons against whom the said orders were passed (respondents herein) preferred appeals before the Tribunal. In all nine appeals, the main argument of the appellants was that the order dated 23.01.2017 is without jurisdiction. In support of the said argument, the appellants relied upon the notification issued by the State Government in exercise of powers conferred under Section 3(2) of the 1965 Act on 05.07.1969 as well as the subsequent notification dated 27.12.1975. They also placed reliance on the judgment of this Court dated 09.04.2010 passed in ***Misc. Single No.1712 of 2010 [Ravi Pratap Srivastava and others vs Co-operative Tribunal, U.P., Lucknow and others]***. The Tribunal relying upon the judgment dated 09.04.2010 passed in the case of Ravi Pratap Srivastava (supra) allowed the appeals vide order dated 21.03.2018 and set aside the orders dated 23.01.2017 holding the same to be without jurisdiction and further observed that in case, any irregularity comes to light, the orders can be passed under Section 68 of the 1965 Act in accordance with law. The said order dated 21.03.2018 is under challenge before this Court.

7. The Counsel for the petitioner argues that the orders passed by officer designated as the Joint Commissioner and

Joint Registrar/ Additional Commissioner and Additional Registrar Co-operative was well within jurisdiction. He argues that Section 3 of the 1965 Act provides for a Registrar and the State Government is under an obligation to appoint a person to be the Registrar of the Co-operative Societies for the State. Sub-section (2) of Section 3 confers additional powers on the State Government to appoint other persons to assist the Registrar by a general or special order and confer upon them all or any of the powers of the Registrar. Section 3 is quoted hereinbelow:

*"**3. Registrar**. - (1) The State Government may appoint a person to be the Registrar of Cooperative Societies for the State.*

(2) The State Government may, for the purposes of this Act, also appoint other persons to assist the Registrar and by general or special order confer on any such person all or any of the powers of the Registrar.

(3) Where any order has been made under sub-section (2) conferring on any person all or any of the powers of the Registrar under any provision of this Act, such order shall be deemed to confer on him all the powers under that provision as may be amended from time to time."

8. The Counsel for the petitioner further argues that the order dated 23.01.2017 was passed in exercise of powers under Section 68 of the 1965 Act which confers the power of levy of surcharge on the Registrar. Section 68 is quoted hereinbelow:

*"**68. Surcharge**. - (1) If in the course of an audit, inquiry, inspection or the winding up of a co-operative society it is found that any person, who is or was entrusted with the organization or management of such society or who is or has at any time been an officer or an employee of the society, has made or caused to be made any payment contrary to this Act, the rules or the bye-laws or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has misappropriated or fraudulently retained any money or other property belonging to such Society, the Registrar may of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorized by him by an order in writing in this behalf to inquire into the conduct of such person:*

Provided that no such inquiry shall be commenced after the expiry of twelve years from the date of any act or omission referred to in this sub-section.

(2) Where an inquiry is made under sub-section (1) the Registrar may, after affording the person concerned a reasonable opportunity of being heard, made an order of surcharge requiring him to restore the property or repay the money or any part thereof with interest at such rate, or to pay contribution and costs or compensation to such an extent as the Registrar may consider just and equitable.

(3) Where-an order of surcharge has been passed against a person under sub-section (2) for having caused any deficiency in the assets of the society by breach of trust or willful negligence, or for having misappropriated or fraudulently retained any money or other property belonging to such society, such person shall, subject to the result of appeal, if any, field against such order, be disqualified from continuing in or being elected or appointed to an office in any co-operative society for a period of five years from the date of the order of surcharge."

9. The Counsel for the petitioner further argues that by means of a specific notification issued under Section 3(2) of the 1965 Act on 05.07.1969, the powers to be exercised by the Registrar were conferred upon the Deputy Registrar/ Assistant Registrar, (in-charge of a Division) under Clause 2 of the said notification and in the light thereof, all the powers to be exercised by the Registrar could also be exercised by the Deputy Registrar/ Assistant Registrar, (in-charge of a Division). He further argues that subsequent to the notification dated 05.07.1969, another notification was issued on 27.12.1975 reiterating the delegation of powers on the Deputy Registrar who could exercise all the powers conferred on the Registrar. Based upon the said notifications, the Counsel for the petitioner argues that the Tribunal has erred in allowing the appeal on the question of jurisdiction, inasmuch as, the Deputy Registrar was duly empowered to perform the functions which are conferred upon the Registrar in terms of the mandate of the 1965 Act. He further argues that the judgment of this Court dated 09.04.2010 in *Ravi Pratap Srivastava (supra)* does not go into all these questions and does not take notice of the notifications and thus merely placing reliance on the said judgment was not a proper exercise of power by the Tribunal. In the light of the aforesaid arguments, it is argued that the petitions deserve to be allowed and the order passed in appeal by the Tribunal is required to be set aside.

10. The learned Additional Chief Standing Counsel based upon the instructions of Mr. R.K. Kulshrestha, the Additional Registrar, who is present in Court, argues that in terms of the notification issued by virtue of powers conferred under Section 3 (2) of the 1965 Act, the notification issued on 05.07.1969 conferred simultaneous powers on the Additional Registrar and the Joint Registrar for exercise of powers of the Registrar only in respect of the societies which were given under the charge of the Additional Registrar or the Joint Registrar by the Registrar as well as the Assistant Registrar was conferred the powers in respect of Primary Co-operative Societies for exercise of powers under Section 68. He further states that subsequently by virtue of notification dated 27.12.1975, the position which stood by virtue of Clause (1) of the notification of 1969 was clarified and extended to include all the powers of the Registrar by the Additional Registrar at the Headquarters or the Deputy Registrar at the Headquarters in respect of the societies which were assigned by the Registrar to the said Additional Registrar or the Deputy Registrar in respect of the societies within the division. The Deputy Registrar was conferred to the powers exercised by the Registrar within the said division and it was further clarified that the District Additional Registrar can exercise the powers only in respect of the societies which fall within the area of jurisdiction and to that extent, the notification dated 05.07.1969 was clarified.

11. The Counsel for the respondent Sri Rakesh Srivastava, on the other hand, argues that it is well settled that the powers under Section 68 are to be exercised by the Registrar of the Society and the said powers can be delegated validly by the State Government by exercising the powers under Section 3(2) of the 1965 Act. He, however, submits that in the notification dated 05.07.1969 while in Clause (2), the powers of a Registrar were delegated upon the Deputy Registrar/ Assistant Registrar,

however, in terms of Clause (4), there was specific delegation of powers on the District Assistant Registrar for exercise of powers under Section 68 relating to Primary Co-operative Societies.

12. The Counsel for the respondent further argues that the subsequent notification of 1975 does not repeal the earlier notification of 1969, in fact, it specifically provides that the notification dated 27.12.1975 is in continuation of the earlier notification. He argues that although in the notification dated 27.12.1975, the powers have been conferred upon the Deputy Registrar under Clause (2) of the 1975 notification, however, the fact remains that a specific delegation as conferred by Clause (4) of the 1969 notification could still not held to be repealed especially relating to exercise of power under Section 68 of the 1965 Act relating to the Primary Co-operative Societies. On the foundation of the said, he argues that once the delegation is specific, the general delegation would not prevail and the argument of the Counsel for the petitioner cannot be accepted. In support of his submission, he places reliance on the views of the various Authors, while quoting from "*Juridical Review Of Administrative Action*". He relies upon the following paragraphs:

"A discretionary power must, in general, be exercised only by the authority to which it has been committed. It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another. This principle, which has often been applied in the law of agency, trusts and arbitration, is expressed in the form of the maxim delegatus non potest delegare (or delegari), a maxim which, it has been suggested, "owes its origin to mediaeval commentators on the Digest and the Dcretals, and its vogue in the common law to the carelessness of a sixteenth-century printer." The widespread assumption that it applies only to the sub-delegation of delegated legislative powers and to the sub-delegation of other powers delegated by a superior administrative authority is unfounded. It applies to the delegation of all classes of powers, and it was indeed originally invoked in the context of delegation of judicial powers. It is therefore convenient to travel beyond the delegation of discretionary powers in the strict sense and to view the problem as a whole."

13. The Counsel for the respondent further relies upon the commentary of "*Administrative Law*" of *Sir William Wade*, which is as under:

"An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the courts are rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as ultra vires action taken by agents, sub-committees or delegates, however expressly authorised by the authority endowed with the power."

14. He further argues that the Government Orders have to be construed

harmoniously and specifically relies upon the judgment of the Hon'ble Supreme Court in the case of ***Sultana Begum vs Prem Chand Jain; (1997) 1 SCC 373*** wherein he places particular emphasis. Paragraphs 11 to 17 and 21 are quoted below:

"11. The statute has to be read as a whole to find out the real intention of the legislature.

12. In Canada Sugar Refining Co. vs. R. (1898) AC 735, Lord Davy observed:-

"Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

13. This Court has adopted the same rule in M. Pentiah vs Muddala Veeramallappa; AIR 1961 SC 1107; Gamman India Ltd. vs Union of India; AIR 1974 SC 960; Mysore State Road Transports Corporation vs Mirza Khasim All Beg; AIR 1977 SC 747; V. Tulsamma vs. Sesha Reddy; (1977) 3 SCC 99; Punjab Beverages (P) Ltd. vs Suresh Chand; AIR 1978 SC 995; Commissioner of Income-tax vs. National Taj Traders; AIR 1980 SC 485; Calcutta Gas Co. (Proprietary) Ltd. vs State of West Bengal; AIR 1962 SC 1044 and J.K. Cotton Spinning and Weaving Mills vs State of U.P. AIR 1961 SC 1170.

14. This rule of construction which is also spoken of as "ex visceribus actus" helps in avoiding any inconsistency either within a Section or between two different Section or provisions of the same statute.

15. On a conspectus of the case law indicated above, the following principles are clearly discernible:

(1) It is the duty of the courts to avoid a head-on clash between two Sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.

(2) The provisions of one Section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them.

(3) It has to be borne in mind by all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of "harmonious construction".

(4) The courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction.

(5) To harmonise is not to destroy any statutory provision or to render it otiose.

16. Interpreting the provisions of Section 47 and Order XXI Rule 2 in the light of the above principles, there does not appear to be any antithesis between the two provisions. Section 47 deals with the power of the court executing the decree while Order XXI Rule 2 deals with the procedure which a court whose duty it is to execute the decree has to follow in a limited class of cases relating to the discharge or satisfaction of decrees either by payment of money (payable under the decree) out of court or adjustment in any other manner by consensual arrangement.

17. Since Section 47 provides that the question relating to the execution, discharge or satisfaction of the decrees shall be determined by the court executing the decree, it clearly confers a specific jurisdiction for the determination of those questions on the executing court.

21. The problem can be looked into from another angle on the basis of the

maxim "generalia specialibus non derogant".

15. He also places reliance on the judgment of the Hon'ble Supreme Court in the case of ***Maya Mathew vs State of Kerala and others; (2010) 4 SCC 498*** wherein the Hon'ble Supreme Court held on an occasion to consider the applicability of two Rules applicable to the services of the employee concerned and specifically laid the law with regard to the interpretation as under:

*"**12.** The rules of interpretation when a subject is governed by two sets of Rules are well settled. They are:*

(i) When a provision of law regulates a particular subject and a subsequent law contains a provision regulating the same subject, there is no presumption that the later law repeals the earlier law. The rule making authority while making the later rule is deemed to know the existing law on the subject. If the subsequent law does not repeal the earlier rule, there can be no presumption of an intention to repeal the earlier rule;

(ii) When two provisions of law - one being a general law and the other being special law govern a matter, the court should endeavour to apply a harmonious construction to the said provisions. But where the intention of the rule making authority is made clear either expressly or impliedly, as to which law should prevail, the same shall be given effect.

(iii) If the repugnancy or inconsistency subsists in spite of an effort to read them harmoniously, the prior special law is not presumed to be repealed by the later general law. The prior special law will continue to apply and prevail in spite of the subsequent general law. But where a clear intention to make a rule of universal application by superseding the earlier special law is evident from the later general law, then the later general law, will prevail over the prior special law.

(iv) Where a later special law is repugnant to or inconsistent with an earlier general law, the later special law will prevail over the earlier general law."

16. He also places reliance on another judgment of the Hon'ble Supreme Court in the case of ***Commercial Tax Officer, Rajasthan vs M/s Binani Cements Limited and another; (2014) 8 SCC 319*** wherein the Hon'ble Supreme Court has held on the occasion to consider the applicability of two laws and to decide whether a general law would apply or special law would apply and in that context, Hon'ble Supreme Court has observed as under:

*"**34**. It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the Latin maxim of generalia specialibus non derogant i.e. general law yields to special law should they operate in the same field on same subject (Vepa P. Sarathi, Interpretation of Statutes, 5th Edn., Eastern Book Company; N.S. Bindra's Interpretation of Statutes, 8th Edn., The Law Book Company; Craies on Statute Law, S.G.G. Edkar, 7th Edn., Sweet & Maxwell; Justice G.P. Singh, Principles of Statutory Interpretation, 13th Edn., Lexis Nexis; Craies on Legislation, Daniel Greenberg, 9th Edn., Thomson Sweet & Maxwell, Maxwell on Interpretation of Statutes, 12th Edn., Lexis Nexis).*

***35**. Generally, the principle has found vast application in cases of there being two*

statutes: general or specific with the latter treating the common subject-matter more specifically or minutely than the former. Corpus Juris Secundum, 82 C.J.S. Statutes § 482 states that when construing a general and a specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes therefore should be harmonised, if possible, with the objective of giving effect to a consistent legislative policy. On the other hand, where a general statute and a specific statute relating to the same subject-matter cannot be reconciled, the special or specific statute ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy (Edmond v. United States [137 L Ed 2d 917 : 520 US 651 (1997)], Warden v. Marrero [41 L Ed 2d 383 : 417 US 653 (1974)]).

***36**. The maxim generalia specialibus non derogant is dealt with in Vol. 44(1) of the 4th Edn. of Halsbury's Laws of England at Para 1300 as follows:*

"The principle descends clearly from decisions of the House of Lords in Seward v. Vera Cruz [(1884) LR 10 AC 59 : (1881-85) All ER Rep 216 (HL)] and the Privy Council in Barker v. Edger [1898 AC 748 : (1895-99) All ER Rep Ext 1642 (PC)] and has been affirmed and put into effect on many occasions.... If Parliament has considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to interfere with that provision; and therefore, if such an enactment, although inconsistent in substance, is capable of reasonable and sensible application without extending to the case in question, it is prima facie to be construed as not so extending. The special provision stands as an exceptional proviso upon the general. If, however, it appears from a consideration of the general enactment in the light of admissible circumstances that Parliament's true intention was to establish thereby a rule of universal application, then the special provision must give way to the general."

17. The Hon'ble Supreme Court in the case of ***Commercial Tax Officer, Rajasthan (supra)***, after discussing the various judgment on the point aforesaid finally observed as under:

*"**47**. Having noticed the aforesaid, it could be concluded that the rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction. This rule is particularly applicable where the legislature has enacted comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject specific provision relating to a specific, defined and descriptable subject is regarded as an exception to and would prevail over a general provision relating to a broad subject."*

18. In the light of the aforesaid arguments and the judgments cited, the Counsel for the respondents argues that the petition deserves to be dismissed.

19. In rejoinder, the Counsel for the petitioner while placing reliance on paragraphs 6 and 7 of the Hon'ble Supreme Court judgment in the case of ***State of***

Kerala vs P.B. Sourabhan and others; (2016) 4 SCC 102 argues that the powers could be exercised by the Deputy Registrar as has been rightly done and the tribunal was wrong in passing the order which is impugned in the bunch of writ petitions.

20. He also places reliance on the judgment of this Court in the case of ***Smt. Lilawati and six others vs U.P. Co-operative Tribunal, Lucknow and others; 2020 (3) ADJ 622*** to argue that the question of jurisdiction was not raised and thus he would be estopped from raising question at the appellate stage.

21. In the light of the arguments, the Court is to decide the effect of two notifications which are to be interpreted by this Court conferring jurisdiction on the Deputy Registrar and District Assistant Registrar or the District Assistant Registrar only for exercise of powers under Section 68 of the1965 Act in respect of Primary Co-operative Societies.

22. Section 3(2) of the Act confers the powers upon the State Government to appoint other persons to assist the Registrar by special or general order. Thus, in terms of the mandate of Section 3(2), it is upon for the State Government to delegate the functions and powers to be performed by the Registrar upon any of the officers as specified in the notification.

23. Relevant extracts of Notification No.3328-C/ XII-CA-25(1)-67, dated June 24, 1969 and Notification No.5539/ C-1-7 (16) 75, Lucknow dated 27.12.1975 are quoted herein:

"Notification No.3328-C/ XII-CA-25(1)-67, dated June 24, 1969

In exercise of the powers under sub-section (2) of Section 3 of the Uttar Pradesh Co-operative Societies Act, 1965 (U.P. Act XI of 1966), the Governor is pleased to confer, subject to the provisions of the said Act and the rules made thereunder, the powers of the Registrar under that Act and the rules, to be exercised as follows:

(1) An officer for the time being holding the post of Additional Registrar, Co-operative Societies, at the headquarters of the Registrar Co-operative Societies, U.P. or the Deputy Registrar of the Co-operative Societies at the said headquarters shall exercise the powers of the Registrar under the Act and the rules in respect of such class or classes or type or types of Co-operative Societies which, by the order of the Registrar, are placed under the charge of such officer:

Provided that the power under Section 14, 125 and 126 and under Rules, 30, 31, 32 and 33 shall not be exercised by the said Deputy Registrar in respect of an apex Co-operative Society or a Central Co-operative Society and the powers under Rules, 124, 125 and 126 shall not be exercised by him in respect of an apex Co-operative Society;

2. An officer for the time being holding the post of Deputy Registrar/ Assistant Registrar, Incharge of a Division, shall exercise the powers of the Registrar under the Act and the rules within the area of his jurisdiction:

Provided that the powers under Sections 14, 125, and 126 and under Rules 30, 31, 32 and 33 shall not be exercised by the said Deputy Registrar/ Assistant Registrar in respect of an apex Co-operative Society or a Central Co-operative Society and the powers under Rules 124, 125 and 126 shall not be

exercised by such officer in respect of an apex Co-operative Society;

(3) ...

(4) An office for the time being holding the post of District Assistant Registrar, Co-operative Societies, U.P. shall exercise the powers of the Registrar -

(a) under Section 32, 33, 37, 66, 67, 69 and 103 of the Act and Rules 104, 134 and 287 in respect of all the Co-operative Societies, other than apex Co-operative Societies, having headquarters within the area of his jurisdiction;

(b) under Sections 70, 71, 98, 109 and 115 of the Act and Rules 312(c) 331, 332, 336, 365, 366, 369, 370, 371, 372, 374, 377 and 378 in respect of all the Co-operative Societies, having headquarters within the area of his jurisdiction; and

(c) under Sections 27, 29, 31, 65, 68, 74, 91, 92 and 127 of the Act and Rules 42, 43, 60, 61, 62, 90, 97, 110, 111, 124, 125, 151, 178, 180, 213, 214, 215 and 224 in respect only the primary Co-operative Societies, having headquarters within the area of his jurisdiction;"

{सहकारिता(1) अनुभाग, संख्या 5539/सी–1–7(16) 75, लखनऊ दिनांक 27 दिसम्बर, 1975}

उत्तर प्रदेश साधारण खंड अधिनियम, 1904 (उत्तर प्रदेश अधिनियम संख्या 1, 1904) की धारा 21 के साथ पठित उत्तर प्रदेश सहकारी समिति अधिनियम, 1965 (उत्तर प्रदेश अधिनियम संख्या 11, 1966) की धारा 3 की उपधारा (2) के अधीन शक्ति का प्रयोग करके तथा सरकारी अधिसूचना संख्या 3328/सी/12 सी ए–25 (1)/67, दिनांक 24 जून 1969 के क्रम में राज्यपाल निम्नलिखित व्यक्तियों को तत्कालीन प्रभाव से उत्तर प्रदेश सहाकरी समिति (संशोधन) अध्यादेश, 1975 (उत्तर प्रदेश अध्यादेश संख्या 26, 1975) द्वारा यथासंशोधित उक्त अिनियम संख्या 11, 1966 के अधीन निबन्धक के अधिकारी प्रदान करते हैः–

(1) सहकारी समितियों के निबन्धक, उत्तर प्रदेश के मुख्यालय अपर पर निबन्धक, या उक्त मुख्यालय पर सहकारी समितियों के उप निबन्धक का पद धारण करने वाला कोई व्यक्ति ऐसे वर्ग या वर्गो अथवा ऐसे प्रकार या प्रकारो की सहकारी समितियों के जो निबन्धक के आदेश द्वारा ऐसे अपर निबन्धक या उप निबन्धक के प्रभार में रखी गई हो, सम्बन्ध में उक्त अध्यादेश द्वारा यथा संशोधित उक्त अधिनियम संख्या 11, 1966 के अधीन निबन्धक की शक्तियों का प्रयोग करेगा।

(2) डिवीजन में तत्समय, सहकारी समितियों के उप निबन्धक का पद धारण करने वाला कोई व्यक्ति अपने अधिकारिता के क्षेत्र में उक्त अध्यादेश द्वारा यथासंशोधित उक्त अधिनियम सख्या 11, 1966 के अधीन निबन्धक की शक्तियों का प्रयोग करेगा।

(3) तत्समय जिला सहायक निबन्धक, सहकारी समितियों का पद धारण करने वाला कोई व्यक्ति केवल ऐसी प्रारम्भिक सहकारी समितियों के जिनके मुख्यालय उनकी अधिकारिता के क्षेत्र के भीतर हो, सम्बन्ध में उक्त अध्यादेश द्वारा यथासंशोधित उक्त अधिनियम संख्या 11, 1966 की धारा 29, 35–क तथा 95–क के अधीन निबन्धक की शक्तियों का प्रयोग करेगा।"

24. From the notification dated 05.07.1969, it is clear that the powers of the Registrar have been delegated extensively upon the Deputy Registrar/ Assistant Registrar, (in-charge of the Division) in terms of Clause (2) relating to all the powers of the Registrar except as prohibited under the proviso to Clause (2) of the notification dated 05.07.1969. If Clause (2) is read with Clause (4), it makes clear that simultaneous and concurrent powers have been delegated to the Deputy Registrar and the District Assistant Registrar, the only difference being that the powers of the Deputy Registrar/ Assistant Registrar in that division go the extent of all the powers to be performed by the Registrar except as prohibited under the proviso to Clause (2) whereas the District Assistant Registrar under Clause (4)not can perform and exercise the powers of a Registrar in respect of the powers conferred and specifies under Clause (a) to (c) of Clause (4) of the notification dated 05.07.1969. The notification of 1975 delegated all powers to be exercised by the Registrar upon the Additional Registrar or Deputy Registrar in respect of societies placed by the Registrar under the said

Additional Registrar or Deputy Registrar. Interestingly there is no corresponding provisions akin to Clause (4) as was contained in the notification dated 1969.

25. It is also relevant to mention here that the word "Deputy Registrar" used in the earlier notifications of 1969 and 1975 were amended to include the word "Joint/ Deputy Registrar" by virtue of another notification dated 26.07.2006.

26. Considering the submissions of the Counsel for the respondents, the law in respect of delegation of powers/ functions is reasonably and fairly well settled that the powers can be exercised only by the person upon whom the powers are delegated specifically and in terms of the mandate of the Act and by no one else. However, there is no bar that the powers cannot be conferred on multiple officers giving them concurrent jurisdiction to exercise the powers which also appears from the mandate of Section 3(2) of the 1965 Act which used the word 'persons' and not 'person'.

27. The judgment cited by the Counsel for the respondent in the case of *Sultana Begum (supra)* lays down the law while interpreting two provisions which are inconsistent. Similarly the judgment of the Supreme Court in Maya Methew (supra) interprets and lays down law to interpret rules which are overlapping, whereas, in the present case the two provisions in the notification of 1969 are not inconsistent but confer jurisdiction on two set of officers one at the divisional level and other at the district level in respect of Primary Co-operative Societies.

28. Conforming concurrent jurisdiction on two or more offices is neither barred under the Act nor is unknown in adjudicatory functions, in fact the Section 3(2) envisages and provides for delegations in favour of 'persons'.

29. It is well established that the court cannot read a statutory provisions contrary to its language unless the same is prohibited under the Act or has the potential to lead to absurd results.

30. This Court can also not loose site of the fact that the vires of the notifications or the provisions of the Act are not under challenge in the present proceedings and thus the same are to be read only on the terms as contained in the notification.

31. As regards the judgment of this Court in the case of *Ravi Pratap Srivastava (supra)* which is the foundation for passing the impugned order, the same ex-facie does not consider the scope of notifications of 1969 or 1975, thus cannot be read to be laying any law on question of jurisdiction of officers under the Act.

32. Thus on the basis of the reasoning recorded above, it has to be held that concurrent jurisdiction has been conferred upon the officers in respect of Primary Co-operative Societies and the order passed by the Joint Registrar/ Joint Commissioner (Co-operative), Lucknow, respondent no.3 dated 23.01.2017 and impugned before the Tribunal was well within jurisdiction and thus the order of the Tribunal dated 21.03.2018 is clearly not sustainable and is set aside in all the petitions, the matters are remanded before the Tribunal to decide the matter afresh on merits and in accordance with law with all expedition.

33. The writ petitions stand ***allowed***.

(2022)04ILR A852
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Writ-C No. 22624 of 2021

Prathama U.P. Gramin Bank, Moradabad ...Petitioner

Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dharmendra Vaish

Counsel for the Respondents:
A.S.G.I., Sri Deepak Singh, Ms. Punita Pandey, Mrs. Shweta Pandey

Civil Law - Consumer Protection Act,1986 - Complaint was filed in the year 1999 by the Consumer - sum of Rs.1,01,145/- with interest @ 15% was ordered to be paid by the bank vide order 01.04.022 - State Consumer Redressal Dispute Commission, U.P. Lucknow rejected the appeal of the petitioner bank - No appeal was filed by the bank before the National Consumer Dispute Redressal Commission - Held - Petitioner bank has chosen after three years to come before this Court challenging the order date 24.05.2021 in spite of contesting the execution proceedings - order of the Consumer Commission cannot be brought to challenge by way of seeking a writ of certiorari - writ petition against the issuance of notice by the Consumer Commission cannot be entertained and they should appear before the Commission and raise all objections - writ petition dismissed as not maintainable with costs quantified at Rs.20,000/- (Para 6, 7)

Dismissed. (E-5)

List of Cases cited :-

1. N.N. Global Mercantile (P) Ltd. Vs Indo Unique Flame Ltd. (2021) 2 SCC (Civ.) 555

2. Radha Krishan Industries Vs St. of H.P. (2021) 6 SCC 771

3. M. Chinnamuthu (Dead) Vs Kamaleshan @ Shanmugam (Dead) Through LRS reported in 2022 LiveLaw (SC) 209

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Ajai Tyagi, J.)

1. Heard learned counsel for the petitioner and Mrs. Shweta Pandey, learned counsel appearing on behalf of respondents and counsel for the State.

2. This petition has been filed by the petitioners seeking following relief:

" Issue a writ, order or direction in the nature of Certiorari quashing the order dated 01.04.2002 (Annexure-2) along with its execution Notice dated 24.05.2021 (Annexure-5) issued in Complaint No.80/1999 by the respondent no.2."

3. The compliant was filed in the year 1999 by the respondent no.2. The consequential effect goes to show that even after the judgment, the Consumer who has succeeded before the Commission is unable to get benefit of the judgment and decree for a small amount which was ordered by the Commission. The public bank as has rushed to this Court challenging the notice dated 24.05.2021 they could have very well appeared before the Commission. The Bank was the tenant. We are not going into the factual data at this stage, the petition lacks merit and bona fide.

4. The averments made in paragraph 7 cannot be gone into as the judgment of the Consumer/Conjugal Commission has attained finality. The petitioner had contested the litigation sum of Rs.1,01,145/- with interest @ 15% was ordered to be paid. The appeal was preferred before the State Consumer Redresssal Dispute Commission U.P. Lucknow. The State Consumer Redressal Dispute Commission, U.P. Lucknow rejected the appeal of the petitioner bank in the year 2018. The appeal was never filed before the National Consumer Dispute Redressal Commission even till date. The petitioner bank by way of a Gazette Notification No. 853 dated 22.02.2019 issued by the Government of India, the Prathama U.P. Gramin Bank came in force on 01.04.2019, on account of Amalgamation of erstwhile Sarva U.P. Vihar District- Moradabad. The petitioner bank states that they did not challenge the order dated 15.02.2018 because of Pandemic. The Pandemic said to be only in March, 2020. The amalgamation took place in the year 2019 that one full year but no such endeavors were made. The petition is also belated. The order of the Consumer Commission cannot be brought to challenge by way of seeking a writ of certiorari. The petition was filed without disclosing the date on which the matter was fixed on 30th July as the petition came to be filed on 16th August, 2021.

5. In that view of the matter, we have no other option but to dismiss the petition with no costs. The R.B.I. guidelines would not help the petitioner in this end in filing this writ petition. The order dated 01.04.2002 and the orders in appeal are very clear and categorical despite that the litigants cannot ripe the fruit of the decree passed by both the competent authorities which has attained the finality. We cannot go into the findings of the appellate authority, namely, The Consumer Dispute Redresssal Commission.

6. The petition lacks merit and is delayed. The appeal also has not been satisfactorily explained, however, we do not go in the same.

7. It is very clear that petitioner bank has challenged the issuance of notice issued by the State Consumer Redressal Dispute Commission, U.P. Lucknow. We have conveyed to the learned counsel for the petitioner that the writ petition against the issuance of notice by the Consumer Commission cannot be entertained and they should appear before the Commission and raised all objections but the learned counsel has conveyed that he has instructions to press the petition on the merits for the grounds which are alleged in the petition.

8. The ground taken, are as follows:-

"(a) During the period of running the term loan account of respondent no.3 and 4 even till its final payment made by the respondent no.3 and 4 never raised any dispute regarding interest, but without any reference to the petitioner bank had raised consumer complaint before the respondent no.2 against the petitioner bank and had claimed refund of interest amount @ 18% along with damages and cost etc.

(b) The complaint No.80/1999 was filed by the Respondent no.3 and 4 before the respondent no.2 and the same was contested by the petitioner bank, as the same was not maintainable and bank had charged interest upon the term loan as per agreed terms settled between the parties in terms of loan agreement, furthermore the interest charged upon the term loan of

respondent no.3 and 4 was as per the R.B.I. guidelines.

(c) The respondent no.2 entertained the complaint of the respondent no.3 and 4 and after hearing the counsel for the parties directed to the bank to pay the amount of interest to the tune of Rs.1,01,145.00 along with interest @15% since November, 1995, within a period of 30 days vide its order dated 01.04.2002.

(d) Being aggrieved with the order dated 01.04.2002 passed by the respondent no.2 the petitioner bank preferred an appeal bearing No.1016/2002 in the name and style of Prathama Bank (Through Chairman) Head Office Moradabad and another Vs. Smt. Pramila Gupta & Others; before the State Consumer Redressal Dispute Commission U.P. Lucknow.

(e) The State Consumer Redressal Dispute Commission U.P. Lucknow, was failed to appreciate the contentions of the bank and rejected the Appeal of the petitioner bank vide order dated 13.02.2018.

(f) The respondent no.3 and 4 filed an execution application on 12.02.2021 under Section 72(1) of The Consumer Protection Act, 2019 in Complaint Case No.80/1999 before the respondent no.s, in which the respondent no.2 issued a show cause notice dated 24.05.2021 which received to the bank on 28.05.2021, fixing therein a date of 7th June, 2021.

(g) The respondent no.2 upon the date fixed on 7th June, 2021 but the learned forum was vacant as such further a date on 16th August, 2021 is fixed for further hearing."

9. This is nothing else but the abuse of process of the Court and, therefore, also we are obliged to follow the mandate of the Apex Court in **N.N. Global Mercantile (P) Ltd. Vs. Indo Unique Flame Ltd. (2021) 2 SCC (Civ.) 555**.

10. Thus, even in view of the decision of the Apex Court in the case of **Radha Krishan Industries Vs. State of H.P. (2021) 6 SCC 771**, will not permit us to exercise our jurisdiction.

11. As there is full mechanism available, the petitioner has chosen after three years to come before this Court challenging the order date 24.05.2021 in spite of contesting the execution proceedings.

12. In this case, the Consumer Commission dismissed the appeal. The litigation is since 1999, the recent anguish shown by the Supreme Court in the Case of **M. Chinnamuthu (Dead) Vs. Kamaleshan @ Shanmugam (Dead) Through LRS** reported in **2022 LiveLaw (SC) 209**, we also while dictating this judgment feel that here is a case where M.I.T. Bank is not even going before the Commission and rushes to the High Court and the man without the fruits of the decree of the Consumer Forum upheld by the U.P. State Consumer Commission, hence, we dismiss this writ petition as not maintainable with costs quantified at Rs.20,000/- which is minimal for the bank, to be deposited with the Registry of the High Court within two weeks, which should be transferred to the Legal Services Authority for betterment of the downtrodden people.

13. This petition lacks merit and is hereby dismissed.

(2022)04ILR A855
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.04.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-C No. 26666 of 2021

M/S Supertech Precast Tech. Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Abhishek Khare, Saumya

Counsel for the Respondents:
C.S.C., Prashant Kumar

Industrial Law - U.P. Industrial Area Development Act, 1976 -Section 12 - Urban Planning Development Act, 1973 - Section 41(3) - Allotment of land - Authority demanded land premium and lease rent as petitioner did not pay any amount except payment of 10% allotment money - petitioner's case that it was not provided water connection for production of precast by the Authority - *Held* - petitioner will deposit Rs. 1 Crore with the Authority and make the payment for laying down the pipeline from STP to its unit for making supply of STP water for its industrial unit at the applicable rate - Authority should lay down the pipeline after receiving the cost and provide the water to the industrial unit so that its cost of manufacturing of concrete precast gets reduced and industrial unit becomes viable (Para 33)

B. Industrial Law - U.P. Industrial Area Development Act, 1976- Section 12 - Allotment of land - 90% of the premium was to be paid with interest @ 12% per annum - in case of default of payment, penal interest @ 14% was to be charged - default in payment - petitioner requested for rescheduling and restructuring the land dues and also payment of interest as per bank rate - Held - interest @ 12% per annum on premium compounding penal interest @ 14% would make an industry unviable - It could not be the purpose of Authority to allow industries to be set up and then make same unviable - Such a high rate of penal interest besides the interest @ 12% per annum on premium is enough to bleed the industry and make it unviable - matter is remitted back to the Revisional Authority i.e. State Government to reduce penal interest to 6% per annum instead of 14% per annum on default of payment of premium and allow the petitioner to pay the premium along with interest (12% + 6%, total 18% per annum simple interest) in installments, may be spread over to 5- 7 years (Para 33)

Allowed. (E-5)

List of Cases cited :

1. Gajraj & ors. Vs St.of U.P. & ors. (2011) ADJ 1 (FB)

2. M/s Gaursons Promoters Pvt. Ltd. Vs St. of U.P. & ors. Writ-C No.18684 of 2019

3. M/s Shakuntala Educational and Welfare Society Vs St. of U.P. & ors. order Writ-C No.28968 of 2018 dated 28.05.2020

4. Bikram Chatterji & ors. Vs U.O.I. & ors. Writ Petition (C) No.940 of 2017

5. MC Mehta Vs U.O.I. Civil Writ Petition No.4677 of 1985

6. Savitrai Devi & ors. Vs State (2015) 7 SCC 21

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

1. Petitioner, a Company incorporated under the provisions of the Companies Act, 1956 (for short "the Act, 1956"), has filed the present petition, impugning the order dated 25.11.2020 passed by the Additional

Chief Secretary, Department of Industrial Development, Government of Uttar Pradesh, Lucknow (Revisional Authority) under Section 41(3) of the Urban Planning Development Act, 1973 (for short "the Act, 1973") read with Section 12 of the U.P. Industrial Area Development Act, 1976 (for short "the Act, 1976").

Further prayer has been made for quashing of Letter of Cancellation dated 06.01.2021 issued by the Greater Noida Industrial Development Authority (for short "GNIDA"), demanding Rs.67,78,23,456/- in respect of Plot No. 2, Sector Ecotech-16, GNIDA, ad-measuring 58271 square meters as per the lease dated 22.06.2011 executed by the GNIDA in favour of the petitioner in pursuance of the allotment letter dated 31.03.2011.

A prayer has also been made for quashing of the letter dated 29.09.2021 issued by the GNIDA, directing the petitioner to deposit Rs 67,78,23,456/- within a period of 15 days and get the lease deed executed, otherwise the GNIDA would take action for cancellation of the allotment of plot in favour of the petitioner.

2. The State Legislature had enacted U.P. Industrial Area Development Act, 1976 (for short "the Act, 1976") to provide for constitution of an Authority for the development of certain areas in the State into industrial and urban township and for the matters connected therewith. Under Section 3 of the Act, 1976, the State Government is empowered to constitute Industrial Development Authority for the purposes of the Act, 1976 for any industrial development area. The GNIDA is an Authority constituted under the Act, 1976. Under Article 243-Q of the Constitution of India, such an authority, constituted under the Act, 1976 virtually replaces the municipality in the area so far as the industrial areas are concerned. All the functions of a development authority as well as municipal authority are required to be discharged by the GNIDA in the industrial areas for which it has been constituted.

3. Section 5A of the Act, 1976 provides that the State Government may at any time, by notification, create one or more 'Industrial Development Authorities Centralized Services' for such posts, as the State Government may deem fit, common to all the Industrial Development Authorities, and may prescribe the manner and conditions of recruitment to and the terms and conditions of service of persons appointed to such service. Functions of the Authority are prescribed under Section 6 of the Act, 1976, which provides that the object of the Authority is to secure the planned development of the industrial development areas. The Authority is empowered to acquire land in the industrial development area by agreement or through proceedings under the Land Acquisition Act, prepare a plan for the industrial development area, demarcate and develop sites for industrial, commercial and residential purposes according to the plan, provide infrastructure for industrial, commercial and residential purposes and to provide amenities. The Authority is also empowered to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial and residential purposes or any other specific and specified purposes in such area.

4. Amenities have been defined under Section 2(a) of the Act, 1976, which includes roads, water supply, street lighting and power supply, sewerage, drainage, collection, treatment and disposal of

industrial waste and town refuse and other community facilities services or conveniences as the Government may, by notification, specify to be an amenity for the purposes of the Act, 1976.

5. In the year 2011, GNIDA invited sealed tenders in two-bid systems in the prescribed application form for allotment of lease lands in various sectors in Greater NOIDA for a lease period of ninety years. The petitioner was successful in bidding process for Plot No. 2, Sector Ecotech-16. An allotment letter dated 31.03.2011 was issued to the petitioner for allotment of the said plot in its favour. The total area of the plot was 60000 (Sixty Thousands) square meters. The rate of land was fixed at 2,687=00 per square meter and total provisional premium, as per the rate, was Rs.16,12,20,000=00. 10% (Ten percent) of the total provisional premium was the allotment money. The allotment money was payable by 30.05.2011 along with registration money, which was Rs.77,36,185=00. Remaining 90% (Ninety Percent) amount with interest @ 12% per annum would be payable in twenty half yearly installments.1st four half yearly installments would be for interest payable on 90% remaining amount @ 12% and thereafter 16 half yearly installments would be charged with premium and interest @ 12% per annum. It was also provided in the allotment letter that in case of default of payment, penal interest @ 14% would be charged. In the allotment letter, it was also provided that the allottee would comply all the terms & conditions pertaining to supply of water and drainage/sewerage facilities provided by the authority.

6. Pursuant to the said allotment letter, leased deed dated 21.06.2011 was executed between the petitioner and the GNIDA with respect to the Plot No. 2, Sector Ecotech-16, GNIDA, Greater NOIDA, Gautam Budh Nagar for 58271 square meters for the total premium of Rs.15,65,74,177=00.

7. Out of the said premium, the petitioner paid 10% i.e. 1,56,57,418=00 and the balance amount of Rs. 14,09,16,759=00 became payable in 10 installments along with interest @ 12% per annum, compounded half yearly. The petitioner was also required to pay lease rent of Rs. 4,30,57,899=00 i.e. 27.5% of the total premium as one time lease rent payment.

8. The possession letter dated 24.06.2011 was issued to the petitioner after the petitioner paid 10% of the total premium i.e. Rs. 1,56,57,418=00-, as mentioned above. The lay-out plan for the project was sanctioned on 15.10.2012. The petitioner completed construction of manufacturing unit and obtained completion certificate dated 19.02.2014.

9. It is alleged that the petitioner could not start its manufacturing activities of precast due to non-availability of water. There was no proper road or drainage system, which made it impossible for the petitioner to start commercial production of precast. It is also stated that the petitioner could not start commercial production of precast due to agitations of farmers for non-payment of compensation by the State of Uttar Pradesh and due to pendency of court case pertaining to major portion of land situated in the aforesaid plot. It is also stated that the petitioner wrote several letters to the GNIDA, informing them obstructions created by the villagers and for maintaining law and order. The petitioner requested for security and maintenance of

law and order conducive for the manufacturing and commercial activities of the petitioner.

10. The Full Bench of this Court in its judgment in ***Gajraj and others Vs. State of U.P. and others (2011) ADJ 1 (FB)*** though upheld the land acquisition notification, but held that invocation of urgency clause was bad in law. However, instead of quashing notification inasmuch as widespread development had taken place on the acquired land, in order to balance equities, the High Court directed for payment of additional compensation of 64.7% to the tenure holders, whose land was acquired, and allowed them retention of 10% of developed land. The GNIDA was directed to pay the additional compensation to the farmers and, it was left open to the discretion of GNIDA to take a decision upon shifting the proportionate burden of additional compensation upon the allottees.

11. The petitioner was not provided water connection for production of precast by the Authority, nor the petitioner got permission to dig bore-well to extract ground water needed for production of precast. The petitioner did not pay any amount after payment of 10% allotment money and, therefore, the Authority vide demand letter dated 19.08.2016 directed the petitioner to deposit Rs.17,96,39,097/- against the land premium and Rs. 2,83,51,710/- against lease rent. Another demand letter was issued on 24.08.2016 for Rs.17,12,86,068.72/- against the land premium and for Rs.2,83,51,710/- against the lease rent.

12. It is further stated that the petitioner had made several requests to the GNIDA to provide water connection for production of precast, however, the Authority did not take notice of the request and another demand letter dated 01.02.2017 was issued, claiming an amount of Rs. 19,23,86,569/- towards land premium and Rs. 2,92,11,357/- against the lease rent. It is further stated that the petitioner was forced to buy STP water from NOIDA and private STP units for production of precast. The cost of water being brought from the STP on tankers was not economically and commercially viable for the precast unit. It is further stated that the petitioner sought no objection certificate form the Authority for extracting ground water so that the petitioner could approach the Central Ground Water Authority for permission to extract ground water for commercial production for precast. The Authority had issued further demand letters, directing the petitioner to deposit the land premium, lease rent as well as Rs.5,63,86,898/- for additional compensation to be paid to the farmers by the GNIDA in pursuance of the direction issued by the High Court.

13. The State Government issued guidelines dated 13.07.2020, allowing industrial plot owners of more than 2.5 acres of land to sub-lease their land with certain conditions. Some area was to be taken back by the by the Authority as buy-back scheme.

14. The petitioner vide letter dated 01.09.2020 proposed the Authority to allow them to sub-lease 4 acres of land out of 15 acres land allotted to them. Out of 4 acres of land, 2 acres land was to be bought back by the GNIDA and that sum was to be immediately deposited/adjusted by the Authority against the land dues. The petitioner also requested for remaining dues to be rescheduled into 6 monthly installments. The petitioner made requested for rescheduling and restructuring the land

dues and also payment of interest as per bank rate. However, when no action was taken on any petitioner's representations by the GNIDA, the petitioner approached the Revisional Authority under Section 41(3) of the U.P. Urban Planning and Development Act read with Section 12 of the Industrial Planning and Development Act.

15. The Revisional Authority, however, vide impugned order dated 25.11.2020 held that the petitioner had started production with effect from August, 2013 and, it has been using recycled water with effect from 30.06.2015. The petitioner had made default in making payment of the premium and other dues and, therefore, there was no ground to interfere with the demand notice and cancellation notice issued by the Authority. It is further stated that the Authority issued the impugned demand letter dated 06.01.2021 to which the petitioner had given detailed reply on 16.01.2021. However, the Authority had not considered the reply of the petitioner and issued impugned notice/cancellation letter dated 29.09.2021 as the petitioner did not pay dues of premium of Rs. 52,08,24,999/-, lease rent of Rs. 8,09,26,063 and additional compensation of Rs. 5,99,97,884/-.

16. Heard Mr. Sri Anil Tewari, learned Senior Advocate, assisted by Mr. Abhishek Khare, representing the petitioner, Mr. Sanjay Mishra, learned Additional Chief Standing Counsel, representing respondents-State and Sri Prashant Kumar, learned counsel representing respondent no. 2.

17. On behalf of the petitioner, learned Senior Advocate has submitted that the main function of GNIDA is to secure the planned development of industrial areas, demarcate and develop sites for industrial purposes. It is the duty of the GNIDA to provide requisite infrastructure for industrial purposes and provide amenities as defined under the Act, 1976. Under Article 243-Q of the Constitution of India, the Authority constituted under the Act, 1971 virtually replaces the municipality in the area so far as industrial areas are concerned. All the functions of development authority as well as municipal authority are to be discharged by the GNIDA which include providing water, drainage and road etc. etc. to the industrial units. The facts would disclose that the Authority had failed to provide 'amenities', making it impossible for the petitioner to utilize its full potential and become economically and commercially viable unit. The Revisional Authority did not take into consideration the failure of the Authority to provide amenities, including water connection, drainage and road etc. and, without considering the facts and circumstances in a proper perspective, in a mechanical manner, has passed the impugned order.

18. On behalf of the petitioner, Mr. Anil Tewari, learned Senior Advocate has further submitted that the petitioner has been charged for water connection, but the water connection for unit was not given and the petitioner was forced by the Authority to bring water by tankers to make the unit functional. It has also been submitted that the petitioner is not required to pay the additional compensation in view of judgments of this Court dated 18.09.2019 passed in **Writ-C No.18684 of 2019 (M/s Gaursons Promoters Private Limited Vs. State of U.P. and others**) and dated 28.05.2020 passed in **Writ-C No.28968 of 2018 (M/s Shakuntala Educational and**

Welfare Society Vs State of U.P. and others). It has been further submitted that rate of interest should be charged on simple rate, as per SBI MCLR rate and, not on compounding basis. The learned Senior Advocate has placed reliance on the order of the Supreme Court passed in **Writ Petition (C) No.940 of 2017 (Bikram Chatterji & others Vs. Union of India and others**) and submitted that only simple rate of interest should be charged by the Authority.

19. On behalf of the petitioner, Mr. Anil Tewari, learned Senior Advocate, has further submitted that the Authority should be directed to provide water connection. The petitioner is ready and willing to pay the amount for laying down pipelines etc. for providing water connection by the Authority so that the unit becomes economically viable. It has been further submitted that in light of the judgment in the case of *Bikram Chatterji & others Vs. Union of India and others (supra)*, the authority must work out rate of interest and recalculate the charges.

20. In view of the aforesaid, it has been submitted that the cancellation notice as well as the order passed by the Revisional Authority are liable to be set-aside and a direction be issued to the Authority to revise the demand in light of the observations contained in the order passed in *Bikram Chatterji & others Vs. Union of India and others* (supra) and the petitioner should not be forced to pay the additional compensation till the Supreme Court decides the pending issue.

21. On other hand, Mr. Prashant Kumar, learned counsel for the GNIDA, and Mr. Sanjay Mishra, learned Additional Chief Standing Counsel, representing respondents-State, have submitted that total liability is of Rs.67,78,23,456/- in respect of the Industrial Plot No. 2, Sector Ecotech-16, GNIDA, ad-measuring 58271 square meters allotted to the petitioner by the GNIDA. It has been further submitted that the allotment letter contains the map of the allotted plot, terms & conditions for allotment as well as payment schedule. After accepting the allotment letter and executing the sale-deed, the petitioner cannot come before this Court for amendment of the contract/lease deed entered into between the petitioner and the GNIDA. The petitioner was given physical possession on 24.06.2011. The building plan got approved on 15.10.2012 for manufacturing of concrete-precast. The petitioner, after completing construction of the industrial unit, started commercial production in August, 2013, but did not make payment as per schedule and, in fact no payment has been made till date despite the unit had started commercial production in the year 2013 itself. It has been further submitted that the petitioner's unit is fully operational.

22. The amenities would not mean providing of raw-material for commercial unit working within the development area under the Authority. Water is one of the raw-materials for production of concrete-precast. There is no obligation on the part of the Authority to provide water, which is used as a raw-material. It has been further submitted that the petitioner has created a smoke screen to hide its failure to make payment of dues and, there is no substance in the writ petition, which is liable to be dismissed.

22. Mr. Prashant Kumar, learned counsel representing the Authority, has further submitted that the GNIDA provides

water to industrial unit by following three modes:-

i. via tanker wherein the respondent no. 2 Authority provides the recycled water from the STPs and supply them to the industries at the cost of the industries itself;

ii. laying pipeline the respondent authority under a Memorandum of Understanding with the industrial unit lay pipeline of the recycled water; and

iii. connection of recycled water the respondent no.2 after taking a requisite fee provide connection of recycled water from already laid pipeline in the vicinity.

However, the Authority did not have power to grant permission for digging bore-well for use of water commercially. It is the Central Ground Water Authority, which is empowered to grant approval for extraction of ground water for commercial use. The Authority has already provided all the amenities, as it is required to provide and, there is no substance in the submissions made by Mr. Anil Tewari, learned Senior Advocate, on behalf of the petitioner that the amenities were not provided to the petitioner. The Authority had already provided the amenities like water, drainage, waste management, however, providing of water for commercial use does not come within the purview of the amenities.

23. The Central Government, in compliance of the judgment dated 10.12.1996 passed by the Supreme Court in **Civil Writ Petition No.4677 of 1985 (MC Mehta Vs. Union of India)** had constituted the Central Government Ground Water Authority in exercise of power under Section 5 of the Environment (Protection) Act, 1986 with a special purpose to regulate and control development and management of ground water resources in the country. It is the Central Government Ground Water Authority, which is empowered to grant no objection certificate for extraction of ground water and the GNIDA has no power or authority to grant 'no objection certificate'.It has been further submitted that the grievances of the petitioner is wholly untenable and the petitioner, who has failed to make payment of its dues which as of today stands to Rs.67,78,23,456/-. The petitioner is not entitled for any relief from this Court as the petitioner has violated the terms and conditions.

24. It has been further submitted that the reliance placed by the petitioners on judgment/order passed by the Supreme Court in *Bikram Chatterji & others Vs. Union of India and others* (supra) is not applicable to the facts of this case. There is no question of clearance inasmuch the petitioner was given possession on due date of the land and the petitioner started its commercial production in August, 2013 and, therefore, the petitioner cannot latch on the orders passed by the Supreme Court in the aforesaid two cases.

25. I have considered the submissions made by the learned counsel for the parties.

26. Industrial development authorities are creation of the Statute with specific purpose. The main work of the Authority is to facilitate industrial and commercial activities within its area and, for that purpose to provide infrastructure i.e. land, road, electricity, water and drainage etc. The purpose of Authority is not profiteering, but to see the industrial and economic growth by providing congenial environment and infrastructure so that industrial and commercial activities are carried out within its area for overall economic growth of the area and the State.

27. It is admitted in the counter affidavit, as stated above, that the Authority provides water connection for commercial use by three modes, mentioned above. In view thereof, Mr. Prashant Kumar, learned counsel for the GNIDA, has submitted that if the petitioner is ready to bear the cost and burden for laying down pipelines etc, the Authority would provide water from STP through pipeline, provided the petitioner should come to the office of the Authority and make a request and settle the dues.

28. In view of the aforesaid submissions, I direct the petitioner to make deposit of Rs.1 Crore (Rupees One Crore) within 15 days from today with the Authority and the Authority shall provide the cost etc. for laying down pipelines for providing water through STP for commercial use at the prevailing rates.

29. So far as the question of additional compensation of Rs. 5 Crore is concerned, a Coordinate Bench at Allahabad vide judgment and order dated 18.09.2019 passed in Writ-C No.18684 of 2019 and connected Writ-C No.17643 of 2019 quashed the demand of additional compensation of Rs.1,769/- per square meter for Group Housing Yojana, as was fixed by the Board of Authority on 31.05.2019, and remitted the matter back to the Authority for taking decision afresh, strictly in light of the observations made in the judgment. Operative portion of the judgment dated 18.09.2019 passed in the said writ petitions is quoted herein below:-

"Another aspect which would merit consideration is the apportionment of compensation amongst allottees. As contended by the petitioners here the loading of additional compensation must necessarily have a nexus and correlation to the area of land allotted and the additional compensation cost created in respect of that area by the Authority. This submission clearly appears to be sound for the adoption of any other method may lead to a charge of discrimination amongst allottees that do not constitute the same class. It would essentially result in the creation of liabilities having no nexus or correlation to the actual liability of additional compensation ultimately borne by the Authority in respect of the allotted piece of land. The computation of additional compensation would depend upon a host of variables such as the situation of the plot, its area, the number of individuals whose holdings were acquired in connection therewith and the amount of additional compensation ultimately paid. There can be no computation of proportionate liability without these factors being taken into account and consideration. In the absence of any explanation or justification offered by the Authority, the Court finds itself unable to sustain the creation of the liability against the petitioner as embodied in the impugned order on this score also.

The Court also bears in mind that the creation of liability does not affect the petitioners alone. It would also impact the interests of numerous individual allottees of the proposed Group Housing Scheme. Their interests cannot be ignored bearing in mind the harsh economic realities of the housing sector. The Authority would be well advised to bear all the aforesaid aspects in mind before proceeding to compute the liability to be borne by the petitioners.

Accordingly and for the reasons aforenoted the instant writ petition is allowed. The impugned order dated 2 July 2019 is hereby quashed. The matter is remitted to the Authority for taking a decision afresh strictly in accordance with

the observations made hereinabove. Since the completion certificate has already been granted to the petitioner pursuant to the interim directions issued and in view of the result of the instant petition, the same is made absolute. The issue of refund of moneys already deposited by the petitioner towards additional compensation shall be open to be raised dependent upon the fresh decision that the Authority shall now take in light of the directions issued."

30. A Division Bench of this Court in **Writ-C No.28968 of 2018 (M/s Shakuntala Educational and Welfare Society Vs State of U.P. and others) and other connected matters** vide judgment and order dated 28.05.2020 had quashed the Resolution of Board of the Yamuna Expressway Industrial Development Authority dated 15.09.2014 and the Government Order dated 29.08.2014 for recovering additional payment of compensation from the allottees. It has been held that the lease-deed is required to be registered both under the provisions of the Transfer of Properties Act and the Registration Act. The amount of premium or the sale consideration, mentioned therein, is not liable to any change otherwise than by execution of another registered instrument. It has also been held that the Full Bench decision in **Gajraj and others Vs. State of U.P. and others (2011) ADJ 1 (FB),** which was approved by the Supreme Court in the case of **Savitrai Devi and others Vs. State (2015) 7 SCC 21**, is not judgment in rem and same could not be applied to proceedings for acquiring the land under different notifications. It was also held by this Court that issuance of Government Order dated 29.08.2014 and its acceptance by the by the Yamuna Express Industrial Development Authority is patently illegal and it was violative of provisions of the Land Acquisition Act and even otherwise without jurisdiction. The concluding part of the judgment is quoted herein below:-

(i) The decision in the case of Gajraj as approved by Savitri Devi is not a judgement in rem which could have been applied to proceedings for acquiring the land under different notifications or for Y.E.I.D.A.;

(ii) the issuance of the Government Order dated 29.08.2014 and its acceptance by Y.E.I.D.A. is patently illegal. It is violative of the provisions of the L.A. Act and is otherwise without jurisdiction as no such Government Order is liable to be issued in equity by the Government and that the policy behind it is unfair, unreasonable and arbitrary which is in violation of the provisions of the T.P. Act; and

(iii) the aforesaid Government Order dated 29.08.2014 as such is held to be invalid and liable to be ignored. Consequentially, all actions and demands of the Y.E.I.D.A. based upon it are held to be illegal.

In view of above facts and circumstances, the impugned Government Order dated 29.08.2014 is declared to be illegal and without jurisdiction and consequently all demands raised on its basis are quashed."

31. The said judgment has been challenged in the Supreme Court, which is pending for final disposal. In view thereof, since the demand of additional compensation has been decided by the Division Bench of this Court, the same should not be enforeced against the petitioner till disposal of Petition for Special Leave to Appeal (C) Nos.10015-10034 of 2020 pending before the Supreme

Court. In case the Supreme Court allows the said Special Leave Petitions, the petitioner would be liable to pay the additional compensation.

32. The 3rd issue, which requires consideration by this Court, is the rate of interest and penal rate of interest. As mentioned above, the purpose of Authority is not profiteering, but to provide infrastructure facilities/amenities for industrial and economic growth and commercial activities in the area under its control. Besides interest @ 12% per annum on premium compounding penal interest @ 14% would make an industry unviable. It could not be the purpose of Authority to allow industries to be set up and then make same unviable. The Supreme Court in the case of *Bikram Chatterji & others Vs. Union of India and others (supra)* has directed the Authority for charging the interest at bank rate on the outstanding amount from Amraprali Group of Housing Company. In this case, as noted above, interest is 12% per annum on premium on six monthly basis and in default, the penal interest is to be charged @ 14% per annum. Such a high rate of penal interest besides the interest @ 12% per annum on premium is surely enough to bleed the industry and make it unviable.

33. In my view, the State Government must consider to revise rate of interest to make it compatible with the bank interest with 2% more and penal interest should also not exceed more then 6%. In view thereof, the present writ petition is **allowed**. The impugned order dated 25.11.2020, impugned demand letter dated 06.01.2021 and impugned letter of cancellation dated 29.09.2021, copies of which are contained in Annexure Nos. 1, 2 and 3 to the petition, are quashed. The matter is remitted back with following directions:-

I. The petitioner will deposit Rs. 1 Crore with the Authority within 15 days from today and make the payment for laying down the pipeline from STP to its unit for making supply of STP water for its industrial unit at the applicable rate. The Authority should lay down the pipeline after receiving the cost and provide the water to the industrial unit so that its cost of manufacturing of concrete precast gets reduced and industrial unit becomes viable.

II. So far as levy of penal interest is concerned, the matter is remitted back to the Revisional Authority i.e. State Government to reduce it to 6% per annum instead of 14% per annum on default of payment of premium and allow the petitioner to pay the premium along with interest (12% + 6%, total 18% per annum simple interest) in installments, may be spread over to 5-7 years.

III. So far as payment of additional premium is concerned, it should be deferred till decision of the Supreme Court in Special Leave to Appeal (C) Nos.10015-10034 of 2020.

The petitioner should furnish an undertaking to the effect that it will abide by the decision of the Supreme Court and, in case the Supreme Court allows the said SLPs, it shall make the payment of additional compensation without any demur.

IV. Revisional Authority is directed to pass a fresh order within a period of one month after affording an opportunity of hearing to the petitioner.

(2022)04ILR A865
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2022

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE VIKRAM D. CHAUHAN, J.

Writ-C No. 31925 of 2021

Nand Kumar Maurya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Udayan Nandan, Sri Shashi Nandan (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Akhilesh Kumar, Narendra Kumar, Sri Veer Singh

Civil Law – Constitution of India, 1950 - Article 226, - U.P. Municipalities Act, 1916 - Sections 48, 48 (2), 48(2)(b) & 82 - Writ Petition - challenging the Show Cause Notice and impugned order of ceasing the Financial & Administrative power of the petitioner who is the President of a Nagar Panchayat – on account of a complaint in respect of irregularities in purchase of dustbins – 1st enquiry report submitted by SDM - petitioner was exonerated – Additional Commissioner without providing any opportunity of hearing directed for fresh enquiry – enquiry report submitted by another SDM – show cause notice was issued – petitioner submitted written explanation as well as produced the enquiry committee constituted by the DM – report forwarded before Addl. Chief Secretary - impugned notice – petitioner replied – impugned order passed by the St. Govt. – writ petition – while passing the impugned orders St. Govt. neither objectively considered the material & reply of the petitioner nor discussed the same – orders issued under section 48(2) of the Act, for cessation of financial & administrative powers should reflects the 'due application of mind' applied by the authority concern - writ petition allowed – impugned order is set aside – matter remitted back to proceed afresh in accordance with law.(Para – 28, 31, 35, 36)

Writ Petition allowed. (E-11)

List of Cases cited: -

1. Paras Jain Vs St. of U.P. & ors.(2016 vol. 1 ADJ 1 FB),

2. Hafiz Ataullah Ansari Vs St. of U.P. & ors.(2011 vol. 3 ADJ 502 FB)

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. The present writ petition is preferred by the petitioner challenging the show cause notice dated 11th November, 2021 issued by the Additional Chief Secretary, Nagar Vikas, U.P. at Lucknow, whereby the petitioner has been show caused as to why he may not be removed from the office of the President, Nagar Panchayat, Khamariya, District Bhadohi and further by the impugned order dated 11th November, 2021 the financial and administrative powers of the petitioner has been ceased.

2. The brief facts of the case is that the petitioner is the President, Nagar Panchayat, Khamariya, District Bhadohi. In respect of the alleged irregularities in purchase of dustbins in Nagar Panchayat, Khamariya, District Bhadohi, an enquiry was conducted by the Sub Divisional Magistrate, Aurai, District Bhadohi and a report was submitted on 24th June, 2019. The aforesaid enquiry was conducted on the basis of the complaint made by one Sri Mainuddin Ansari, Sabhasad, Ward No. 12, Akbarpur and other Sabhasad, Nagar Panchayat, Khameriya, District Bhadohi.

The Sub Divisional Magistrate by report dated 24th June, 2019 did not find any irregularity in the purchase of the dustbins and as such, the complaint against the petitioner was shelved. The aforesaid report dated 24th June, 2019 was forwarded by the Additional District Magistrate to the Commissioner, Vindhyanchal Mandal, Mirzapur by his communication dated 15th July, 2019. Thereafter, another enquiry was ordered by the Additional Commissioner, Mirzapur on two issues, one relating to the allegations with regard to purchase of dustbins without following the relevant provisions of law and second that the dustbins were purchased from a firm owned by the daughter in law of the brother of the President-petitioner. The aforesaid enquiry was conducted by the Sub Divisional Magistrate, Gyanpur and the enquiry report was submitted on 19th October, 2019. On the basis of the aforesaid, the notice was issued by the respondents to the petitioner on 3rd September, 2020 calling upon the petitioner to give explanation with respect to the allegations pursuant to the abovementioned enquiry report. In pursuance thereof, the petitioner has submitted his written explanation before the respondent authorities on 13th October, 2020. The District Magistrate on 21st November, 2020 has submitted his reply to the explanation submitted by the petitioner on 13th October, 2020 and thereafter the personal hearing was also accorded to the petitioner on 17th March, 2021 wherein also the petitioner submitted his explanation dated 16th March, 2021 before the Additional Chief Secretary, Nagar Vikas-respondent no. 2.

3. It further transpires that after the hearing and the presentation of the submission by the petitioner on 17.03.2021, the explanation/written submissions of the petitioner were sent to the District Magistrate concerned on 13th April, 2021 and thereafter the District Magistrate has submitted report dated 7th June, 2021 of Committee. The aforesaid report dated 7th June, 2021 was against the petitioner and on the aforesaid basis, the impugned show cause notice dated 11th November, 2021 has been issued by the Additional Chief Secretary, Nagar Vikas-respondent no. 2 and further the financial and administrative powers of the petitioner has been ceased.

4. Heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri Udayan Nandan, Advocate, learned counsel for the petitioner, learned Standing Counsel for the State-respondents and Sri Veer Singh, learned counsel for the complainant-respondent no. 6.

5. It is submitted by learned counsel for the petitioner that the petitioner is the President of the Nagar Panchayat, Khamariya, District Bhadohi and he has been issued show cause notice in terms of Section 48 (2) of the U.P. Municipalities Act, 1916 and also by the impugned notice dated 11th November, 2021 his administrative and financial powers have been ceased by respondent authority. It is also submitted on behalf of petitioner that while passing the impugned notice and ceasing of the administrative and financial powers of the petitioner, the reply submitted by the petitioner has not been considered by the Additional Chief Secretary, Nagar Vikas - respondent no. 2 and further the respondent authority while passing the impugned order has also failed to take into consideration earlier report dated 24th June, 2019 which was in favour of the petitioner. It is also the case of the petitioner that after the arguments were

heard on 17th March, 2021 and the written explanation dated 16th March, 2021 was submitted by the petitioner, the respondent authorities has invited a report from the District Magistrate concerned in respect of the explanation and argument of the petitioner and the District Magistrate in pursuance thereof had formed a four member committee comprising of Additional District Magistrate, District Information Officer-NIC, Finance and Audit Officer, Bhadohi and EDM, Bhadohi. On the basis of the aforesaid, the District Magistrate by his letter dated 7th June, 2021 has submitted a enquiry report before the Principal Secretary, Nagar Vikas. It is submitted by the learned counsel for the petitioner that prior to submission of the report dated 7th June, 2021, no opportunity of hearing was granted by the aforesaid committee nor any opportunity of hearing was granted at the level of the District Magistrate. It is also submitted that prior to passing of the impugned order, the copy of the aforesaid report dated 7th June, 2021 has also not been served on the petitioner nor the petitioner has been granted opportunity to file any objection to the aforesaid report dated 7th June, 2021. It is also urged that while passing the impugned order, the respondent authorities has relied upon the report dated 7th June, 2021 against the petitioner without considering the explanation submitted by the petitioner in response to the allegations against the petitioner. It is urged on behalf of the petitioner that the impugned order is arbitrary, without application of mind and without giving any reasons has ceased the financial and administrative powers of the petitioner.

6. Learned Standing Counsel appearing for the State-respondents and Sri Veer Singh, learned counsel appearing on behalf of the respondent no. 6 has submitted that the petitioner is the Chairman of Nagar Panchayat, Khameriya, District Bhadohi and allegations with respect to misappropriation of funds of Nagar Panchayat for purchase of articles without following proper procedure prescribed is levelled against the petitioner. In this respect, the Sub Divisional Magistrate, Gyanpur has submitted an enquiry report dated 19th October, 2019 indicting the petitioner in respect of the allegations of misappropriation of funds. The aforesaid report dated 19th October, 2019 was forwarded by the Additional District Magistrate to the Commissioner and the same has thereafter being forwarded to the State Government. The State Government consequently has issued letter dated 3rd September, 2020 to the petitioner calling for an explanation. The petitioner submitted his reply on 13th October, 2020 and the District Magistrate has thereafter submitted the explanation on 21st November, 2020. It is also submitted that the petitioner has also submitted his reply on 16th March, 2021 before the State Government and the petitioner was granted opportunity of hearing by the State Government on 17th March, 2021. Thereafter show cause notice dated 11th November, 2021 has been issued to the petitioner and the financial and administrative powers of the petitioner has been ceased under Section 48 (2) of the U.P. Municipalities Act, 1916. The petitioner was given full opportunity of hearing and thereafter the impugned order has been passed by the State Government. It is also urged on behalf of the respondents that while passing impugned order, the reply of the petitioner has been considered and the authority concerned has prima facie found a case against the petitioner and as

such, the financial and administrative powers of the petitioner has been ceased. A notice has been issued to the petitioner in terms of Section 48 (2) of the U.P. Municipalities Act, 1916. On the aforesaid basis, it is submitted that the present writ petition has no force and as such liable to be dismissed.

7. The controversy involved in the present writ petition revolves around Section 48 (2) of the U.P. Municipalities Act, 1916 and the same is quoted hereunder:-

"**48. Removal of President**. - (1) [Omitted]

(2) Where the State Government has, at any time, reason to believe that, -

(a) there has been a failure on the part of the President in performing his duties; or

(b) the President has -

(i) incurred any of the disqualifications mentioned in Sections 12-D and 43-AA; or

(ii) within the meaning of Section 82 knowingly acquired or continued to have, directly or indirectly or by a partner, any share or interest, whether pecuniary or of any other nature, in any contract or employment with by or on behalf of the [Municipality]; or

(iii) knowingly acted as a President or as a member in a matter other than a matter referred to in clauses (a) to (g) of subsection (2) of Section 32, in which he has, directly or indirectly or by a partner, any share or interest whether pecuniary or of any other nature, or in which he was professionally interested on behalf of a client, principal or other person; or

(iv) being a legal practitioner acted or appeared in any suit or other proceeding on behalf of any person against the [Municipality] or against the State Government in respect of nazul land entrusted to the management of the [Municipality] or against the State Government in respect of nazul land entrusted to the management of the [Municipality], or acted or appeared for or on behalf of any person against whom a criminal proceeding has been instituted by or on behalf of the [Municipality]; or

(v) abandoned his ordinary place of residence in the municipal area concerned; or

(vi) been guilty of misconduct in the discharge of his duties; or

(vii) during the current or the last preceding term of the] [Municipality], acting as President or [* * *], or as Chairman of a Committee, or as member or in any other capacity whatsoever, whether before or after the commencement of the Uttar Pradesh Urban Local Self-Government Laws (Amendment) Act, 1976, so flagrantly abused his position, or so wilfully contravened any of the provisions of this Act or any rule, regulation or bye-law, or caused such loss of damage to fund or property of the [Municipality] as to render him unfit to continue to be President; or

(viii) been guilty of any other misconduct whether committed before or after the commencement of the Uttar Pradesh Urban Local Self-Government Laws (Amendment) Act, 1976 whether as President or as [* * *], exercising the powers of President, or as [* * *], or as member; or

(ix) caused loss or damage to any property of the municipality; or

(x) misappropriated or misused of Municipal found; or

(xi) acted against the interest of the municipality; or

(xii) contravened the provisions of this Act or the rules made thereunder; or

(xiii) created an obstacle in a meeting of the municipality in such manner that it becomes impossible for the municipality to conduct its business in the meeting or instigated someone to do so; or

(xiv) wilfully contravened any order or direction of the State Government given under this Act; or

(xv) misbehaved without any lawful justification with the officers or employees of the municipality; or

(xvi) disposed of any property belonging to the municipality at a price less than its market value; or

(xvii) encroached, or assisted or instigated any other person to encroach upon the land, building or any other immovable property of the municipality;]

it may call upon him to show cause within the time to be specified in the notice why he should not be removed from office.

Provided that where the State Government has reason to believe that the allegations do not appear to be groundless and the President is prima facie guilty on any of the grounds of this sub-section resulting in the issuance of the show-cause notice and proceedings under this sub-section he shall, from the date of issuance of the show-cause notice containing charges, cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President until he is exonerated of the charges mentioned in the show-cause notice issued to him under this sub-section and finalization of the proceedings under sub-section (2-A) and the said powers, functions and duties of the President during the period of such ceasing, shall be exercised, performed and discharged by the District Magistrate or an officer nominated by him not below the rank of Deputy Collector."

8. In order to appreciate the contentions urged on behalf of the parties, it would be appropriate to examine the charges levelled against the petitioner and the response submitted by the petitioner in respect of the charges levelled against the petitioner.

9. The first charge against the petitioner is that in the process of purchase of dustbins the comparison was not made between the dustbin of same capacity but the comparison was made with dustbin of higher capacity. It is also alleged that in case the dustbin with regard to sanction capacity was not available on the GEM portal then in accordance with the order dated 12th September, 2018 of the Additional District Magistrate, the dustbin ought to have been purchased by way of e-tender.

10. The petitioner in respect of the first charge submitted his reply to the effect that after the selection of the capacity of the dustbin on the GEM portal, the other capacity of dustbin was being shown in the category of the sanctioned capacity of dustbin, was not reflected on the buyer's portal. The process of comparison of the dustbin of various capacity is the sole prerogative of the GEM portal and the GEM portal after completion of the comparison publishes the final list. It is not possible for the buyer to find out the capacity of dustbin which were being compared. In the GEM portal it is not possible to purchase unless the comparison process and the L1 process is completed on the aforesaid portal. The GEM portal further prepared the contract, sanction order and other documents on automation basis and the President/petitioner has no role in the aforesaid process. The purchases have been made from the GEM portal and

as such there are no irregularities in the purchase of the dustbin and no financial loss has been made to the Nagar Panchayat.

11. The second charge against the petitioner is to the effect that the Government Order No. G.F.R./2017 provided that purchases to an amount of Rs. 30 Lacs can be made directly from the GEM portal. The purchases made by the Nagar Panchayat in respect of various categories of dustbins were within the limit of Rs.30 Lacs individually however, if the amount of all the categories of dustbins are added together the same would be more than Rs. 30 Lacs limit fixed by the aforesaid Government Order. One firm was given order for various categories of dustbin and the aforesaid order in total amounted to more than Rs. 30 Lacs. No information in this respect was given to the District Magistrate nor any sanction was taken by the Nagar Panchayat in this respect and as such irregularities have been committed by the petitioner.

12. The petitioner in response to the second charge submitted that in the Government Order dated 23rd August, 2017 it is provided that for an amount from Rs.50,000/- to Rs.30,00,000/- the purchases can be made from the GEM portal on the basis of the lowest price offered. The purchases have been made after obtaining necessary sanction from the District Magistrate and in accordance with the abovementioned Government Order. It was also the defence of the petitioner that the work pertaining to upload of purchase order on the GEM portal and acceptance of the work order is within the domain of the Executive Officer, Nagar Panchayat. The concerned authority in respect of the alleged purchase is the Executive Officer, Nagar Panchayat. It was also the defence of the petitioner that the Government Order did not provide that the value of all the purchases of various categories were required to be added and thereafter the purchases are to be affected. In the present case, the purchases have been made in respect of various categories by means of different contract proposal and the sanction also is also made separately and the payments have been made against the various categories separately by the authorised officer being the Executive Officer, Nagar Panchayat. The petitioner had no role in the purchase of the aforesaid dustbin. The purchase of various capacity of dustbin which have been purchased by separate order on the GEM portal could not have been clubbed together.

13. The third charge against the petitioner pertains to the allegation that the purchase of dustbins was made by the Nagar Panchayat from the firm of which the proprietor was the daughter-in-law of the brother of the petitioner and as such is in violation of Section 82 of the Uttar Pradesh Municipalities Act, 1916 as the petitioner has interest in the contract awarded for purchase of dustbin to the above-mentioned firm.

14. The explanation given by the petitioner in respect of the third charge is to the effect that the firm Shree Hari Impex is already registered on the GEM portal and the purchases have been made in accordance with the Government Order dated 23rd August, 2017 after approval of the District Magistrate from the GEM portal. It was also submitted that the aforesaid firm is a proprietorship firm and the petitioner has no interest or connection with the aforesaid firm and the payments were made to the aforesaid firm after the scrutiny by the committee constituted by

the District Magistrate. It was also stated that at the level of the petitioner, no proceedings were undertaken for selection of the aforesaid firm for purchase of the dustbin and the aforesaid selection was made from the GEM portal on which the petitioner has no control. The selection of the aforesaid firm was made by the GEM portal on automation basis to the lowest bid.

15. The Nagar Panchayat in question is a unit of local self-government. The concept of a local self-government paves the way for a proper delineation of functions and powers of the latter, for the smooth flow of funds from State Governments and also ensure community involvement in activities. The Nagar Panchayat is constituted under the Uttar Pradesh Municipalities Act, 1916. The aforesaid Act further provides that the members of the Nagar Panchayat shall be on the basis of electoral representative. The aforesaid Act under Section 43 also provides that the President of the Nagar Panchayat shall be elected on the basis of adult suffrage by the electors of the Nagar Panchayat. By means of 73rd Constitutional Amendment the Municipalities have been accorded the constitutional status.

16. The section 48 of the Uttar Pradesh Municipalities Act, 1916 provides for the removal of the President. The grounds on which the President can be removed has been envisaged under Section 48 (2) of the Uttar Pradesh Municipalities Act, 1916. It provides that where the State Government has reason to believe that there has been failure on the part of the President in performing his duties or the President has committed any misconduct provided under Section 48(2)(b), then he can be called upon to show cause as to why he should not be removed from the office of the President.

17. The proviso to Section 48(2) of the Uttar Pradesh Municipalities Act, 1916 provides for cessation of financial and administrative powers under the specified conditions. The aforesaid provision does not envisage cessation of financial and administrative powers on merely issuance of notice under Section 48(2) of the aforesaid Act. The provision requires that where the State Government has reason to believe that the allegations do not appear to be groundless and the President is prima facie guilty on any of the grounds of sub-section 2 of Section 48 resulting in issuance of show cause notice containing charges, the State Government can cease the financial and administrative powers of the President unless he is exonerated of the charges mentioned in the show cause notice and finalisation of proceedings.

18. It is further to be noted that during the cessation of the financial and administrative powers of the President, the proviso to Section 48(2) of the Act further provides that the aforesaid powers would be performed and discharged by the District Magistrate or an officer nominated by him not below the rank of a Deputy Collector. It is to be seen that the powers under the proviso to Section 48(2) of the Uttar Pradesh Municipalities Act, 1916 will result in transfer of the powers of the President from an elected representative to an executive authority, who is not elected by the electoral College of the Nagar panchayat. In this manner, the cessation of the administrative and financial powers of the President have grave consequences as the elected representative power are ceased and handed over to an executive authority

who is not directly answerable to the electoral College.

19. Under the present constitutional framework, the emphasis has been to set up democratic institutions for governance of the people of the country and all decisions are rooted through democratic elected representatives. The executive authority has been imparted with the duty to implement the decisionsand policy framed by the elected representatives. Further, the elected representatives (in higher hierarchy) under the Constitution can be removed by a special process either by way of no confidence motion or by way of impeachment and in this manner a protection is provided to the elected representative so that the executive may not usurp the office of the elected representative by removing him except by way of no confidence motion or by way of impeachment. It is to be seen that under the constitutional scheme, the elected representatives have been insulated from being removed from the office by the executive. However, in the case of the President of the Nagar Panchayat under the Uttar Pradesh Municipalities Act, 1916, the power to remove the President of the Nagar Panchayat is vested with the State Government in exercise of powers under Section 48 of the Uttar Pradesh Municipalities Act, 1916. Once the power has been vested with the executive for removing an elected representative from the post of the President of Nagar panchayat, it emphasises a greater responsibility of the State Government that the power is exercised within the four corners of the Uttar Pradesh Municipalities Act, 1916 and further keeping into consideration the constitutional scheme. While exercising the powers under Section 48(2) of the Uttar Pradesh Municipalities Act, 1916, the State Government by ceasing the financial and administrative powers of the President is taking upon a drastic step of precluding an elected representative who is President of the Nagar panchayat from exercising his powers as provided under law. The institution of local self government including the Nagar Panchayat have been specifically constituted for the purpose of giving powers of governance in the hand of the citizens of the area through their elected representatives and once the powers under the proviso to Section 48 (2) of the Uttar Pradesh Municipalities Act, 1960 is exercised by the State Government, the governance comes into the hands of the executive authority. The aforesaid power under Section 48 of the Act including the cessation of administrative and financial powers of the President are to be exercised by the State Government fairly and in a responsible manner so that the democratic institutions are strengthened. The five Judges Bench of this Court in **Paras Jain Vs State of U.P. and others**, reported in **2016 (1) ADJ 1 (FB)** in paragraph 14 has emphasised on the institution of local self-government and decentralisation of democratic governance and the same is quoted hereinbelow :-

"**14**. Part IX-A of the Constitution contains provisions in relation to the panchayats. Part IX-A provides for the municipalities. These provisions were introduced by the Seventy-third and Seventy-fourth amendments to the Constitution. Municipalities and panchayats as institutions of local self-Government have a constitutional status. Their role and position are defined by the Constitution as are their powers, duties and responsibilities. They are not mere administrative agencies of the State but, as

institutions of self-governance, have been conferred with a degree of autonomy to ensure that democracy finds expression at the grassroots of Indian society. The Constitution seeks to attain a decentralisation of democratic governance through these institutions."

20. It however goes without saying that the elected representatives has greater responsibility to exercise the powers under the Act for the benefit of the public at large and in accordance with sound administrative and financial principles within the corners of statute. It is the duty of the elected representative that the public money is not wasted and that the public money is expended for the benefit of the citizens of the municipal area/nagar panchyat. The electoral college of the area concerned has elected its representative to the Nagar Panchayat so that they will exercise, the power for benefiting the public at large and will not involve in any activity which is detrimental to the society and not involve in misappropriation of funds and abuse of the office, which the electoral representative is holding. It is true that the electoral representative cannot hide behind his position of being an electoral representative and in the garb of the aforesaid conduct himself in a manner which is detrimental to the society at large and to the objectives of the Nagar Panchayat. The aforesaid misconduct has further been envisaged under Section 48(2) of the Uttar Pradesh Municipalities Act, 1916.

21. The removal of the President of Nagar Panchayat under Section 48 of the Uttar Pradesh Municipalities Act, 1916 and cessation of the administrative and financial powers of the President is a drastic step. The aforesaid powers, in fact, takes away the powers of the elected representative and confers the said power on the District Magistrate or other officer who are the executive officers of the State. In such circumstances, the interpretation to the aforesaid provision is to be in accordance with scheme under the constitution and the Government is require to follow the provisions and the condition precedent prior to exercise of the power of cessation of financial and administrative powers of the President. It is to be borne in mind that the Nagar Panchayat is a local self government and it is to be run in conformity with the constitutional standards and in this respect, the statute/legislation, which is in the nature of regulatory framework, must be interpreted in a manner that fulfils the constitutional goals and objectives and as such, the State Government while passing any order under Section 48 of the Act, is required to pass such order in conformity with the constitutional scheme and should not dilute the autonomy of the institution. It is also to be seen that the cessation of the financial and administrative powers of the President while holding an enquiry for removal of the President under Section 48 of the Act is detrimental to the public interest in the sense that an elected representative while continuing on the post would not be able to exercise his powers and functions under the Uttar Pradesh Municipalities Act, 1916 and such a drastic measure should only to be adopted where there are serious material against the President. It is also the duty of the State Government while exercising such drastic powers which are having civil consequences that the procedure adopted is just, fair and reasonable and in consonance with Article 14 of the Constitution. In this reference the five Judges Bench of this Court in **Paras Jain (supra)** in paragraph 15 has elucidated the interpretation to be

accorded to such a provision and the same is quoted hereinbelow:

"15. The extent of control which the agencies of the State exercise over these institutions of local self-government must necessarily conform to constitutional standards. State legislation of a regulatory nature must be interpreted in a manner that fosters the attainment of constitutional objectives. The Court, consistent with the high constitutional purpose underlying Parts IX and IXA of the Constitution, must give expression to the autonomy expected to be wielded by the constitutionally recognized levels of local self-government. Hence, while interpreting state legislation, the need to conform to constitutional parameters must be borne in mind. An interpretation of state legislation which will dilute the autonomy of institutions of local self-government must, to the extent possible, be avoided. Similarly, an interpretation which would result in reducing the panchayats and municipalities to a role of administrative subordination must be eschewed. Consequently, where an issue arises in regard to the removal of an elected head of a municipality, as in the present case, the procedure prescribed by the law must be followed. The law itself must be interpreted in a manner that would render it fair, just and reasonable in its operation and effect. Moreover, in areas where the law is silent, an effort must be made by the Court in the process of interpretation to ensure that the procedure for removal is just, fair and reasonable to be consistent with the mandate of Article 14."

22. In the present case, the question of interpretation of Section 48(2) of the Act including the proviso is involved. The aforesaid Section 48(2) empowers the State Government to issue show cause notice to the President as to why he may not be removed from his office if the State Government has reason to believe that there is failure on the part of the President in performing his duties or has misconducted in accordance with the provisions of Section 48(2)(b) of the Act. Further, the State Government under proviso to Section 48 sub-clause (2) is further empowered to cease the financial and administrative powers, functions and duties of the President, where the State Government has the reason to believe that the allegation do not appear to be groundless and the President is prima facie guilty on any of the grounds of said section resulting in issuance of show cause notice. The aforesaid proceedings for cessation of financial and administrative powers during the pendency of the proceedings for removal of the President under the aforesaid proviso require to fulfill twin conditions.

23. The first condition for exercise of the powers for cessation of administrative and financial powers of the President is that the State Government has reason to believe that the allegations do not appear to be groundless. It is to be seen that the aforesaid action of the State Government should be based on the material before it and must reflect the application of mind by the State Government. The cessation of administrative and financial powers should be on objective assessment of the authority concerned based on the material on record and is distinguishable from the purely subjective satisfaction. It is also to be seen that the aforesaid reasonable belief is to be formed on the basis of relevant facts available on record. The aforesaid provision casts a duty on the State Government to lay down the factual

foundation and circumstances for coming to the conclusion that there exist a reasonable belief that allegations do not appear to be groundless. In this reference, the five Judges Bench of this Court in **Paras Jain (supra)** in paragraph 27 has interpreted the expression "reason to believe" and the same is quoted hereinbelow :-

"27. The formation of a reason to believe within the meaning of the proviso must be on objective considerations which have a rational connection or link to the material before the State Government. Fairness requires that this be disclosed to the President of the municipality before the consequences in the proviso ensue. The President must have an opportunity to explain."

24. The objective consideration which has rational connection to the material before the State Government is essential for fair and just exercise of the power by the State Government. The State Government while exercising the power cannot loose sight of the fact that an elected representative is being denuded of his powers under the Municipalities Act, 1916. The objective assessment/consideration to the material before the State Government would ensure that the reasons are disclosed to the President of the municipality before the consequences under the proviso ensue.

25. The second condition for exercise of power under Section 48(2) of the Uttar Pradesh Municipalities Act, 1916 is that the President is prima facie guilty on the grounds of this section and it is thereafter that the show cause notice can be issued to the President and the financial and administrative powers can be ceased. The prime facie satisfaction of the guilt under the aforesaid provision postulates application of mind to the material available on record before the State Government as well as the explanation/reply submitted by the petitioner. The formation of a prime facie opinion by the State Government must be consistent with the principles of natural justice. The objective assessment of the material on record including the reply of the petitioner will ensure fair and just exercise of the powers by the State Government.

26. In this reference, the five Judges Bench of this Court in **Paras Jain (supra)** in paragraph 28 has interpreted the expression "prima facie" and the same is quoted hereinbelow :-

"**28.** The State Government is also required by the proviso to be of the view that the President is prima facie guilty on any of the grounds contained in the sub-section which have resulted in the issuance of the notice to show cause. The formulation of a reason to believe that the allegations do not appear to be groundless and that the President is prima facie guilty on any of the grounds mentioned in the sub-section would postulate that before these statutory requirements are found to exist, a fair opportunity of being heard must be granted to the President of the municipality. A finding of prima facie guilt must, in our view, be consistent with a prior fulfillment of the norms of natural justice, consistent with the stage of enquiry. There is intrinsic evidence in the statutory provision which leads to the inference that the mere issuance of the notice to show-cause does not a fortiori result in the cessation of the financial and administrative powers, functions and duties but it is only when the conditions which are

spelt out in the proviso exist, that such a consequence will follow. If a mere issuance of a notice to show-cause was intended to necessarily result in the consequence of the cessation of financial and administrative powers as envisaged in the proviso, the legislature would have made a provision to that effect. On the contrary, the legislature has carefully crafted a statutory provision, in the form of a proviso which ensures that it is only upon the State Government having a reason to believe that the allegations do not appear to be groundless and that the President is prima facie guilty on any of the grounds contained in the sub-section, that the cessation of the financial and administrative powers would follow from the date of the issuance of the notice to show-cause containing the charges."

27. The cessation of financial and administrative powers of an elected representative is a matter of great significance and has serious consequences. The aforesaid action erodes the authority of the elected head to effectively discharge the functions of the office. An action which has civil consequences is to be in consonance with the principles of natural justice. In the present case, the cessation of financial and administrative powers of the President of the Nagar Panchayat has civil consequences and as such the principles of natural justice are required to be followed in consonance with the law laid down by the five Judges Bench of this Court in **Paras Jain (supra).**

28. In the present case, prior to passing the order for cessation of financial and administrative powers, the State Government had called for the explanation of the petitioner and the petitioner has submitted his reply/explanation to the State Government in respect of the allegations. The reply of the petitioner was also before the State Government while passing the impugned order. A perusal of the impugned order would disclose that after mentioning the charges against the petitioner in the impugned order, the State Government has relied upon the report of the District Magistrate dated 7th June, 2021 and the report of the committee dated 7th June, 2021 and thereafter has passed the impugned order. The State Government while passing the impugned order has neither objectively considered the material before the State Government nor the reply of the petitioner has been considered. The State Government while passing the impunged order has not even discussed the material which existed in support of the allegations against the petitioner. It is further to be seen that the report dated 7th June, 2021 of the District Magistrate and the report of the committee dated 7th June, 2021 have been submitted after hearing of the petitioner was completed on 17th March, 2021. The State Government has not recorded its reasons for proceeding under Section 48 of the U.P. Municipalities Act, 1916 and also the reasons as to why the financial and administrative powers have been ceased. The impugned order is absolutely silent on the aspect of the application of mind by the authority concerned to the material available on record. The explanations/reply submitted by the petitioner has also not been discussed in the impugned order. It is noted that all the charges have been mentioned in the impugned order however there is no application of mind by the authority concerned on the material available in respect of prime facie guilt of the petitioner as well as the reason to believe that the charges against the petitioner are not groundless. The report of the District Magistrate and the committee dated 7th

June, 2021 by itself cannot be ground to proceed under Section 48(2) of the Uttar Pradesh Municipalities Act, 1916. The authority concerned is obliged under law to independently consider all the material available before it including the report of the District Magistrate as well as the reply of the petitioner and to come to a conclusion on objective assessment of the facts and material before proceeding to issue show cause notice to the petitioner and cessation of financial and administrative powers of the President/petitioner.

29. The very purpose of calling for the reply of the petitioner prior to issuing the show cause notice was to inform the petitioner about the charges levelled against the petitioner as well as to bring on record the version of the petitioner to the charges levelled against the petitioner. Once the reply has been submitted by the petitioner, the authority concerned while passing the impugned order, ought to have considered the explanation of the petitioner to the charges levelled. The calling of the reply from the petitioner in respect of the charges levelled prior to issuing the show cause notice cannot be an empty formality, it has significance as the same strike at the arbitrary exercise of the power and bring fairness in the procedure and also the compliance of the principles of natural justice. In this reference, the Full Bench of this Court in **Hafiz Ataullah Ansari Vs. State of U.P. and others,** reported in **2011 (3) ADJ 502 (FB)** and paragraphs 124 to 126 have considered the importance of principle of natural justice and consideration of the explanation and the same is quoted hereinbelow:-

"124. Considering the object and reason, there is no justification to involve the heads of the local bodies at every step of collection of material or in the preliminary enquiry. The principles of natural justice or the yardstick of fairness would be met if the explanation of the effected head of the local body or his point of view or version is considered before recording the satisfaction or finding of prima facie guilt before issuing notice and passing order for ceasing financial and administrative powers.

125. Affording opportunity to submit explanation of the head or considering it, is not to be as detailed as in the regular inquiry or to the extent of permitting cross-examination of any witness, who might be examined in the preliminary enquiry. It is in the sense of getting his point of view or version to the charges before being so satisfied. But what is the point in affording the opportunity if the explanation is not considered. It has to be considered too: there has to be application of mind.

126. In our opinion, getting explanation or point of view or version of a head of a local body regarding charges and considering them before issuing show-cause notice under relevant provisos, not only strikes at the arbitrary exercise of power but brings about fairness in the procedure; in the circumstances, it is also sufficient compliance of the principles of natural justice."

30. The petitioner in his reply has given explanation in respect of the charges levelled against him. However, we find the non-consideration of the reply in the impugned order by the respondent authorities. The specific reply submitted by the petitioner to the allegations made against him has neither been adverted to nor there is any application of mind on the part of the State Government while passing the impugned order.

31. From the material placed before this Court we find substance in the argument advanced on behalf of the petitioner that the decision to proceed under Section 48 (2) of the Uttar Pradesh Municipalities Act, 1916 is not preceded by proper application of mind to the material placed by the petitioner and the impugned order has blindly relied upon the report of the District Magistrate dated 7th June, 2021 and the Committee Report dated 7th June, 2021, which were not furnished to the petitioner and was further submitted after the conclusion of the hearing by the State Government on 17th March, 2021. The State Government while passing the impugned order has neither considered the reply/explanation submitted by the petitioner in respect of the allegations levelled against the petitioner nor the State Government while passing the impugned order has neither recorded any prime facie finding with regard to guilt of the petitioner nor any objective satisfaction has been recorded by the State Government that the allegations against the petitioner do not appear to be groundless. The impugned order has been passed in mechanical manner without application of mind to the material available on record including the reply/explanation of the petitioner. The State government is enjoined with the duty to act in Just, fair and reasonable manner and to record reasons for proceeding under section 48(2) of the Uttar Pradesh Municipalities Act, 1916 and the order passed by the authority concerned should not reflect arbitrariness. The order under the aforesaid provision should be on the basis of the application of mind and within the ambit of the constitutional framework and principles.

32. While application of mind to the material available to the competent authority is an essential pre-requisite for the making of a valid order, that requirement should not be confused with the sufficiency of such material to support any such order. Whether or not the material placed before the competent authority was sufficient to justify the decision taken by it, may not be of significance at this stage. That aspect may have assumed importance only if the competent authority has shown to have applied its mind to whatever material was available to it. Since application of mind as a thresh-hold requirement for a valid order is conspicuous by its absence the question whether the decision was reasonable having regard to the material before the authority is rendered academic. What is absolutely essential is that the authority making the order is alive to the material on the basis of which it purports to take a decision. The power which is being exercised by the authority is in trust only to be exercised for a legitimate purpose and along settled principles of administrative law and constitutional principles.

33. In this reference, the five Judges Bench of this Court in **Paras Jain (supra)** in paragraph 35 has interpreted the scope of section 48(2) and the same is quoted hereinbelow :-

"35. We accordingly proceed to answer the reference in the following terms:

(I) Re Question (a): The decision of the Full Bench in Hafiz Ataullah Ansari Vs State of U P (supra) lays down the correct position in law.

(II) Re Questions (b) & (c): The cessation of financial and administrative powers of the President does not necessarily follow merely upon the issuance of a notice to show cause under

the substantive part of Section 48(2). The financial and administrative powers of the President shall stand ceased if the State Government has reason to believe that (i) the allegations do not appear to be groundless; and (ii) the President is prima facie guilty on any of the grounds of sub-section (2) resulting in the issuance of the notice to show-cause and proceedings thereunder. The President of the municipality will, in that event, cease to exercise, perform and discharge financial and administrative powers, functions and duties from the date of the issuance of the notice to show-cause containing the charges. For a cessation of financial and administrative powers to take effect, the requirements of the proviso to Section 48(2) must be fulfilled. Hence, proceedings for removal of a President of a municipality under Section 48(2) may take place in a given situation though the financial and administrative powers have not ceased under the terms of the proviso.

(III) Re Question (d): There is no requirement under the statute that a separate order has to be passed under the proviso to Section 48(2) when the financial and administrative powers of the President of a municipality cease. Such a consequence would come into being upon the requirements specified in the proviso to Section 48(2) being fulfilled.

(IV) Re Question (e): An opportunity of being heard, consistent with the principles of natural justice, before there is a cessation of the financial and administrative powers of the President does not stand excluded by the provisions of Section 48(2). As a matter of textual interpretation, the requirement of complying with the principles of natural justice is an integral element of the proviso to Section 48(2). The requirements of natural justice would warrant the grant of an opportunity to the elected head of a municipality to respond to the notice issued by the State indicating the basis for the formation of a reason to believe that the charges do not appear to be groundless and that the President is prima facie guilty on any of the grounds mentioned in sub-section (2) of Section 48. The period of notice can be suitably molded to deal with the exigencies of the situation."

34. In view of the above, it would be expedient in the interest of justice that the matter may be remitted back to the authority concerned for decision afresh in accordance with law and as such we are proceeding at this stage to decide the matter finally without calling for any affidavits in the matter.

35. The power to seize the administrative and financial powers of the President, Nagar Panchyat vest under the statute with the State Government. The State Government is enjoined with the duty to record a prime facie guilt and reason to believe on objective assessment of the material available on record including the reply of the petitioner and the order to be passed under Section 48 (2) of the Act should reflect the application of mind to the material available before the authority concerned. The conclusion that may be drawn by the authority concerned must also reflect due application of mind to the merits of the reply/defence submitted by the petitioner. It is to be clarified that a detailed finding at this stage may not be required however consideration of the material including reply of the petitioner is necessary prior to passing any order ceasing financial and administrative powers.

36. As a result, the impugned order dated 11th November, 2021 is set aside.

The writ petition is **allowed**. Liberty is granted to the State Government to proceed afresh after examining the material on record and the reply submitted by the petitioner in respect of the allegations levelled against the petitioner and pass appropriate order afresh in accordance with law.

37. It is clarified that this court has not considered the merit of the allegations against the petitioner and the same may be considered by the authority concerned independently.

(2022)04ILR A880
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2022

BEFORE

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

Writ-C No. 48730 of 2015

Amar Singh ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Naveen Pandey, Sri Sudhanshu Pandey

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India, 1950 - Article 226, - Arms Act, 1959 – Sections 17, 17(3), 17(3)(a), 17(3)(b) & 17(3)(d)- Indian Penal Code, 1860 - Sections 147, 148, 307, 427, 352, 406 & 506: - Firearm License – cancelled on the ground of misused of arm, pendency of a criminal case & threat to public peace – Appeal rejected – writ petition - on the ground that allegation of misused was baseless since alleged criminal case was registered prior to date of issue of license - in another criminal case petitioner was acquitted & Authority while cancelling the license not recorded any finding based on cogent material relating to breach of public peace – authorities entrusted with power under section 17 of the Arms Act cannot exercise on a ground which not envisaged under the Act - its power beyond – impugned orders quashed.
(Para – 15, 16, 18, 19, 21)

Writ Petition Allowed. (E-11)

List of Cases cited: -

1. Vishwanath Singh Vs Commissioner Lucknow & ors.(2015 (7) ADJ 393 (LB)),

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

1. The petitioner's firearm licence has been cancelled by the District Magistrate of Kaushambi vide order dated 03.12.2008 in exercise of powers under Section 17 of the Arms Act. That order has been upheld in appeal by the Commissioner, Allahabad Division, Allahabad (now Prayagraj) by his order dated 01.07.2015. It is these orders depriving the petitioner of his firearms licence that he impugns through the present writ petition.

2. The petitioner was granted a firearm licence in the year 1997 bearing no. 9050, entitling him to hold a D.B.B.L. Gun. The licence was granted by the Licensing Authority under the Arms Act, 1959 in accordance with law. The petitioner purchased a D.B.B.L. bearing no. 94400486. It appears that acting on a report by the Police of Police Station Saini, District Kaushambi, recommending cancellation of the petitioner's firearms licence, Case No. 102/167 of 2007-08 was registered before the District Magistrate, Kaushambi. The petitioner was put to notice. At one stage of proceedings, the case proceeded ex parte but later on before orders could be passed, upon the

petitioner's application dated 18.07.2007 the order to proceed ex parte was set aside and the petitioner was granted opportunity to object. The petitioner filed objections to the show cause notice on 31.07.2008. It was said in their report by the Police that the petitioner had misused his firearm held on the licence leading to registration of Case Crime No. 61 of 1995, under Sections 147, 148, 307, 427 IPC, P.S. Saini, District Kaushambi, and further, another Crime No. 199 of 2007 under Sections 352, 406, 506 IPC, P.S. Saini, District Kaushambi.

3. The petitioner filed his objections as aforesaid saying that the firearms licence, subject matter of proceedings for cancellation, was issued in the year 1997, and therefore, Crime No. 61 of 1995 could not at all relate to a possible misuse of his firearm held on the subject licence. The report of the Police on this score was castigated as baseless. It was also said by the petitioner that going by the principles of settled law laid down by this Court, a firearm licence could not be cancelled because a case had been registered against him by the Police or even a charge sheet filed. It was in particular pointed out that so far as Case Crime No. 199 of 2007 was concerned, the petitioner had been tried in the case arising from the said crime and acquitted by the learned Chief Judicial Magistrate, Kaushambi vide his judgment and order dated 31.10.2014. The other crime, that is Case Crime No. 61 of 1995, related to a period of time when the petitioner did not hold the firearms licence at all, obviating any possible misuse of the weapon in the said crime. It is on the basis of these facts and defences that the petitioner asked the Licensing Authority to discharge the notice for cancellation.

4. The licensing Authority by its order dated 03.12.2008 proceeded to opine that Case Crime No. 61 of 1995, under Sections 147, 148, 307, 427 IPC and Case Crime No. 199 of 2007 under Sections 352, 406, 506 IPC are heinous offences registered against the petitioner. Therefore, it was not in 'public interest (जनहित)', 'interest of justice (न्यायहित)' and "point of view of peace and order (शान्ति व्यवस्था)' that the petitioner may continue to hold the firearms licence in question. Whatever kind of findings these are, recording them the District Magistrate/ Licensing Authority proceeded to cancel the petitioner's firearms licence. The petitioner preferred an appeal to the Commissioner of the Division, that came up before the Appellate Authority/ the Commissioner, Allahabad Division, Allahabad.

5. Before the Appellate Authority, it was pointed out that the petitioner has been acquitted in the case arising out of Case Crime No. 199 of 2007 (supra), but the Commissioner remarked that a perusal of the judgment passed by the Criminal Court acquitting the petitioner showed that he had been acquitted giving him the benefit of doubt. This remark was made in relation to the case arising out of Crime No.61 of 1995 on account of an error apparent. In the other case i.e. Case Crime No.199 of 2007 (supra), the case was noted to be still subjudice though it had been decided by time the appeal came up before the Commissioner. It was also the Appellate Authority's opinion that it was not in "public interest', "interest of justice' and "point of view of peace and order (शान्ति व्यवस्था)' that the petitioner may continue to hold the firearms licence. It was on the basis of these findings that the Appellate

Authority affirmed the Licensing Authority's order.

6. Aggrieved, this petition has been filed.

7. Parties have exchanged affidavits.

8. Admit.

9. Heard forthwith.

10. Heard Mr. Sudhanshu Pandey, learned Counsel for the petitioner and Mr. Anuj Pratap Singh, learned Standing Counsel appearing on behalf of the respondents.

11. This Court has no hesitation to say that the orders impugned passed by both the Authorities below are grossly flawed. It is by now well settled that mere registration of a criminal case or pendency of a criminal case is no ground under Section 17 of the Arms Act to cancel a firearms licence. This Court may refer to with immense profit the essence of judicial opinion on this point that finds eloquent mention in the judgment of this Court in **Vishwanath Singh vs. Commissioner Lucknow and Others, 2015(7) ADJ 393 (LB)**, where it was held:

"7. Thus, the trivial question involved in this writ petition is as to whether licensing authority is vested with the power under the Arms Act to revoke/cancel the license of a public person mere on involvement in a criminal case or pendency of a criminal case.

8. To answer the aforesaid question, it would be apt to refer relevant paragraphs of Rakesh Kumar v. District Magistrate, Raebareli and others, 2013(31) LCD 1313, wherein it has been held that merely because of pendency of a criminal case, the arms- licenses of the petitioner cannot be cancelled. Relevant paras 12, 13, 14 and 15 read as under:

"12. Further, this Court in the case of Sahab Singh v. Commissioner Agra Region, Agra and others, 2006 (24) LCD 374, in paragraph No. 3 held as under :

The submission of the petitioner is That merely because of pendency of a criminal case, the arms licence of the petitioner cannot be cancelled in support of the said submission, learned counsel for the petitioner has placed reliance on two decisions of this Court in the case of Hausla Prasad Tiwari v. State of U.P. and Ishwar @ Bhuri v. State of U.P. It has further been submitted that in view of the Full Bench decision of this Court in the cases of Balaram Singh v. State of U.P. and others; Kailash Nath v. State of U.P., 1985 AWC 493 as well as the Division Bench decision of this Court in the case of Sadri Ram v. District Magistrate, Azamgarh and others, the arms licence of the petitioner cannot be placed under suspension pending enquiry."

13. In the case of Mulayam Singh v. State of U.P., 2013 (80) ACC 786 in paragraph Nos. 11 and 12 held as under :

"Para No. 11 - 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 the Arms Act, has been dealt with by a Division Bench of this Court in Sheo Prasad Mishra v. District Magistrate, 1978 AWC 122. The division Bench relied upon the earlier decision of another Division Bench of this Court in the case of Masi Uddin v. Commissioner, Allahabad, 1972 ALJ 573 wherein it has been held :

"A licence may be cancelled, inter alia, on the ground that it is "necessary for the security of public peace or for public

safety, to do so. The District Magistrate has not recorded a finding that it was necessary for the security of the public peace or for public safety to revoke the licence. The mere existence of enmity between a licencee and another person would not establish the "necessary" connection with security of the public peace or public safety.

In the case before us also the District Magistrate has not recorded any finding that it was necessary to cancel the licence for the security of public peace or for public safety. All that he has done is to have referred to some applications and reports lodged against the petitioner. The mere fact that some reports had been lodged against the petitioner could not form basis for cancelling the licence. The order passed by the District Magistrate and that passed by the Commissioner cannot, therefore, be upheld on the basis of anything contained in Section 17(3)(b) of the Act."

Para No. 12- Similar view has been taken by this Court in various decisions relying upon the Division Bench judgment passed in Sheo Prasad Mishra (supra). There is no doubt that the District Magistrate and the Commissioner i.e. administrative authorities are bound to take appropriate action in the matter of grant of licence and also its cancellation for the purpose of maintaining peace and harmony in the society. The assessment of administrative authorities with regard to grant or cancellation of licence should not be interfered in usual course by the Court in its extraordinary jurisdiction unless there is illegality or arbitrariness."

14. In the case of Raj Kumar Verma v. State of U.P., 2012(7) ADJ 230 (LB) this Court in paragraph No. 4 held as under:

"The ground for issue of show-cause notice, suspension and ultimately cancellation of the licence is that one and precisely one criminal case was registered against the petitioner. The District Magistrate has also held that the petitioner has been enlarged on bail. He has gone further to observe that if the licence remained intact, the petitioner, may disturb public peace and tranquility. The same findings have been given by the Commissioner, Unmindful of the fact that this Court is repeating the law of the land, but the deaf ears of the administrative officers do not ready to succumb the law of the land. The settled law is that mere involvement in a criminal case without any finding that involvement in such criminal case shall be detrimental to public peace and tranquility shall not create the ground for the cancellation of Armed Licence. In Ram Suchi v. Commissioner, Deuipatan Division, 2004 (22) LCD 1643, it was held that this law was relied upon in Balram Singh v. State of U.P., 2006 (24) LCD 1359. Mere apprehension without substance is simply an opinion which has no legs to stand. Personal whims are not allowed to be reflected while acting as a public servant. "

15. Further, in the case of C.P. Sahu v. State, 1984 AWC 145, this Court while interpreting the provisions of Section 17(3) of the Act held as under :

"The object of the enquiry that a licensing authority may, while proceeding to consider the question as to whether or not an arms licence should be revoked or suspended, like to make, clearly is to enable the licensing authority to come to a conclusion as to whether or not the facts stated in clauses (a) to (e) of Section 17(3) exist and as already explained, it is not obliged to before considering that a case for revocation/suspension of license has been made out, associate the licensee in such enquiry, in this view of the matter it can

safely be taken that where a licensing authority embarks upon such an enquiry it is, till then not convinced about existence of the conditions mentioned in clauses (a) to (e) of Section 17(3), of the Act. So long as it is not so convinced no case to make an order either revoking or suspending an arms licence as contemplated by the Section will be made out."

9. The aforesaid view has been reiterated in Hridaya Narain Tiwari v. State of U.P. and others, 2014 (4) ADJ 744 (LB); Rama Kushwaha v. State of U.P. and others, 2011 (29) LCD 1045; Hiramani Singh v. State of U.P. and others, 2011(29) LCD 829 and Rajendra Singh v. Commissioner, Lucknow Division, Lucknow and others, 2011 (29) LCD 1041, wherein it has been propounded that involvement in criminal case or pendency of criminal case cannot be a ground for cancellation/revocation of firearm license.

10. In the case of Jageshwar v. State of U.P. and others, 2009 (67) ACC 157, it has been held that mere involvement in criminal case cannot in any way affect the public Security or public interest.

11. In Thakur Prasad v. State of U.P. and others, 2013 (31) LCD 1460, this Court propounded that "Public Peace" or "Public Safety" do not mean ordinary disturbance of law and order, but the public safety means safety of the public at large and not safety of few persons only. Relevant paras 9,10 and 11 of the said case read as under:

"9. Further, while passing the impugned order also the licensing authority has not given any adequate finding that if petitioner holds the arms license then the same shall be against the public peace or public safety.

"10. Public peace" or "public safety" do not mean ordinary disturbance of law and order public safety means safety of the public at large and not safety of few persons only and before passing of the order of cancellation of arm license as per Section 17(3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and safety involved in the case in view of the judgment given by this Court in the case of Ram Murli Madhukar v. District Magistrate, Sitapur, 1998(16) LCD 905, wherein it has been held that license can not be suspended or revoked on the ground of public interest (Jan-hit) merely on the registration of an F.I.R. and pending of a criminal case.

11. Further, this Court in the case of Habib v. State of U.P., 2002 ACC 783, held as under :

"The question as to whether mere Involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this Court in Sheo Prasad Misra v. District Magistrate, Basti and others, 1978 AWC 122, wherein the Division Bench relying upon the earlier decision in Masi Uddin v. Commissioner, Allahabad, 1972 ALJ 573, found that mere involvement in criminal case cannot, in any way, affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside. The present impugned orders also suffer from the same infirmity as was pointed out by the Division Bench in the above-mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserve to be quashed and are hereby quashed.

There is yet another reason that during the pendency of the present writ petition, the petitioner has been acquitted from the aforesaid criminal case and at present there is neither any case pending, nor any

conviction has been attributed to the petitioner, as is evident from Annexure SA-I and II to the supplementary-affidavit filed by the petitioner. In this view of the matter, the petitioner is entitled to have the firearms licence. It is submitted by petitioner's counsel that the petitioner has been acquitted of the charges."

12. The aforesaid position of the law clearly distinguishes the mere registration of a criminal case or pendency of one from what is relevant under Section 17(3) for the Licensing Authority to exercise its power to cancel a firearms licence. Section 17(3)(b) empowers the Licensing Authority to suspend or revoke a licence, if it is deemed necessary for 'security of the public peace', or for 'public safety'. These expressions convey a widespread and broad based threat to the public at large or a threat to the prevalent all found equanimity and peace in society. The connotation of the words employed in Section 17(b) do not refer to mere cases of violation of law and order, but an impending threat to the general safety of the public or to public peace. If a licence is to be cancelled on any of these grounds, some objective material has to be there on record to form an opinion that the continued possession of a firearm held under the licence would imperil public peace or public safety. The mere registration of a criminal case is certainly not a relevant fact, on the basis of which, an inference may be drawn about vitiation, either of public peace or public safety.

13. If the holder of a licence has misused his firearm in a crime targeting an individual, the licence may be liable to be cancelled for the breach of one of the conditions of the licence under Section 17(3)(d), or may be on the ground that the licensee is held for that reason unfit to hold a licence under the Act, as envisaged under sub-Section (3)(a) of Section 17. It is possible that because of the petitioner's involvement in some crime, the Licensing Authority after considering the circumstances of the crime, the evidence about the petitioner's involvement for the limited purpose of exercise of powers by him under the Act might have opined to hold the licensee unfit, but that is not the case here. The findings recorded by the Licensing Authority and those by the Appellate Authority seem to proceed on a reasoning where the registration of a criminal case and the petitioner's trial on the relative charges have been regarded facts ipso facto relevant to cancel his firearm licence. This is certainly not what the law envisages while empowering the Licensing Authority to cancel a firearm licence. There is not an iota of material that has been taken into consideration by the two Authorities below to opine any threat to public safety or security of public peace. The inference that has been drawn, if at all it can be said to be one related to security of public peace or to public safety, is based solely on the fact of registration of a criminal case and trial in that connection. This is against so consistent a judicial opinion that this Court may venture to say that the Authorities below have passed orders that suffer from mala fides in law.

14. It must also be remarked that the Authorities below have been so callous in their reasoning that they have not cared to notice the relevant words used in the Statute on the foundation of which power may be exercised to cancel. While the Statute refers to 'security of the public peace' or 'public safety' as relevant considerations on the basis of which power may be exercised, both the Authorities below have employed similar sounding

expressions that are foreign to the Statute, while exercising the power to cancel. The words employed in the order impugned are "जनहित (public interest)', "न्यायहित (interest of justice)' and 'शान्ति व्यवस्था (peace and order)'. "Public interest' and "interest of justice' are words not even remotely employed by Section 17(3)(b) of the Arms Act, furnishing them to be grounds for cancellation.

15. So far as the words "peace and order' are concerned, that too do not find place in form or substance under Section 17(3)(b) aforesaid. The grounds mentioned in Section 17(3)(b) of the Arms Act are "security of the public peace' and "public safety'. Public safety is a word too remote from the Hindi word "शान्ति व्यवस्था' that the impugned order mentions. Security of the public peace may bear a vague resemblance, but is essentially different. While "शान्ति व्यवस्था' would translate in English to "peace and order', which is not a ground under Section 17(3)(b), "security of the public peace' translates in Hindi to "लोक शान्ति की सुरक्षा' that the Hindi translation of the Statute employs. Clearly, "लोक शान्ति की सुरक्षा' is an expression that envisages a completely different ground from "शान्ति व्यवस्था की दृष्टिकोण से' or "from the point of view of peace and order', the precise ground mentioned in both the orders impugned. Considerations of "peace and order' or "point of view of peace and order' are very different from the expression "security of the public peace'. The expression "security of the public peace' is an idea that envisages a far wider and deeper impact on the maintenance of general public peace than what is envisaged by the expression "point of view of peace and order'. The essential difference in the two expresses or the idea behind the two expressions is the degree of threat to public peace by the action of the licensee involved.

16. The authorities entrusted with power under Section 17 of the Arms Act to cancel a firearms licence, notwithstanding the subjective satisfaction that the Statute postulates while exercising the power, cannot exercise it on a ground not envisaged under the Act. Simply put, mere infractions of public peace or violations of law and order do not constitute that degree of a exacerbated threat or violation of public peace that the expression "security of the public peace' connotes. The Licensing Authority, therefore, must have on record material on the basis of which a reasonable conclusion can be drawn that the act of the licensee is one that is not a mere infraction of public peace or a violation of law and order. There has to be material on the basis of which the Licensing Authority can be credited with subjective satisfaction that the act of the licensee is a threat to security of the public peace. Certainly, this kind of an inference cannot be drawn on the mere registration of a criminal case against a licensee.

17. No doubt, the grant of a licence under the Arms Act is a concession by the State in favour of the licensee, but the State or its Authority, once regulated in the exercise of that concession by Statute, cannot exercise that power arbitrarily, whimsically or on grounds not envisaged under the law. Here, by referring to expressions, such as "public interest', "interest of justice' and "the point of view of peace and order', the Authorities have exercised power on considerations, not at all relevant under the Arms Act.

18. The reasoning on facts that the Appellate Authority has somewhat made

efforts to introduce in order to lend some pretense of legitimacy to the exercise of power to cancel, is also ill-founded. This Court has perused the judgment of the 1st Additional Sessions Judge, Kaushambi dated 19.09.2018 in Sessions Trial No.532 of 2009 (arising out of Case Crime No. 61 of 1995), under Sections 147, 148, 307, 427 IPC, P.S. Saini, District Kaushambi. In the clear opinion of this Court, the judgment passed by the learned Additional Sessions Judge does not acquit the petitioner on a benefit of doubt. It orders an acquittal on merits. May be the Appellate Authority could have drawn that inference because four witnesses for the prosecution were declared hostile, but a reading of the judgment shows that the learned Additional Sessions Judge has entered a verdict of acquittal on merits. It also seems rather incongruous as to how the Appellate Authority could look into the judgment passed by the Criminal Court in relation to the sessions trial arising out of Case Crime No. 61 of 1995, inasmuch as the Appellate Authority has passed the order impugned on 01.07.2015, whereas the judgment in Sessions Trial No.532 of 2009 (arising out of Crime No.61 of 1995) has been passed on 19.09.2018 by the learned Additional Sessions Judge, Kaushambi. The findings in this regard by the Appellate Authority, therefore, also seem to be flawed.

19. Possibly, this error has crept in the judgment of the Appellate Authority because he read the judgment passed by the Chief Judicial Magistrate, Kaushambi in Case No. 3651 of 2007, State vs. Raju Agrahari and others (Crime No.199 of 2007), that was passed on 21.10.2014. About this case, the Appellate Authority has remarked that it is still pending. This is also the result of an error apparent, inasmuch as on the date the Appellate Authority decided the appeal, the case arising out of Case Crime No.199 of 2007, had been decided with a verdict of acquittal in favour of the petitioner. This judgment, no doubt, acquits the petitioner, granting him the benefit of doubt. Therefore, most certainly, the Commissioner had read this judgment thinking it to be one relating to Case Crime No.61 of 1995, that had led to a sessions trial decided much later. All these incongruities betray lack of application of mind.

20. In the conspectus of facts that we have found clearly established, the orders impugned passed by the two Authorities below cannot be sustained and must be quashed with consequential relief to the petitioner.

21. In the result, this petition succeeds and is **allowed with costs**. The impugned order dated 01.07.2015 passed by the Commissioner, Allahabad Division, Allahabad (now Prayagraj) in Appeal No.33 of 2009, Amar Singh vs. State and the order impugned dated 03.12.2008 passed by the District Magistrate, Kaushambi in Case No.107/167 of 2007-08, State vs. Amar Singh, are hereby quashed. The District Magistrate, Kaushambi is ordered to consider granting of renewal of the petitioner's firearms licence as if he had before him an application for renewal of licence never cancelled by the order impugned dated 03.12.2008. The non-renewal because of the orders impugned shall be ignored. The District Magistrate, Kaushambi shall facilitate the petitioner in making the necessary application for renewal of the firearms licence before passing orders thereon, **all of which shall be done within a month** of receipt of a copy of this judgment.

22. Let this order be communicated to the Commissioner, Prayagraj Division, Prayagraj and the District Magistrate, Kaushambi by the Registrar (Compliance).

(2022)04ILR A888
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW13.04.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ-C No. 3000075 of 2002

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

Counsel for the Petitioner:
Standing Counsel, R. Srivastava

Counsel for the Respondents:
C.S.C., H.S. Jain, R. Chandra, V.K. Pandey, Vijay Kumar Pandey, Yogita Chandra

Civil Law - U.P. Zamindari Abolition and Land Reforms Act 1950 - Sections 209 &. 210 - Adverse Possession - Mere Possession Vs Adverse Possession - mere long possession over a property without title can not be deemed to be unauthorized or without consent of the original tenure holder unless and until such possession being claimed to be unauthorized or adverse is within the knowledge of the original tenure holder - mere possession irrespective of its length does not necessarily cannote adverse possession against the true owner - For possession over the property to be adverse, requires such possession to be hostile in implied denial of title of the true owner and within his knowledge - The possession must be open and hostile enough to be capable of being known by the parties interested in the property (Para 14, 15, 16, 24)

Land declared surplus - objections filed u/s 11(2) of 1960 Act – In the objections filed by opposite party it was stated that he is in cultivatory adverse possession of the disputed property and has perfected his rights under Section 210 of U.P. Z.A. & L.R. Act in absence of any suit for ejectment - By means of impugned order appeal against order rejecting objections under section 11(2) of the Act 1960 allowed & the entire land held to be surplus was released in favour of opposite party - *Held* - objection does not indicate the date on which he entered into possession over the property in question - no averment as to when the original tenure holder came into knowledge regarding adverse title and possession being set up by the opposite party to its detriment - appeal allowed primarily taking into account entries in the khasra records from the year 1362 to 1372 fasli indicating name of opposite party No.1 as being in possession over the property in question - khasra entries does not indicate as to whether such possession was permissive or unauthorized without consent of original tenure holder - without satisfying twin conditions required under Section 209 of the Zamindari Abolition Act, possession or retention thereof cannot automatically be deemed to be unauthorized or without consent of the original tenure holder - opposite party No.1 claiming to be in adverse possession over the property in question, failed to substantiate the story of adverse possession - Appellate authority has failed to consider the fact that opposite party No.1 has not been able to make out a case of adverse possession - Impugned order passed by appellate authority quashed (Para 24, 25)

Allowed. (E-5)

List of Cases cited:

1. Satish Chand Mathur & ors. Vs St. of U.P. & ors. 1996 JLR 151

2. Abdul Wahid Khan & ors. Vs Deputy Director of Consolidation, Jaunpur & ors. 1968 ALJ 117

3. T. Anjanappa & ors. Vs. Somalingappa & anr. reported in (2006) 7 SCC 570

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

1. Heard Mr. Pankaj Srivastava learned Chief Standing Counsel appearing on behalf of petitioner and Mr. V.K. Pandey learned counsel appearing on behalf of respondent.

2. Petition under Article 226 of the Constitution of India has been filed against order dated 25th July, 1998 passed in appeal under section 13 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 and the consequential orders dated 13th August, 1998 and 25th July, 2001. By means of impugned order dated 25th July, 1998, appeal against order dated 5th July, 1997 rejecting objections under section 11(2) of the Act 1960 has been allowed.

3. Dispute pertains to a tract of land situate in village Puranpurwa, Patihan, Aithpur, Phulwaria, Gajraura which was earlier recorded in the name of original tenure holder Messers Collective Forms and Forest (Private) Limited to whom notices under Section 10(2) of the Act were served and by means of order dated 31st December, 1964, an area of 80 acres was declared surplus. Subsequently objections under Section 11(2) of the Act were filed by the opposite party No.1 on 17th May, 1983. The same were rejected by the prescribed authority vide order dated 15th November, 1990. Appeal there against was allowed vide order dated 29th January, 1992 remanding the case to the prescribed authority for decision afresh.

4. In pursuance to the said order, matter was reconsidered and by means of order dated 29th June, 1995 objections of opposite party No.1 were again rejected. The dispute again went up in appeal and vide order dated 19th August, 1996 it was again remanded for reconsideration by the prescribed authority, allowing the appeal. In pursuance to aforesaid directions, objections of opposite party No.1 were again rejected vide order dated 5th July, 1997, appeal there against being allowed vide impugned order dated 25th July, 1998 whereby the entire land held to be surplus in 1964 was released in favour of opposite party No.1.

5. Initially vide order dated 10th October 2002, the order under challenge was stayed by means of interim directions.

6. Learned State Counsel appearing on behalf of petitioner has submitted that the order dated 5th July 1997 passed by the prescribed authority rejecting objections of opposite party No.1 was reasoned and cogent order based primarily on the fact that the opposite party No.1 claiming to be in adverse possession over the property in question, failed to substantiate the story of adverse possession.

7. It is submitted that the appellate authority by means of impugned order has completely misdirected itself by looking into the aspect of the opposite party No.1 being in possession over property in question without adverting to the fact that opposite party No.1 has failed to substantiate the story of being in adverse possession.

8. Mr. V.K. Pandey learned counsel appearing on behalf of opposite party No.1 refuting submissions advanced by learned counsel for petitioner has submitted that the prescribed authority had clearly erred in ignoring the documentary evidence furnished by the opposite party No.1 pertaining to his possession over property in question. It is submitted that the opposite party No.1 very well proved his possession

over the property in question and claim of adverse possession which was proved by the revenue records adduced in evidence clearly indicating name of petitioner over the properties. He has placed reliance on judgments of this Court rendered in the case of Satish Chand Mathur and others versus State of U.P. and others reported in 1996 JLR 151 and the Full bench decision in Abdul Wahid Khan and others versus Deputy Director of Consolidation, Jaunpur and others reported in 1968 ALJ 117 to substantiate that opposite party No.1 had consolidated his right over the property in question in terms of Section 209 and 210 of the U.P. Zamindari Abolition and Land Reforms Act 1950.

9. Upon consideration of submissions advanced by learned counsel for parties and upon perusal of material on record, it is apparent that the prescribed authority rejected objections of opposite party No.2 primarily on the ground that he had been unable to prove his adverse possession over the property in question. It has been recorded that although plea of possession of opposite party no.1 had been taken in terms of Section 145 Cr.P.C. but no documentary evidence was produced to prove the same. It has been recorded that although revenue record such as khasra for the years 1362 fasli to 1372 fasli have been submitted but it also apparent that subsequently during consolidation operations, petitioner's name as being in possession over properties in question has been removed. The order also indicates that the Assistant Registar Kanoongo produced the original khasra records pertaining to years 1378 to 1380 fasli to indicate that the name of opposite party No.1 no longer continued as being in possession over property in question.

10. From perusal of impugned order dated 25th July, 1998 passed in appeal, it is also apparent that appeal has been allowed primarily taking into account entries in the khasra records from the year 1362 to 1372 fasli indicating name of opposite party No.1 as being in possession over the property in question. The appellate authority in terms of said revenue entries has held the opposite party No.1 to be a tenure holder in terms of Section 11(2) of the Act.

11. From the record it transpires that the objections filed by opposite party No.1 were clearly with regard to plots numbers 2M having an area of 9.35 acres and 2M having an area of 5.62 acres situated in vilalge Puranpurwa, Pargana Paliya, District Kheri. The opposite party No.1 has clearly stated that he is in cultivatory adverse possession of the disputed property as held under proceedings under section 145 Cr.pP.C. and has perfected his rights under Section 210 of Zamindari Abolition and Land Reforms Act in absence of any suit for ejectment.

12. It is therefore apparent that the primary claim of opposite party No.1 over the properties in dispute was on the basis of adverse possession against the original tenure holder in terms of Section 209 and 210 of U.P. Zamindari Abolition & Land Reforms Act, 1950, which are as follows:-

*"**209. Ejectment of persons occupying land without title**. - [(1)] A person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force; and-*

(a) where the land forms part of the holding of a bhumidhar, [* *] or asami without the consent of such bhumidhar, [* * *] or asami;*

(b) where the land does not form part of the holding of a bhumidhar, [* *] or asami without consent of the [Gaon Sabha],*

shall be liable to ejectment on the suit in cases referred to in Clause (a) above of the bhumidhar, [* *] or asami concerned and in cases referred to in Clause (b) above of the [Gaon Sabha] [* * *] and shall also be liable to pay damages.*

[(2) To every suit relating to a land referred to in Clause (a) of sub-section (1) the State Government shall be impleaded as a necessary party.]

*[**210. Consequence of failure to the suit under Section 209**. - If a suit for eviction from any land under Section 209 is not instituted by a bhumidhar or asami, or a decree for eviction obtained in any such suit is not executed within the period of limitation provided for institution of such suit or the execution of such decree, as the case may be, the person taking or retaining possession shall-*

(a) where the land forms part of the holding of a bhumidhar with transferable rights, become a bhumidhar with a transferable rights of such land and the right, title and interest of an asami, if any, in such land shall be extinguished;

(b) where the land forms part of the holding of a bhumidhar with non-transferable rights, become a bhumidhar with non-transferable rights and the right, title and interest of an asami, if any, in such land shall be extinguished;

(c) where the land forms part of the holding of an asami on behalf of the Gaon Sabha, become an asami of the holding from year to year.]

[Provided that the consequences mentioned in Clauses (a) to (c) shall not ensue in respect of any land held by a bhumidhar or asami belonging to a Scheduled Tribe.]"

13. The objection filed by opposite party No.1 on 17th May 1983 does not indicate the date on which he has claimed to have entered into possession over the property in question. There is absolutely no averment as to when the original tenure holder came into knowledge regarding adverse title and possession being set up by the opposite party No.1 to its detriment.

14. Law pertaining to claim of adverse possession is now settled to the effect that mere possession irrespective of its length does not necessarily cannote adverse possession against the true owner. For possession over the property to be adverse, requires such possession to be hostile in implied denial of title of the true owner and within his knowledge.

15. Hon'ble Supreme Court in the case of T. Anjanappa and others v. Somalingappa and another reported in (2006) 7 SCC 570 has already indicated conditions under which a plea of adverse possession can succeed. The same are as follows :-

"It is well recognized proposition in law that mere possession however long does not necessarily means that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by

the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

16. Upon applicability of the aforesaid judgment in the present case, it is apparent that there is no pleading or evidence produced by the opposite party No.1 on which the plea of adverse possession could succeed. The appellate authority while placing reliance only on alleged possession of opposite party No.1 over the properties in question has clearly overlooked the factor that possession over the properties in question was being claimed by the opposite party No.1 only in terms of adverse possession without fulfiling the requirements to claim such adverse possession.

17. The appellate authority has clearly failed to distinguish between mere possession over property in question and adverse possession as was being claimed by the opposite party No.1. There is absolutely no discussion in the impugned order with regard to claim of adverse possession of the opposite party No.1 who has not even indicated the date on which he claims to have come into possession over property in question or even the date on which the original tenure holder came into knowledge of petitioner's hostile possession and title.

18. The claim of opposite party No.1 pertaining to Sections 209 and 210 of the Act of 1950 are also required to be seen in the context of claim of adverse possession by the opposite party No.1 which he has failed to prove. The Full Bench decision in the case of A.W. Khan (supra) while indicating the provisions of Sections 209 and 210 of the Act 1950, in the considered opinion of this Court would have no applicability since the opposite party No.1 has clearly failed to indicate knowledge of the original tenure holder pertaining to petitioner's hostile possession over the properties in question.

19. Similarly in the case of Satish Chand Mathur (supra), it has been held as follows:-

" The expression 'held' takes in both title and possession. As observed by Hon'ble Supreme Court it means to possess by legal title. What is, therefore, necessary is that the person apart from having title to the land should also have its possession either actual or notional. If a person is not having both title and actual or notional possession of the land, he cannot be said to be holder of the holdings and, therefore, cannot be treated as a tenure-holder. Mere possession, without a title, cannot make a person holder of the holding, unless he has perfected his right by prescription in consequence of adverse possession or his case falls within one of the two explanations appended to the section 5(1) of the Act. Similarly mere title without possession, actual or notional, may not make a man tenure-holder, unless he also has a right to regain possession. ....."

20. Clearly the aforesaid judgment would not be of any help to the opposite party No.1 since it has been clearly held that if a person is not having both title and actual on notional possession of land, he can not be said to be holder of the holdings and therefore can not be treated as a tenure holder. It has been held that mere possession without title can not make a person holder of the holding unless he has perfected his right by prescription in

consequence of adverse possession. As such it is apparent that the entire gist of claim of opposite party No.1 over the properties in question being based on adverse possession could not have been allowed by the appellate authority without the opposite party No.1 substantiating his claim for adverse possession as indicated herein above.

21. Learned counsel for opposite party No.1 along with written submissions has annexed a plethora of judgments with regard to rights being perfected under Sections 209 and 210 of the Zamindari Abolition Act. The aforesaid judgments are as follows:-

(1) Hanuman Rai versus Dy. Director of Consolidation ,1973 R.D. 207

(2) Abdul Wahid Khan and others versus Deputy Director of Consolidation, Jaunpur and others, 1968 A.L.J. 118

(3) Ram Charan versus State of U.P. etc, 1978 AWC 677

(4) Ziley Singh versus The State of U.P and others 1978 ALL. L. J. 772

(5) Baldeo Singh versus The State of U.P. and others 1980 LLJ 31

22. In these judgments cited by the opposite party No.1, the single thread which follows pertains to perfection of rights of an unauthorized occupant over the property belonging to a bhumidhar. A reading of the aforesaid clearly indicates that for perfection of such right under Section 209 read with Section 210 of the Zamindari Abolition Act requires that the person taking or retaining possession of land belonging or forming part of the holding of a bhumidhar, sirdar or assami should be otherwise than in accordance with provisions of law i.e. unauthorizedly and further that it should be without consent of such bhumidhar, sirdar or assami.

23. For a person to succeed on the basis of aforesaid Sections 209 and 210 of the Act, therefore requires satisfaction of firstly, that the possession should be otherwise than in accordance with provisions of law i.e. unauthorizedly and secondly, without the consent of the bhumidhar, sirdar or assami to whom it belongs.

24. In the present case, it is apparent from the objections filed by the petitioner that there is no averment as to when the petitioner entered into possession of disputed property otherwise than in accordance with law and that such retention of possession was without consent of the original tenure holder. As has been indicated herein above, mere long possession over a property without title can not be deemed to be unauthorized or without consent of the original tenure holder unless and until such possession being claimed to be unauthorized or adverse is within the knowledge of the original tenure holder.

25. The petitioner has not indicated anywhere in the objection or even thereafter the date when the original tenure holder gained knowledge regarding alleged unauthorized possession of petitioner over the property in question. The khasra entries also relied upon by petitioner does not indicate as to whether such possession was permissive or unauthorized without consent of original tenure holder. As such without the petitioner satisfying twin conditions required under Section 209 of the Zamindari Abolition Act, his possession or retention thereof can not automatically be deemed to be unauthorized or without

consent of the original tenure holder. As such the judgments cited by learned counsel for opposite party No.1 are of no avail to him.

26. Since the impugned order passed by the appellate authority has failed to consider the fact that opposite party No.1 has not been able to make out a case of adverse possession, the order dated 25th July, 1998 clearly being unsustainable is quashed by issuance of writ in the nature of Certiorari. Consequential orders dated 13th August, 1998 and 25th July, 2001 are also quashed in consequence thereof.

27. A writ in the nature of Mandamus is issued commanding the opposite parties to correct records pertaining to entries over the properties in question.

28. In the result petition succeeds and is allowed. Parties to bear their own costs.

(2022)04ILR A894
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.12.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

Misc. Single No. 32679 of 2019

Shankar Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mr. Rajat Rajan Singh, Advocate

Counsel for the Respondents:
Mr. Manjive Shukla, Addl. C.S.C.

A. Civil Law – Cancellation of fair price shop license - U.P. Scheduled Commodities Distribution Order, 2004 - Clause 21 and 22 - GO dated 29.07.2004 - Essential Commodities Act, 1955 - Section 3 - Uttar Pradesh Scheduled Commodities Distribution Order 1990 - Sub-clause (1) of clause 4, Clause 22 - Uttar Pradesh food grains and other Essential Articles Distribution Order, 1977 - National Food Security Act, 2013 framed the Uttar Pradesh State Food Security Rules, 2015 - Section 40 - Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order 2016: Sub-clause (4) of Clause-8.

Words and Phrases – "full fledged enquiry" - While dealing with an enquiry regarding cancellation of fair price shop license a full fledged enquiry is contemplated which includes serving of the charge-sheet and notifying the licensee of the place and date of hearing during course of enquiry. Supply of enquiry report has also been held to be *sine qua non.* (Para 9)

It is held that the words "full fledged enquiry" as used by the Full Bench of this Court in the decision of *Puran Singh* (infra) has to be read in context with paras 4 and 5 of the GO of July 2004 and scheme therein which merely requires adherence to the principles of natural justice and does not provide for a detailed enquiry involving various stages and steps as are required to be met in disciplinary enquiry against a government servant. (Para 47)

After the promulgation of the Control Order 2016, the matter is governed by the said control order which also notices the agreement which is signed between the parties i.e. the licensee and the State Government which partakes the nature of a statutory contract and is nothing but a contract of agency where **the licensee conduct activities on behalf of the State, distributing food grains and in return is entitled to a commission and it is clearly a contract of agency, as known in law.** (Para 45)

The requirement of entering into an agreement between licensee and the

State is also provided in the Distribution Order of 2004. Thus, the position of a licensee remains that of an agent of the State who is appointed to carry out the functions as entrusted to him in terms of the Distribution Order of 2004 and now under the Control Order of 2016 and is governed by the said Control Order and the terms of the agreement. **Neither the agreement nor the Distribution Order of 2004 or the Control Order of 2016 envisage an elaborate enquiry nor the same can be claimed by the licensee.** (Para 46)

B. Rules of natural justice are not rigid or immutable rules and they are not to be applied in a straight-jacket formula rather these are rules which are flexible to meet the exigencies of a situation. (Para 44)

It is held that the parameters for an enquiry to be conducted against the licensee for the irregularities committed by the licensee in terms of the Distribution of Essential Commodities is on broad principles of natural justice where the competent authority shall provide a show cause notice to the licensee indicating the violations and irregularities committed by the licensee with sufficient particularity to enable him to respond to the same and after affording an opportunity of hearing, the decision can be taken by the competent authority by a reasoned and speaking order**. The enquiry envisaged is summary in nature and does not entail a detailed hearing, akin to a departmental enquiry**. (Para 47)

The GO of July 2004, indicates the suspension of a fair price shop license will not be done merely on a complaint by a person rather it provides that in case if any complaint is received from any source then first a preliminary enquiry be held. The suspension order/a show cause notice must be passed with a speaking order and must also mention and refer to all such irregularities and violations which have been noticed in the preliminary enquiry to enable the fair price shop owner to respond with particularity. (Para 31)

Clause 4 of the GO of July 2004 also provides that the enquiry in respect of the suspended fair price shop must be completed by the competent authority within a period of one month and the decision to be given by a speaking order after affording full opportunity of hearing to the licensee concerned. It also envisages that the licensee is under responsibility to cooperate in the early hearing and conclusion of the enquiry. (Para 32)

The efforts made by the Government from time to time is clearly to establish an accepted procedure and manner in which the enquiries regarding suspension/cancellation of a fair price shop is to proceed. (Para 42)

Matter to be placed before learned Single Judge at the earliest to decide the same in the light of the reference so answered. (E-4)

Precedent referred:

1. Puran Singh & ors. Vs St. of U.P. & ors., (2010) 2 UPLBEC 947 (Para 1(b))

2. Santara Devi Vs St. of U.P. & ors., 2016 (2) ADJ 70 (Para 9)

3. Ansar Khan Vs St. of U.P. & ors., 2018 (141) RD 586 (Para 9)

4. Ashok Kumar Tiwari Vs St.of U.P. & ors., Writ-C No.12737 of 2013 (Para 9)

5. Vishwajeet Singh Vs St. of U.P. & ors., Writ Petition No.26319 (M/S) of 2019 (Para 9)

6. Meena Devi Vs St. of U.P. & ors., 2018 (10) ADJ 385 (Para 10)

7. Pramod Kumar Vs St. of U.P. & ors., 2007 (1) ALJ 407 (Para 33)

8. Har Pal Vs St. of U.P. & ors., 2008 (4) ALJ 10 (Para 33)

9. A.S. Motors Pvt. Ltd. Vs U.O.I. & ors., (2013) 10 SCC 114 (Para 44)

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

1. A Single Judge of this Court vide order dated November 29, 2019 passed in Writ Petition No.32679 (M/S) of 2019 noticing a cleavage of opinion in various decisions of Single Judges of this Court in respect of the true import of the scope for enquiry as required to be undertaken while dealing with cancellation of fair price shop license, referred, to a Larger Bench the following two questions:

(a) What are the parameters of principles of natural justice to be followed in inquiries conducted by Licensing Authority on complaints of irregularities in the distribution of Essential Commodities?

(b) Whether the observation made in Paragraph 35 of the Full Bench decision in **Puran Singh and others Vs. State of U.P. and others (2010) 2 UPLBED 947** regarding holding of "full fledged enquiry" after suspension of license can be read in such a manner as would require the whole gamut of steps required in disciplinary proceedings of Government servants to be followed?

2. The writ petition was filed by the petitioner impugning the order dated September 16, 2019 passed by Joint Commissioner (Food), Lucknow Division, Lucknow upholding the order dated April 4, 2019 passed District Supply Officer, Lucknow cancelling fair price shop license of the petitioner.

3. The grievance of the petitioner raised before the appellate authority as well as before this Court was that before cancelling the fair price shop license of the petitioner, no opportunity of hearing was afforded.

4. Taking into consideration various judgments cited by learned counsel for both the parties, the Single Judge referred the aforesaid questions for consideration by a Larger Bench.

5. The facts, as have been recorded in the reference order passed by learned Single Judge are being noticed hereinbelow, in brief.

6. The petitioner was a licensee of a fair price shop of Alambagh in Lucknow City. He distributed essential commodities to various card-holders as per their entitlement. On August 28, 2018, an F.I.R. was registered against the petitioner under Section 3/4 of Essential Commodities Act, 1955 at Police Station Alambagh, District Lucknow. Immediately thereafter, District Supply Officer vide order dated September 1, 2018 suspended the fair price shop license of the petitioner and directed him to submit the explanation. The F.I.R. registered against the petitioner was challenged by him by filing Writ Petition No.25409 (MB) of 2018. The same was dismissed as withdrawn but with certain observations regarding investigation being conducted in the matter.

7. The petitioner made a detailed representation against the order of suspension of his fair price shop license dated September 1, 2018, on which explanation was called for. It was alleged that neither the reply of the petitioner was considered nor any final order was passed. The appeal was preferred before the Commissioner challenging the suspension of fair price shop license dated September 1, 2018. The same was disposed of vide order dated January 31, 2019 directing District Supply Officer to conduct an

enquiry in the matter and pass a speaking order.

8. After the aforesaid order was passed, a report was called from Regional Food Officer, who vide his letter dated February 25, 2019, reported certain irregularities in the record of the petitioner. The copy of the report was not given to him. However, vide order dated April 4, 2019, fair price shop license of the petitioner was cancelled. Against the aforesaid order, the petitioner preferred an appeal. The aforesaid appeal preferred by the petitioner was dismissed by the Appellate Authority, Joint Commissioner (Food), Lucknow Division, Lucknow vide order dated September 16, 2019. Challenging the aforesaid orders, present writ petition has been filed in this Court.

9. The issue has cropped up in view of the fact that in quite a few decisions, the learned Single Judges of this Court, have opined that while dealing with an enquiry regarding cancellation of fair price shop license a full fledged enquiry is contemplated which includes serving of the charge-sheet and notifying the licensee of the place and date of hearing during course of enquiry. Supply of enquiry report has also been held to be sine qua non. (See, **Santara Devi Vs. State of U.P. and others 2016 (2) ADJ 70)** The aforesaid decision of Santara Devi has been followed by another Single Judge of this Court in **Ansar Khan Vs. State of U.P. & others 2018 (141) RD 586.** The other decisions which follow the similar reasoning are **Writ-C No.12737 of 2013 (Ashok Kumar Tiwari Vs. State of U.P. and others) Writ Petition No.26319 (M/S) of 2019 (Vishwajeet Singh Vs. State of U.P. and others)**

10. On the other side is the decision of another Single Judge of this Court in the case of **Meena Devi Vs. State of U.P. and others 2018 (10) ADJ 385** wherein the learned Single Judge considering the challenge to an order by which fair price shop license was cancelled, the Court dismissed the writ petition, observing that a fair price licensee is only an agent for distribution of scheduled commodities under public distribution system which has been devised to help the poor and needy for supply of subsidized food grains and since such a licensee cannot claim any violation of fundamental rights hence if a show cause notice is given to the licensee and noticing his reply and after affording an opportunity of hearing if any order is passed, the same would suffice and there is no violation of a fundamental rights akin to Article 311 of the Constitution of India.

11. Noticing the divide between the two sets of opinions, the matter has been referred as hereinabove noted for answering the two questions as framed. Before answering the aforesaid questions, it will be relevant to notice the scheme as envisaged by help of the relevant statutory provisions.

12. Since in the opinion of many learned Single Judges, reference and reliance has been placed on the Full Bench decision of this Court in **Puran Singh's case (supra)**, thus, it will be apposite to notice the issue before the Full Bench.

13. The question referred before the Full Bench of **Puran Singh's case (supra)** was whether before suspension of a fair price shop licensee, an opportunity of hearing is mandatory and on failure thereof, the suspension order is liable to be set aside.

14. Answering the aforesaid reference, the Full Bench of this Court after noticing the Scheme of the distribution of

essential commodities as well as the U.P. Scheduled Commodities Distribution Order, 2004 as well as the Government Order dated 29.07.2004 in para 50 to 52 of the said judgment held as under:-

"50. In view of the aforesaid it is clear that in the Government Order dated 29.7.2004 there is no contemplation of any notice and opportunity before suspending the fair price shop, rather there is a clear stipulation that the authority can pass the order of suspension at the time of surprise inspection and otherwise also if complaint of serious irregularity is received.

51. Opportunity will be required only before order of cancellation. This is also clearly provided in the Distribution Order, 2004, the provisions of which has an overriding effect on the Government Order dated 29.7.2004. In terms of the Distribution Order of 2004 parties are to sign draft/agreement with a clear stipulation of the power of the authority to pass the order of suspension.

52. On the basis of the above analysis we answer both the questions so referred as below:

(i) Before suspension of fair price agreement it is not mandatory to give an opportunity of hearing and thus on the plea of its violation, the order of suspension is not liable to be set aside.

(ii) Division Bench judgments in Pramod Kumar v. State of U.P. reported in 2007 (1) ALJ 407 and Harpal v. State of U.P. reported in 2008 (4) ALJ 10 holding that opportunity is must does not lay down the correct law."

15. Before proceeding further, it will be relevant to note that Article 47 of the Constitution of India contained in Part-IV of the Constitution under Directive Principles of State Policy provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

16. After the country gained independence the Essential Commodities Act, 1955 replaced the earlier legislation on the subject i.e. Essential Commodities Act, 1915.

17. Section 3 of the Essential Commodities Act, 1955 confers power to control production, supply distribution etc. of essential commodities. It is in furtherance thereof that the various State Governments have been endevouring to device a mechanism for effective distribution of food grains and other essential articles and the State Governments in exercise of powers derived from Section 3 of the Essential Commodities Act, 1955 have issued various distribution control orders which have remained effective from time to time in order to achieve the said object as enshrined in Article 47 of the Constitution of India.

18. In taking the Constitution principles ahead the State of U.P. had promulgated the Uttar Pradesh Scheduled Commodities Distribution Order 1990 which rescinded the earlier Distribution Order i.e. Uttar Pradesh food grains and other Essential Articles Distribution Order, 1977. The Distribution Order 1990 in Clause -3 envisaged the setting up of a fair price shop and in Clause-4 it provided that a fair price shop shall be run through such

person and in such manner as the Collector, subject to the direction of the State Government may order.

19. Significantly, it also clearly provided that a person appointed to run a fair price shop under sub-clause (1) of clause 4 of the Distribution Order 1990 shall act as the agent of the State Government. Clause 22 of the Distribution Order 1990 also provided that the agent shall observe such conditions as the State Government or the Collector may by an order in writing direct from time to time in respect of opening of shop, maintenance of stocks, supply and distribution of scheduled commodities, maintenance of accounts, keeping of accounts, filing returns and issue of receipts to identity card holders and other matters.

20. This Distribution Order of 1990 was superseded by the promulgation of Uttar Pradesh Scheduled Commodities Distribution Order 2004, which came into effect from December 20, 2004. The instant Distribution Order 2004 made qualitative changes to ensure the effective maintenance of supplies of food grains and other essential commodities and also securing their equitable distribution and availability at fair prices.

21. Clause 4 which related to running of a fair price shop was quite similar to the Clause 4 of the Distribution Order of 1990. However, it incorporated sub-clause (3) to clause 4 and Clause 4 reads as under:-

"**4. Running of fair price-** (1) A fair price shop shall be run through such person and in such manner as the Collector, subject to the directions of the State Government may decide,

(2) A person appointed to run a fair price shop under sub-clause (1) shall act as the agent of the State Government.

(3) 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 the fair price shop as per the draft appended to this order before the competent authority prior to the coming with effect of the said appointment. "

22. It also incorporated Clause 21 which related to monitoring in accordance with the order issued by the State Government amongst others. However, for present matter at hand Clause 21 and 22 of the said Distribution Order of 2004 are relevant and are being reproduced hereinafter for ready reference:-

21. Monitoring in accordance with the order issued by the State Government. -(1) A Food Officer shall ensure regular inspection of fair price shop in his area not less than once in a month in urban area and not less than once in a month in rural area by the supply inspector. The State Government may issue order specifying the inspection schedule, list of checkpoints and authority responsible for ensuring compliance of the said order.

(3)(i) Competent authority shall ensure constitution of Vigilance Committees, Administrative Committee (Gram Sabha Level) at fair price shop which shall monitor the functioning of the fair price shop.

(ii) Meeting of such Committees shall be held on regular basis and in a manner as directed by the State Government.

(4) Competent Authority shall ensure a periodic system of reporting and the complete information in this regard shall be sent in the prescribed form as follows:

(i) By fair price shops to the District Authorities by the 7th of the month following the month for which allocation is made in Form-A.

(ii) By the District Authorities to State Government by 15th of the Month following the month for which allocation is made in Form-B.

(5) Competent authority shall ensure that Scheduled Commodities are made available to agents in accordance with the roster prescribed by the State Government in this regard.

(6) Monthly allocation of food grains, sugar, kerosene and other Scheduled commodities shall be supplied to the agent only and that only on receipt of a certificate, issued by the concerning Vigilance Committee, Administrative Committee duly countersigned by the supply or Senior Supply Inspector or Village Development Officer of the area clearly mentioning that prior month's allocations have been distributed by the agent in accordance with the rules.

(7) Competent authority shall ensure delivery of one copy of allocation order made to fair price shop simultaneously to Gram Panchayat or Nagar Palika or Nagar Nigam as the case may be and Vigilance Committees or any other body nominated for monitoring the functioning of the fair price shops by the State Government.

(8) Competent authority and Food Officer shall check the diversion, substitution or adulteration of Scheduled Commodities.

22. Power of entry, search, seizure, etc.-(1) The Food Officer, the Competent Authority, the Senior Supply Inspector or Supply Inspector may within his jurisdiction with such assistance if any, as he thinks fit

(a) Require the owner, occupier or any other person in charge of any place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order has been or is being, or is about to be made, to produce any book, account or other documents showing transaction relating to such contravention;

(b) Enter, inspect or break open and search any place or premises, vehicle or vessel in which he has reason to believe that any contravention of the provisions of this order has been or is being or is about to be made,

(c) Examine and seize any books of accounts and documents which in the opinion of such officer may be useful for or relevant to any proceeding under this order and return such books of accounts and documents to the person from whom they were seized after copies thereof or extracts therefrom as may be considered necessary and certified by the person to be correct have been taken:-

(d) Seize any scheduled commodities, if he is satisfied that there has been in contravention of this order:

(e) Send a report as provided in Section 6 (a) of the Act to the Collector of the District in which such seizure is made and the Collector may thereafter proceed to confiscate the scheduled commodities, animals, vehicles, vessels or other conveyance so seized in accordance with the provisions of the Act.

(2) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (Act No 2 of 1974) relating to search shall as far as may apply to search under this clause.

23. It is in furtherance thereof the State Government issued various Government Order for effective implementation of the scheme as well as to ensure equitable distribution of the food grains and essential commodities at fair

prices. In order to ensure effective checks and balances one such Government Order was issued on July 29, 2004.

24. The legal position relating to licensee of fair price shop remained covered by the aforesaid Distribution Order of 2004 and the relevant Government Orders issued from time to time. However, then came the National Food Securities Act, 2013. The said Act came into effect from September 10, 2013 and was introduced as an Act to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto.

25. This Act also envisaged running of fair price shop but also introduced the concept of identifying eligible house holds. The State of U.P. in exercise of powers under Section 40 of the National Food Security Act, 2013 framed the Uttar Pradesh State Food Security Rules, 2015. This advent made by the State Government led to the promulgation of the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order 2016 which came into effect from August 10, 2016. Clause 19 of the Control Order of 2016 repelled the Distribution Order 2004.

26. In the Control Order of 2016 a mechanism was deviced for appointment and regulation of fair price shop. Clause-8 provides a detailed mechanism for operation of fair price shops which also includes conferring powers on the competent authority to suspend or cancel their fair price shop owner's license. Clause 8 of the Distribution Order of 2016 is being reproduced herein after for ready reference:-

8. Operation of fair price shop:- The fair price shop owner shall disburse food grains to the ration card holders as per his entitlement under the Targeted Public Distribution System.

(2) A ration card holder may draw his full entitlements of food grains in more than one installment:-

(iii) the fair price shop owner shall not retain the ration cards after the supply of food grains.

(iv) the license issued by the State Government to the fair price shop owner shall lay down the duties and the responsibilities of the fair price shop owner, which shall include, inter alia-

(i) sale of food grains 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 food grains received during the month, (f) opening and closing stock of food grains, (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 number.

(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 detail description of receipt of food grain and other essential commodities actual distribution during the month and remaining balance of stock to designated officer who will sent a compilation of all each 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 any include suspension or cancellation of the fair price shop owner's license.

(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.

27. This Control Order of 2016 also introduced a mechanism to monitor the functioning of the fair price shops and effective measure for transparency and accountability.

28. From the perusal of the aforesaid provisions, it would indicate that even under the Control Order of 2016 a person appointed to run a fair price shop under clause-7 is required to enter into an agreement with the State Government. It would further indicate that sub-clause (4) of Clause-8 of the Control Order, 2016 also lays down the duties and responsibilities of the fair price shop owner which includes the duty to display information regarding the entitlement of the food grains, sale of

issue, timings or opening and closing of the fair price shop, stock of food grains received during the month, opening and closing stock of the food grains amongst other. The record are required to be maintained including in electronic format, It has also cast a duty on the competent authority to take action in respect of violation made by the licensee including or any irregularities committed and the power to take action against such violation and irregularities include empowers to suspend or cancell the license. It also envisages that an enquiry instituted for irregularities committed by a fair price shop owner shall be concluded maximum within a period of two months. An order passed against the appointment, suspension and cancellation of a fair price shop by the competent authority is appealable before the Divisional Commissioner which is also required to be disposed of within a period of 60 days.

29. In the aforesaid backdrop, it will be seen that prior to promulgation of the Control Order of 2016 and while the Distribution Order of 2004 was in operation primarily three Government Orders issued by the State Government; (i) dated 29th of July, 2004; (ii) 16th of October, 2014; and (iii) 15th/16th of December, 2015 were holding the field.

30. The Government Order of 29th of July, 2004 provided a procedure relating to suspension and cancellation of the license of a fair price shop owner and the relevant Clause 2, 3, 4, 5, 6 and 7 are relevant which reads as under:-

"2. उक्त पृष्ठभूमि में मुझे यह कहने का निदेश हुआ है कि ग्रामीण एवं शहरी क्षेत्रों की उचित दर की दुकानों के निलम्बन/निरस्तीकरण के सम्बन्ध में निम्न प्रक्रिया का पालन किया जाए।

;पद्ध उचित दर की दुकान का निलम्बन मात्र किसी व्यक्ति की शिकायत के आधार पर नहीं किया जाये। यदि किसी दुकानदान के विरूद्ध किसी स्रोत से शिकायत प्राप्त होती है तो पहले उसकी प्रारम्भिक जॉच करायी जाये। यदि प्रारम्भिक जॉच में दुकानदार के विरूद्ध ऐसी गम्भीर अनियमितताएं प्रथम दृष्टया सिद्ध हो रहीं हों जिनके आधार पर दुकानदार की दुकान निरस्त होने की सम्भावना हो तभी दुकान को निलम्बित किया जाये और साथ ही साथ दुकानदार को कारण बताओ नोटिस जारी किया जाये कि उसकी दुकान क्यों न निरस्त कर दी जाये। यदि प्रारम्भिक जॉच में पाया जाये कि अनियमितता इतनी गम्भीर नहीं है कि दुकान के निरस्तीकरण की सम्भावना हो तो केवल कारण बताओ नोटिस जारी किया जाये। निलम्बन आदेश/ कारण बताओ नोटिस एक ''स्पीकिंग आर्डर'' होना चाहिए तथा उसमें प्रारम्भिक जॉच में पायी गयी उन सभी अनियमितताओं का विवरण होना चाहिए जिनका उत्तर दुकानदान से अपेक्षित हो।

;पपद्ध (क) खाद्य विभाग के अधिकारियों/ जिला प्रशासन के अधिकारियों/ अन्य प्राधिकृत व्यक्तियों द्वारा उचित दर की दुकान के आकस्मिक निरीक्षण के दौरान यदि पाया जाता है कि दुकानदार द्वारा कोई गम्भीर अनियमितता की गयी है तो भी दुकान को नियुक्ति अधिकारी द्वारा अपने विवेक का प्रयोग करते हुए निलम्बित किया जा सकता है।

(ख) खाद्य विभाग के अधिकारियों/ जिला प्रशासन के अधिकारियों/ अन्य प्राधिकृत व्यक्तियों द्वारा यदि दुकानदार कोई अनियमित कार्य, वितरण में गड़बड़ी या अनुसूचित वस्तुओं की कालाबाजारी करते हुए पकड़ा जाता है तो भी नियुक्ति अधिकारी द्वारा अपने विवेक का प्रयोग करते हुए दुकान को निलम्बित किया जा सकता है।

उक्त परिस्थितियों में दुकान के निलम्बन की स्थिति में भी ''स्पीकिंग आर्डर'' से निलम्बन आदेश जारी किया जायेगा जिसमें सभी अनियमितताओं का उल्लेख होगा तथा दुकानदार को कारण बताओ नोटिस जारी किया जायेग कि क्यों न उसकी दुकान निरस्त कर दी जाये।

3. उक्त प्रकार से यदि उचित दर की कोई दुकान निलम्बित की जाती है तो उसका सम्बद्धीकरण गांव/ शहर की (जैसी भी स्थिति हो) सबसे निकट की उचित दर की दुकान से किया

जायेगा। किसी भी एक दुकान से अधिकतम एक ही निलम्बित दुकान का सम्बद्धीकरण किया जा सकता है और किसी भी परिस्थिति में एक दुकान से एक से अधिक निलम्बित दुकान का सम्बद्धीकरण नहीं किया जायेगा।

4. निलम्बित की गयी दुकान के विरूद्ध जॉच की कार्यवाही अधिकतम एक माह में अनिवार्य रूप से पूरी की जायेगी तथा जॉच में सम्बन्धित दुकानदार को सुनवाई का पूरा मौका दिया जायेगा। सम्बन्धित दुकानदार का यह दायित्व होगा कि वह जॉच में अपना पूरा सहयोग दे ताकि जॉच का कार्य जल्दी से जल्दी पूरा किया जा सके तथा नियुक्ति प्राधिकारी द्वारा प्रकरण में गुण–दोष के आधार पर अन्तिम निर्णय लिया जा सके। यदि दुकानदार द्वारा जॉच में सहयोग नही दिया जा रहा हो और जॉच में विलम्ब करने का प्रयास किया जा रहा हो तो दुकानदार को इस आशय का भी नोटिस जारी किया जायेगा और अपना पक्ष रखने का अन्तिम अवसर प्रदान किया जायेगा।

5. जॉच की कार्यवाही अधिकतम एक माह में पूर्ण करके नियुक्ति प्राधिकारी द्वारा प्रकरण में अन्तिम निर्णय लिया जायेगा और गुण–दोष के आधार पर एक ''स्पीकिंग आर्डर'' जारी किया जायेगा। इस आदेश में यह स्पष्ट उल्लेख होना चाहिए कि सम्बन्धित दुकानदार को सुनवाई का अवसर दिया गया और उसे सुना गया। यदि दुकानदार ने जॉच में सहयोग नहीं किया हो और सुनवाई के अवसर का जानबूझकर उपयोग न किया हो तो अन्तिम आदेश में इस बात का भी पूरा उल्लेख होना चाहिए कि दुकानदार को अवसर प्रदान किया गया तथा अन्तिम नोटिस दिया गया परन्तु उसने जानबूझकर अवसर का उपयोग किया और जॉच में सहयोग नहीं किया।

6. जॉच की कार्यवाही के उपरान्त दुकानदार के दोष की गम्भीरता देखते हुए उसे दण्ड दिया जाये। यदि दण्ड स्वरूप दुकानदार की निलम्बित दुकान निरस्त की जाती है जो निरस्तीकरण आदेश की तिथि से अधिकतम एक माह के अन्तर्गत नये उचित दर के दुकानदार की नियुक्ति अनिवार्य रूप से हो जानी चाहिए ताकि दुकान की सम्बद्धता जल्दी से जल्दी समाप्त हो सके।

7. नियुक्ति प्राधिकारी उपरोक्त आदेशों का कड़ाई से पालन करेंगे और कार्यवाही के लिए ऊपर दी गयी समय सारिणी को सुनिश्चित करेंगे। समय सारिणी के अनुसार जॉच की कार्यवाही एक माह में तथा दुकान के निरस्तीकरण की स्थिति में एक और माह नयी नियुक्ति के लिए निर्धारित है। अतः निलम्बित/ निरस्त दुकान का किसी अन्य दुकान से सम्बद्धीकरण अधिकतम दो माह के लिए होगा।''

31. From the perusal of the Government Order of July 2004, it indicates that the suspension of a fair price shop license will not be done merely on a complaint by a person rather it provides that in case if any complaint is received from any source then first a preliminary enquiry be held. In case if during the preliminary enquiry certain serious violations and irregularities came to the fore which *prima facie* may give rise to such grounds which may possibly lead to cancellation of the license, if established, then the license can be suspended and simultaneously the fair price shop owner shall be issued with a show cause notice as to why his license may not be cancelled. In case, in the preliminary enquiry the violations are not found to be serious then merely a show cause notice can be issued. However, the suspension order/a show cause notice must be passed with a speaking order and must also mention and refer to all such irregularities and violations which have been noticed in the preliminary enquiry to enable the fair price shop owner to respond with particularity.

32. Clause 4 of the Government Order of July 2004 also provides that the enquiry in respect of suspended fair price shop must be completed within a period of one month after affording full opportunity of hearing to the licensee concerned. It also envisages that the licensee is under responsibility to co-operate in the early hearing and conclusion of the enquiry and in case the licensee does not co-operate or attempts to

delay then he can also be issued with a notice to the aforesaid effect by requiring him to furnish his reply as a last opportunity. The competent authority is required to conclude the enquiry within a period of one month and to give his decision by a speaking order.

33. At this stage, it will be relevant to notice that the aforesaid Government Order of July 2004 came up for consideration before a Full Bench of this Court in **Puran Singh and others Vs. State of U.P. and others (2010) 2 UPLBEC 947.** The Full Bench was required to answer the question before it: (i) whether before suspension of fair price agreement an opportunity of hearing is mandatory to be given to the fair price shop agent in violation of which the suspension order is liable to be set aside? (ii) Whether the Division Bench Judgment in **2007 (1) ALJ 407 Pramod Kumar Vs. State of U.P. and others and 2008 (4) ALJ 10 Har Pal Vs. State of U.P. and others** lay down the correct law that opportunity is must or whether the Division Bench in Gopi's case lays down the correct law.

34. In the aforesaid backdrop the Full Bench noticed that the Distribution Order of 2004 so also the Government Order dated 29th of July, 2004 and in para 50 of the said judgment, it answered the question in the negative as already noticed in the former part of this opinion.

35. From the perusal of the decision of the Full Bench it is evident that it is not mandatory to give an opportunity of hearing before an order of suspension of licensee is passed nor does its violation affect the validity of the suspension order simplicitor on the ground of having been passed without granting an opportunity of hearing. It also held that the Division Bench Judgment of **Pramod Kumar (supra)** and **Harpal (supra)** does not lay down the correct law.

36. In para 45 of the Full Bench decision it was held that the grant of fair price shop license does not fall within the category of fundamental right to carry on business as provided in Article 19 (1)(g) of the Constitution of India. Para 45 reads as under:-

"It has been further held by the Bench that power of suspension if exercised in public interest does not by itself cause prejudice to the licensee. These kind of licenses does not fall within a category of fundamental right to carry on their business as provided in Article 19(1)(g) of the Constitution of India."

37. Incidentally while considering the questions as noticed above, the Full Bench in para 35 has observed as under:-

"35. Para 4 and 5 of the Government Order clearly permits full fledged enquiry pursuant to the show cause notice for cancellation and then final decision in the matter. So far the order of suspension is concerned Government Order do not provide any appeal and at the same time there was no contemplation of signing an agreement as was made obligatory pursuant to Distribution Order of 2004."

38. The word used in the first sentence of aforesaid para 35 that "para 4 and 5 of the Government Order clearly permits full fledged enquiry pursuant to show cause notice for cancellation and then final decision in the matter" has been interpreted in various decision of the Single Judges to mean a full fledged enquiry as

noticed in the case of **Santara Devi (supra)**. This view is in divergence with the decision of another Single Judge of this Court in the case of **Meena Devi (supra)** and thus the issue has been placed before the Larger Bench.

39. Taking the matter forward, the State Government also issued a Government Order dated 16th of October, 2014 wherein it noticed that the enquiry relating to violation of fair price shop has revealed that these are not being conducted in a manner which *prima facie* established that they are being done in fair and transparent manner. It also noticed that during enquiry it is not being noticed whether relevant endorsements are being made by the fair price shop owner on the ration cards of the consumers and without verifying and cross checking the relevant endorsement, merely on the basis of complaint made by a person, the enquiries are being proceeded. Thus to avoid perpetuation of the said discrepancy the Government in furtherance to the Government Order dated 29th of July, 2004 it incorporated Clause-4 which reads as under:-

4- उक्त के दृष्टिगतसम्यक विचारोपरान्त शासनादेश् दिनांक 29–07–2004 के क्रम में यह व्यवस्था भी की जाती है कि उचित दर दुकानों के विरूद्व वितरण में की गयी वितरण की प्रविष्टियों के मिलान हेतु कार्डधारकों के राशन कार्ड में दुकानदार द्वारा की गई प्रविष्ठियों का संज्ञान भी अनिवार्य रूप से लिया जाये और यह चेक किया जाये कि राशनकार्ड में अंकित प्रविष्ठियाँ दुकानदार के रजिस्टर में अंकित प्रविष्ठियों के अनुरूप है। साथ ही शिकायतकर्ता व अन्य सम्बन्धित पक्षों का कथन अंकित करते समय उनका प्रतिपरीक्षण भी अवश्य किया जाये ताकि जाँच कार्यवाही की निष्पक्षता प्रथम दृष्टया स्थापित हो एवं अनावश्यक लिटिगेशन की स्थिति उत्पन्न न हो।"

40. The attempt made by the State Government vide Government Order dated 16th of October, 2014 was to avoid any unnecessary litigation. To achieve that it provided that the competent authority shall record the gist of the statements of the complainant and other connected persons and also cross examine them to verify the veracity of the complaints and statements and also to examine and cross check the entries and endorsement made in the records maintained in the office regarding distribution of food grains and essential commodities to the shopkeepers and the license holder and regarding its distribution to the consumers and the endorsement made on the ration cards of such consumers and after verifying the same, it may proceed as this would curtail unnecessary litigation as much could be screened to verify the genuineness of the complaint and would also inspire confidence and transparency in case any enquiry is proceeded against a fair price shop owner.

41. Once again the State Government on 16th of December, 2015 issued a Government Order directing that in respect of any proceedings regarding suspension/cancellation of a fair price shop, the Sub Divisional Officer concerned shall maintain a proper order-sheet indicating dates of hearing and the order passed on such date so as to bring in transparency.

42. The efforts made by the Government from time to time is clearly to establish an accepted procedure and manner in which the enquiries regarding suspension/cancellation of a fair price shop is to proceed. In the aforesaid context, it would be seem that the Full Bench in **Puran Singh (supra)** has clearly held that the fair price shop licenses are not akin to the right by doing business as protected under Article 19 (1)(g) of the Constitution of India and noticing the provisions of the

Government Order of July 2004 where there is an elaboration regarding issuance of a show cause notice which must contain the material and findings surfaced in the preliminary enquiry to enable the licensee to know the charge against him so that he can reply to the same which sufficient particularity. It also contemplates the conclusion of the enquiry within a period of one month and it is incumbent upon the competent authority to give its decision by a speaking order. It is in this context that the Full Bench used the word full fledged enquiry specifically relating to Clause 4 and 5 of the Government Order of July 2004.

43. The process of grant of opportunity of hearing and holding a fair and just enquiry is inbuilt in the provision of Government Order dated 29th of July, 2004. With the advent of the Government Order of October 2014 and December 2015 as noticed above. It further clarifies the position that the licensee must be made aware of the violation and irregularities which have been found, upon which it is proposed to move against the licensee, either for suspension or cancellation so that he can place his reply with sufficient particularity which must be decided by a speaking order and order-sheet of the proceeding is also to be maintained scrupulously to bring in transparency and fairness in the enquiry so held.

44. Rules of natural justice are not rigid or immutable rules and they are not to be applied in a straight-jacket formula rather these are rules which are flexible to meet the exigencies of a situation. The Apex Court in the case of **A.S. Motors Private Limited v. Union of India and others, (2013) 10 SCC 114** in Paragraphs 7 and 8 in reference to cancellation of contract viz-a-viz violation of principles of natural justice has held as under:-

"7. It was argued on behalf of the appellant that the termination of the contract between the parties was legally bad not only because the principles of natural justice requiring a fair hearing to the appellant were not complied with but also because there was no real basis for the respondent Authority to hold that the appellant had committed any breach of the terms and conditions of the contract warranting its termination. We find no merit in either one of the contentions. The reasons are not far to see.

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 legion. We may refer to only some of the decisions on the subject which should in our opinion suffice."

45. At this stage, it will be relevant to notice that after the promulgation of the Control Order 2016, the matter is governed by the said control order which also notices the agreement which is signed between the parties i.e. the licensee and the State Government which partakes the nature of a statutory contract and is nothing but a contract of agency where the licensee conduct activities on behalf of the State, distributing food grains and in return is entitled to a commission and it is clearly a contract of agency, as known in law.

46. The requirement of entering into an agreement between licensee and the State is also provided in the Distribution Order of 2004. Thus, the position of a licensee remains that of an agent of the State who is appointed to carry out the functions as entrusted to him in terms of the Distribution Order of 2004 and now under the Control Order of 2016 and is governed by the said Control Order and the terms of the agreement. Accordingly, it cannot be said that the enquiry as required to be held against the licensee for suspension or cancellation is akin to a disciplinary enquiry which is against a government servant. Neither the agreement nor the Distribution Order of 2004 or the Control Order of 2016 envisage an elaborate enquiry nor the same can be claimed by the licensee.

47. Thus, we answer the reference as under:-

(i) It is held that the parameters for an enquiry to be conducted against the licensee for the irregularities committed by the licensee in terms of the Distribution of Essential Commodities is on broad principles of natural justice where the competent authority shall provide a show cause notice to the licensee indicating the violations and irregularities committed by the licensee with sufficient particularity to enable him to respond to the same and after affording an opportunity of hearing, the decision can be taken by the competent authority by a reasoned and a speaking order. The enquiry envisaged is summary in nature and does not entail a detailed hearing, akin to a departmental enquiry;

(ii) It is held that the words "full fledged enquiry" as used by the Full Bench of this Court in the decision of **Puran Singh (supra)** has to be read in context with paras 4 and 5 of the Government Order of July 2004 and the scheme therein which merely requires adherence to the principles of natural justice and does not provide for a detailed enquiry involving various stages and steps as are required to be met in disciplinary enquiry against a government servant.

48. Having answered the question referred now, the matter be placed before the learned Single Judge at the earliest to decide the same in light of the reference so answered.

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REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.04.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Civil Revision No. 201 of 2005

Vinay Kumar Jain & Ors. ...Revisionists
Versus
U.P. Export Corporation Limited ...Opposite Party

Counsel for the Revisionists:
P. Agrawal, Akshay Sahay, Amit Kumar Srivastava, B.K. Saxena, Chittaranjan Sahay, Divyanshu Sahay, Shradha Narayan

Counsel for the Opposite Party:
Mohd. Arif Khan, A.P. Singh Gaur, Mohammad Adil Khan, Mohiuddin Khan, Shobhit Mohan Shukla

A. Civil Law – Tenancy – Ejectment – Determination of mesne profits - Immovable Property under the Wealth Tax Act, 1957 - Section 34 AB; Provincial Small Causes Courts Act - Section 25 - The tenant continuing in occupation of the tenancy premises after the termination of tenancy is an unauthorized and wrongful occupant and a decree for damages or mesne profits can be passed for the period of such occupation, till the date he delivers the vacant possession to the landlord. (Para 16)

B. If the rent represents a fair value, mesne profits may be assessed at the amount of the rent, but if the real value is higher than the rent, mesne profits must be assessed at a higher value. (Para 19)

After determination of tenancy, the position of the tenant is akin to that of a trespasser and he cannot claim that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the Rent Control Order. If the real value of the property is higher that the rent earned then the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the higher value. (Para 16)

C. Interest on mesne profits – Code of Civil Procedure: Section 2(12) - As per the definition of mesne profits, interest forms an integral part of the mesne profits and once the Court awards the mesne profits, the interest accruing thereon has to be allowed in the computation of the mesne profits itself. Thus, a tenant cannot be permitted to urge that mesne profits, which in fact ought to have been paid years ago, should not bear any interest. (Para 24)

Revision disposed off. (E-4)

Precedent followed:

1. Vinay Kumar Jain & ors. Vs U.P. Export Corp. Ltd. through its Managing Director, Civil Appeal No.5576 of 2008 (Para 5)

2. Atma Ram Properties (P) Vs Federal Motors (P) Ltd., (2005) 1 SCC 705 (Para 16)

3. Marshall Sons & Co. (I) Ltd. Vs Sahi Oretrans (P) Ltd., (1999) 2 SCC page 25 (Para 17)

4. Matuk Dhari Singh Vs Ali Naqi, 1887 SCC Online Allahabad Page 11 (Para 18)

5. Chiranji Lal Vs Kunwar Prasad & anr., AIR 1963 All.249 (Para 19)

6. Anderson Wright & Co. Vs Amar Nath Roy, 2005 (6) SCC 489 (Para 20)

7. Mohd Yamin Khan & Others Vs Sheikh Maqbool Husain & ors., 1965 SCC online Allahabad 335 (Para 21)

8. Clifton Securities Ltd. Vs Huntley, 1948 (2) All E.R.283 (Para 21)

9. Bhagwan Das Vs Mst. Kokabai, AIR 1943 Nagpur 186 (Para 21)

10. National Insurance Co. Ltd Vs Turner Morrison Ltd., 2016 SCC online Calcutta 4956 (Para 22)

11. M/S Sushi Enterprises Pvt. Ltd. Vs CEAT Ltd., 2018 SCC online Delhi 12551 (Para 23)

12. Mahant Narayan Dasjee Varu & ors. Vs Board of Trustees, The Tirumalai Tirupathi Devasthanam, AIR 1965 SC 1231 (Para 24)

Present revision challenges judgment and order dated 28.11.2005, passed by learned Additional District Judge, Lucknow.

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

[Oral]

1. There were two SCC revisions filed by U.P. Export Corporation Limited and Vinay Kumar Jain, i.e., the tenants and the landlord respectively under Section ? 25 of the Provincial Small Causes Courts Act against the judgment and order dated 28.11.2005, passed by learned Additional District Judge, Court No.2, Lucknow whereby the suit filed by the landlord for ejectment was decreed and the tenant was directed to pay Rs.16000/- per month as damages for use and occupation of the shop in question till the date of vacation of the premises.

2. The tenant had preferred revision no.198/2005 challenging the decree for ejectment along with the quantification of damages for use and occupation of the premises. The landlord had filed civil revision no.201/2005 only against that part of the judgment of the trial court whereby it determined the mesne profits of the premises at the rate of Rs.5/- per square feet instead of Rs.50/- per square feet, as had been prayed for by the landlord.

3. This Court after noticing the facts before the learned trial court rejected the revision of the tenant but at the same time observed in para 17 & 18 of its judgment as follows :-

"17. With regard to enhancement of rent, the Court below has taken into account various exemplars filed by the revisionist to indicate the rate of rent of the adjoining buildings. In respect of the buildings leased out to Bank of Baroda as well as ICICI Bank, the landlord had permitted to raise construction and make alterations in accordance with the requirements of the Bank. In so far as the building in question was concerned, there was no such relaxation by the landlord to the tenant nor was there any fixture etc in accordance with the requirements of the revisionist. The disputed premises was only in the shape of a Hall measuring 3300 square feet of which the Court had fixed Rs.5/- per square feet taking into account the exemplars filed by the revisionist. The conclusion arrived at by the Court below in respect of the enhancement of rent is well considered and perfectly justified and does not deserve to be interfered with.

18. Looking to the surrounding facts and circumstances of the case, the rate of Rs.5/- per square feet in respect of the premises in question appears to have been rightly fixed."

4. This Court by its order dated 25.5.2007 rejected both the revisions and directed the tenant who continued to be in possession over the shop in question and to pay the landlord a sum of Rs.16,000/- per month for use and occupation, by the 10th of each month and the tenant was also directed to vacate the premises in question by 31.12.2007.

5. The landlord being aggrieved against the determination of the mesne profits, i.e., rent at the rate of Rs.5/- per square feet and direction for payment of only Rs.16,000/- per month as damages for continued use and occupation of the shop in question, approached the Supreme Court by filing a Special Leave Petition which was converted into Civil Appeal No.5576 of 2008 [Vinay Kumar Jain and Others vs. U.P. Export Corporation Limited through its Managing Director]. The Hon?ble Supreme Court disposed of the Civil

Appeal by its order dated 08.9.2008 by making the following observations :-

"In this matter, the dispute is regarding mesne profits. The High Court had awarded mesne profits at the rate of Rs.5/- per square feet. During the pendency of the SLP, we directed valuation report to be filed before us. The appellant has done so. According to the valuation report, the rate comes to Rs.29.65 per square feet.

We are of the view that Rs.5/- per square feet was a very low amount. However, as far as the correct rate to be applied, we set-aside the impugned judgment of the High Court and remit the matter to the High Court for fresh consideration in accordance with law. It would be open to both the sides to file respective valuation reports and argue on that basis before the High Court.

Civil Appeal is disposed of with no order as to cost."

6. In view of the matter being remanded before this Court by the Hon?ble Supreme Court only for determining the question of mesne profits, an application has been filed by Vinay Kumar Jain and Others for placing two documents, i.e., the judgment of the Hon?ble Supreme Court as well as the original valuation report dated 14.02.2008 under the signatures of one Shri Khajan Chandra in respect of the fair rental value of the property in question along with the documents lists which was before the Hon?ble Supreme Court in the Civil Appeal.

7. The valuation report of Shri Khajan Chandra dated 14.02.2008 has been perused by me. Shri Khajan Chandra has shown his qualification as MIE (India) FIV Registered Valuer [Govt. of India], Chartered Engineer, Retired Executive Engineer UPPWD. Shri Khajan Chandra, in his introduction has shown himself to be a recognized valuer by the Chief Commissioner of Income Tax, Lucknow since 1995. His valuation report is based on the survey of Mahatma Gandhi Marg and site inspection done by him on 12.02.2008 and on the facts and figures supplied by the representatives of the landlords.

8. Shri Khajan Chandra has given a description of the property in question and as to how Mr. Vinay Kumar Jain and Others came to be in possession thereof. It has been mentioned that a plot of land was purchased in year 1935 on which a double storied building was constructed some time in year 1940. It came into the hands of the landlord on the basis of a family settlement. The property was bounded in north by the shop of ?Libas Bombay Dying?, on the South By the shop of PHOTO Point, on the East by the Mahatma Gandhi Marg and on the West by the MAQBARA Road. The details of construction have been mentioned but it has been pointed out that the Fair Rental value is to be calculated for the shop on the ground floor only which is in the shape of a Hall with columns and in front of the shop there is a 15 feet wide verandah. The walls are 14? to 18? thick in lime/ cement mortar, duly plastered with cement and the flooring is of marble stone. The roof was constructed of reinforced brick and it has been observed that the building is in good sturdy condition. The valuer Shri Khajan Chandra has thereafter considered the general principles of determination of the rent of a property. It has been observed that while fixing fair rent of any property, a fixed percentage factor is considered over total value of such property. Total value referred to would consist of the market value of site, and value of amenities etc. A return of 6% to

9% for residential property and 9% to 12% for commercial property can be considered as reasonable. He has observed that he considers a rent of 10% as reasonable in the case of the particular shop rented out to U.P. Export Corporation.

9. Thereafter, a detailed consideration of valuation on the basis of annual rental value of the property has been made with regard to the covered area of the shop and the circle rates fixed by the District Magistrate, Lucknow for the purpose of stamp duty with effect from 01.4.2002. Rates of land were fixed for Hazratganj Ward for commercial land is Rs.15,100/- per square meter and such rates had to be enhanced by 10% on property being situated on more than 9 meter wide road. The rate worked out to Rs.16,610/- per square meter for commercial land. The District Magistrate, Lucknow in his list had fixed Rs.100/- per square meter per month as rent for commercial property. Mr. Khajan Chandra took into account the covered area of the shop of 306.57 square meters and the value of the land at the rate of Rs.16,610/- per square meter and the value of the building at the rate of Rs.100/- per square meter fixed by the District Magistrate and came to assess the total value of the property at Rs.1,17,43,164/- only.

10. For determination of rent of such property Shri Khajan Chandra has observed that fair rental value would be 10% of the value of the property and worked out the rent on a per month basis @ Rs.97,860/- which worked out per square feet to Rs.29.65 paise. Shri Khajan Chandra has also taken into consideration the rent of adjoining properties, i.e., shop no.31/37, Mahatma Gandhi Marg, Lucknow let out to U.P. Co-operative Bank Limited for an area of 1280 square feet as fixed by the High Court in Writ Petition No.62/2004 which worked out to approximately Rs.29 per square feet at the circle rate applicable on 01.4.2002.

11. In the case of another adjoining shop no.31/29 Mahatma Gandhi Marg, Lucknow let out by Shri Gyan Chand Jain to U.P. Export Corporation Limited for an area of 1875 square feet, rent was fixed by the District Judge in Rent Appeal no. 8 of 2007 which worked out to Rs.28.78 per square feet or Rs.29 per square feet approximately.

12. Shri Khajan Chandra has observed that since for the adjoining shops, rent determined by the High Court in Writ Petition No. 62 of 2004 and by the District Judge, Lucknow in Rent Appeal No.8 of 2007 worked out to around Rs.29/- per square feet, the rent as determined by him at the rate of Rs.29.65 per square feet, seemed to be reasonable to him.

13. He has, however, observed that the building was situated at Mahatma Gandhi Marg in Main Hazratganj Ward and the open market rate of rent was much higher, say around Rs.60/- to 80/- per square feet in year 2002, which on the date of submission of his valuation report in year 2008 was over Rs.100/- per square feet.

14. Shri Khajan Chandra, however, has not relied upon the market rate and he has only relied upon fair rent as worked out by him on the basis of Circle Rate and the rental value as determined by the District Magistrate, Lucknow with effect from 01.4.2002, and reiterated that such rent should be Rs.29.65 per square feet.

15. Shri Divyanshu Sahay, learned counsel appearing for the Revisionist-landlords through virtual mode has relied upon several judgments of the Hon?ble Supreme Court and of various High Courts to say that fair rental value should not be determined on the basis of circle rate but should be determined on the basis of market rate of rent as applicable in the area in question. He has argued that Mahatma Gandhi Marg where the shop is situated in Hazratganj, is the main shopping area of the City of Lucknow and the shop is a corner shop. As per current situation, it is bounded on the East by the showroom of ?Sony World? and on the West by the Showroom of ?Roopali?. The shop in question no doubt is situated on the same road as the shops whose exemplars have been considered by Shri Khajan Chand, i.e., Shop No.31/37 let out to U.P. Co-operative Bank Limited and Shop No.31/29 let out to U.P. Export Corporation Limited but it has been submitted by Shri Divyanshu that right across the road the rent that has been determined in the case of Bank of Baroda and ICICI Bank is much much higher and these exemplars were produced before the learned Trial court by the landlords to show that they were entitled to at least Rs.50/- per square feet. The exemplars have been rejected by the learned Trial court and by the High Court wrongly by making observations that the landlords in such cases have let out the buildings to Banks and had made alterations that were necessary for the running of the Banks and had also provided various of the fixtures and amenities to facilitate the Banks? functioning, therefore, such buildings have been rented out on a higher rent and not comparable to the disputed premises.

16. Shri Divyanshu Sahay has placed reliance upon ***Atma Ram Properties (P) vs. Federal Motors (P) Limited [(2005) 1 SCC 705]*** and para 13 of the said judgment where the Hon?ble Supreme Court observed as follows :-

"13. In Shyam Charan v. Sheoji Bhai [(1997) 4 SCC 393] this Court has upheld the principle that the tenant continuing in occupation of the tenancy premises after the termination of tenancy is an unauthorized and wrongful occupant and a decree for damages or mesne profits can be passed for the period of such occupation , till the date he delivers the vacant possession to the landlord. With advantage and approval, we may refer to a decision of the Nagpur High Court. In Bhagwandas Lakhamsi v. Kokabai [AIR 1953 Nag 186] the learned Chief Nagpur High Court held that the Rent Control Order, governing the relationship of the landlord and tenant, has no relevance for determining the question of what should be the measure of damages which a successful landlord should get from the tenant for being kept out of the possession and enjoyment of the property. After determination of tenancy, the position of the tenant is akin to that of a trespasser and he cannot claim that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the Rent Control Order. If the real value of the property is higher that the rent earned then the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the higher value. We find ourselves in agreement with the view taken by the Nagpur High Court."

17. Mr. Sahai has also referred to ***Marshall Sons & Co. (I) Limited vs. Sahi Oretrans (P) Limited [(1999) 2 SCC page 25]*** and para 4 of the said judgment which makes certain observations with regard to

how the landlord is made to suffer because proceedings are dragged for long time at the stage of trial and thereafter on technical ground in execution and the Court has observed that for protecting the interest of the judgment-creditor, it is necessary to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.

18. Learned counsel has also placed reliance upon a judgment of this Court in ***Matuk Dhari Singh vs. Ali Naqi reported in 1887 SCC Online Allahabad page 11*** and to the observation made by Justice Mahmood that mesne profits awarded must be assessed as damages against the present appellant with reference to his character of having been in possession under an invalid sale-deed and thus, being the trespasser upon the land. The Court observed thus :- *"It seems to me that the proper measures of the damages is not the rent which was payable by the occupancy-tenant to the zamindar, a rent subject to its own peculiar statutory, limitations but the proper market value of the land for the purposes of leasing. That value has been found ---------- and this sum, therefore, represents the loss occasioned by the wrongful act of the present appellant in getting into possession of the land under an invalid sale-deed from the occupancy tenants ----------."*

19. Learned counsel for the revisionist-landlord has also placed reliance upon ***Chiranji Lal vs. Kunwar Prasad and Another [AIR 1963 All.249, para 3]*** where while assessing mesne profits the court observed that they should be assessed according to reasonable market value of the premises. If the rent represents a fair value, mesne profits may be assessed at the amount of the rent, but if the real value is higher than the rent, mesne profits must be assessed at a higher value.

20. Learned counsel has also placed reliance upon the judgments rendered by the Hon'ble Supreme Court in ***Anderson Wright & Co. vs. Amar Nath Roy [2005 (6) SCC 489, para 6]*** where the Supreme Court had observed while noting down the contention of the appellants that they are not liable to pay anything more than the standard rent of the premises that such a contention was misconceived in the light of the observations made by the Supreme Court in the case of Atma Ram Properties Private Limited (supra). The Court observed that both the parties had placed on record material giving Court a fair idea of rent generally prevalent in the locality where the suit property was situated. Taking an overall view of the material made available by the parties, the Court fixed mesne profits/ compensation for use and occupation on the basis of rent of adjoining properties till final determination of the same was made by a competent forum.

21. Learned counsel has also placed reliance upon another judgment of a co-ordinate bench of this Court rendered in ***Mohd Yamin Khan & Others vs. Sheikh Maqbool Husain and Others [1965 SCC online Allahabad 335]*** where this Court had observed that the assessment of compensation for use and occupation should not be on the basis of controlled rent but on the basis of fair rent. The question that as to what was fair rent has to be decided on the circumstances of each case. If the controlled rent does not represent the fair rental value of the accommodation, mesne profits should be assessed at a higher value. For such observations this

Court has placed reliance upon ***Clifton Securities Limited vs. Huntley [1948 (2) All E.R.283] and Bhagwan Das vs. Mst. Kokabai [AIR 1943 Nagpur 186].***

22. Learned counsel for the revisionist-landlord has also placed reliance upon judgment rendered by the High Court of Calcutta in ***National Insurance Company Ltd vs. Turner Morrison Ltd [2016 SCC online Calcutta 4956]*** where in para 9, 12, 19 and 20 the principles for determining mesne profits of Commercial property have been enumerated and it has been observed that *"a person who is deprived of a right to possess a property is not only entitled to receive possession of the property but also damages for wrongful possession from the person who had occupied the property wrongfully and illegally. Mesne profit is meant to be a compensation, which is penal in nature. The object of awarding a decree for mesne profit is to compensate the person who has been kept out of possession and deprived of enjoyment of the property even though he was entitled to possession thereof. Since the mesne profit is in the nature of damages, no invariable rule governing its award and assessment in every case can be laid down and "the Court may mould it according to the justice of the case."* ---------- *There hardly exists any uniform and standard pattern of the assessment of mesne profits. Comparative assessments of the nature, location, accessibility to the main road, facilities, age of the suit premises on the one hand and similar characteristics in surrounding area on the other hand, would be a relevant factor in assessing the mesne profit. Such determination of the amount of mesne profits must receive a liberal and purposive construction and the provision relating to mesne profit is required to be construed in a manner that is just and equitable. While determining mesne profits, the Court, need not be over-strict in expecting such proof of the suggested amount as it would accept for holding certain fact being established."*

23. Learned counsel has also placed reliance upon a judgment of Delhi High Court in ***M/S Sushi Enterprises Private Limited vs. CEAT Limited reported in [2018 SCC online Delhi 12551]*** where it has been observed that if some documentary evidence is available in terms of the lease deed of adjoining properties then mesne profits has to be granted in terms of such evidence.

24. Shri Divyanshu Sahai has also placed reliance upon certain judgments of the Calcutta High Court and the Delhi High Court on the question of interest on mesne profits where the Delhi High Court has placed reliance upon a judgment of the Hon?ble Supreme Court rendered in ***Mahant Narayan Dasjee Varu And Others vs. Board of Trustees, The Tirumalai Tirupathi Devasthanam [AIR 1965 Supreme Court 1231]***. The Hon?ble Supreme Court had observed in the said case that as per the definition of mesne profits given in Section 2(12) of the CPC, interest forms an integral part of the mesne profits and once the Court awards the mesne profits, the interest accruing thereon has to be allowed in the computation of the mesne profits itself. Thus, a tenant cannot be permitted to urge that mesne profits, which in fact ought to have been paid years ago, should not bear any interest. Since the Hon?ble Supreme Court had held that interest is the integral part of the mesne profits and, therefore, the same has to be allowed in the computation of the mesne profits itself, hence, Shri Divyanshu Sahai has argued that the revisionists are also

entitled to interest on the rent as determined by this Court for the tenant to be liable to pay to the landlord for continued occupation from the date of the judgment of the learned trial court till actual possession was delivered to the landlord, on 31.01.2008.

25. Shri Shobhit Mohan Shukla appears for the U.P. Export Corporation Limited, the respondent-tenant. He has pointed out that in pursuance of observations made by the Hon?ble Supreme Court fair market rent has to be determined by this Court. He has pointed out from the trial court judgment the exemplars considered by the trial court of adjoining properties and he has also pointed out that the lease deed submitted as exemplars by the landlord in respect of the ICICI Bank and Bank of Baroda had been rightly rejected as the circumstances as well as the situation of the said shops in the Mahatma Gandhi Marg were entirely different. He has argued on the basis of a report submitted through application dated 29.01.2014 of Shri K.K. Agarwal, approved Valuer wherein Shri K.K. Agarwal who is a Government approved Valuer under Section 34 AB of Immovable Property under the Wealth Tax Act, 1957, and the Income Tax Act since 1993, had also inspected the property in question and surveyed the surrounding area. In the said report filed through affidavit of Shri K.K. Agarwal himself on January, 2014 reference has been made to assessment of the property as on 01.4.2008 for market value.

26. A brief description of the property leased out to U.P. Export Corporation by the revisionist-landlord has been mentioned and this Court has carefully perused such report. It finds that even though the property in question is situated in Hazratganj ward, Shri K.K. Agarwal has inexplicably mentioned the Ward as Narhi in the year 1981, and has taken the Circle Rate as applicable on 30.3.1981 for calculation of the value of the land. He has observed that the market rate of land in Narhi Ward at Mahatma Gandhi Marg is Rs.45/-per square feet and the area of the land being 3300 square feet multiplying it by 45 he has come to the rate of the land as Rs.1,48,500/-. By applying Cost Inflation Index as notified by the Central Government the said cost of land has been brought to the year 2008 at Rs.8,64,270/-. For calculation of built up area, Shri K.K. Agarwal has considered the circle rate of 2006 as determined by the District Magistrate Lucknow, for type-I construction at Rs.5500/- per square meter but the valuation was being done in the year 2008 by Shri Agarwal. He considered the age of construction of the building which was almost 55 years old and has observed that accounting for the life of the property has been 80 years only, he applied depreciation and has proposed depreciation of 52.5% at Rs.5500/- per square meter as determined in the year 2006, therefore, the net rate of construction has been determined as Rs.2612/- per square meter. At the same time Mr. K.K. Agarwal has observed that he has inspected the building which is in good condition and, therefore, no depreciation was being considered and the rate of Rs.5500/- per square meter was followed to calculate the value of the covered area. Taking the value of the plot of land at Rs.8,64,270/- and value of the covered area at Rs.16,86,135/- the total value determined by Shri Agarwal is Rs.25,50,000/-. The annual rental value @ 7% of 25,50,000/- has been determined as Rs.1,78,500/- and the monthly rent having been determined accordingly and taking into consideration the area of the property

the per square feet, rent has been determined at Rs.4.55 per square feet.

27. This valuation report of Shri K.K. Agarwal has only been mentioned in detail to show how unreasonable Circle Rates have been applied by the Valuer of the respondent and he has fixed the rate as Rs.4.55 per square feet which is even less than that which was granted by the trial court and affirmed by the High Court.

28. It is pertinent to note that the Hon?ble Supreme Court while deciding the Civil Appeal in its order dated 08.9.2008 has observed that Rs. 5/- per square feet was a very low amount and has, therefore, remanded the matter to this Court to determine fair rental value/ mesne profits afresh in accordance with law.

29. The report of Shri K.K. Agarwal relied upon by Shri Shobhit Mohan Shukla being unreasonable, is rejected by this Court.

30. The question now before this Court is whether the report of the valuer which was submitted in the Civil Appeal by the revisionist-landlord should be taken to be a fairly reasonable report on the basis of which mesne profits can be determined by this Court.

31. This Court finds that report submitted by Shri Khajan Chandra dated 14.02.2008 has considered not only the Circle Rate and the annual rental value determined by the District Magistrate with effect from 01.4.2008 but has also considered exemplars of the properties situated adjoining to the shop in question and has also taken into account that the shops whose exemplars he was considering was also under tenancy under the State Government bodies. He has come to a conclusion that Rs.29.65 per square feet per month was a fair rent of the shop and this Court finds that observations made in the said report regarding open market rental rate being much higher, say Rs.60/- to Rs.80/- per square feet on Mahatma Gandhi Road in the year 2002-2008 which is now up to over Rs.100/- per square feet, is an observation that can be ignored having not been made on the basis of any documentary evidence and as an off hand remark only.

32. With regard to the rental value being determined as per prevalent market rates for which Shri Divyanshu Sahai has placed reliance upon several judgments as cited hereinabove. This Court finds that there is no determinable or identifiable criteria on which this Court can determine market value of the property of Mahatma Gandhi Market in Hazratganj area. The Court cannot make any 'guesstimate' as the Court is not an expert of such matters. Taking the report of Shri Khajan Chandra to be fairly reasonable assessment of rent, this Court is of the opinion that the rate of Rs.29.65 per square feet is admissible to the revisionist-landlord.

33. Since the judgment of the trial court is of 28.11.2005 and directs grant of mesne profits with effect from 08.7.2002 till the delivery of vacant and peaceful possession to the revisionist which was on 31.01.2008, the revisionist-landlord is also entitled to interest at the rate of 9% per annum in view of the observations made by the Hon?ble Supreme Court in the judgment rendered by it in ***Mahant Narayan Dasjee Varu And Others (supra)***.

34. It is ordered accordingly, that the respondent shall pay rent @ Rs.29.65 per square feet for the property in question which was around 3300 square feet and

also interest thereon with effect from July 2002 to January 2008.

35. The revision stands ***disposed of.***

(2022)04ILR A918
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2022

BEFORE

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

Civil Revision No. 202 of 2013

Aziz Uddin ...Revisionist
Versus
Rajesh Verma ...Respondent

Counsel for the Revisionist:
Sri Om Prakash-I, Sri Archit Mandhyan, Sri Ayush Khanna, Sri Prateek Dawar, Sri Satish Mandhyan

Counsel for the Respondents:
Sri Arvind Srivastava, Sri Anil Kumar Pandey

A. Civil Law – Tenancy – Eviction, recovery of arrears of rent and mesne profits - The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) - Section 30(1) - Provincial Small Cause Courts Act, 1887 - Section 25.

Indian Evidence Act, 1872 - Section 17 - Admission made by a party in an earlier suit, not inter parties, is certainly admissible against it in a subsequent suit involving a different party u/s 17 of the Indian Evidence Act, 1872, but the admission is not conclusive. It is open to the party, who has made the admission in the plaint of an earlier suit, to demonstrate that it was not true. (Para 18)

The plaintiff/revisionist made an admission in the plaint giving rise to Suit No. 85 of 2004 filed by him against the Agra Development Authority, challenging their order of demolition to the effect that the demised shop was an old construction, but it cannot be regarded as conclusive proof of the fact or an estoppel by pleading against the plaintiff. The Trial Court has looked into some other evidence also, like the map attached to the plaintiff's sale deed and some photographs placed on record, which have not been believed to hold that the demised shop is a new construction. (Para 21)

The overall inference that has been drawn to hold that the demised shop is not a new construction is primarily based on the plaintiff's admission made in the plaint of the earlier suit, which the Trial Court has relied upon. The Trial Court missed considering the evidence that in fact, the demolition order passed by the Agra Development Authority that is on record as Paper No. 37, relates to the demised shop and proceeds on the premise that the demised shop is a new construction. There is nothing on record to show that the demolition order was set aside or revoked, holding the demised shop to be an older construction. Rather, the demolition proceedings later appear to have been compounded between the plaintiff and the Development Authority, which would prima facie indicate that the demised shop, being a new construction, was a factual position established by the Development Authority. This part of the evidence has not at all been considered by the Trial Judge while deciding the crucial question about the age of the demised shop that would determine whether the Act is applicable to it. If the Trial Judge had taken into consideration the demolition order passed in the year 2003, he might have reached a different conclusion. (Para 22, 23)

The finding of the Trial Court, therefore, on the issue that the demised shop is an old construction, an integral part of Premises No. 1/208, to which the Act is applicable, is vitiated for non-consideration of material evidence. Also, the finding is manifestly illegal, because it proceeds on a wrong notion of the law that an admission made in the plaint of an earlier suit inter se the plaintiff and the Development Authority is virtually to be regarded as conclusive proof of the fact or

an estoppel by pleading against the plaintiff, as if it were. (Para 23)

The Trial Court is required to re-examine the issue about the construction of the building being a new one, dating to the year 2003, the decree passed by the Trial Judge would have to be set aside, with a remand to the Trial Court to determine the question afresh, whether the Act is applicable to the demised shop. If the finding is that the demised shop is indeed a construction raised in the year 2003, it goes without saying that the Act would not govern the tenancy. In that event, the rate of rent or default would all become irrelevant. (Para 27)

It was observed by the Hon'ble High Court that defendant/opposite party was tenant of the of the plaintiff's/revisionist's in the demised shop and no default was committed by the defendant/opposite party in the payment of agreed rent that was paid regularly and through the pendency of the suit also. Therefore, the decision of the Trial Court was affirmed on these points of determination. For the plaintiff's right to evict defendant, it was observed that the Trial Court will see whether a valid notice to quit in accordance with S.106 of the Transfer of Property Act, 1882 has been served upon the defendant. (Para 10, 25, 26, 28)

Revision allowed in part. (E-4)

Precedent followed:

1. Basant Singh Vs Janki Singh & ors., AIR 1967 SC 341 (Para 18)

2. Govindpal Singh Vs Deputy Director of Consolidation, Meerut & ors., 1988 SCC OnLine All 471 (Para 19)

3. Janki Ram & anr. Vs Amir Chand Ram & ors., 1983 SCC OnLine Pat 241 (Para 20)

Present revision challenges the order dated 18.01.2013, passed by Additional District Judge, Agra.

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

1. This revision is directed against the judgment and decree of Mr. Arun Chandra Srivasava, Additional District Judge, Court No.6, Agra dismissing S.C.C. Suit No.21 of 2005 for eviction, recovery of arrears of rent and mesne profits.

2. According to the revisionist, the plaintiff in S.C.C. Suit No.21 of 2005, he is the owner in possession of property bearing Premises No.1/2008, Professors' Colony, Civil Lines, Agra. The defendant, who is the respondent to this revision, according to the plaintiff-revisionist (for short, 'the plaintiff'), proposed to the plaintiff that if the latter were to construct a shop on the corner of his lawn, which was part of his premises No.1/208, Professors Colony, Civil Lines, Agra, the defendant would take the shop on rent in the sum of Rs.10,000/- per mensem. The plaintiff got a shop constructed on the south-western corner of his lawn between the months of July to August, 2003 and let it out to the defendant-respondent (for short, 'the defendant'). The defendant entered the tenanted shop, accepting it on a rent of Rs.10,000/- per month. The tenancy commenced on 28.08.2003. The defendant paid to the plaintiff rent for the period 28.08.2003 to 27.09.2003 and 28.09.2003 to 27.10.2003 at the rate of Rs.10,000/- per month. The plaintiff issued receipts to the defendant for the rent paid by the latter. Next, the defendant paid the plaintiff the accumulated rent for the period 28.10.2003 to 27.12.2003, that is to say, for a period of two months in the sum of Rs.20,000/-. Thereafter, the defendant did not pay any rent to the plaintiff. The plaintiff got a notice dated 24.05.2005 served upon the defendant, which was dispatched by registered post on 17.06.2005. Despite service of the notice, the defendant did not pay the rent due.

3. The notice aforesaid determined the defendant's tenancy, asking him to quit on the expiry of thirty days from the receipt of notice, but he did not vacate. According to the plaintiff, the shop is a new construction that was raised in the months of July and August, 2003 and the contracted rent is Rs.10,000/- per month. As such, the provisions of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No.13 of 1972) (for short "the Act') do not govern the tenancy. The defendant is a troublesome character and whenever the plaintiff would demand the due rent, the former would get annoyed and lay false complaints to the Police. It was in the said background that the plaintiff was compelled to terminate the defendant's tenancy, as already indicated, vide notice dated 24.05.2005. It is asserted that the notice that was sent by registered post on 17.06.2005 was delivered to the defendant personally on 18.06.2005.

4. In answer to the suit, the defendant filed his written statement, saying that he is a tenant in the shop that bears the humble dimensions of 7' x 8'. The said shop is part of Municipal Premises No.1/108, Professors' Colony, Civil Lines, Hariparvat Ward, Agra. The defendant, however, asserted that he is a tenant in the demised shop at a monthly rent of Rs.1000/-. The demised shop was a garage in the past. He does not hold the shop on a rent of Rs.10,000/- per month. It has been denied by him that he ever approached the plaintiff to get a shop constructed in a part of his lawn, which he later on took on a rent of Rs.10,000/- per month. The defendant also denied the fact that the demised shop stands on the south-western corner of the plaintiff's lawn or that it was constructed in the months of July and August 2003. The defendant denied the plaintiff's case that the tenancy commenced on 28.08.2003 at a contracted rent of Rs.10,000/-. To the contrary, the plaintiff let out the demised shop to the defendant on 1st May, 2002 on a rent of Rs.1,000/- per month and charged from the defendant, by way security, a sum of Rs.1,45,000/-. The security was paid by the defendant on the plaintiff's assurance that whenever the defendant would vacate the shop, his security money would be refunded. It has been denied that any rent receipt was ever issued by the plaintiff to the defendant. The defendant remitted rent to the plaintiff for the months of May and June, 2005 in the sum of Rs.2000/- through money orders, which the plaintiff refused on 29.06.2005. He then refused to accept the said rent by hand.

5. Thereupon, the defendant applied to deposit the due rent in Court under Section 30(1) of the Act. The defendant's application made for the purpose to the Civil Judge (Jr. Div.), Agra was registered as Misc. Case No.81 of 2005. In the said case, the defendant has been regularly depositing the rent well within the plaintiff's knowledge. The plaintiff has appeared in the case under Section 30(1) of the Act also. The fact that the defendant has paid rent from 28.08.2003 to 27.09.2003 and then from 28.09.2003 to 27.10.2003 in the sum of Rs.10,000/- per month has been denied. The fact that the defendant had not paid any rent to the plaintiff after 28.12.2003 has also been denied. According to the defendant, the notice dated 24.05.2005 was received by him on 17.06.2005 and it is not true that thereafter, he has not remitted any rent to the plaintiff. The notice dated 24.05.2005 was responded to on behalf of the defendant by his Counsel Mr. Mahesh Chandra Galav by addressing a reply to the plaintiff's Counsel,

Mr. H.B. Bansal. The reply was sent to the plaintiff's Counsel by registered post.

6. It has been denied for a fact that the demised shop was constructed in the month of July and August, 2003 or that the rate of rent was Rs.10,000/- per month. The plaintiff's case that the provisions of the Act were not applicable to the demised shop was denied, and protection of his tenancy under the Act was also claimed by the defendant. Notice to quit has been assailed as invalid. It was pleaded that the defendant was not in arrears of four months of rent so as to make the default actionable under Section 20(2)(a) of the Act. The demised shop is an old construction much ante-dating the month of April, 1985 and, therefore, the Act is applicable to it. It has been denied for a fact that a sum of Rs.1,96,667/- towards arrears of rent is due to the plaintiff or there are any dues from the date of termination of the tenancy until institution of the suit on account of mesne profits. The claim in the suit is one that is designed to bear pressure upon the defendant in order to enhance the rent to Rs.4,000/- per month, or else vacate the demised shop.

7. There is a long list of documentary evidence, the summary of which is set out in the Trial Court's judgment led on behalf of the plaintiff. It includes a carbon copy of the notice, the demolition order from the Agra Development Authority, photographs of the demised shop, bank account statements, income tax returns, the plaintiff's sale deed in original dated 28.10.1978 relating to premises No.1/208, Civil Lines, Agra, etc. The entire summary of evidence need not be recapitulated for the sake of brevity. Documents as are relevant would be referred to during course of the judgment. The plaintiff, by way of oral testimony testified on his own behalf as PW-1 and examined as PW-2, Adil Aziz. Both these witnesses, in lieu of their examination-in-chief in the dock, filed affidavits. Both the witnesses were cross-examined on the basis of their testimony in the affidavits. A further witness-PW-3, Deepak Kashyap, a handwriting expert, was examined, who filed his affidavit in lieu of his examination-in-chief in the dock, but before his cross-examination could be concluded, he passed away. Another witness, who testified on behalf of the plaintiff, is one Ram Autar Saxena. He filed his affidavit in lieu of his examination-in-chief in the witness-box, but did not turn up to face cross-examination.

8. The defendant also filed a host of documents, that include tenders of rent deposited in Court, house tax assessment for the years 1975-81, money order receipts, besides photographs and negatives. He filed a copy of the plaint giving rise to Suit No.85 of 2004, together with the plaintiff's affidavit filed in support of the said plaint. The entire summary of the documents need not be recapitulated, as that finds eloquent mention in the Trial Court's judgment. The relevant documentary evidence would, however, be referred to during course of this judgment. In support, the defendant examined himself as DW-1 and in lieu of his examination-in-chief in the witness-box, filed an affidavit. He further examined DW-2 Raj Kumar Shrotriye, a handwriting expert, who, in lieu of his testimony in the witness-box, submitted an affidavit. Both the witnesses were cross-examined with reference to their affidavits.

9. The Trial Court framed the following points for determination (translated into English from Hindi):

(1) Whether there is a relationship of landlord and tenant between the plaintiff and the defendant and the provisions of U.P. Act No.13 of 1972 are applicable to the property in question?

(2) Whether the defendant is a tenant in the shop in question at the rate of Rs.10,000/- per month?

(3) Whether the defendant has committed default in the payment of rent?

(4) Relief.

10. It must be remarked that the Trial Court proceeded on the basis of points of determination, because the case before it was a small cause suit and not a regular suit. On the point of determination No.1, which is a composite point involving two issues, it was held that there was no dispute that the defendant was a tenant of the plaintiff's in the demised shop. On the second part of the first point, it was held that the shop in dispute was an old construction, to which the provisions of the Act were applicable. On the second point of determination, it was held that the rate of rent was Rs.1,000/- per month and not Rs.10,000/-. On the third point of determination, it was held that no default was committed by the defendant in the payment of agreed rent that was paid regularly and through the pendency of the suit also. In view of the conclusions that the Trial Court reached on the points framed by it, the suit was ordered to be dismissed.

11. Aggrieved, this revision has been preferred by the plaintiff under Section 25 of the Provincial Small Cause Courts Act, 1887.

12. Heard Mr. Ayush Khanna, learned Counsel for the plaintiff, Mr. Anil Kumar Pandey, learned Counsel appearing for the defendant and perused the lower court records.

13. The most crucial question to be determined in the present suit is the fact, whether the provisions of the Act are applicable to the demised shop and govern the tenancy. Mr. Ayush Khanna, learned Counsel for the plaintiff has vehemently submitted that the Act does not apply. He submits that the demised shop is a new construction raised by the plaintiff on a corner of his residential premises virtually at the defendant's behest. The shop was raised during the months of July and August, 2003, a fact which the learned Counsel for the plaintiff seeks to support by referring to the map attached to the sale deed dated 28.10.1978 through which the premises bearing No. 1/208, Civil Lines, Agra were purchased by the plaintiff. He has taken the Court through the map bearing paper No. 34ग/10, which he says does not show any structure that may be explained as an old existing construction, now let out as a shop to the defendant.

14. On the other hand, Mr. Anil Kumar Pandey, learned Counsel for the defendant has argued that the demised shop is an integral part of the residential premises. It was formally a garage, which was let out to the defendant by the plaintiff on 1st of May, 2002 on a rent of Rs.1000/- per month. The learned Counsel for the defendant has particularly drawn the attention of the Court to the plaint giving rise to Original Suit No.85 of 2004, Aziz Uddin v. Agra Development Authority. This plaint is on record as paper no. 85ग. The learned Counsel has particularly referred to paragraph No.2 of the plaint giving rise to Suit No.85 of 2004, where it is averred:

"2. That interalia other constructions existed over the property as mentioned above there is shop towards Northern Western side of the property in question which is a very old one constructions."

15. It is submitted on the foot of this averment in the plaint that there is a clear admission on the plaintiff's part that the demised shop is an old construction. The learned Counsel points out that the suit is one instituted after the Agra Development Authority had issued an order for demolition of the demised shop. The plaintiff instituted Suit No.85 of 2004, seeking to assail the demolition order, where a specific stand was taken that the shop is an old construction, not requiring a sanctioned plan from the Agra Development Authority. It is urged that the plaintiff cannot go back on his word, which constitutes his stand in his pleadings.

16. This Court has keenly considered the rival submissions of parties on the issue whether the Act applies to the demised shop. This Court finds that in writing its opinion, the Trial Court has been decisively swayed by the fact that in Original Suit No.85 of 2004, the plaintiff took a specific stand that the demised shop was an old construction. Before the Trial Court, a stand was taken by the plaintiff that he never filed the suit, but somebody else did it on his behalf in order to create evidence against him. The suit was soon afterwards withdrawn. The Trial Court has taken note of the fact that the withdrawal application was moved on 07.08.2006, after the present suit was instituted, in order to wriggle out of his admission. The stand that the plaint giving rise to the suit was not signed or filed by the plaintiff was not accepted by the Trial Court. The finding of the Trial Court that Suit No.85 of 2004 was not filed by the plaintiff against the Agra Development Authority is an incorrect stand by the plaintiff, may not be wrong. It is also true that the plaintiff withdrew the suit after he had filed the present suit for eviction, taking a stand that the demised shop was a new construction. It does seem that the plaintiff has been guided by his self-interest in taking contradictory stands in the two suits. He also seems to have indulged in some falsehood by saying that he never filed the earlier suit against the Agra Development Authority. A prelude to the central question is: Does such indulgence in falsehood to secure relief disentitle the plaintiff from establishing the truth of the matter, whether the demised shop is a new construction, that is free from operation of the Act? In the opinion of this Court, it does not.

17. The purpose of trial of a cause before a Court of law is to find out the truth and its bearing upon the rights of parties in accordance with law. Parties, as they go through the turmoil of litigation, may go wayward in the pursuit of relief. They may vacillate in their stand or indulge in falsehood, but all vacillations in a parties' stand in Court or some assertions that are contradictory or false, may not be relevant at all to the issue under inquiry. If they are not relevant, these are to be generally ignored. The central question involved is whether the demised shop is an old construction to which the Act applies, or is it a new one that is under the umbrella of a rent holiday. The Trial Court has been decisively swayed in its opinion by the fact that in the plaint giving rise to Suit No.85 of 2004, the plaintiff has stated that the shop is an old construction. The Trial Court has regarded this averment in the plaint giving rise to the suit filed against the Development Authority as an admission on

the plaintiff's part. The question is whether pleadings in an earlier suit, not inter partes, are at all admissible in a subsequent suit between one of the parties to the earlier suit and a third party.

18. This question did pose some challenge to judicial opinion at one point of time long ago, but has now come to be settled in terms of authority to the effect that admission made by a party in an earlier suit, not inter partes, is certainly admissible against it in a subsequent suit involving a different party under Section 17 of the Indian Evidence Act, 1872, but the admission is not conclusive. It is open to the party, who has made the admission in the plaint of an earlier suit, to demonstrate that it was not true. The most authoritative statement of the law on this point is to be found in the holding of their Lordships of the Supreme Court in **Basant Singh v. Janki Singh and others, AIR 1967 SC 341**, where it was observed:

"**5**. The High Court also observed that an admission in a pleading can be used only for the purpose of the suit in which the pleading was filed. The observations of Beaumont, C.J. in Ramabai Shriniwas v. Bombay Government [AIR 1941 Bom 144] lend some countenance to this view. But those observations were commented upon and explained by the Bombay High Court in D.S. Mohlte v. S.I. Mohile [AIR 1960 Bom 153] . An admission by a party in a plaint signed and verified by him in a prior suit is an admission within the meaning of Section 17 of the Indian Evidence Act, 1872, and may be proved against him in other litigations. The High Court also relied on the English law of evidence. In Phipson on Evidence, 10th Edn, Article 741, the English law is thus summarised:

"Pleadings, although admissible in other actions, to show the institution of the suit and the nature of the case put forward, are regarded merely as the suggestion of counsel, and are not receivable against a party as admissions, unless sworn, signed, or otherwise adopted by the party himself."

Thus, even under the English law, a statement in a pleading sworn, signed or otherwise adopted by a party is admissible against him in other actions. In Marianski v. Cairns [1 Macq 212 (HL)] the House of Lords decided that an admission in a pleading signed by a party was evidence against him in another suit not only with regard to a different subject-matter but also against a different opponent. Moreover, we are not concerned with the technicalities of the English law. Section 17 of the Indian Evidence Act, 1872 makes no distinction between an admission made by a party in a pleading and other admissions. Under the Indian law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive, and it is open to the party to show that it is not true."

(Emphasis by Court)

19. The aforesaid position of law was noticed by this Court in **Govindpal Singh v. Deputy Director of Consolidation, Meerut and others, 1988 SCC OnLine All 471**, where A.P. Misra, J. (as His Lordship then was of the High Court) held:

"**23**. Apart from this, the argument that the statement is an admission and binding between the parties is unsustainable. Before drawing an admission all the circumstances under which admission was made has to be taken into consideration before reliance could be placed by a party in subsequent proceedings and an admission could be made in a given case to terminate a proceeding in order to avoid long litigation

and enjoying fruits even by giving up the existing right, but that statement could only be confined to the suit in which it was made. Any statement made in the previous suit or proceeding if it is regarded by a party as an admission he must prove the circumstances under which it was made and to show that such an admission was not confined for the purpose of that suit then only in a subsequent proceeding reliance could be placed to bind such party not to resile from it. Normally, every person making a statement in the earlier proceeding has a right to explain away a statement in subsequent proceedings and merely making such statement cannot bind nor could it apply as an estoppel to explain away such statement. Thus, statement under O. X, R. 2, C.P.C. cannot be said to be such which is an admission on behalf of the petitioner on which reliance has been placed by the respondents to show that it constitutes an act of consent of co-option to admit Smt. Reoti Kunwar as a co-tenant Learned counsel for the petitioner very rightly relied on a passage in "Sarkar on Evidence" Vol. I, Thirteenth edition at page 198, which is quoted hereunder:--

"Statements in pleadings are not evidence against the party pleading in subsequent proceedings (Boileau v. Rutlin, 1848, 2 Ex 665; Hals. 3rd Ed. Vol. 15, para 540). "Pleadings recorded in one cause are admissible in evidence in subsequent proceedings to prove the institution and subject-matter of such cause but are generally inadmissible even as against parties or privies as proof of the truth of the facts stated therein. (Hals. 3rd Ed Vol. 15, para 709).

The rule rejecting the pleadings in prior causes as admissions is of considerable antiquity and was based on the theory that the statements were not those of the party, but were merely "pleader's matter' and consisted largely of "suggestions of counsel' and "flourishes of the draftsmen'."

24. The case Basant Singh v. Janki Singh, AIR 1967 SC 341 repelled the earlier views of the Court that admission by a party in plaint signed and verified by him may be used as evidence against him in other suits in terms of S. 17, Indian Evidence Act, 1872. The Supreme Court repelling the earlier views held as follows:--

"Moreover, we are not concerned with the technicalities of the English Law. S. 17 of the Indian Evidence Act, 1872 makes no distinction between an admission made by a party in a pleading and other admissions. Under the Indian Law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive, and it is open to the party to show that it is not true."

25. Learned counsel for the petitioner also relied on a case Kailash Chandra v. Ratan Prakash, AIR 1974 All 138. In this case, this Court held that the statement of a counsel of a party can be recorded under R. 1 of O. X and not under R. 2.

26. Reliance was also placed on Muhammad Imam Ali Khan v. Husain Khan, (1899) ILR 26 Cal 81. In this case certain statement was made in 1878 which was sought to be relied on in subsequent proceedings. It was in this light that the court held as follows:--

"Supposing that in 1978 he believed them to be true and made them spontaneously, why should he not assert the true state of the case after he has learned it? An Oudh talukh cannot be transferred like an ordinary estate under Mohomedan or Hindu law because the Oudh Estates Act requires special modes of transfer. It is not

now contended that the mutation operated as a transfer. It would be absurd to suppose that the plaintiff made any misrepresentation to the defendant; neither was the situation of the defendant altered in any way to his prejudice. No consideration was given by the defendant, nor is there anything in the transaction to create a trust Possibly it might have given the defendant a possession on which time would run; but if so, time has not run long enough to create a bar....."

27. It was also held:

".....a gratuitous admission may be withdrawn unless there is some obligation not to withdraw it; and there is not here any title on which such an admission can rest....."

20. The question also fell for consideration of the Patna High Court in **Janki Ram and another v. Amir Chand Ram and others, 1983 SCC OnLine Pat 241**, where it was observed:

"15. Then remains the second submissions of the learned counsel for the appellants to be considered that is, whether the statements made by the plaintiff Janki in a duly sworn affidavit filed in a proceeding under S. 145 of the Criminal P.C. in the year 1963 could be used as a piece of evidence against the plaintiffs in the instant suit. It is well settled that an admission on a question of fact made by a party in course of a proceeding can be regarded as a good piece of evidence relied upon, which the contesting party may contend that the claim made in the subsequent proceeding was unjustified The Court is entitled to consider the admission solemnly made by a party concerning the subject matter in dispute (words have been underlined by me for emphasis) in course of a proceeding in adjudicating upon the truth or otherwise of a claim made by the parties in a subsequent proceeding concerning the subject matter in dispute. The admission made by a party may be used as evidence against him in the other suit if it concerns the subject matter in dispute. However, such an admission cannot be regarded as conclusive and the party can show that it was not (true). Reference be made to the case of Basant Singh v. Janki Singh (AIR 1967 SC 341)."

21. Here, no doubt the plaintiff has made an admission in the plaint giving rise to Suit No.85 of 2004 filed by him against the Agra Development Authority, challenging their order of demolition to the effect that the demised shop was an old construction, but it cannot be regarded as conclusive proof of the fact or an estoppel by pleading against the plaintiff. It is open to the plaintiff to show that the admission was made under circumstances that proceed from misinformation or is the product of legal draftsmanship of pleadings that he did not understand; or still more, it was an incorrect stand in point of fact taken in his pleading to save the demised shop from demolition. What is important to be determined is not the morality or the probity of the plaintiff, but the fact whether the demised shop is a new construction, as the plaintiff alleges, or an old construction standing over a part of the plaintiff's residential premises. No doubt, the Trial Court has looked into some other evidence also, like the map attached to the plaintiff's sale deed and some photographs placed on record, which have not been believed to hold that the demised shop is a new construction.

22. The overall inference that has been drawn to hold that the demised shop is not a new construction is primarily based

on the plaintiff's admission made in the plaint of the earlier suit, that is to say, Suit No.85 of 2004, which the Trial Court has lavishly and overwhelmingly relied upon. What the Trial Court, however, has missed from consideration is the evidence that in fact, there was a demolition order passed by the Agra Development Authority, that is on record as Paper No.37ग. This demolition order relates to the demised shop and proceeds on the premise that the demised shop is a new construction. The demolition matter later appears to have been compounded between the plaintiff and the Development Authority. This part of the evidence has not at all been considered by the Trial Judge while deciding the crucial question about the age of the demised shop that would determine whether the Act is applicable to it.

23. The Trial Judge seems to have been so fascinated and overwhelmed by the admission made in the plaint that he has bestowed no consideration to the fact that the foundation of the statutory demolition proceeding was a new construction done by the plaintiff in the year 2003. The demolition order was served upon the plaintiff, as he alleges, in the plaint giving rise to Suit No.85 of 2004 on 04.12.2003. If the Trial Judge had taken into consideration the demolition order passed in the year 2003, he might have reached a different conclusion about the fact whether the demised shop was a new construction or not. There is nothing on record to show that the demolition order was set aside or revoked, holding the demised shop to be an older construction. Rather, the demolition proceedings appear to have been compounded, which would prima facie indicate that the demised shop, being a new construction, was a factual position that was acquiesced into by the plaintiff and established by the Development Authority. The finding of the Trial Court, therefore, on the issue that the demised shop is an old construction, an integral part of Premises No. 1/208, to which the Act is applicable, is vitiated for non-consideration of material evidence. Also, the finding is manifestly illegal, because it proceeds on a wrong notion of the law that an admission made in the plaint of an earlier suit inter se the plaintiff and the Development Authority is virtually to be regarded as conclusive proof of the fact or an estoppel by pleading against the plaintiff, as if it were. The correct legal position is that the admission made in the said plaint, though admissible, it is open to the plaintiff to explain it by other evidence that it did not represent the true state of facts.

24. In view of what has been said above, this Court is of opinion that the finding recorded by the Trial Court on point of determination No.(1) is not sustainable. The Trial Judge ought to reconsider the said finding, giving further opportunity to the plaintiff and the defendant to explain the admission about the age of the building. The Trial Judge also ought to look into the proceedings for demolition that were taken by the Development Authority, relating to the demised shop. The parties shall be permitted to lead evidence further about this fact in issue, as may be relevant and advised.

25. So far as the finding on point of determination No.(2) is concerned, this Court is of opinion that the Trial Court has rightly discarded the rent deed dated 20th August, 2003 as a bogus document. A comparison of the defendant's signatures on the rent deed with those made elsewhere, such as the written statement or

his testimony in Court, clearly show that the signatures on rent deed are not the defendant's. This conclusion is inevitable on a bare comparison of the defendant's admitted signatures with those on the rent deed. The report of the expert produced by the defendant, who too, for good reasons assigned, has opined against the genuineness of the defendant's signatures on the rent deed, appears to be correct. At the same time, the document Paper No. 66ग, which evidences payment of premium in the sum of Rs.1,45,000/- by the defendant to the plaintiff, has also been rightly believed. The signatures on the said document made across the revenue stamp are unmistakably those of the plaintiff. The conclusion on this point also is based on expert opinion, which the Trial Court has accepted. There is no reason for this Court to disagree with this conclusion of the Trial Court either. The rate of rent mentioned in the document Paper No.66ग is Rs.1000/-. The opinion of the Trial Court, therefore, that the rate of rent is Rs.1000/-, is based on a very plausible view of the evidence on record, that does not warrant interference in the exercise of our revisional jurisdiction.

26. The findings of the Trial Court on point of determination No. (3) about default in the payment of rent also does not deserve to be disturbed. The Trial Court has carefully looked into documentary evidence showing tender of rent by money order and by deposit in Court under Section 30(1) of the Act relative to different periods of time vis-à-vis the figures of rent deposited. The record bears out with the findings of the Trial Court and does not lead to any inference about default in the payment of rent. The finding of the Trial Court, therefore, on point of determination No. (3) is also **affirmed**.

27. Since this Court is of opinion that the Trial Court is required to re-examine the issue about the construction of the building being a new one, dating to the year 2003, the decree passed by the Trial Judge would have to be set aside, with a remand to the Trial Court to determine the question afresh, whether the Act is applicable to the demised shop. In doing that, the Trial Court shall bear in mind the guidance in this judgment and will consider all relevant evidence on the point; not just the admission of the plaintiff in the plaint of Suit No.85 of 2004. Any further evidence led by parties shall also be considered. If the finding is that the demised shop is indeed a construction raised in the year 2003, it goes without saying that the Act would not govern the tenancy. In that event, the rate of rent or default would all become irrelevant.

28. So far as the right of the plaintiff to evict the defendant is concerned, all that would then have to be seen by the Trial Court is whether a valid notice to quit in accordance with Section 106 of the Transfer of Property Act, 1882 has been served upon the defendant.

29. In the result, this revision succeeds and is **allowed in part**. The impugned judgment and decree dated 18.01.2013 passed by the Additional District Judge, Court No.6, Agra in S.C.C. Suit No.21 of 2005 is **set aside**. The suit shall stand restored to the file of the learned Trial Judge for trial and decision afresh, in accordance with the remarks in this judgment and on the point required to be re-determined. The Trial Court shall proceed to try and decide the suit, after affording necessary opportunity to both parties in accordance with law, within a period of **six months** of the receipt of a

copy of this judgment. Since the matter is a small cause suit, that is one of the year 2004, the Trial Judge shall fix one date of effective hearing every week. Both parties shall appear before the Trial Court on **20th April, 2022**. There shall be no order as to costs.

30. Let the lower court records be sent down at once and shall be made available to the Trial Court positively before the date fixed for appearance of parties.

(2022)04ILR A929
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.03.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 406 of 2022

M/s Calcutta South Transport Co., Kolkata ...Petitioner

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Aloke Kumar

Counsel for the Respondents:
C.S.C.

A. Tax Law – Confiscation of goods or conveyances and levy of penalty - CGST/UPGST Act, 2017 - Section 130 - Code of Criminal Procedure - Section 156(3) - It is settled law that if a public functionary 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. No law provides protection against it. Harassment by public authorities is socially abhorring and legally impermissible which causes more serious injury to society. In modern society no authority can arrogate to itself the power to act in a manner which is arbitrary.

Award of compensation for unauthorised, arbitrary and illegal detention of the truck of the petitioner by the respondent authorities would not only compensate the petitioner for loss suffered by him but it would also help in improving work culture and public confidence in rule of law. (Para 10)

Once the order of confiscation dated 29.11.2020 and the order of first appellate authority dated 28.06.2021 were quashed by this Court by judgment dated 15.11.2021, the order of confiscation stood eclipsed from the very date of issuance. There is no order of confiscation in existence and, yet, the truck of the petitioner is being unauthorisedly and illegally detained by the respondent no. 2 since almost 18 months. (Para 9)

Petitioner is suffering financial loss of Rs. 5000/- per day since the date of detention of truck, i.e. 14.10.2020. Since determination of loss due to arbitrary, illegal and unauthorised detention by the respondent no. 2, is a question of fact, therefore, Commissioner of Commercial Tax, U.P., Lucknow is directed to determine the financial loss of the petitioner in respect of the truck in question, within three weeks from today after affording opportunity of hearing to the petitioner and pay it to the petitioner within next one week through account payee bank draft. (Para 12)

Writ petition allowed. (E-4)

Precedent followed:

1. Lucknow Development Authority Vs M.K. Gupta, (1994) 1 SCC 243 (Para 10)

2. N. Nagendra Rao and Co. Vs St. of Andhra Pradesh, (1994) 6 SCC 205 (Para 10)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Shri Aloke Kumar, learned counsel for the petitioner and Shri B.P. Singh Kachhawaha, learned Standing Counsel for the State-respondents.

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

"(i) Issue a suitable writ, order or direction in the nature of mandamus commanding the respondent no.2 to release the vehicle no.HR 55 S 1171 [so detained by the order dated 14.10.2020] of the petitioner.

(ii) Issue any other suitable writ, order or direction in favour of the petitioner as this Hon'ble High Court may deem fit and proper under the facts and circumstances of the case.

(iii) Award the cost of the petition to the petitioner."

3. Briefly stated facts of the present case are that the petitioner is the owner of truck bearing registration no.HR 55 S 1171. The petitioner is engaged in the business of leasing trucks and other vehicles on hire/fixed freight basis to various transporting entities. In the course of its business, the petitioner has given on hire the aforesaid truck in question to one M/s Aruna Chaleswara Transport Company (hereinafter referred to as the 'hirer') for the purpose of transportation of goods from Delhi to Vijayawada (Andhra Pradesh) for a period of 7-8 days on a consideration of Rs.80,000/-. The hirer loaded the goods for transportation from Delhi on 06.10.2020 for Vijayawada. In the course of journey, the aforesaid truck was passing through the State of Uttar Pradesh when it was intercepted by the respondent no.2, i.e. Assistant Commissioner (Mobile Squad) Unit-2, Commercial Tax, Agra, who found that some of the goods loaded in the truck are over and above those covered by invoices, therefore, he issued an order of detention dated 14.10.2020 in MOV-06. Since neither the owner of the goods nor the transporter, i.e., the hirer, came forward to deposit the tax and penalty as demanded by order dated 31.10.2020, the respondent no.2 initiated proceedings under Section 130 of the CGST/UPGST Act, 2017 for confiscation of the truck in question. In this regard, a notice in GST MOV-10 dated 23.12.2020 was issued to the petitioner fixing the date for hearing on 28.11.2020. Immediately on the receipt of the aforesaid notice, the petitioner submitted an application dated 05.12.2020 before the respondent no.2 bringing to his notice the entire facts and requested to release the truck. However, in the meantime, the respondent no.2, without affording any opportunity of hearing to the petitioner, passed an order of confiscation dated 29.11.2020 in GST MOV-11.

4. Aggrieved with the aforesaid order of confiscation dated 29.11.2020, the petitioner filed First Appeal No.63 of 2021 before the appellate authority which was dismissed by order dated 28.06.2021. In the meantime, the petitioner also attempted to lodge a first information report on 17.12.2020 against the hirer for using the truck for transportation of certain goods not covered by valid invoice. Since the FIR was not registered by the SHO, Police Station, Alipur, Delhi, therefore, the petitioner approached the Commissioner of Police, New Delhi through mail on 25.01.2021 and when nothing happened, the petitioner filed an application dated 01.02.2021 in the court of Chief Metropolitan Magistrate, District North,

Rohini Courts, Delhi under Section 156(3) of the Code of Criminal Procedure, which was registered as Criminal Case No.525 of 2021.

5. Aggrieved with the order of confiscation dated 29.11.2020 under Section 130 of the CGST Act and the order of the first appellate authority dated 28.06.2021, the petitioner filed Writ-Tax No.650 of 2021 before this Court in which he also prayed for a direction in the nature of mandamus to the authorities concerned to release the aforesaid truck detained by order dated 14.10.2020. The aforesaid writ petition was allowed and the orders impugned therein were quashed by this Court by judgment and order dated 15.11.2021. The relevant portion of the judgment is reproduced below:-

"In the light of the aforesaid decision, the present case has to be considered. The facts and circumstances narrated above reflect that the show cause notice dated 23.12.2020 was misleading and incorrect. Where a show cause notice in Form GST MOV-10 is issued, which is a preclude to possibility of imposition of liability in the nature of civil consequences against a person, the same has to be specific, containing necessary and correct particulars that may enable the noticee to clearly understand the matter and appear or file his reply on the date and in the manner specified in the notice. **Evidently, the show cause notice sent in the aforesaid Form GST MOV-10 dated 23.12.2020 does not comply with the aforesaid requirement as the date for appearance is stated as 28.11.2020.** The quandary and dilemma that can visit a person served with such a show cause notice can only be imagined. The plight of the petitioner is well reflected in the aforesaid legal notices a sent by him as well as his repeated efforts to get an FIR lodged against the aforesaid transporter and other persons. The learned Standing Counsel implying that the petitioner would be deemed to have knowledge of proceedings for confiscation because the signature of its driver appears on the Form MOV-4, is misplaced. The proceedings and consequences of seizure and of confiscation are different. Had the show cause notice Form GST MOV-10 been properly prepared, the petitioner could have had adequate opportunity to represent his case and, subject to such proof as required by clause (v) of sub-section (1) of Section 130 of the Act, would not have been saddled with the liability under sub-sections (2) and (3) of Section 130 of the Act. **Therefore, the show cause notice Form GST MOV-10 that was issued was defective which resulted in denial of opportunity to the petitioner, and as such, cannot be said to be a show cause notice in the eyes of law.**

Thus, not only have the principles of natural justice not been complied with by the respondents, the petitioner has also been prejudiced by such non-compliance. **There is no material on record to demonstrate that an opportunity of hearing was duly granted to the petitioner as is the mandate of sub-section (4) of Section 130 of the Act.**

Under the circumstances, **the order dated 28.06.2021 (as corrected on 25.09.2021)** passed by the Additional Commissioner Grade II (Appeal)-I, State Tax, Agra as well as the **order dated 29.11.2020 Form GST MOV-11** passed by the Assistant Commissioner (Mobile Squad) Unit-2, Commercial Tax, Agra cannot be sustained and **are hereby quashed.** However, in the interest of justice, it is left open to the respondents to issue a fresh show cause notice to the

petitioner and proceed thereafter in accordance with law.

Subject to the aforesaid observations, this writ petition is **allowed.**"

(emphasis supplied)

6. Despite the aforesaid judgment dated 15.11.2021, the respondents have neither issued any fresh notice to the petitioner nor have released the truck so far although there exists no order of confiscation.

7. Learned Standing Counsel has produced before us the written instructions of the respondent no.2 dated 15.03.2022 which also leaves no manner of doubt that no notice has been issued to the petitioner pursuant to the liberty granted by this Court by judgment dated 15.11.2021. The written instructions of the respondent no.2 dated 15.03.2022, as produced by learned Standing Counsel, are kept on record. The relevant portion of the aforesaid instructions of the respondent no.2 is reproduced below:-

"उक्त के सम्बन्ध आपको अवगत कराना है कि सचल दल कार्यालय में पुनः सुनवाई हेतु पोर्टल पर नोटिस जारी करने की कोई व्यवस्था नहीं दी गई है। अतः माननीय उज्ज्ञ न्यायलय द्वारा पारित आदेश के अनुपालन में ज्वाइंट कमिश्रर (आई०टी०) अनुभाग वाणिज्यकर लखनऊ (ज्वा0कमि० विधि प्रकोष्ठ को/प्रतिलिपि प्रेषित) को इस कार्यालय के पत्र संख्या 178 दि० 21/12/2021 अनुस्मारक पत्र संख्या 187 दिनांक05/01/2022, द्वितीय अनुस्मारक पत्र संख्या 189 दि० 13/01/2022, तृतीय अनुस्मारक पत्र संख्या 195 दि० 03/02/2022, चतुर्थ अनुस्मारक पत्र संख्या 201 दि० 24/02/2022 एवं पंचम अनुस्मारक पत्र संख्या 226 दि० 14/03/2022 प्रेषित कर निवेदन किया गया है कि पुनः नोटिस जारी करने की सुविधा सचलदल कार्यालय को उपलब्ध कराने की कृपा करें ताकि माननीय उच्च न्यायालय के आदेश का पालन सुनश्चित किया जा सके। किन्तु आज तक पुनः सनवाई हेतु नोटिस जारी करने का कोई विकल्प विभागीय साईट पर उपलब्ध नहीं कराया गया है।"

8. Section 130 of the CGST Act 2017 provides for confiscation of goods or conveyances and levy of penalty, as under :-

"**130. Confiscation of goods or conveyances and levy of penalty.-- (1)** Notwithstanding anything contained in this Act, if any person--

(i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made there under with intent to evade payment of tax; or

(ii) does not account for any goods on which he is liable to pay tax under this Act; or

(iii) supplies any goods liable to tax under this Act without having applied for registration; or

(iv) contravenes any of the provisions of this Act or the rules made there under with intent to evade payment of tax; or

(v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made there under unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance, then, all such goods or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122.

(2) Whenever confiscation of any goods or conveyance is authorised by this Act, the officer adjudging it shall give to the owner of the goods an option to pay in lieu of confiscation, such fine as the said officer thinks fit:

Provided that such fine leviable shall not exceed the market value of the goods confiscated, less the tax chargeable thereon:

Provided further that the aggregate of such fine and penalty leviable shall not be less than the amount of penalty leviable under sub-section (1) of section 129:

Provided also that where any such conveyance is used for the carriage of the goods or passengers for hire, the owner of the conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine equal to the tax payable on the goods being transported thereon.

(3) Where any fine in lieu of confiscation of goods or conveyance is imposed under sub-section (2), the owner of such goods or conveyance or the person referred to in sub-section (1), shall, in addition, be liable to any tax, penalty and charges payable in respect of such goods or conveyance.

(4) **No order for confiscation of goods or conveyance or for imposition of penalty shall be issued without giving the person an opportunity of being heard.**

(5) Where any goods or conveyance are confiscated under this Act, the title of such goods or conveyance shall thereupon vest in the Government.

(6) The proper officer adjudging confiscation shall take and hold possession of the things confiscated and every officer of Police, on the requisition of such proper officer, shall assist him in taking and holding such possession.

(7) The proper officer may, after satisfying himself that the confiscated goods or conveyance are not required in any other proceedings under this Act and after **giving reasonable time not exceeding three months to pay fine in lieu of confiscation, dispose of such goods or conveyance and deposit the sale proceeds thereof with the Government."**

9. Once the order of confiscation dated 29.11.2020 and the order of first appellate authority dated 28.06.2021 were quashed by this Court by judgment dated 15.11.2021, the order of confiscation stood eclipsed from the very date of issuance. There is no order of confiscation in existence and, yet, the truck of the petitioner is being unauthorisedly and illegally detained by the respondent no.2. About 18 months have passed since the detention of the aforesaid truck without any valid order for confiscation or any proceeding of confiscation in existence, yet, the truck in question is being detained by the respondent no.2 arbitrarily, illegally and unauthorisedly, resulting in harassment of the petitioner.

10. It is settled law that if a public functionary 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. No law provides protection against it. Harassment by public authorities is socially abhorring and legally impermissible which causes more serious injury to society. In 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 for compliance of order of this Court, linger on leaving the petitioner to run from one end to other with no result. Therefore, award of

compensation for unauthorised, arbitrary and illegal detention of the truck of the petitioner by the respondent authorities would not only compensate the petitioner for loss suffered by him but it would also help in improving work culture and public confidence in rule of law. The principles of law aforestated also find support from the law laid down by Hon'ble Supreme Court in **Lucknow Development Authority vs. M.K. Gupta; (1994) 1 SCC 243** and **N. Nagendra Rao and Company vs. State of Andhra Pradesh; (1994) 6 SCC 205.**

11. In paragraph 46 of the writ petition, the petitioner has stated that the petitioner is facing recurring financial loss due to detention of its truck since 14.10.2020. In paragraph 8 of the application dated 05.12.2020 submitted by the petitioner before the respondent no.2, it has been stated as under :-

"8. That due to keeping of the said truck under custody my client is not in a position to run his business and he is paying salary to the driver and he is bearing bank EMI. Taxes and Insurances of that truck and in the manner aforesaid he is suffering loss at least Rs.5,000/- per day."

12. Thus, as per pleadings, the petitioner is suffering financial loss of Rs.5000/- per day since the date of detention of truck, i.e. 14.10.2020. Since determination of loss due to arbitrary, illegal and unauthorised detention by the respondent no.2, is a question of fact, therefore, we direct the Commissioner of Commercial Tax, U.P., Lucknow to determine the financial loss of the petitioner in respect of the truck in question, within three weeks from today after affording opportunity of hearing to the petitioner and pay it to the petitioner within next one week through account payee bank draft.

13. For all reasons stated above, the writ petition is allowed with cost. The respondents are directed to release forthwith the truck bearing registration no.HR 55 S 1171.

14. For grossly arbitrary, illegal and unauthorised action of the respondent no.2 to detain the truck in question even despite the judgment of this Court dated 15.11.2021, we impose cost of Rs.5000/- upon the respondents which shall be deposited by the respondents with the High Court Legal Services Committee, High Court, Allahabad within three weeks from today.

15. With the aforesaid directions, the writ petition is **allowed.**

(2022)04ILR A934
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.04.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ Tax No. 41 of 2022

Distributors India (South) ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Shailesh Verma

Counsel for the Respondents:
Manish Misra

A. Tax Law – Reassessment - Uttar Pradesh Krishi Evam Prodyogik Vishwavidyalaya Adhiniyam, 1988 -

Income Tax Act,1962 - Sections 194 H, 194 J, 194 C, 148, 147 & 151 - At the stage of the notice of reopening of the assessment, the Court has only to see whether there is prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. (Para 17)

B. It is settled law that the validity of any order has to be adjudged on the basis of the reasons mentioned in the order itself and additional reasons, which are not mentioned in the order itself, cannot be supplied afterwards either to support the order or to challenge it. Since the reasons for issuing the notice u/s 148 stated by the A.O. and approved by the approving authority do not make any mention of the audit para, the petitioner cannot assail the validity of the order for issuance of the notice u/s 148 of the Act on the said ground. (Para 22)

The A.O. had merely sent a report to the CIT (Audit) and he did not have the authority to take a decision regarding the audit objection. Therefore, the ground taken by the learned Counsel for the petitioner regarding letter dated 07-02-2020 sent by the A.O. not accepting the audit objection, is without any force and the same cannot be accepted. (Para 23)

C. The obligation on the assessee to disclose the material facts -- or what are called, primary facts -- is not a mere disclosure but a disclosure which is full and true. A false disclosure is not a true disclosure. The disclosure must not only be true but must be full -- "fully and truly". (Para 29)

As material facts relevant for the assessment on the issues under consideration were not produced during the assessment proceedings, the A.O. could not examine the issues and could not form an opinion regarding the same during the original assessment proceedings. (Para 30)

D. Words and Phrases - "change of opinion" - The words "change of opinion" imply formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection. (Para 31)

Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable.

Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings. (Para 31)

In the present case, at the time of making the assessment originally, the AO had not formed any opinion regarding the reasons on which the notice u/s 148 of the Act has been issued. To say it more particularly, the A.O. had not formed any opinion regarding receipt of payments by the petitioner u/s 194J, which had not been shown in its P & L account, non-disclosure of the amount of reimbursement of expenses claimed by it, non-submission of the details of expenses incurred by it for verification during the assessment proceedings and non-production of any ledgers, bills and vouchers of expenses incurred on behalf of the Principal Companies etc. Thus the petitioner did not make a "full and true" disclosure of all the material facts which resulted in an income of Rs. 1,07,24,386/- having escaped assessment. Therefore, **it is not a case of "change of opinion" and challenge to the notice u/s 148 of the Act on the ground that it seeks to initiate reassessment on the ground of change of opinion, cannot be accepted.** (Para 27, 32)

E. The Commissioner is required to apply his mind to the proposal put up before him for approval in the light of the material relied upon by the A.O. (Para 33)

The order dated 23-03-2021 passed by the approving authority u/s 151 of the Act has been placed on record by the Department and the detailed reasons recorded by the A.O. have been annexed to, and made a part of the order. The approving authority - the PCIT, has stated that he agrees with the comments of the A.O., which were annexed with the order, and has recorded his satisfaction that it was a fit case for issuance of the notice u/s 148 of the Act. **The aforesaid order (dated 23.03.2021) does not indicate non-application of mind by the PCIT to the proposal made by the A.O.** (Para 35)

Writ petition dismissed. (E-4)

Precedent followed:

1. Raymond Woolen Mills Ltd. Vs I.T.O., (1999) 236 ITR 36 (SC) (Para 17)

2. Raymond Woollen Mills Ltd. Vs ITO, (2008) 14 SCC 218 (Para 18)

3. CIT Vs Rajan, 403 ITR 30 (Para 20)

4. Phool Chand Bajrang Lal Vs ITO, (1993) 4 SCC 77 (Para 28)

5. Srikrishna (P) Ltd. Vs ITO, (1996) 9 SCC 534 (Para 29)

6. CIT Vs Techspan India (P) Ltd., (2018) 6 SCC 685 (Para 31)

Precedent distinguished:

1. Aventis Pharma Ltd. Vs ACIT, (2010) 323 ITR 570 (Bom.) (Para 24)

2. Arun Gupta Vs U.O.I., (2015) 371 ITR 394 (All) (Para 25)

3. United Electrical Co. Ltd. Vs Commissioner of Income Tax, (2002) 258 ITR 317 (Para 33)

Present petition challenges the validity of notice dated 26.03.2021, issued by the Income Tax Officer, Range-5, Ayakar Bhawan, 5, Ashok Marg, Lucknow.

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Shri Desh Deepak Chopra, Senior Advocate assisted by Sri. Shailesh Verma, Advocate, the learned counsel for the petitioner and Shri Manish Misra, Advocate, the learned counsel for the respondents.

2. By means of this writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged the validity of a notice dated 26.03.2021 issued by the Income Tax Officer, Range-5, Ayakar Bhawan, 5, Ashok Marg, Lucknow under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') proposing to assess/reassess the income/loss for the assessment year 2013-14.

3. The petitioner's case is that it is a registered partnership firm. It has entered into agreements with various Pharmaceutical and FMCG (Fast Moving Consumer Goods) Companies for providing Carrying and Forwarding Agents (C&F Agents) services. As per the terms of the agreements, the petitioner incurs various business expenses on behalf of the principal companies and while reimbursing the expenses, the principal companies deduct TDS. However, the reimbursement of expenses is not the petitioner's income and, therefore, it is not reflected in the petitioner's books of accounts as receipts from C&F business. Some of the companies have deducted TDS under different heads like Section 194 H of the Act that is meant for income from brokerage and commission and Section 194 J that is meant for fee for professional and technical services.

4. During the assessment year 2013-14 the petitioner had shown the total receipts of Rs.3,59,59,861/- in its Profit and Loss (P&L) Account, which comprised of commission income of Rs.3,47,58,295/- and interest income of Rs.12,01,566/-. The amount of TDS as per the statement in Form 26 AS was Rs.32,14,869/-. The petitioner filed its return for a total income of Rs.9,77,090/-.

5. During scrutiny, the Assessing Officer raised a query regarding high ratio of refund to TDS and the petitioner was asked to reconcile 26 AS with gross receipts as per P&L Account.

6. On 12-02-2015, the petitioner submitted a reply stating that it is making several expenses on behalf of the Principal Companies. The agreements are in the nature of a contract and hence TDS should be deducted @ 2% under Section 194 C of the Act. However, the nomenclature used for payments made to the petitioner is commission and, therefore, the Companies are deducting TDS @ 10% under Section 194 H. After taking into account all the expenses, the petitioner's net margins are such that the tax accrued is much less than the TDS and hence a heavy refund results. Every year the petitioner gets a certificate for lower deduction of TDS, but for the relevant year they got it very late and this was the reason for high ratio of refund to TDS. Again, on 27-02-2015, the petitioner sent another letter reiterating its earlier reply.

7. On 25-03-2015, the A.O. passed an Assessment Order assessing the petitioner's total income at Rs.11,42,428/-, after adding Rs.1,65,338/- to the returned income of Rs.9,77,090/- towards part of expenses disallowed.

8. On 26-03-2021, the A.O. issued a notice under Section 148 of the Act for the Assessment Year 2013-14, stating that he had reason to believe that the petitioner's income chargeable to tax has escaped assessment within the meaning of Section 147 of the Act. On 22.12.2021, the National Faceless Assessment Centre provided the reasons for re-opening of assessment. It states that on examination of documents on record and 26 AS, it is noticed that the assessee has received payments under Section 194 J also, but he has not shown the said receipts and has not given any explanation for the same. The assessee has not disclosed the amount of reimbursement of expenses claimed by it and the actual amount received by it towards reimbursement. It has not submitted the details of expenses incurred by it for verification during the assessment proceedings. It did not produce any ledger, bills and vouchers of expenses incurred on behalf of the Principal Companies. As per 26 AS, the assesse has received a total sum of Rs.4,66,84,247/- and TDS is Rs.32,14,869/-, whereas it has shown its income at Rs.3,59,59,861/-. Thus the assesse has shown its income short by Rs.1,07,24,386/- and this income has escaped assessment.

9. The notice further states that although the assessee had produced the books of account, annual report, P&L account and balance sheet, but the requisite material facts mentioned above were embedded in such a manner that the material facts could not be discovered by the A.O. As all the material facts relevant for the assessment on the issues under consideration were not produced during the assessment proceedings, the AO did not examine the issues and, therefore, it is not a case of change of opinion.

10. The petitioner submitted its objections against the notice under Section 148 mainly on the grounds that in the letter dated 20-10-2020 written to the CIT (Audit), the A.O. had himself stated that the audit objection was not accepted, yet he initiated the action under Section 147 merely to safeguard the interest of Revenue. Secondly, the notice under Section 148 of the Act has been issued without bringing any fresh tangible material on record, on the basis of information which was already available on record, whereas the reassessment cannot be done for matters already discussed. The reasons recorded are based on a mere change of opinion, which is not permissible in law. The approval under Section 151 of the Act has been given by the PCIT in a routine manner, without application of mind and without seeing the records and the correspondence made with the revenue authorities, which is not as per the law.

11. On 16-02-2022, the National Faceless Assessment Centre has passed an order rejecting the petitioner's objections stating that there is no material to establish that the case has been re-opened on the basis of audit objections. Moreover, the A.O. has no authority to accept or reject the audit objection and the same has to be decided by the Principal Commissioner of Income Tax after taking into consideration the recommendations of the Joint Commissioner of Income Tax, as provided in the Standard Operating Procedure for handling audit cases contained in CBDT Instruction no. 7 of 2017.

12. Dealing with the assessee's objection that no new material was there to justify reassessment, it has been stated that on examining the difference between 26 AS and the income admitted, it was revealed that although the assessee claimed that some receipts were towards reimbursements of expenses incurred on behalf of the Principal companies, but the assessee did not produce any material evidence or ledger or books to prove this and thus it did not make true and full disclosure of all the material facts necessary for assessment.

13. The order further states that the case has been reopened on the basis of question of fact regarding the difference between the total receipts and declared income and not on any question of law and, therefore, it is not a case of change of opinion. After applying his mind to the information available on record, the A.O. has formed an opinion that he had reason to believe that the income had escaped assessment and this was not based on mere suspicion, but was based on a belief formed after examination of the material available on record.

14. The respondents have brought on record a copy of the approval under Section 151 of the Act, which indicates that the Assessing Officer had made a proposal for issuance of a notice under Section 148 of the Act, annexing therewith the detailed reasons for the proposal, the Range Head recommended the proposal and the PCIT expressed his agreement with the comments of the AO and recommendation of the Range Head and granted his approval for issuance of a notice under Section 148 of the Act.

15. Before proceeding to examine the rival contentions advanced on behalf the parties, it would be appropriate to have a look at the relevant provisions of the Act and refer to some pronouncements of the Hon'ble Supreme Court explaining the

scope of interference under Article 226 of the Constitution of India while examining the validity of a notice issued under Section 148 of the Income Tax Act.

16. The relevant provisions of Sections 147 and 148 of the Act, as those stood at the relevant time, are being reproduced below: -

"147. Income escaping assessment.-- If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, *he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year):*

.....

Explanation 1.--Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."

"148. Issue of notice where income has escaped assessment.-- *(1) Before making the assessment, reassessment or recomputation under Section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the 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 .....

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

(Emphasis supplied)

17. Thus after giving a notice under Section 148 of the Act giving reasons for doing so, the Assessing Officer can pass an order for reassessment if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. The Hon'ble Supreme Court has explained the scope of judicial review while examining the validity of a notice under Section 148 of the Act in **Raymond Woolen Mills Ltd. Versus I.T.O**., (1999) 236 ITR 36 (SC), in which it has been held that at the stage of the notice of reopening of the assessment, the Court has only to see whether there is prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage.

18. Again, in **Raymond Woollen Mills Ltd. v. ITO**, (2008) 14 SCC 218, the Hon'ble Supreme Court reiterated that while examining the validity of a notice issued under Section 148 of the Income Tax Act, *"we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have to see only whether there was prima*

facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage."

19. We proceed to examine the rival submissions advanced on behalf of the parties in light of the aforesaid pronouncements of the Hon'ble Supreme Court so as to ascertain as to whether there was prima facie some material on the basis of which the Department could reopen the case, without going into the sufficiency or correctness of the material.

20. Mr. Desh Deepak Chopra, the learned Senior Advocate representing the petitioner, has submitted that in the present case the reassessment proceedings have been initiated merely on the basis of an audit objection raised by the revenue auditor and there was no tangible material with the A.O. suggesting that the income of the petitioner has escaped assessment. In the letter dated 07-02-2020 addressed to the CIT (Audit), the A.O. had himself refused to accept the audit para. Relying upon a decision of the Bombay High Court in CIT versus Rajan, 403 ITR 30, he has submitted that if the A.O. has rejected the audit objection, subsequent re-opening on the same ground of audit objection will not be valid, unless the A.O. shows that there was separate application of mind, which is not found in the present case.

21. Per contra, Sri. Manish Mishra, the learned Counsel for the Income Tax department, has submitted that as per the circular dated 21-07-2017 issued by the CBDT, the authority to accept or reject the Revenue audit objection vests in the Commissioner of Income Tax and the A.O. had no power to reject the audit objection. Therefore, the letter dated 07-02-2020 written by the A.O. to the CIT (Audit) Revenue stating that the audit objection was not acceptable to him, was not of any consequence.

22. It is settled law that the validity of any order has to be adjudged on the basis of the reasons mentioned in the order itself and additional reasons, which are not mentioned in the order itself, cannot be supplied afterwards either to support the order or to challenge it. Since the reasons for issuing the notice under Section 148 stated by the A.O. and approved by the approving authority do not make any mention of the audit para, the petitioner cannot assail the validity of the order for issuance of the notice under Section 148 of the Act on the said ground.

23. Moreover, the petitioner has itself annexed a copy of Instruction No. 07 of 2017 dated 21-07-2017 issued by the CBDT, laying down the Standard Operating Procedure for handling the audit objections and Clause 5.2 thereof provides that the PCIT shall, after calling for a report from AO and Range Head, if needed, take a decision as to whether or not the objection is acceptable. The A.O. had merely sent a report to the CIT (Audit) and he did not have the authority to take a decision regarding the audit objection. Therefore, the ground taken by the learned Counsel for the petitioner regarding the letter dated 07-02-2020 sent by the A.O. not accepting the audit objection, is without any force and the same cannot be accepted.

24. Sri. Chopra has next submitted that the proceedings under Section 147 have been initiated without bringing any fresh tangible material on record, by merely relying upon the documents that were already placed before the A.O. at the time

of the original assessment proceedings. Relying upon another decision of the Bombay High Court in Aventis Pharma Ltd. Versus ACIT, (2010) 323 ITR 570 (Bom) he has submitted that it is a settled position of law that re-opening of assessment on the very same issue due to change of opinion in the absence of any fresh material is held to be invalid and bad in law.

25. Relying upon the judgment in **Arun Gupta versus Union of India, (2015) 371 ITR 394 (All)**, the learned Counsel for the petitioner has submitted that even if new facts are discovered from the records already available before the A.O., it would amount to a change of opinion, since there is no fresh tangible material from which the authority to reopen the assessment has emerged.

26. The reasons recorded by the A.O. for initiating the process of re-assessment state that on examination of the documents on record and 26 AS, it was noticed that the petitioner has received payments under Section 194 J also, but it has not shown the said receipts in his P&L account and has not given any explanation for the same. The petitioner has not disclosed the amount of reimbursement of expenses claimed by it and the actual amount received by it towards reimbursement. It has not submitted the details of expenses incurred by it for verification during the assessment proceedings. It did not produce any ledger, bills and vouchers of expenses incurred on behalf of the Principal Companies. As per 26 AS, the total receipts of the assesse under Sections 194 A, 194 C, 194 H and 194 J is Rs.4,66,84,247/- and TDS is Rs.32,14,869/-, whereas it has shown its income at Rs.3,59,59,861/-. Thus the petitioner has shown its income short by Rs.1,07,24,386/- and this income has escaped assessment. Although the assesse had produced the books of account, annual report, P&L account and balance sheet, but the requisite material facts mentioned above were embedded in such a manner that the material facts could not be discovered by the A.O. This material which came to light upon investigation conducted subsequent to passing of the assessment order, would certainly amount to a fresh tangible material giving rise to reason to believe that certain income has escaped assessment necessitating initiation of re-assessment proceedings.

27. From the reasons recorded by the A.O. for initiating the process of re-assessment, we find that the A.O. has recorded his reasons to believe that the petitioner had received payments under Section 194 J also, but it had not shown the said receipts in his P&L account and had not given any explanation for the same. The assesse had not disclosed the amount of reimbursement of expenses claimed by it and the actual amount received by it towards reimbursement. It had not submitted the details of expenses incurred by it for verification during the assessment proceedings. It did not produce any ledger, bills and vouchers of expenses incurred on behalf of the Principal Companies. Thus the petitioner did not make a "full and true" disclosure of all the material facts which resulted in an income of Rs. 1,07,24,386/- having escaped assessment.

28. In **Phool Chand Bajrang Lal v. ITO, (1993) 4 SCC 77**, the Hon'ble Supreme Court held that: -

"25. From a combined review of the judgments of this Court, it follows that an Income Tax Officer acquires jurisdiction

to reopen assessment under Section 147(a) read with Section 148 of the Income Tax Act, 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. ***He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the Income Tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information.*** *To that limited extent, the Court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief.* ***It would be immaterial whether the Income Tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent information, the Income Tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment."***

29. In **Srikrishna (P) Ltd. v. ITO**, (1996) 9 SCC 534, the Hon'ble Supreme Court held that: -

"Now, what needs to be emphasised is that the obligation on the assessee to disclose the material facts -- or what are called, primary facts -- is not a mere disclosure but a disclosure which is full and true. A false disclosure is not a true disclosure. The disclosure must not only be true but must be full -- "fully and truly"*. A false assertion, or statement, of material fact, therefore, attracts the jurisdiction of the Income Tax Officer under Sections 34/147. Take this very case: the Income Tax Officer says that on the basis of investigations and enquiries made during the assessment proceedings relating to the subsequent assessment year, he has come into possession of material, on the basis of which, he has reasons to believe that the assessee had put forward certain bogus and false unsecured hundi loans said to have been taken by him from non-existent persons or his dummies, as the case may be, and that on that account income chargeable to tax has escaped assessment. According to him, this was a false assertion to the knowledge of the assessee. The Income Tax Officer says that during the assessment relating to subsequent assessment year, similar loans*

(from some of these very persons) were found to be bogus. On that basis, he seeks to reopen the assessment. It is necessary to remember that we are at the stage of reopening only. The question is whether, in the above circumstances, the assessee can say, with any justification, that he had fully and truly disclosed the material facts necessary for his assessment for that year. Having created and recorded bogus entries of loans, with what face can the assessee say that he had truly and fully disclosed all material facts necessary for his assessment for that year? ***True it is that Income Tax Officer could have investigated the truth of the said assertion -- which he actually did in the subsequent assessment year -- but that does not relieve the assessee of his obligation, placed upon him by the statute, to disclose fully and truly all material facts.*** *Indubitably, whether a loan, alleged to have been taken by the assessee, is true or false, is a material fact -- and not an inference, factual or legal, to be drawn from given facts. In this case, it is shown to us that ten persons (who are alleged to have advanced loans to the assessee in a total sum of Rs 3,80,000 out of the total hundi loans of Rs 8,53,298) were established to be bogus persons or mere name-lenders in the assessment proceedings relating to the subsequent assessment year. Does it not furnish a reasonable ground for the Income Tax Officer to believe that on account of the failure -- indeed not a mere failure but a positive design to mislead -- of the assessee to disclose all material facts, fully and truly, necessary for his assessment for that year, income has escaped assessment? We are of the firm opinion that it does.* ***It is necessary to reiterate that we are now at the stage of the validity of the notice under Sections 148/147. The enquiry at this stage is only to see whether there are reasonable grounds for the Income Tax Officer to believe and not whether the omission/failure and the escapement of income is established. It is necessary to keep this distinction in mind.***

A recent decision of this Court in Phool Chand Bajrang Lal v. ITO, we are gratified to note, adopts an identical view of law and we are in respectful agreement with it. The decision rightly emphasises the obligation of the assessee to disclose all material facts necessary for making his assessment fully and truly. A false disclosure, it is held, does not satisfy the said requirement. We are also in respectful agreement with the following holding in the said decision"

(Emphasis supplied)

30. As material facts relevant for the assessment on the issues under consideration were not produced during the assessment proceedings, the A.O. could not examine the issues and could not form an opinion regarding the same during the original assessment proceedings.

31. The meaning of the expression "change of opinion" has been explained by the Hon'ble Supreme Court in CIT v. Techspan India (P) Ltd., (2018) 6 SCC 685, in the following words: -

"16. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. ***The words "change of opinion" imply formulation of opinion and then a change thereof.*** *In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.*

17. It is well settled and held by this Court in a catena of judgments and it would be sufficient to refer to CIT v. Kelvinator of India Ltd. wherein this Court has held as under: (SCC p. 725, para 5-7)

"5. ... where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe".... Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.

6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

18. ***Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable.*** *If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings.* ***Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings."***

(Emphasis supplied)

32. In the present case, at the time of making the assessment originally, the Assessing Officer had not formed any opinion regarding the reasons on which the notice under Section 148 of the Act has been issued. To say it more particularly, the A.O. had not formed any opinion regarding receipt of payments by the petitioner under Section 194 J, which had not been shown in its P&L account, non-disclosure of the amount of reimbursement of expenses claimed by it, non-submission of the details of expenses incurred by it for verification during the assessment proceedings and non-production of any ledgers, bills and vouchers of expenses incurred on behalf of the Principal Companies etc. Therefore, it is not a case of "change of opinion" and challenge to the notice under Section 148 of the Act on the ground that it seeks to initiate reassessment on the ground of change of opinion, cannot be accepted.

33. Relying upon a decision of Delhi High Court in **United Electrical Co. Ltd. Versus Commissioner of Income Tax, (2002) 258 ITR 317**, the learned Counsel for the petitioner has submitted that the

Commissioner is required to apply his mind to the proposal put up before him for approval in the light of the material relied upon by the A.O., but in the present case the approval was casually given merely relying upon the reasons to believe as provided by the A.O., without going through the previous records.

34. Section 151 of the Act, which contains the provision for grant of approval to a proposal for issuance of a notice under Section 148 of the Act, is as follows: -

*"**151. Sanction for issue of notice.**-- (1) In a case where an assessment under sub-section (3) of Section 143 or Section 147 has been made for the relevant assessment year, no notice shall be issued under Section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice:*

***Provided** that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice."*

35. The order dated 23-03-2021 passed by the approving authority under Section 151 of the Act has been placed on record by the Department and the detailed reasons recorded by the A.O. have been annexed to, and made a part of the order. The approving authority - the PCIT, has stated that he agrees with the comments of the A.O., which were annexed with the order, and has recorded his satisfaction that it was a fit case for issuance of the notice under Section 148 of the Act. The aforesaid order does not indicate non-application of mind by the PCIT to the proposal made by the A.O. and we are not able to accept the submission that the PCIT has granted approval without application of mind to the proposal put up by the A.O.

36. Keeping in view the scope of power of judicial review while scrutinizing a notice issued under Section 148 of the Act as explained in **Raymond woolen Mills Ltd. (1) and (2) and Phool Chand Bajarang Lal and Srikrishna (Supra),** we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not as the sufficiency or correctness of the material cannot a thing to be considered at this stage. In the instant case, the notice under Section 148 of the Act has been issued by the assessing officer after conducting an investigation and going through the income tax return and other related documents of the petitioner and after forming reason to believe that the petitioner did not truly and fully disclose all the material facts, because of which income amounting to Rs. 1,07,24,386/- has escaped assessment. We are satisfied that there was prima facie material available on record before the assessing officer for issuing a notice for reassessment and the notice under Section 148. The order dated 23-03-2022 passed by the National Faceless Assessment Centre rejecting the petitioner's objections against issuance of the notice, does not suffer from any such illegality as to warrant interference by this Court in exercise of its Writ Jurisdiction,

37. The Writ Petition lacks merits and is, accordingly, **dismissed.**

38. No order as to costs.

(2022)04ILR A946
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.03.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Sales/Trade Tax Revision No. 109 of 2014

M/s Prarthana Infinite Lucknow ...Revisionist
Versus
Commissioner Commercial Taxes U.P. Lucknow ...Opposite Party

Counsel for the Revisionist:
Sunil Sharma

Counsel for the Opposite Party:
C.S.C.

A. Tax Law – Benefit of Classification - Indian Stamp Act,1899 - Sections 47-A - U.P. VAT Act, 2008 - Schedule-2 Part-B Entry no.22 - Customs Tariff Act, 1975 - Note 5 (E) to Chapter 84 - As per the law settled by the Hon'ble Supreme Court in the case of *M/s. Xerox India Limited* Vs. *Commissioner of Customs, Mumbai (infra),* **this Court finds that the Revisionist is an Authorized Dealer of a Printer manufacturer by the name of Sharp Computer Systems, and although their Printers are multifunctional in nature their components are mainly used for the purpose of printing and their main character is that of a Printer**, therefore, the Revision deserves to be allowed. (Para 22)

The Tribunal had not given the benefit of the judgment rendered in *M/s. Xerox India Limited* Vs. *Commissioner of Customs, Mumbai* (*infra*) and not treated Multifunctional Printer as a Computer peripheral only because the manufacturer in the case before the SC had given Certificates with regard to its Printers and various models thereof saying that parts of all such Multifunctional Devices were used to the extent of 75% to 85% for the purpose of printing. The Revisionist had not given any such factual basis for the Tribunal to extend the benefit of judgment rendered in *M/s. Xerox India Limited* Vs. *Commissioner of Customs, Mumbai* (*infra*) to it also. (Para 15)

B. Words and Phrases - "Peripherals" - Longman's Dictionary of Contemporary English - A piece of equipment such as a Visual Display Unit or a Central Processing Unit which is connected to a Computer help in the use of Computer.

Readers Digest Dictionary "peripheral" has been treated as an item of Hardware, such as Modem that is not specifically part of the CPU, but used for the purpose of a Computer.

The Tribunal has found that **a Multifunctional Printer does Printing, Scanning, E-Mailing, Faxing, Photocopy etc. and these functions are mostly performed by it independently of the Computer, therefore, it could not be said to be a Computer peripheral like the Visual Display Unit or Modem or such other things which are connected inseparably to a Computer.** (Para 17)

C. The Supreme Court in *M/s. Xerox India* (*infra*) considered the Customs Act and the General Rules for interpretation of the Schedule-II attached to the Act, more specifically, it dealt with the goods/machinery which had to be classified by reference to such component as gave them their essential character or on the basis of function and what was their major function. In Para 17 of *M/s. Xerox India (infra*) the SC referred to the Certificate of the manufacturer which clearly showed that the printing function emerges as the main function giving the Multifunctional Machine its essential character. It was used mainly for printing and was attached to the CPU and was able to accept Data in the form of Codes and Signals, which could then be used by its system for printing. (Para 20)

Since the predominant components all related to printing function, the SC was satisfied that the appellants were rightly claiming the benefit on the basis of nature of function that the machines performed and the basis of nature of components. The Court thereafter, gave the appellants the benefit of classification of such imported Multifunctional Machines serving as output device of a Computer as Computer Peripheral. (Para 21)

Revision allowed. (E-4)

Precedent followed:

1. M/s Xerox India Ltd. Vs Commissioner of Customs, Mumbai, (2010) 14 SCC 430 (Para 9)

Present revision challenges order dated 05.07.2014, passed by learned Commercial Tax Tribunal, Bench – III, Lucknow.

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

(1) Heard Shri Sunil Sharma, for the revisionist and Shri Sanjay Sarin, appearing on behalf of the State respondent.

(2) This Revision has been filed against the order dated 05.07.2014 passed by the learned Commercial Tax Tribunal, Bench-III, Lucknow.

(3) The facts in brief as stated by the learned counsel for the revisionist are that the revisionist is a Firm Trading in Photocopies, Printers, Cartridges, Toners and Spares and is registered in the office of the Dy. Commissioner, Commercial Tax, with TIN No.09352304188 under the U.P. Value Added Tax Act, 2008. The Firm has been depositing tax regularly every month. The revisionist having deposited admitted tax alongwith return disclosing sale of Printer under VAT Act as a Computer peripheral admitting 4% tax deposited under Entry 22 of the Schedule which reads as:- "22 -Computer System and Peripherals Electronic Diaries for the Assessment year 2008-09.

(4) The Assessing Authority by its order dated 29.02.2012 assessed the revisionists sale of Multifunctional Printers @ 12% created a dispute of Rs.7,23,387/-. The revisionist had admitted tax @ 4% but the Assessing Authority assessed the sale of Multifunctional Printer under Residuary Entry and therefore taxed it at rates meant for unclassified items
under Schedule @ 12.5%.

(5) Learned counsel for the revisionist has argued that a Printer is a specifically designed device only for printing and is admittedly a Computer peripheral. With the advancement of technology, most of such Printers also performed the functions of Scanning, E-Mailing, Faxing and Copying. However such Printers are bought mainly for the purpose of printing and are attached to Computers and they cannot perform their main function without the help of a Computer, therefore, they have to be treated as a Computer peripheral and taxed @ 4%. The Assessing Authority however, concentrated on other functions performed by Multifunctional Printer and treated it as an unclassified item.

(6) The order of the Assessing Authority was challenged by filing an Appeal No.589 of 2012. The said Appeal was dismissed by the Additional Commissioner on 03.07.2013.

(7) Feeling aggrieved the revisionist filed a Second Appeal before the learned Commercial Tax Tribunal, Bench-III, Lucknow, namely Second Appeal No.399

of 2013. During the pendency of the Appeal the Tribunal had stayed 80% of the disputed amount, the revisionist had deposited the remaining 20% before it.

(8) During the pendency of the Second Appeal, the Commissioner in the exercise of powers under Section 59 of the Act passed an order on 05.03.2014 on an application of M/s Neoterric Infomatic Private Limited holding that the primary work of a Multifunctional Printer is that of printing which cannot be performed without the Computer. In common parlance, the Multifunctional Printer is also known as Printer and it should be taxed @ 4% under Schedule-2 Part-B Entry no.22 of the U.P. VAT Act, 2008. Despite such order being passed by the Commissioner and the Revisionist and other Traders being now taxed @ 4% regarding the sale of Multifunctional Printer as Computer peripheral, for the Assessment year 2008-09 with Tribunal did not extend the benefit and rejected the Second Appeal by its order dated 05.07.2014.

(9) It has been argued that such judgment of the Tribunal has been passed contrary to the decision of the Supreme Court in the case of **M/s Xerox India Limited Vs. Commissioner of Customs, Mumbai reported in (2010) 14 SCC 430.**

(10) Learned counsel for the revisionist has pointed out the questions of law framed in this Revision and the order passed initially by this Court on 09.10.2014 where this Court has admitted the Revision on Question No.2 as framed in the Memo of the Revision. Since after dismissal of the Second Appeal the revisionist had already deposited 20% of the disputed tax liability, the Court did not find it appropriate to pass any order on such tax liability but directed that the Tribunal orders shall remain stayed.

The Question No.2 as framed by the Revisionist is as follows:-

".....Whether the Commercial Tax Tribunal was justified in not giving the benefit/parity of judgment pronounced by the Hon'ble Apex Court in the case of Xerox India Ltd. thereafter?"

(11) Learned counsel appearing for the State respondents has referred to counter affidavit filed by them wherein it has been stated that the original assessment order for the Assessment year 2008-09 was passed on 27.02.2012 and on Multifunctional Device tax was assessed @ 12.5% but the revisionist only admitted tax @ 5% treating the said multifunctional devices as a Computer peripheral. On 08.08.2008, in the case of M/s Neoterric Infomatic Private Limited, the Commissioner Commercial Tax had decided the tax-ability of Multifunctional Device @ 12.5% as an unclassified item, therefore, the First Appellate Authority on the basis of the order dated 08.08.2008 passed by the Commissioner in the case of Neoterric Infomatic Pvt. Ltd. rejected the First Appeal of the revisionist. Neoterric had challenged the order dated 08.08.2008 passed by the Commissioner in Commercial Tax Tribunal and the Tribunal by its order dated 06.06.2013 had remanded the matter to the Commissioner for reconsideration. After remand the Commissioner Commercial Tax, reclassified Multifunctional Device relying upon a decision of the Supreme Court in the case of **M/s Xerox India Limited Vs. Commissioner of Customs, Mumbai** (supra) under the Category of Computer peripheral under Schedule-II Part-B at

sl.no.22 holding taxability @ 4% + 1% Additional tax by an order dated 05.03.2014.

(12) Since the invoice produced by the Revisionist before the Tribunal by the revisionist showed Multifunctional Printer as Multifunctional Device, the Tribunal did not provide the benefit of the order dated 05.03.2014 of the Commissioner and confirmed the order passed by the Assessing Authority and the First Appellate Authority.

(13) It has also been stated in the said counter affidavit that in the case of the Revisionist for Assessment year 2010-11 the First Appellate Authority had cancelled the Assessment order and remanded the matter to the Assessing Authority by its order dated 01.12.2015. The Assessing Authority being satisfied that the case in hand was of a Multifunctional Device/Multifunctional Printer and came under the Category of Computer peripheral had accordingly taxed it @5% by the Assessment order dated 01.12.2015.

(14) Similarly, for the Assessment year 2011-12, by an assessment order dated 02.02.2015 tax has been levied @ 12.5% + 1% Additional Tax and on Appeal the matter was remanded. After remand the Assessing Authority had treated it as a Computer peripheral. Same is the case for Assessment Year 2012-13, wherein the Assessing Authority has treated the Printer in question as Multifunctional Device and taxed it @ 4% + 1% Additional Tax i.e. 5% by its Assessment order dated 02.03.2016.

(15) This Court has perused the impugned order it is apparent from a perusal of the order of the Tribunal that the Tribunal had not given the benefit of the judgment rendered in **M/s Xerox India Limited Vs. Commissioner of Customs, Mumbai** (supra) and not treated Multifunctional Printer as a Computer peripheral only because the manufacturer in the case before the Supreme Court had given Certificates with regard to its Printers and various models thereof saying that parts of all such Multifunctional Devices were used to the extent of 75% to 85% for the purpose of printing. The Revisionist had not given any such factual basis for the Tribunal to extend the benefit of judgment rendered in **M/s Xerox India Limited Vs. Commissioner of Customs, Mumbai** (supra) to it also.

(16) Learned counsel for the Revisionist has pointed out that in the supplementary affidavit filed by it, it has annexed a copy of the Certificate issued by the manufacturer on 28.02.2015 namely **Sharp Business India Limited** wherein it had acknowledged that their Multifunctional Devices are used as Printers, Scanners and Copiers and more than 75% of the parts are used in making a Computer printer. Rest of the other 25% parts are used in making it as a Computer Scanner and Copier.

(17) Such Certificates admittedly was not before the Tribunal. However this is not only the ground on which the Tribunal has rejected the Second Appeal. It has referred also to Dictionaries like Longman's Dictionary of Contemporary English and considered the definition of *"peripherals"* and observed that a piece of equipment such as a Visual Display Unit or a Central Processing Unit which is connected to a Computer help in the use of Computer. Similarly, in Readers Digest Dictionary *"peripheral"* has been treated as an item of Hardware, such as Modem that is not

specifically part of the CPU, but used for the purpose of a Computer. The Tribunal has found that a Multifunctional Printer does Printing, Scanning, E-Mailing, Faxing, Photocopy etc. which functions are mostly performed by it independently of the Computer, therefore, it could not be said to be a Computer peripheral like the Visual Display Unit or Modem or such other things which are connected inseparably to a Computer.

(18) Since this Revision has been admitted by this Court on the substantial question *"whether the judgment in **M/s Xerox India Limited Vs. Commissioner of Customs, Mumbai** (supra) should have been considered as settling the issue and whether a Tribunal was wrong in not giving its benefit to the revisionist?"* This Court has considered the judgment rendered in **M/s Xerox India Limited Vs. Commissioner of Customs, Mumbai** (supra). It related to Classification under Customs Tariff Act, 1975. The appellants were engaged in a Trading of high technology reproduction and duplicating machines, Printers and multifunctional machines capable of discharging a number of functions. The appellants imported certain machines namely Xerox Regal 5799, Xerox WorkCenter XD100 and Xerox WorkCenter XD155df respectively and sought classification of these imported machines as Computer peripherals. Such machines being used for as Printers, Faxing Machine, Copiers or Scanners, the Customs Authorities classified them as Automatic Inter-Processing Machine used independently of the Computer under the Residuary heading. The Customs Authorities were of the view that Digital Printers were an Automatic Data Processing Unit as such the same were being considered as the unit of Automatic Data Processing Machine. For a peripheral, it should be able to work only with a Computer. The moment it is able to perform independently of a Computer, its claim to be a unit of the computer ceased to hold good. Merely working in conjunction with a computer did not bestow upon it the status of a unit of the computer as a peripheral Machine. Since Digital printer was not classifiable under any specific heading, the same required to be classified under residual heading. It also observed that the Machine is capable of functioning as a stand-alone digital copier, even without a computer and therefore, in terms of Note 5 (E) to Chapter 84 of the Act, the imported machine could not be classified under Heading 84.71. The Appellate Authority while deciding the appeal filed by the appellant has concurred with the finding and conclusion reached by the Deputy Commissioner of Customs.

(19) The appellants were before the Supreme Court explaining the function performed by Printers which work alongwith side a computer. The printing is carried out by the Computers giving command in the form of Digital signals which is transmitted through wires, converted into a readable language, and then printed. The counsel for the Appellants had gone on to explain the function of a Scanner, which converts documents into digital signals for storage in the Computer. In this way , the Scanner and Printer serve as input and output devices for the Computer. Similarly, when it was functioning as a Copier it served as a combined Scanner/Printer. He further explained the purpose of a Digital Scanner, which copies a document and sends it to the Central Processing Unit of the Computer; independently. The Copier can also print on its own after scanning. Thus,

according to the learned counsel, a Copier served as a combined Scanner-cum-Printer. The learned counsel submitted that the multifunctional machines (which included Printer, Scanner and Copier) are not automatic data-processing machines (in short ADPM) they served as input and output devices of an ADPM (Computer) and thus they would fall under Sub-Heading 8471.60.

(20) In ***M/s Xerox India (supra***) learned counsel arguing on behalf of the Customs Authorities had pointed out that the machines in question were not Printers simplicitor attached to a Computer but are capable of performing a number of functions independently and no single function could be said to be predominant. The Supreme Court considered the Customs Act and the General Rules for interpretation of the Schedule-II attached to the Act, more specifically, it dealt with the goods/machinery which had to be classified by reference to such component as gave them their essential *character* or on the basis of function and what was their *major function.* In Paragraph-17 of ***M/s Xerox India (supra)*** the Supreme Court referred to the Certificate of the manufacturer which clearly showed that the printing function emerges as the main function giving the Multifunctional Machine its essential *character*. It was used mainly for printing and was attached to the Central Processing Unit and was able to accept Data in the form of Codes and Signals, which could then be used by its system for printing.

(21) Since the predominant components all related to printing function, the Supreme Court was satisfied that the appellants were rightly claiming the benefit on the basis of nature of function that the machines performed and the basis of nature of components. The Court thereafter, gave the appellants the benefit of classification of such imported Multifunctional Machines serving as output device of a Computer as Computer Peripheral.

(22) Keeping in mind the law settled by the Hon'ble Supreme Court in the case of **M/s Xerox India Limited Vs. Commissioner of Customs, Mumbai** (supra), this Court finds that the Revisionist is an Authorized Dealer of a Printer manufacturer by the name of Sharp Computer Systems, and although their Printers are multifunctional in nature their components are mainly used for the purpose of printing and their main character is that of a Printer, therefore, the Revision deserves to be allowed.

(23) The Tribunal committed factual and legal error in treating the multifunctional printers sold by the revisionist as falling in the Residuary category and not giving the benefit of judgment rendered by the Supreme Court in the case of **M/s Xerox India Limited Vs. Commissioner of Customs, Mumbai** (supra). The order of the Tribunal is hence, **set aside.**

(24) The Revision is **allowed.**

(25) The amount of tax is required to be determined afresh, therefore, a copy of this decision shall be sent to the Tribunal for afresh determination of the amount of tax payable by the revisionist.

(26) From the facts as mentioned in the affidavit filed in support of the stay application and the supplementary affidavit, it is evident that only for the Assessment year 2008-09, there was a disputed tax liability and in rest of the years

either Assessing Authority or Appellate Authority had accepted the contention of the Revisionist.

(27) The Tribunal shall pass necessary orders taking into account the observations made hereinabove within a period of three months from the date a certified copy of this order is produced before it.

(2022)04ILR A952
REVISIONAL JURIDICTION
CIVIL SIDE
DATED: LUCKNOW 31.03.2022

BEFORE

THE HON'BLE PIYUSH AGRAWAL, J.

Commercial Tax Revision No. 234 of 2016
with
Sales/Trade Tax Revision No. 272 of 2016
and
Sales/Trade Tax Revision No. 233 of 2016

The Commissioner, Commercial Tax, U.P. Lucknow ...Revisionist
Versus
S/s Gaurav Gupta, New Delhi ...Opposite Party

Counsel for the Revisionist:
S.C.

Counsel for the Opposite Party:
Sri Naveen Chandra Gupta

A. Tax Law - VAT Act, 2013 - Section 3(8), 17 - U.P. VAT Rules, 2016 - Rules 63(4), 38(7), 38(7)(a) & 38(9) _ U.P. VAT Act, 2008 - Section 2(h)(ix) - The Railway Container Contractor is deemed to be a dealer and is required to get itself registered within the State for transporting the goods. (Para 9)

S. 2(h)(ix), VAT Act provides that the person operating as a Railway Container Contractor shall be deemed to be a dealer and is obliged to provide complete details and address of the consignor and consignee name and address, etc. Further, as per the provision of S.17, VAT Act, the Railway Container Contractor is required to get itself registered under the Act, failing which shall not operate its business within the State. Rule 38(7), VAT Rules prescribes for maintenance of record. Rule 38(7)(a) further provides register in respect of all consignment and goods received by the Railway Container Contractor for transportation and storage is required to be maintained and before receiving the goods, require to obtain declaration in Form - XVIII and before delivery is required to obtain declaration in Form - XX from the owner of the goods. Further, Rule 38(9), VAT Rules provides to preserve all records maintained by the Railway Container Contractor for a period of 8 years after expiry of the assessment order, to which they belong. (Para 8)

B. The Tribunal, before passing the final order, should/must have called for the report from the Assessing Authority of the respective dealer on the books of account produced in support of the claim by the respondents. The Tribunal has failed to do so and just calling for the record of the Department and making certain observations cannot be sustained in the eyes of law. (Para 11)

C. The Tribunal has shifted the burden on the Revenue in the impugned order and has held that the Revenue has failed to bring on record any taxable goods being transported through SLR taken on lease by the respondents. This observation of the Tribunal is perverse and liable to be set aside. (Para 12)

The Tribunal should have kept in mind that the present proceedings are regular proceedings and not reassessment proceedings for which the burden is upon the Revenue for placing materials for escapement of assessment. Since it is a regular assessment for non-payment of tax or there is not liability of tax, it is incumbent upon the dealers to produce such material/such record or other evidence to support their claim. (Para 13)

D. In the event of failure on the part of the dealer to produce evidence, the assessment order cannot be set aside by merely referring the provision of the Act, which, otherwise, supports the claim of the Revenue. In other words, the language of the provision is very clear and straight. (Para 14, 16)

The person, who is doing/operating as a Railway Container Contractor has to follow and abide its activity as per the provision of the U.P. VAT Act, which was enforced in the relevant disputed years. Once the provisions of the VAT Act are applicable upon the respondents to claim any benefit or non-taxable, the respondents are required to produce all the documents, forms, books of account, etc. as prescribed under the Act. (Para 15)

Revisions allowed. Remanded back to Tribunal. (E-4)

Precedent followed:

1. Haryana & ors.Vs Sant Lal & Another, (1993) 4 SCC 380 (Para 4)

Present revisions challenge judgments and orders dated 04.03.2016, passed by the Commercial Tax Tribunal (Bench – I), Ghaziabad.

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Heard Shri A.C. Tripathi, learned Standing Counsel for the revisionist and Shri Naveen Chandra Gupta, learned counsel for the opposite party.

2. These revisions have been filed against the judgements & orders dated 04.03.2016 passed by the Commercial Tax Tribunal (Bench-I), Ghaziabad in Second Appeal Nos. 261, 259 & 260 of 2015 for the assessment year 2010-11, in which following common question of law has been framed:-

"Whether on the facts & in the circumstances of the case, Commercial Tax Tribunal was legally justified in holding that the opposite party is not a dealer and not liable for payment of tax under the provisions of the U.P. Value Added Tax Act?"

3. Learned Standing Counsel submits that it is admitted case between the parties that the opposite party has taken SLR on lease in the passenger train run by the Northern Railways for transporting/ carrying goods of other dealer(s)/person(s) from the station of origin to the station of destination, on which the persons, whose goods are transported, paid the money for such transport. In other words, the opposite party was treated as Railway Container Contractor. Once this fact is admitted between the parties, the opposite party was treated as Railway Container Contractor, then the provisions as provided under the Act and the Rules were required to be fulfilled, i.e., the Railway Container Contractors were required to get themselves registered and follow the procedure for maintaining books of account, relevant forms, as prescribed therein, were required to be filled up and maintained, but the opposite party had, at no stage during the assessment or at the appellate stage, produced any document to discharge its liability. Once the dealer has failed to discharge its liability as provided under the Act, the Tribunal was not justified in accepting the version of the dealer and allowing the appeal by deleting heavy tax imposed upon the opposite party. He prays for allowing the revision.

4. Per contra, learned counsel for the opposite party supports the orders passed by the Tribunal and submits that there is no iota of evidence to show that any taxable goods were found in possession of the dealer so that levy of tax can be justified. At this juncture, he further refers to section 3(8) of the VAT Act providing incident of tax to be levied on possession of taxable goods by the opposite party. He further submits that the primary burden has not been discharged by the Department. Therefore, levy of tax upon the opposite party cannot be justified. He further submits that as per rule 63(4) of the U.P. VAT Rules, records were summoned. On perusal of the records by the Tribunal, no material was found and therefore, the Tribunal has rightly allowed the appeal of the dealer and discharged the liability of tax. He further submits that the Tribunal has rightly interpreted the provisions of the Act and deleted the tax. In support of his submissions, he has placed reliance on the judgement of the Hon'ble Supreme Court in State of ***Haryana & Others Vs. Sant Lal & Another*** reported in (1993) 4 SCC 380 (paragraph no. 19) and prays for dismissal of the revision.

5. Heard learned counsel for the parties and perused the records.

6. Admittedly, all the respondents in these revisions have taken SLR's on lease in the Passenger Trains from Northern Railways for transporting/carrying the goods of the person(s) or dealer(s) from the station of origin to the station of destination and charged transportation charges. It is also admitted between the parties that the said activity of the respondents fall or can be classifiable as a Railway Container Contractor as described under section 2(h)(ix) of the U.P. VAT Act as "dealer", as person, who carries on in Uttar Pradesh, a business of distributing goods, directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration. Section 17 of the VAT Act provides for registration of dealers. Sub-section 6(a) thereof, provides that no Railway Container Contractor shall operate its business of taxable goods in the State without being registered with the registering authority in such manner as may be prescribed.

7. Admittedly, in the normal course of business, the respondents were transporting goods for and on behalf of the person, who sends its goods through SLR of the respondents, from the station of origin to the station of destination. Certain provisions of the UP VAT Act as well as UP VAT Rules, which are relevant for consideration of the issue involved in the present revisions, are quoted herein-below:-

"Section 2(h): *"dealer" means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes,*

(ix) a railway container contractor, an air cargo operator, a courier service provider, who fails to disclose the name and complete address of consigner or consignee or if discloses such name or address of consigner or consignee is found bogus, forged or not verifiable, or the owner or person in-charge of a vehicle who obtained authorization for transit of goods from the officer in-charge of entry check post but failed to deliver the same to the officer in -charge of the exit check post;

17. Registration of dealers:

(6) (a) No railway container contractor, air cargo operator, courier service provider, or owner or person in-charge of a godown, cold storage or warehouse other than transporter who stores commercial goods, shall operate its business of taxable goods in the State without being registered with the registering authority in such manner as may be prescribed. Any operator of such business shall apply within prescribed period for his registration to the registering authority in the prescribed manner;

Rule 38: *Registration of railway container contractor, an air cargo operator, a courier service operator, owner or person incharge of godown or cold storage or warehouse other than transporter:*

8(a): *Where a railway container contractor, an air cargo operator or a courier service provider, receives any goods from any person for carrying to any destination, he shall require the person to submit a declaration in Form XVII and like wise where a railway container contractor, an air cargo operator or a courier service provider receives any good for delivery he shall obtain declaration in Form XVIII from the person to whom goods are delivered;*

Rule 38(9): Every a railway container contractor, an air cargo operator or a courier service provider or an owner or person incharge of godown or cold storage or warehouse other than transporter or carrier shall preserve all records maintained by him for a period of 8 years after the expiry of the assessment year to which they belong."

8. Section 2(h)(ix) of the VAT Act provides the and at the person operating as a Railway Container Contractor shall be deemed to be a dealer and is obliged to provide complete details and address of the consignor and consignee name and address, etc. Further, as per the provision of section 17 of the VAT Act, the Railway Container Contractor is required to get itself registered under the Act, failing which shall not operate its business within the State. Rule 38(7) of the VAT Rules prescribes for maintenance of record. Rule 38(7)(a) of the Rules further provides register in respect of all consignment and goods received by the Railway Container Contractor for transportation and storage is required to be maintained and before receiving the goods, require to obtain declaration in Form - XVIII and before delivery is required to obtain declaration in Form - XX from the owner of the goods. Further, Rule 38(9) of the VAT Rules provides to preserve all records maintained by the Railway Container Contractor for a period of 8 years after expiry of the assessment order, to which they belong.

9. From the perusal of the aforesaid provisions, it is amply clear that the Railway Container Contractor is deemed to be a dealer and is required to get itself registered within the State for transporting the goods. Further, the provisions provide for disclosure of various details, failing which it should be deemed to be the dealer and is liable to be taxed for transportation of goods. Section 3(8)(1) of the Act is quoted below:-

"Section 3: Incidence and levy of tax:-

(3) 8(i) A railway container contractor, an air cargo operator, a courier service provider, who fails to disclose the name and complete address of consigner or consignee or if discloses such name or address of consigner or consignee is found bogus, forged or not verifiable; or the owner or person in-charge of a vehicle who

obtained authorization for transit of goods from the officer in-charge of entry check post but failed to deliver the same to the officer in-charge of the exit check post."

10. The aforesaid provision provides for incidence and levy of tax, who fails to disclose the name and complete address of consigner or consignee or if discloses such name or address of consigner or consignee is found bogus, forged or not verifiable.

11. It is nobody's case that the goods during the disputed period/year have not been transported through SLR taken on lease by the respondents. Once this fact is admitted between the parties, the first appellate authority has remanded the matter to the assessing authority empowering to provide an opportunity to the respondents to clarify their position on facts as the assessment order was passed ex parte. The Tribunal, against the remand order, has just allowed the appeal of the respondents by just referring to the provisions of the Act. Further, the Tribunal has observed that on record, there is no information of transport of goods by SLR and therefore, deleted the levy of tax. Once a fact is admitted by the respondents that SLR was taken on lease for transporting the goods, as per the provision was required to take registration and further all the details of the person(s) for whom the goods were transported from the station of origin to the station of destination were required to be maintained by the respondents. The Tribunal ought to have called for the records of the respondents and should & must have recorded a finding of fact after due verification of the books of account. The Tribunal, before passing the final order, should/must have called for the report from the Assessing Authority of the respective dealer on the books of account produced in support of the claim by the respondents. The Tribunal has failed to do so and just calling for the record of the Department and making certain observations cannot be sustained in the eyes of law.

12. It is not the case of the respondents that the SLR was neither taken on lease nor any transportation in the disputed year has been undertaken by them. The Tribunal has shifted the burden on the Revenue in the impugned order and has held that the Revenue has failed to bring on record any taxable goods being transported through SLR taken on lease by the respondents. This observation of the Tribunal is perverse and liable to be set aside.

13. The Tribunal should have kept in mind that the present proceedings are regular proceedings and not reassessment proceedings for which the burden is upon the Revenue for placing materials for escapement of assessment. Since it is a regular assessment for non-payment of tax or there is not liability of tax, it is incumbent upon the dealers to produce such material/such record or other evidence to support their claim.

14. In the event of failure on the part of the dealer to produce such evidence, the assessment order cannot be set aside by merely referring the provision of the Act, which, otherwise, supports the claim of the Revenue. In other words, the language of the provision is very clear and straight.

15. The person, who is doing/operating as a Railway Container Contractor has to follow and abide its activity as per the provision of the U.P. VAT Act, which was enforced in the relevant disputed years. Once the

provisions of the VAT Act are applicable upon the respondents to claim any benefit or non-taxable, the respondents are required to produce all the documents, forms, books of account, etc. as prescribed under the Act.

16. In the event of failure by the respondents, the levy of tax cannot be said to be unjustified, but the Tribunal, in the case in hand, has just referred to the provisions and passed the impugned order deleting levy of tax upon the respondents without verifying any books of account or material.

17. In view of the aforesaid facts & circumstances of the case, the impugned orders passed by the Tribunal are set aside. The matter is remanded back to the Tribunal to reconsider the matter afresh in the light of the observations made above and decide the same in accordance with law.

18. The revisions are allowed. The question of law is answered accordingly.

19. It is expected that since the matter is very old, the Tribunal may take all possible effort to decide the same within a period of three months from the date of receipt of a copy of this order.

20. The revisionist undertakes to serve the copy of this order within a a month from today. In the event of failure on the part of the revisionist, the benefit of this order shall not be accorded to the revisionist.

(2022)04ILR A957
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.04.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-Tax No. 48 of 2022

M/S Ambuj Food Pvt. Ltd. ...Petitioner
Versus
Principal Comm. Of Income Tax & Ors. ...Respondents

Counsel for the Petitioner:
Pradeep Agrawal

Counsel for the Respondents:
Manish Misra

A. Tax Law – Reassessment - Income Tax Act, 1961 - Sections 148, 143(1), 143(2) & 142(1) - **At the stage of the notice of reopening of the assessment, the Court has only to see whether there is prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage.** (Para 14)

The detailed discussion made by in the assessment order of the petitioner for the A.Y. 2012-13, it was established that the companies listed (at sl. Nos. 3 to 5 in the chart given) are shell companies used solely for providing accommodation entries and during the A.Y. 2013-14, the petitioner had routed its undisclosed funds amounting to Rs. 95,00,000/- through entry providers and absorbed it in its books of accounts. It is amply evident that the transactions shown by the petitioner (as given in the chart) are not genuine transactions and accommodation entries of pre-arranged share application money and share premium aggregating to Rs. 95,00,000/- was obtained by the petitioner with the help of a syndicate of operators by way of loopholes of the system in A.Y. 2013-14. In this way, the unaccounted money of the petitioner amounting to Rs. 95,00,000/- was routed to its books of accounts. (Para 20)

It would be immaterial whether the Income Tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent information, the Income Tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment. (Para 21)

B. The obligation on the assessee to disclose the material facts -- or what are called, primary facts -- is not a mere disclosure but a disclosure which is full and true. A false disclosure is not a true disclosure. The disclosure must not only be true but must be full -- "fully and truly". (Para 22)

True it is that Income Tax Officer could have investigated the truth of the said assertion--which he actually did in the subsequent assessment year--but that does not relieve the assessee of his obligation, placed upon him by the statute, to disclose fully and truly all material facts. (Para 22)

At the stage of the validity of the notice u/Ss. 148/147, the enquiry is only to see whether there are reasonable grounds for the Income Tax Officer to believe and not whether the omission/failure and the escapement of income is established. It is necessary to keep this distinction in mind. (Para 22)

The facts regarding the petitioner's dealings with shell companies for routing its own unaccounted money into its books of accounts had not been truly and fully disclosed by the petitioner during the original assessment and scrutiny assessment, though the information was embedded in the records produced before the A.O. and could be found out on a detailed scrutiny and investigation. On the basis of information received subsequently, the A.O. has formulated a reason to believe that the petitioner's income amounting to Rs. 95,00,000/- has escaped assessment and this reason cannot be said to have been formulated on the basis of information already available before the A.O. (Para 23)

C. Words and Phrases - "change of opinion" - The words "change of opinion" imply formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection. (Para 25)

Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable.

Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings. (Para 25)

In the present case, during the original assessment the A.O. had not formed any opinion w.r.t. the facts regarding routing of funds in the garb of share premium, which surfaced from the information received from the ADIT (InVs), Unit-6, Kolkata, the ACIT, Circle-3(2), New Delhi and the ITO (InVs), Unit-4, Kolkata. It was after receipt of this information, that the A.O. examined the records and found that the petitioner had received funds to the tune of Rs. 95,00,000/- by way of routing funds materialized by M/s. Radha Fincom Pvt. Ltd. & others, which were found to be merely paper concerns having no existent and real business. In this way, the unaccounted money of the petitioner amounting to Rs. 95,00,000/- was routed to its books of accounts. (Para 24, 26)

D. The bar of initiating re-assessment proceedings after a lapse of four years since the original assessment contained in the First Proviso appended to S.147 of the Act, would not apply to the present case. The facts regarding the petitioner's dealings with shell companies for routing its own unaccounted money into its books of accounts had not been truly and fully disclosed by the petitioner during the original assessment and scrutiny assessment. Therefore, the present case falls within the exception carved out in the First proviso, ***"unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year*** and the bar of initiating re-assessment proceedings after a lapse of four years since the original assessment contained in the First Proviso appended to Section 147 of the Act, would not apply to the present case.

The fact that information was embedded in the records produced before the A.O. and could be found on a detailed scrutiny and investigation, would not make it a true and full disclosure and as per the Explanation 1 appended to S.147 of the Act. (Para 28, 29)

In the instant case, the notice u/s 148 of the Act has been issued by the assessing officer after receipt of information and conducting an investigation and after forming a reason to believe that the petitioner did not truly and fully disclose all the material facts because of which income amounting to Rs. 95,00,000/- has escaped assessment. There is prima facie material available on record before the assessing officer for issuing a notice for reassessment. (Para 30)

Writ petition dismissed. (E-4)

<u>Precedent followed</u>:

1. Raymond Woolen Mills Ltd. Vs I.T.O., (1999) 236 ITR 36 (SC) (Para 14)

2. Raymond Woollen Mills Ltd. Vs ITO, (2008) 14 SCC 218 (Para 15)

3. Phool Chand Bajrang Lal Vs ITO, (1993) 4 SCC 77 (Para 21)

4. Srikrishna (P) Ltd. Vs ITO, (1996) 9 SCC 534 (Para 24)

5. CIT Vs Techspan India (P) Ltd., (2018) 6 SCC 685 (Para 25)

Present petition challenges the validity of notice dated 31.03.2021, issued by the DCIT Circle Faizabad and order dated 03.03.2022, passed by the National Faceless Assessment Centre, rejecting the objections filed by the petitioner.

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Pradeep Agarwal assisted by Sri. Amar Mani Tiwari, Advocate, the learned Counsel for the petitioner and Shri Manish Misra, learned Counsel for the respondents.

2. By means of this Writ Petition filed under Article 226 of the Constitution of India, the petitioner has challenged the validity of a notice dated 31.03.2021 issued by the DCIT Circle Faizabad under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') proposing to assess/reassess the petitioner's income/loss for the assessment year 2013-14 and directing the petitioner to submit a return for the said assessment year. The petitioner has also challenged the order dated 03-03-2022 passed by the National Faceless Assessment Centre, rejecting the objections filed by the petitioner in response to the aforesaid notice.

3. The petitioner's case is that, it had filed its return for the Assessment Year

2013-14 on 05-08-2013 declaring a total income of Rs.3,65,440/-, which was processed on 19-05-2014 under Section 143 (1) of the Act. The case was selected for scrutiny and notices under Section 143 (2) and Section 142 (1) were issued alongwith a questionnaire asking for certain details. The questionnaire inter alia demanded production of all the share capital details of the petitioner's share-holders alongwith PAN and mode of payment for obtaining shares in his name or in the name of family members, and also the details of share premium receipts. The petitioner submitted a reply giving statement of income and complete address of sundry creditors alongwith the details of all investor companies to whom shares were allotted. The petitioner stated that shares were allotted at a premium to some companies. There is no bar in the Companies Act against issuance of shares at a high premium, and there was no such bar in the Income Tax Act.

4. The petitioner submitted that if the shares were issued at fair market value, there was no question of any addition and there was no contravention. The fair market value of the shares could be calculated as per formula given in Rule 110 A of the Act, as per which, the fair market value of the company's share works out to be Rs.206.50. The shares were issued at the fair market value and, therefore, there was no contravention of law.

5. It has also been submitted by the petitioner that the matter of increase in share capital was examined during assessment proceedings under Section 143 (3) of the Act and by means of an order dated 10-11-2014, the petitioner was assessed for a total income of Rs.3,75,440/-. Nothing adverse came out from the information submitted in response to the questionnaire and an addition of Rs.10,000/- only was made to the petitioner's income on account of internally vouched expenses debited in Profit & Loss account.

6. On 31-03-2021, the A.O. issued a notice under Section 148 of the Act for the Assessment Year 2013-14, stating that he had reason to believe that the petitioner's income chargeable to tax has escaped assessment within the meaning of Section 147 of the Act.

7. The reasons for re-opening of assessment states that on the basis of information received from the ADIT (Inv.), Unit - 6, Kolkata, the ACIT, Circle - 3 (2), New Delhi and the ITO (Inv.), Unit - 4, Kolkata, regarding routing of funds in the garb of share premium, the A.O. examined the returns of other assesses and found that the petitioner had received funds to the tune of Rs.95,00,000/- (Rs.4,75,000/- towards share capital and Rs.90,25,000/- towards share premium thereon) by way of routing funds materialized by M/s Radha Fincom Pvt. Ltd. & others in A.Y. 2013-14 As per the departmental database of bogus shell companies, accommodation entry providers and operators, the company was merely a paper concern having no existent and real business. Finally the cases of these assessees for A.Y.2012-13 were re-opened under Section 147 of the Act and after a detailed and in-depth analysis of the information in possession of the office, it was established that the petitioner had routed its own money in the garb of shares application money and share premium through a number of shell companies operating from Kolkata.

8. In the course of analysis, the financial data of succeeding years was also

examined, which revealed that all these shares were transferred in the names of the Directors and Institutions related to the Directors of the petitioner company in F.Y. 2015-16, as per details tabulated below: -

	Date of Allotment	Company name	Shares issued	Transferred on	Transferred to
1	30-03-2013	Truthful Dervcon Pvt. Ltd.	12,500	18-08-2014	Rahul Dalmia Beneficiary Trust
2	30-03-2013	Welkin Investments Pvt. Ltd.	12,500	18-08-2014	Rahul Dalmia Beneficiary Trust
3	30-03-2013	Punam Chand Modi Paints Pvt. Ltd.	7,500	18-08-2014	Rahul Dalmia Beneficiary Trust
4	30-03-2013	Gyan Darshan Comodeal Pvt. Ltd.	2,500	01-12-2014	Rahul Dalmia Beneficiary Trust
5	30-03-2013	Radha Fincom Ltd,	12,500	01-12-2014	Rahul Dalmia Beneficiary Trust
		Total	47,500		

9. From the detailed discussion made in the assessment order of the petitioner for the A.Y. 2012-13, it was established that the companies listed at sl. nos. 3 to 5 are shell companies used solely for providing accommodation entries and during the A.Y.2013-14, the petitioner had routed its undisclosed funds amounting to Rs.95,00,000/- through entry providers and absorbed it in its books of accounts. It is amply evident that the transactions shown by the petitioner as given in the above chart are not genuine transactions and accommodation entries of pre-arranged share application money and share premium aggregating to Rs.95,00,000/- was obtained by the petitioner with the help of a syndicate of operators by way of loopholes of the system in A.Y. 2013-14. In this way, the unaccounted money of the petitioner amounting to Rs.95,00,000/- was routed to its books of accounts.

10. On 01-09-2021, the petitioner submitted its objections against the notice under Section 148 of the Act mainly on the

grounds that the assessment was completed under Section 143 (3) and more than four years have passed from the end of the relevant assessment. Therefore, as per the Proviso appended to Section 147 of the Act, no action under Section 147 of the Act could be initiated unless any income chargeable to tax has escaped assessment because of the fault of the assesse to disclose truly and fully all material facts necessary for the assessment. The issue of share capital had already been examined by the A.O. in depth and no adverse inference could be drawn. Therefore, the notice was barred by the first Proviso to Section 147 of the Act. The petitioner further stated that its case was completed under Section 143 (3) and the replies and supporting documents of the petitioner were already submitted during scrutiny. The assessment cannot be re-opened on the basis of re-examination of the documents already on record, as it would amount to a change of opinion.

11. The petitioner also submitted that the case of the petitioner as well as that of M/s Arohul Foods Pvt. Ltd., which is a sister concern of the petitioner, was re-opened under Section 148 of the Act for A.Y. 2012-13 on similar issue, where re-opening of the case in the matter of M/s Arohul Foods Pvt. Ltd. was quashed by the ITAT, Lucknow Bench vide order dated 11-08-2021.

12. On 03-03-2022, the National Faceless Assessment Centre passed an order rejecting the petitioner's objections stating that in the assessment order, the A.O. has not mentioned anything about the verification of the issue of introduction of new share capital and share premium. Subsequently, based on the information gathered during the course of assessment for A.Y. 2012-13, on examination of the petitioner's balance sheet for A.Y. 2013-14, it was found that the petitioner had received funds to the tune of Rs.95,00,000/- as given in the chart below, by way of routing of funds materialized by M/s Radha Fincom Pvt. Ltd. and others: -

	Name of share holder	Address	Shares issued	Amount received
1	Truthful Dervcon Pvt. Ltd.	7, Ganesh Chandra Avenue	12,500	25,00,000/-
2	Welkin Investments Pvt. Ltd.	P-38, Princep Street, 1st Floor, Room No. 1, Kolkata	12,500	25,00,000/-
3	Punam Chand Modi Paints Pvt. Ltd.	71, Canning Street, Kolkata - 700001	7,500	15,00,000/-
4	Gyan Darshan Comodeal Pvt. Ltd.	133, Canning Street, Kolkata, 700001	2,500	5,00,000/-
5	Radha Fincom Ltd,	133, Canning Street, Kolkata, 700001	12,500	25,00,000/-
		Total	47,500	95,00,000/-

13. It was also stated in the order rejecting objections that during A.Y. 2013-

14 the petitioner had received Rs.25,00,000/- from M/s Radha Fincom Pvt. Ltd. as share capital and share premium. It was reported from the end of the ADIT (Inv.) Unit-6, Kolata that M/s Radha Fincom has generated funds mainly from Ankush Sales Pvt. Ltd., the core company, which was the main distributor of funds after receiving it through channel of companies, which at terminal deposited the amount in their accounts in cash. It was revealed in examination of documents submitted during assessment proceedings that M/s Radha Fincom had also received funds from M/s Ankush Sales Pvt. Ltd. Thus, there was tangible material in possession of the A.O. with regard to transactions entered into by the petitioner with bogus shell companies providing accommodation entries in guise of share capital and share premium. For the aforesaid reasons, the petitioner's objections against the notice under Section 148 of the Act have been rejected by the National Faceless Assessment Centre.

14. Before proceeding to examine the rival contentions advanced on behalf the contesting parties, it would be appropriate to have a look at some pronouncements of the Hon'ble Supreme Court explaining the scope of interference while examining the validity of a notice issued under Section 148 of the Act in a Writ Petition under Article 226 of the Constitution of India. In **Raymond Woolen Mills Ltd. Versus I.T.O**., (1999) 236 ITR 36 (SC), the Hon'ble Supreme Court has held that at the stage of the notice of reopening of the assessment, the Court has only to see whether there is prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage.

15. Again, in **Raymond Woollen Mills Ltd. v. ITO,** (2008) 14 SCC 218, the Hon'ble Supreme Court reiterated that while examining the validity of a notice issued under Section 148 of the Income Tax Act, "we do not have to give a final decision as to whether there is a suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage."

16. In light of the aforesaid pronouncements of the Hon'ble Supreme Court we proceed to examine the rival submissions advanced on behalf of the parties so as to ascertain as to whether there was prima facie some material on the basis of which the Department could reopen the case, without going into the sufficiency or correctness of the material.

17. Mr. Pradeep Agrawal, the learned Counsel representing the petitioner, has submitted that the petitioner had fully and truly disclosed the entire material during the assessment proceedings and there is no fresh material for initiation of the proceedings. Drawing attention of the Court to the averments made in paragraph 5 of the order disposing off the petitioner's objection, wherein it is stated that the A.O. has not mentioned anything about the verification on the issue of introduction of new share capital and share premium, he has submitted that the A.O. committed an error, for which the petitioner is being penalized by making the re-assessment. The initiation of the proceedings under Sections 147 / 148 of the Act is based on a review of the existing material, which is not permissible in law. The proceedings

initiated after a lapse of more than four years are barred by the First Proviso appended to Section 147 of the Act. The provisions of Sections 147 / 148 of the Act cannot be invoked for making a roving or fishing inquiry on a vague or a remote information pertaining to the earlier year in absence of any specific averment that the income has escaped assessment.

18. Per contra, Sri. Manish Mishra, the learned Counsel for the Income Tax department, has submitted that the petitioner had not made true and full disclosure of all material facts and a mere production of the account books and other material before the A.O., from which the material facts could be discovered by the A.O., would not necessarily amount to full and true disclosure within the meaning of Explanation 1 appended to Section 147 of the Act. The Directorate of Income-tax (System) flagged an information on the insight portal of the A.O. that the petitioner had routed its own money in the garb of share application money and share premium through a number of shell companies operating from Kolkata. From an examination of the petitioner's balance sheet for the A.Y. 2013-14, it was found that the company had received funds to the tune of Rs.95,00,000/- by way of routing of funds materialized by M/s Radha Fincom Pvt. Ltd., which was one among the shell companies through which the share capital and share premium had been collected by the petitioner and which transaction was proved as bogus during the previous A.Y. Although the issue of share capital was examined by the A.O. during scrutiny, but some facts emerged subsequently, upon the information received from the I & CI wing after completion of the assessment proceedings under Section 143 (3) of the Act. The A.O. has issued the process of re-assessment under Section 147 / 148 of the Act as on the basis of information received subsequent to the original assessment, he had reason to believe that the amount of Rs.95,00,000/- received by the petitioner, which was chargeable to tax, had escaped assessment.

19. The reasons recorded by the A.O. for initiating the process of re-assessment state that on the basis of information received from the ADIT (Inv.), Unit - 6, Kolkata, the ACIT, Circle - 3 (2), New Delhi and the ITO (Inv.), Unit - 4, Kolkata, regarding routing of funds in the garb of share premium, the A.O. examined the returns of other assessees and found that the petitioner had received funds to the tune of Rs.95,00,000/- by way of routing of funds materialized by M/s Radha Fincom Pvt. Ltd. & others in A.Y. 2013-14 As per the departmental database of bogus shell companies, accommodation entry providers and operators, the company was merely a paper concern having no existent and real business. Finally the case of these assessees for A.Y.2012-13 were re-opened under Section 147 of the Act and after a detailed and in-depth analysis of the information in possession of the office, it was established that the petitioner had routed its own money in the garb of shares application money and share premium through a number of shell companies operating from Kolkata.

20. The reasons supplied further state that from the detailed discussion made by in the assessment order of the petitioner for the A.Y. 2012-13, it was established that the companies listed at sl. nos. 3 to 5 in the chart given in para 8 above, are shell companies used solely for providing accommodation entries and during the A.Y.2013-14, the petitioner had routed its

undisclosed funds amounting to Rs.95,00,000/- through entry providers and absorbed it in its books of accounts. It is amply evident that the transactions shown by the petitioner as given in the chart given in para 8 are not genuine transactions and accommodation entries of pre-arranged share application money and share premium aggregating to Rs.95,00,000/- was obtained by the petitioner with the help of a syndicate of operators by way of loopholes of the system in A.Y. 2013-14. In this way, the unaccounted money of the petitioner amounting to Rs.95,00,000/- was routed to its books of accounts.

21. In **Phool Chand Bajrang Lal v. ITO**, (1993) 4 SCC 77, the Hon'ble Supreme Court held that: -

"*25. From a combined review of the judgments of this Court, it follows that an Income Tax Officer acquires jurisdiction to reopen assessment under Section 147(a) read with Section 148 of the Income Tax Act, 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the Income Tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the Income Tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent information, the Income Tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment."*

(Emphasis supplied)

22. In **Srikrishna (P) Ltd. v. ITO**, (1996) 9 SCC 534, the Hon'ble Supreme Court held that: -

"Now, what needs to be emphasised is that the obligation on the assessee to disclose the material facts -- or what are called, primary facts -- is not a mere disclosure but a disclosure which is full and true. A false disclosure is not a true

disclosure. The disclosure must not only be true but must be full -- "fully and truly". A false assertion, or statement, of material fact, therefore, attracts the jurisdiction of the Income Tax Officer under Sections 34/147. Take this very case: the Income Tax Officer says that on the basis of investigations and enquiries made during the assessment proceedings relating to the subsequent assessment year, he has come into possession of material, on the basis of which, he has reasons to believe that the assessee had put forward certain bogus and false unsecured hundi loans said to have been taken by him from non-existent persons or his dummies, as the case may be, and that on that account income chargeable to tax has escaped assessment. According to him, this was a false assertion to the knowledge of the assessee. The Income Tax Officer says that during the assessment relating to subsequent assessment year, similar loans (from some of these very persons) were found to be bogus. On that basis, he seeks to reopen the assessment. It is necessary to remember that we are at the stage of reopening only. The question is whether, in the above circumstances, the assessee can say, with any justification, that he had fully and truly disclosed the material facts necessary for his assessment for that year. Having created and recorded bogus entries of loans, with what face can the assessee say that he had truly and fully disclosed all material facts necessary for his assessment for that year? True it is that Income Tax Officer could have investigated the truth of the said assertion -- which he actually did in the subsequent assessment year -- but that does not relieve the assessee of his obligation, placed upon him by the statute, to disclose fully and truly all material facts. Indubitably, whether a loan, alleged to have been taken by the assessee, is true or false, is a material fact -- and not an inference, factual or legal, to be drawn from given facts. In this case, it is shown to us that ten persons (who are alleged to have advanced loans to the assessee in a total sum of Rs 3,80,000 out of the total hundi loans of Rs 8,53,298) were established to be bogus persons or mere name-lenders in the assessment proceedings relating to the subsequent assessment year. Does it not furnish a reasonable ground for the Income Tax Officer to believe that on account of the failure -- indeed not a mere failure but a positive design to mislead -- of the assessee to disclose all material facts, fully and truly, necessary for his assessment for that year, income has escaped assessment? We are of the firm opinion that it does. It is necessary to reiterate that we are now at the stage of the validity of the notice under Sections 148/147. The enquiry at this stage is only to see whether there are reasonable grounds for the Income Tax Officer to believe and not whether the omission/failure and the escapement of income is established. It is necessary to keep this distinction in mind.

10. *A recent decision of this Court in Phool Chand Bajrang Lal v. ITO, we are gratified to note, adopts an identical view of law and we are in respectful agreement with it. The decision rightly emphasises the obligation of the assessee to disclose all material facts necessary for making his assessment fully and truly. A false disclosure, it is held, does not satisfy the said requirement. We are also in respectful agreement with the following holding in the said decision*"

(Emphasis supplied)

23. From the reasons for initiating the process of re-assessment, we find that the aforesaid facts regarding the petitioner's

dealings with shell companies for routing its own unaccounted money into its books of accounts had not been truly and fully disclosed by the petitioner during the original assessment and scrutiny assessment, though the information was embedded in the records produced before the A.O. and could be found out on a detailed scrutiny and investigation. On the basis of information received subsequently, the A.O. has formulated a reason to believe that the petitioner's income amounting to Rs.95,00,000/- has escaped assessment and this reason cannot be said to have been formulated on the basis of information already available before the A.O. Therefore, the submission to this effect made by the learned Counsel for the petitioner cannot be accepted.

24. Now we consider the next submission made on behalf of the petitioner, that the initiation of the proceedings under Sections 147 / 148 of the Act is based on a review of the existing material, which is not permissible in law. From the discussion made above, it is clear that the fact that the petitioner had routed its undisclosed funds amounting to Rs.95,00,000/- through entry providers and absorbed it in its books of accounts by way of accommodation entries of pre-arranged share application money and share premium with the help of a syndicate of operators and thus an unaccounted money of the petitioner amounting to Rs.95,00,000/- was routed to its books of accounts, had not been examined by the AO during the original assessment for want of a full and true disclosure of facts by the petitioner. Therefore, the A.O. did not examine the aforesaid issues and he did not form an opinion regarding the same during the original assessment proceedings.

25. The meaning of the expression "change of opinion" has been explained by the Hon'ble Supreme Court in **CIT v. Techspan India (P) Ltd.,** (2018) 6 SCC 685, in the following words: -

"*16. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The words "change of opinion" imply formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.*

17. It is well settled and held by this Court in a catena of judgments and it would be sufficient to refer to CIT v. Kelvinator of India Ltd. wherein this Court has held as under: (SCC p. 725, para 5-7)

"5. ... where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe".... Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.

6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

18. Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings."

(Emphasis supplied)

26. In the present case, during the original assessment the A.O. had not formed any opinion in respect of the facts regarding routing of funds in the garb of share premium, which surfaced from the information received from the ADIT (Inv.), Unit - 6, Kolkata, the ACIT, Circle - 3 (2), New Delhi and the ITO (Inv.), Unit - 4, Kolkata. It was after receipt of this information, that the A.O. examined the records and found that the petitioner had received funds to the tune of Rs.95,00,000/- by way of routing funds materialized by M/s Radha Fincom Pvt. Ltd. & others, which were found to be merely paper concerns having no existent and real business. In this way, the unaccounted money of the petitioner amounting to Rs.95,00,000/- was routed to its books of accounts.

27. Regarding the submission of the learned Counsel for the petitioner, that assessment of the petitioner as well as that of M/s Arohul Foods Pvt. Ltd., which is a sister concern of the petitioner, was re-opened under Section 148 of the Act for A.Y. 2012-13 on similar issue, where re-opening of the case in the matter of M/s Arohul Foods Pvt. Ltd. was quashed by the ITAT, Lucknow Bench vide order dated 11-08-2021, it has been stated in the Counter affidavit that the department has not accepted the order of the ITAT and has challenged the order by filing an appeal under Section 260 A of the Act. Even otherwise, an order passed by the ITAT would not be relevant when the validity of the re-assessment is being examined by this Court in a Writ Petition.

28. Regarding the petitioner's submission that the proceedings initiated after a lapse of more than four years are barred by the First Proviso appended to Section 147 of the Act, we find that Section 147 of the Act, as it stood at the relevant time, was as follows: -

*"**147. Income escaping assessment.**-- If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped*

assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year):

***Provided** that where an assessment under sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:*

.....

Explanation 1.--Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."

(Emphasis supplied)

29. As is evident from the discussion made in the preceding paragraphs of this judgment, the facts regarding the petitioner's dealings with shell companies for routing its own unaccounted money into its books of accounts had not been truly and fully disclosed by the petitioner during the original assessment and scrutiny assessment. Therefore, the present case falls within the exception carved out in the First proviso, "unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assesse to disclose fully and truly all material facts necessary for his assessment, for that assessment year and the bar of initiating re-assessment proceedings after a lapse of four years since the original assessment contained in the First Proviso appended to Section 147 of the Act, would not apply to the present case. The information was embedded in the records produced before the A.O. and could be found on a detailed scrutiny and investigation, it would not make it a true and full disclosure and as per the Explanation 1 appended to Section 147 of the Act. Therefore, the submission to this effect made by the learned Counsel for the petitioner cannot be accepted.

30. Keeping into view the scope of power of judicial review while scrutinizing a notice issued under Section 148 of the Act as explained in **Raymond woolen Mills Ltd. (1) and (2) and Phool Chand Bajarang Lal and Srikrishna (Supra),** we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not and the sufficiency or correctness of the material need not be considered at this stage. In the instant case, the notice under Section 148 of the Act has been issued by the assessing officer after receipt of information and conducting an investigation and after forming a reason to believe that the petitioner did not truly and fully disclose all the material facts because of which income amounting to Rs. 95,00,000/- has escaped assessment. We are satisfied that there is prima facie material available on record before the assessing officer for issuing a notice for reassessment. Thus, the notice under Section 148 as well as the order

dated 03-03-2022 passed by the National Faceless Assessment Centre rejecting the petitioner's objections against issuance of the notice, do not suffer from any such illegality as to warrant interference by this Court in exercise of its Writ Jurisdiction.

31. The Writ Petition lacks merits and is, accordingly, **dismissed**. However, there will be no order as to costs.

(2022)04ILR A970
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.04.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 212 of 2022
Connected with Writ Tax Nos. 950 of 2021, 297 of 2022, 298 of 2022, 299 of 2022, 307 of 2022, 310 of 2022, 287 of 2022

M/s M.M. Traders ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Aditya Pandey

Counsel for the Respondents:
C.S.C., Sri Amit Mahajan, Sri B.P. Singh Kachawaha, C.S.C.

A. Tax Law – Input Tax Credit - C.G.S.T. /U.P. G.S.T. Rules, 2017 - Rule 86 A - C.G. & S.T. Rules, 2017 - Rule 86 A(2) - C.G. & S.T. /U.P. G. & S.T. Rules, 2017 - Rule 86 A(2) - In view of Rule 86A(2) of the C.G.S.T./U.P.G.S.T. Rules, 2017, and paragraph 3.4 of the guidelines of the Commercial Tax (*infra)* the Hon'ble Court held that the petitioners should first approach the authorised Officer raising objections against the blocking of the input tax credit and the said authority would be under an obligation to decide the objection within a time bound period. (Para 4, 5)

Writ petitions disposed off. (E-4)

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Jayant Banerji, J.)

1. Heard Sri Praveen Kumar, Sri Aditya Pandey, Sri Pranjal Shukla, learned counsels for the petitioners; Sri B.P. Singh Kachhawah, learned standing counsel & Sri Nimai Das, learned Additional Chief Standing Counsel for the respondents.

2. All the aforequoted writ petitions have been filed aggrieved with blocking of input tax credit by the concerned authority under Rule 86 A of the C.G.S.T. /U.P. G.S.T. Rules, 2017. Rule 86 A(2) of the C.G. & S.T. Rules, 2017, which provides as under :-

"86 A(2) The Commissioner, or the officer authorised by him under sub-rule (1) may, upon being satisfied that conditions for disallowing debit of electronic credit ledger as above, no longer exist, allow such debit."

3. The guidelines for disallowing debit of electronic credit ledger under Rule 86 A(2) of the C.G. & S.T. /U.P. G. & S.T. Rules, 2017, has been issued by the Commissioner of Commercial Tax U.P. as under :-

"Office of the Commissioner,
Commercial Tax, Uttar Pradesh
(GST Section)
Letter No.GST/2021-22/ 30 / Commercial Tax
Lucknow: Dated: 23 November, 2021

To

All Zonal Additional Commissioner, Grade-1,

Additional Commissioner, Grade-2 (S.I.B.)

Joint Commissioner, (Executive/ Corporate Circle/ S.I.B.)

Commercial Tax, Uttar Pradesh

Subject: Guidelines for disallowing debit of electronic credit ledger under Rule 86A of the UPGST Rules, 2017 -Reg.

Rule 86A of the Uttar Pradesh Goods and Services Tax Rules, 2017 (hereinafter referred to as "the Rules") provides that in certain circumstances, Commissioner or an officer authorised by him, on the basis of reasonable belief that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible, may not allow debit of an amount equivalent to such credit in electronic credit ledger.

2. Doubts have been raised by the field formations on various issues pertaining to disallowing debit of input tax credit from electronic credit ledger, under rule 86A of the Rules. Further, Hon'ble High Courts in some cases have emphasized the need for laying down guidelines for the purpose of invoking rule 86A. In view of the above, the following guidelines are hereby issued with respect to exercise of power under rule 86A of the Rules:

3.1 Grounds for disallowing debit of an amount from electronic credit ledger:

3.1.1 Rule 86A of the Rules is reproduced hereunder for reference:

"86A. Conditions of use of amount available in electronic credit ledger.-

(1) The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible in as much as-

a) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36-

i. issued by a registered person who has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

ii. without receipt of goods or services or both; or

b) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of which has not been paid to the Government; or

c) the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

d) the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36, may, for reason to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount.

(2) The Commissioner, or the officer authorised by him under sub-rule (l) may, upon being satisfied that conditions for disallowing debit of electronic credit ledger as above, no longer exist, allow such debit.

(3) Such restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction. "

***3.1.2** Perusal of the rule makes it clear that the Commissioner, or an officer*

authorised by him, not below the rank of Assistant Commissioner, must have "reasons to believe" that credit of input tax available in the electronic credit ledger is either ineligible or has been fraudulently availed by the registered person, before disallowing the debit of amount from electronic credit ledger of the said registered person under rule 86A. The reasons for such belief must be based only on one or more of the following grounds:

a) The credit is availed by the registered person on the invoices or debit notes issued by a supplier, who is found to be non-existent or is found not to be conducting any business from the place declared in registration.

b) The credit is availed by the registered person on invoices or debit notes, without actually receiving any goods or services or both.

c) The credit is availed by the registered person on invoices or debit notes, the tax in respect of which has not been paid to the government.

d) The registered person claiming the credit is found to be non-existent or is found not to be conducting any business from the place declared in registration.

e) The credit is availed by the registered person without having any invoice or debit note or any other valid document for it.

***3.1.3** The Commissioner. or an officer authorised by him, not below the rank of Assistant commissioner, must form an opinion for disallowing debit of an amount from electronic credit ledger in respect of a registered person only after proper application of mind considering all the facts of the case, including the nature of prima facie fraudulently availed or ineligible input tax credit and whether the same is covered under the grounds mentioned in sub-rule (l) of rule 86A as discussed in para 3.1.2 above; the amount of input tax credit involved; and whether disallowing such debit of electronic credit ledger of a person is necessary for restricting him from utilizing/ passing on fraudulently availed or ineligible input tax credit to protect the interests of revenue.*

***3.1.4** It is reiterated that the power of disallowing debit of amount from electronic credit ledger must not be exercised in a mechanical manner and careful examination of all the facts of the case is important to determine case(s) fit for exercising power under rule 86A. The remedy of disallowing debit of amount from electronic credit ledger being, by its very nature. extraordinary has to be resorted to with utmost circumspection and with maximum care and caution. It contemplates an objective determination based on intelligent care and evaluation as distinguished from a purely subjective consideration of suspicion. The reasons are to be on the basis of material evidence available or gathered in relation to fraudulent availment of input tax credit or ineligible input tax credit availed as per the conditions/grounds under sub-rule (1) of rule 86A.*

3.2 Proper authority for the purpose of Rule 86A

***3.2.1** The Commissioner is the proper officer for the purpose of exercising powers for disallowing the debit of amount from electronic credit ledger of a registered person under rule 86A. However, Commissioner can also authorize any officer subordinate to him, not below the rank of Assistant Commissioner, to be the proper officer for exercising such power under rule 86A. In exercise of powers conferred by Rule 86A; the officers authorised by the Commissioner on the*

basis of monetary limits are as mentioned below:

Total amount of ineligible or fraudulently availed input tax credit	***Officer to disallow debit of amount from electronic credit ledger under rule 86A***
Not exceeding Rupees 1 crore	*Deputy Commissioner/ Assistant Commissioner as per their jurisdiction;*
Above Rupees 1 crore but not exceeding Rs 5 crore	*Joint Commissioner (Executive)/ Joint Commissioner (Corporate circle) as per their jurisdiction;*
Above Rs 5 crore	*Additional Commissioner Grade-1*

3.2.2 *Where during the course of Audit under section 65 or 66 of UPGST Act, 2017 it is noticed that any input tax credit has been fraudulently availed or is ineligible as per the grounds mentioned in sub-rule (l) of rule 86A, which may require disallowing debit of electronic credit ledger under rule 86A, the concerned Joint Commissioner of UPGST Audit may refer the same to the jurisdictional UPSGST Officer for examination of the matter for exercise of power under rule 86A.*

3.3 Procedure for disallowing debit of electronic credit ledger/blocking credit under Rule 86(A):

3.3.1 *The amount of fraudulently availed or ineligible input tax credit availed by the registered person, as per the grounds mentioned in sub-rule (1) of rule 86A, shall be prima facie ascertained based on material evidence available or gathered on record. It is advised that the powers under rule 86A to disallow debit of the amount from electronic credit ledger of the registered person may be exercised by the Commissioner or the officer authorized by him, as per the monetary limits detailed in Para 3.2.1 above. The officer should apply his mind as to whether there are reasons to believe that the input tax credit availed by the registered person has either been fraudulently availed or is ineligible, as per conditions/ grounds mentioned in sub-rule (1) of rule 86A and whether disallowing such debit of electronic credit ledger of the said person is necessary for restricting him from utilizing/ passing on fraudulently availed or ineligible input tax credit to protect the interests of revenue. Such "Reasons to believe" shall be duly recorded by the concerned officer in writing on file, before he proceeds to disallow debit of amount from electronic credit ledger of the said person.*

3.3.2 *The amount disallowed for debit from electronic credit ledger should not be more than the amount of input tax credit which is believed to have been fraudulently availed or is ineligible, as per the conditions/ grounds mentioned in sub-rule (l) of rule 86A.*

3.3.3 *The action by the commissioner or the authorized officer, as the case may be, to disallow debit from electronic credit ledger of a registered person, is informed on the portal to the concerned registered person, along with the details of the officer who has disallowed such debit.*

3.4 Allowing debit of disallowed/ restricted credit under sub-rule (2) of Rule 86A:

The Commissioner or the authorized officer, as the case may be, either on his own or based on the submissions made by

the taxpayer with material evidence thereof, may examine the matter afresh and on being satisfied *that the input tax credit, initially considered to be fraudulently availed or ineligible as per conditions of sub-rule (1) of rule 86A, is no more ineligible or wrongly availed,* ***either partially or fully, may allow the use of the credit' so disallowed/restricted, up to the extent of eligibility, as per powers granted under sub-rule (2) of rule 86A.*** *Reasons for allowing the debit of electronic credit ledger, which had been earlier disallowed, shall be duly recorded on file in writing, before allowing such debit of electronic credit ledger.*

3.4.1 *The restriction imposed as per sub-rule (1) of rule 86A shall cease to have effect after the expiration of a period of one year from the date of imposing such restriction. In other words, upon expiration of one year from the date of restriction, the registered person would be able to debit input tax credit so disallowed, subject to any other action that may be taken against the registered person.*

3.4.2 *As the restriction on debit of electronic credit ledger under sub-rule (1) of rule 86A is resorted to protect the interests of the revenue and the said action also has bearing on the working capital of the registered person, it should be endeavored that in all such cases' the investigation and adjudication are completed at the earliest, well within the period of restriction, so that the due liability arising out of the same can be recovered from the said taxable person and the purpose of disallowing debit from electronic credit ledger is achieved.*

4. Difficulty, if any, in implementation of the above guidelines may please be brought to the notice of the Undersigned."

4. From perusal of Rule 86 A(2) of the C.G. & S.T./U.P. G. & S.T. Rules, 2017, and paragraph 3.4 of the aforequoted guidelines of the Commercial Tax we are of the view that the petitioners should first approach the authorised Officer raising objections against the blocking of the input tax credit and the said authority would be under an obligation to decide the objection within a time bound period.

5. In view of the aforesaid, we ***disposed off*** all these writ petitions giving liberty to the petitioners to submit objections before the Commissioner or the authorisied Officer, as the case may be, under Rule 86 A(2) of the C.G.S.T. /U.P.G.S.T. Rules, 2017, within two weeks from today alongwith certified copy of this order and in the event objections are submitted by the petitioners within the stipulated period, the same shall be decided by the concerned Authority Officer in accordance with law, by a speaking and reasoned order, within next three weeks, after affording reasonable opportunity of hearing to the petitioners.

6. It is made clear that we have not expressed any opinion on merits of the case.

(2022)04ILR A974
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.03.2022

BEFORE

THE HON'BLE PIYUSH AGRAWAL, J.

Sale/Trade Tax Revision No. 123 of 2017

M/S R.M.G. Fabricators ...Revisionist
Versus
The Commissioner of Commercial Tax, U.P. & Anr. ...Respondents

Counsel for the Revisionist:

Sri Kedar Nath Kumar, Sri Vishnu Kesarwani

Counsel for the Respondents:
C.S.C.

A. Tax Law – Jurisdiction – Permission for Reassessment - U.P. VAT Act,2008 - Sections 29, 31 & 56(1) - The power of the Commissioner is not in question in the present revision as per S. 56(1) of the Act. **The issue involved is only confined to the initiation of the reassessment proceedings by the assessing authority seeking permission of the Commissioner to reassess the revisionist u/s 56(1) of the Act.** If this procedure is permitted, then S. 29 of the Act provides for reassessment will become redundant. **Once there is a specific provision empowering authorities to act as per the procedure, the same must be adhered to. Any deviation from such procedure will cause havoc in the State.** (Para 20)

B. Section 56 of the VAT Act would reveal that the section has wide power, but seeking of permission by the assessing authority for making reassessment of the dealer is not conferred under the said provision. For reassessment, different provision has been prescribed under the VAT Act, i.e., S.29 and its sub-sections. (Para 22)

It is not the case of the Department that section has wrongly been quoted, but specifically the Joint Commissioner (Executive), in the opening paragraph of the order u/s 56(1) of the VAT Act while granting permission, has mentioned the fact that the permission for reassessment is sought by the assessing authority and the permission has wrongly been granted by the Joint Commissioner (Executive). The Joint Commissioner (Executive) has exceeded in his jurisdiction, which has been endorsed by the Tribunal without looking into the provisions of the Act, which is very clear. In the opinion of this Court, the Tribunal should have allowed the dealer's appeal. (Para 22)

Revision is allowed with cost of Rs.5000/-. (E-4)

<u>Precedent followed</u>:

1. M/s A.K. Corporation & anr. Vs St. of U.P. & ors., 1994 UPTC 75 (Para 21)

<u>Precedent distinguished</u>:

1. M/s Samrat Carpet Vs CTT, 1999 UPTC 1023 (Para 3)

Present revision challenges the judgement and order dated 17.11.2016, passed by the Commercial Tax Tribunal, Bench – 2, Kanpur.

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Heard Shri Vishnu Kesarwani, learned counsel for the revisionist and Shri A.C. Tripathi, learned Standing Counsel for the opposite party.

2. The present revision has been filed against the judgement & order dated 17.11.2016 passed by the Commercial Tax Tribunal, Bench - 2, Kanpur in Second Appeal No. 136 of 2016 for the assessment year 2009-10 arising out of the proceedings initiated under section 56(1) of the U.P. VAT Act, in which following questions of law have been framed:-

"(i) Whether in view of the facts & circumstances, the Tribunal's act and decision holding the learned Joint Commissioner' Order legal was in accordance with Act.

(iv) Whether section 56(1) of the Act permits the Assessing Officer to refer the case to the Commissioner or Joint Commissioner for assessment/re-assessment?"

3. Learned counsel for the applicant submits that the proceedings initiated under section 56(1) of the VAT Act against the applicant are bad and without authority of law, as the assessing authority has sought permission for reassessment on various

grounds under section 56(1) of the VAT Act. On issuance of notice, the dealer has specifically objected for initiation of proceedings under section 56(1) of the VAT Act. Copy of reply to the notice has been annexed as Annexure No. 6 to the revision. He submits that while passing the order dated 30.09.2016, the Joint Commissioner (Executive), Kanpur has specifically notices on the opening paragraph of its order (Annexure No. 7 to the revision), but failed to decide the core issue as to whether the permission can be granted to the assessing authority for reassessment under section 56(1) of the Act. On appeal before the Tribunal, again specific ground no. 11 was taken raising the issue of initiation of jurisdiction by the Commissioner granting permission to reassess the assessee. The Tribunal, while deciding the issue has referred to the judgement of this Court in ***M/s Samrat Carpet Vs. CTT*** reported in 1999 UPTC 1023 and held that the Commissioner had power to grant permission for reassessment, which is bad. He prays for allowing the revision.

4. Per contra, learned Standing Counsel supports the initiation of proceedings and the order passed by the authorities below. He submits that the Commissioner has a power under section 56(1) of the VAT Act to revise the order of the assessing authority and therefore, the order is justified. He prays for dismissal of the revision.

5. The Court has perused the record.

6. Admittedly, the proceedings have been initiated under section 56(1) of the VAT Act seeking permission by the assessing authority to reassess the dealer on certain points. In pursuance thereof, notice was issued. In reply to the said notice, an objection was raised by the dealer objecting for initiation of proceedings and the competence of the authority for granting such permission under section 56(1) of the VAT Act. Copy of the reply has been annexed as Annexure No. 6 to the revision. Relevant portion is at page 76, which is quoted below:-

"6- यह कि प्रश्नगत नोटिस के पैरा-2 में कर निर्धारिक अधिकारी द्वारा कर निर्धारण आदेश एवं पुनः कर निर्धारण आदेश की अनुमति मांगे जाने का उल्लेख किया गया है। अधिनियम की धारा- 56(1) से स्पष्ट है कि कमिश्नर या कमिश्नर द्वारा प्राधिकृत अधिकारी को धारा- 56(1) के अन्तर्गत कर निर्धारण आदेश के पुनरीक्षण की शक्ति कुछ शर्तो के अधीन प्राप्त है। प्रश्नगत नोटिस में अंकित भाषा से स्पष्ट है कि कर निर्धारण आदेश का पुनरीक्षण माननीय कमिश्नर या उसके द्वारा प्राधिकृत अधिकारी द्वारा नहीं किया गया है, बल्कि कर निर्धारण अधिकारी द्वारा अधिनियम की धारा-56(2) में कर निर्धारण आदेश को संशोधित/पुनः कर निर्धारण करने की अनुमति मांगी गई। अतः प्रश्नगत प्रकरण में धारा- 56(2) के अन्तर्गत कृत कार्यवाही आरम्भतः अवैध एवं शून्य है।"

7. While granting permission under section 56(1) of the VAT Act, the Joint Commissioner (Executive), in its order dated 30.09.2016, has stated as under:-

"व्यापारी का वर्ष 2009-10 प्रान्तीय वाद में असिस्टेंट कमिश्नगर, वाणिज्यकर, खण्ड-9, कानपुर द्वारा धारा-56 के अन्तर्गत पुनः कर निर्धारण की कार्यवाही के सम्बन्ध में अनुमति मांगी गयी है।"

But has failed to discuss the issue raised by the dealer for granting permission

for reassessment under section 56(1) of the VAT Act.

8. The record further reveals that before the Tribunal, again the dealer raised the competence of initiation of proceedings against it by raising specific ground no. 11, copy of which is annexed as Annexure No. 8 to the writ petition, which is quoted below:-

"11- क्योंकि प्रश्नगत नोटिस/आदेश में कर निर्धारक अधिकारी द्वारा कर निर्धारण आदेश एवं पुनः कर निर्धारण आदेश की अनुमति मांगे जाने का उल्लेख किया गया है। अधिनियम की धारा- 56(1) से स्पष्ट है कि कमिश्नर या कमिश्नर द्वारा प्राधिकृत अधिकारी को धारा- 56(1) के अन्तर्गत कर निर्धारण आदेश के पुनरीक्षण की शक्ति कुछ शर्तो के अधीन प्राप्त है। प्रश्नगत नोटिस/आदेश में अंकित भाषा से स्पष्ट है कि कर निर्धारण आदेश का पुनरीक्षण माननीय कमिश्नर या उसके द्वारा प्राधिकृत अधिकारी द्वारा ही किया गया है, किन्तु प्रश्नगत मामलें में कर निर्धारण अधिकारी द्वारा अधिनियम की धारा-56(2) में कर निर्धारण आदेश को संशोधित/पुनः कर निर्धारण करने की अनुमति मांगी गई। अतः प्रश्नगत प्रकरण में धारा- 56(1) के अन्तर्गत कृत कार्यवाही आरम्भतः अवैध एवं शून्य है।"

9. The Tribunal, while rejecting the contention of the dealer, relying upon the judgement of this Court in ***M/s Samrat Carpet Vs. CTT*** reported in 1999 UPTC 1023, had rejected the contention, which is quoted below:-

" विद्वान अधिवक्ता द्वारा बिन्दु भी उठाया गया है कि कर निर्धारण आदेश का पुनरीक्षण कमिश्नर या उनके द्वारा प्राधिकृत अधिकारी द्वारा ही किया जा सकता है, किन्तु प्रश्नगत आदेश द्वारा मामले में कर निर्धारण अधिकारी को कर निर्धारण/पुनः कर निर्धारण की अनुमति दी गयी है जो विधिक नहीं है। विद्वान अधिवक्ता का यह कथन भी सही नहीं है क्योंकि धारा- 56(1) में ज्वाइन्ट कमिश्नर को यह अधिकार प्राप्त है कि कर निर्धारण आदेश की वैधानिकता/अनौचिकता के संबंध में समाधान हो जाने पर ऐसा आदेश पारित कर सकते है, जैसा वह फिर समझे अर्थात यदि व यह उचित पाते है कि वाद के तथ्यों के परिप्रेक्ष्य में कर निर्धारण अधिकारी को राजस्व हित में कर निर्धारण/पुनः कर निर्धारण हेतु वाद के निस्तारण की अनुमति दिया जाना आवश्यक है जो वह ऐसा आदेश पारित कर सकते है। विद्वान अधिवक्ता द्वारा प्रस्तुत निर्णय-मैसर्स सम्राट कारपेट इलाहाबाद बनाम सी०टी०टी०(सुप्रा) के मामले में धारा 10 बी के अंतर्गत डिप्टी (कार्यपालक) के आदेश की सही ठहराया गया, जिसमें उनके द्वारा कर निर्धारण आदेश के अवैधानिकता/अनौयित्यता के सम्बन्ध में समाधान हो जाने के पश्चात कर निर्धारण अधिकारी को पुनः कर निर्धारण आदेश पारित करने की अनुमति दी गयी थी।"

10. On perusal of the order passed by this Court in ***M/s Samrat Carpet (supra)***, which has been relied upon by the Tribunal, it reveals that the same is entirely on a different context, as the power is confined to the examination of the record as it was before the Assessing Officer; wherein this Court held that the Deputy Commissioner has exceeded in its jurisdiction in passing the order under section 10-B of the Act; whereas, in the case in hand, initiation of proceedings under section 56(1) of the VAT Act was under challenge for grant of permission for reassessment of dealer and not the power of the Commissioner as provided under section 56(1) of the VAT Act. The Tribunal as well as the Joint Commissioner

(Executive) lost sight of this fact and granted permission to reassess the dealer.

11. For deciding the issue in hand, certain provisions, i.e., sections 29, 31 & 56 (1) of the U.P. VAT Act, will be necessary to be looked into. Section 56 of the VAT Act reads as under:-

*"**56. Revision by the Commissioner** - (1)The Commissioner or such other officer not below the rank of Joint Commissioner, as may be authorised in this behalf by the Commissioner may call for and examine the record relating to any order, passed by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order and may pass such order with respect thereto as he thinks fit.*

(2)No order under sub-section (1) affecting the interest of a party adversely shall be passed unless he has been given a reasonable opportunity of being heard.

(3)No order under sub-section (1), shall be passed

(a)to revise an order, which is or has been the subject matter of an appeal under section 55, or an order passed by the appellate authority under that section.

(b)before the expiration of sixty days from the date of the order in question;

(c)after the expiration of four-years from the date of the order in question.

***Explanation**- Where the appeal against any order is withdrawn or is dismissed for non-payment of fee payable under section 72 or for non-compliance of sub-section (3) of section 55, the order shall not be deemed to have been the subject-matter of an appeal under section 55;*

(4) No dealer or any other person, aggrieved by an order against which appeal lies under section 55, shall be entitled to present an application for review of such order under this section."

12. Bare perusal of section shows that the Commissioner is empowered to **call for and examine the record** relating to any order passed by any Officer subordinate to him for the purpose of satisfying himself as to the **legality and propriety of such order**.

13. Section 29 (1) of the VAT Act provides for reassessment, which is quoted below:-

*"**29. Assessment of tax of turnover escaped from assessment**: (1) If the assessing authority has reason to believe that the whole or any part of the turnover of a dealer, for any assessment year or part thereof, has escaped assessment to tax or has been under assessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or re-assess the dealer to tax according to law :*

Provided that the tax shall be charged at the rate at which it would have been charged had the turnover not escaped assessment or full assessment as the case may be.

***Explanation I**:- Nothing in this sub-section shall be deemed to prevent the assessing authority from making an assessment to the best of its judgement.*

***Explanation II**:- For the purpose of this section and of section 31, "assessing authority" means the officer or authority who passed the earlier assessment order, if*

any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

***Explanation III**:- Notwithstanding the issuance of notice under this sub-section, where an order of assessment or re-assessment is in existence from before the issuance of such notice it shall continue to be effective as such, until varied by an order of assessment or re-assessment made under this section in pursuance of such notice.*

(2) .....

(3) .....

(4) .....

(5) .....

(6) ....

(7): Where the Commissioner, on his own or on the basis of reasons recorded by the assessing authority, is satisfied that it is just and expedient so to do, authorises the assessing authority in that behalf, such assessment or re-assessment may be made within a period of eight years after expiry of assessment year to which such assessment or re-assessment relates notwithstanding such assessment or re-assessment may involve a change of opinion:

Provided that it shall not be necessary for the Commissioner to hear the dealer before authorising the assessing authority."

14. Section 29(7) of the VAT Act empowers the Commissioner to grant permission for reassessment after expiry of the assessment year, but within 8 years of such assessment year, on his own or on the basis of reasons recorded by the assessing authority can extend the period of limitation and grant permission to the assessing authority of the respective dealer for reassessment.

15. Section 31 of the VAT Act provides for rectification of mistake, which is also quoted below:-

*"Section 31: **Rectification of mistakes** :-(1) Any officer, authority, the Tribunal or the High Court may on its own motion or on the application of the dealer or any other interested person rectify any mistake apparent on the face of record, in any order passed by him under this Act, within three years from the date of the order sought to be rectified:*

Provided that where an application under this sub-section has been made within such period of three years, it may be disposed of even beyond such period:

Provided further that no rectification which has the effect of enhancing the assessment, penalty, fees or other dues, shall be made unless reasonable opportunity of being heard has been given to the dealer or other person likely to be affected by such enhancement.

(2) Where such rectification has the effect of enhancing the assessment, the assessing authority shall serve on the dealer a revised notice of demand in the prescribed form and therefrom all the provisions of this Act shall apply as if such notice had been served in the first instance"

16. Section 31 of the VAT Act empowers the officer, authority, the Tribunal or the High Court to rectify any mistake apparent on the face of record on its own omission or on the application of the dealer or any other interested person.

17. On perusal of sections 29, 29(7), 31 & 56 of the VAT Act, it is apparently clear that the Legislature, in its wisdom, has used/empowered the authority how to act as per the requirement of the time/in the interest of the Revenue/dealer.

18. Section 31 of the Act provides rectification of the order on an application of any interested person; whereas, section

29 of the Act empowers on the reason recorded by the assessing authority or the Commissioner on its own after being satisfied that it is just and expedient to do so to grant permission of the closed assessment for reassessment, where the turnover of a dealer for any assessment year or part thereof has escaped assessment to tax or has been under-assessed or has been assessed, but taxed at a lower rate than what at which it is assessable under the Act or any deduction or exemption have wrongly been allowed in respect thereof; meaning thereby, under sections 29 & 31 of the Act appropriate order can be passed by moving an application or seeking permission by the authority concerned.

19. However, section 56 of the Act does not provide any power to the Commissioner to grant permission of reassessment on the application of the assessing authority. There is no dispute that the Commissioner, on its own motion, call for and examine the records relating to any order passed by any Officer subordinate to him for the purposes of satisfying himself as to the legality or propriety of such order and thereafter, passed such order in respect thereof as he deems fit.

20. The power of the Commissioner is not in question in the present revision as per section 56(1) of the Act. The issue involved in the present revision is only confined to the initiation of the reassessment proceedings by the assessing authority seeking permission of the Commissioner to reassess the revisionist under section 56(1) of the Act. If this procedure is permitted, then section 29 of the Act provides for reassessment will become redundant. Once there is a specific provision empowering authorities to act as per the procedure, the same must be adhered to. Any deviation from such procedure will cause havoc in the State.

21. The Division Bench of this Court in ***M/s A.K. Corporation & Another Vs. State of U.P. & Others*** reported in 1994 UPTC 75 has held that revisional authority has only empowered under section 10-B of the Act to satisfy itself about the propriety or legality of the order and not empowered the authority for initiating the proceeding for rectification or reassessment. It was further observed that if part of turnover of the assessee has escaped assessment or has wrongly been assessed or under-assessed, then the only course available to the authority under the Act was to issue notice for reassessment under section 21 of the Act, but the impugned action under the revisional jurisdiction cannot be permitted.

22. Section 56 of the VAT Act would reveal that the section has wide power, but seeking of permission by the assessing authority for making reassessment of the dealer is not conferred under the said provision. For reassessment, different provision has been prescribed under the VAT Act,i.e., section 29 and its sub-sections. It is not the case of the Department that section has wrongly been quoted, but specifically the Joint Commissioner (Executive), in the opening paragraph of the order under section 56(1) of the VAT Act while granting permission, has mentioned the said fact that the permission for reassessment is sought by the assessing authority and the permission has wrongly been granted by the Joint Commissioner (Executive). The Joint Commissioner (Executive) has exceeded in his jurisdiction, which has been endorsed by the Tribunal without looking into the provisions of the Act, which is very clear.

In the opinion of this Court, the Tribunal should have allowed the dealer's appeal.

23. In view of the aforesaid facts & circumstances of the case as well as the law laid down by this Court, the impugned order passed by the Tribunal is set aside.

24. The revision is allowed with cost of Rs. 5,000/-, which shall be deposited within a month from today. An affidavit of compliance of deposit shall be filed within two months from today in the Registry of this Court, failing which the matter be listed in Chamber.

25. The questions of law are answered accordingly.

(2022)04ILR A981
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.02.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 1169 of 2021

Ajay Verma ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Mahima Jaiswal, Sri Saurabh Sharma, Sri Shambhu Chopra (Senior Adv.)

Counsel for the Respondents:
A.S.G.I., C.S.C., Sri Krishna Ji Shukla

A. Tax Law – Jurisdiction - CGST Act/UPGST Act,2017 - Sections 73, 2(21), 2(91), 6 & 9 - CGST Act,2017 - Sections 6(1) & 6(2)(a) - The question involved in the present case is not as to the inherent lack of jurisdiction instead but is as to whether the impugned show cause notice and the assessment order issued by the respondent No. 4 are without jurisdiction due to assignment of the assessee to the Central Officer? A further question would be as to whether the impugned show cause notice or the assessment order would become void *ab initio* on account of non assignment of the case to the respondent No. 4 even when the petitioner submitted to the jurisdiction of the respondent No. 4 and participated in the proceeding without raising any objection as to the jurisdiction? (Para 17)

Sub-section (91) of Sections 2 & 6 of the CGST Act/UPGST Act,2017 - read with the minutes of the meeting of the GST Council dated 16.1.2017 agenda Item No. 28 and the order No. 04/2018 dated 12.9.2018 jointly issued by the State and Central authorities, leads to an irresistible conclusion that proper officer under the UPGST Act and proper officer under the CGST Act both have jurisdiction over assessees falling within their territorial jurisdiction but for administrative convenience, assignment of taxpayers have been made by the designated committee at the State level. (Para 15, 18)

In terms of the **order No. 04/2018 dated 12.9.2021 issued by the Commissioner, Commercial Tax, Uttar Pradesh and the Chief Commissioner of Central Tax, Meerut Zone, Lucknow**, the assessment of petitioner under the Act was assigned to the Central Officer and not to the respondent No. 4. However, the respondent No. 4 took up the matter and issued the impugned show cause notice dated 25.6.2021 which was replied by the petitioner without raising any objection as to jurisdiction on account of assignment of case to the Central Officer. It was also not brought to the notice of the respondent No. 4 by the petitioner that his case is assigned to a Central Officer. Instead, the petitioner participated in the assessment proceeding and the assessing officer i.e. the proper officer (respondent No. 4) has passed the impugned assessment order dated 09.08.2021, which can be said to be contributory error of jurisdiction. (Para 16, 19)

After the assessment order dated 09.08.2021 was passed by the respondent No. 4, it came to notice that the case was assigned to a Central Officer. Hence, the respondent No. 4 wrote letters to the Central Officer who informed vide letters dated 22.11.2021 and 03.12.2021 that as per Act the proceedings shall be completed by the officer who initiated it, i.e. by the respondent No. 4. (Para 16)

B. Consequences of 'Submitting to the Jurisdiction' - Present case is not a case of inherent lack of jurisdiction rather it is a case of error of jurisdiction on account of non allotment of case of the petitioner assessee to the respondent No. 4/State officer. (Para 20)

It is well settled that if a person has submitted to the jurisdiction of the authority, he cannot challenge the proceedings on the ground of lack of jurisdiction of the said authority in further appellate proceedings. (Para 22)

C. Difference between <u>inherent lack of jurisdiction</u> and <u>error of jurisdiction</u> - There is a difference between the existence of jurisdiction and the exercise of jurisdiction. **In case jurisdiction is exercised with material irregularity or with illegality, it would also constitute jurisdictional error. However, if a court has jurisdiction to entertain a suit but in exercise of jurisdiction, a mistake has been committed, though it would be a jurisdictional error but not lack of it.** It may be a jurisdictional error open for interference in appellate or revisional jurisdiction. (Para 27)

D. Words and Phrases – *"Jurisdiction"* - The word 'jurisdiction' is a verbal coat of many colours. It is used in a wide and broad sense while dealing with administrative or quasi-judicial tribunals and subordinate courts over which the superior courts exercise a power of judicial review and superintendence. Then it is only a question of "how much latitude the court is prepared to allow" and "there is no yardstick to determine the magnitude of the error other than the opinion of the court." (Para 23)

The impugned show cause notice and the impugned assessment order do not suffer from any inherent lack of jurisdiction and instead it is the result of contributory error of jurisdiction by the respondent No. 4. Had the petitioner objected to it at the initial stage or during the course of assessment proceedings, the position could have been rectified by the respondent No. 4 by informing the central officer to complete the assessment proceedings. (Para 31)

Writ petitions dismissed. (E-4)

<u>Precedent followed</u>:

1. Municipal Commissioner, Kolkata & ors. Vs Salil Kumar Banerji, (2000) 4 SCC 108 (Para 21)

2. Kedar Shashikant Deshpandey & ors. Vs Bhor Municipal Council & ors., (2011) 2 SCC 654 (Para 22)

3. A.R. Antulay Vs R.S. Nayak & anr., (1988) 2 SCC 602 (Para 23)

4. H.V. Nirmala Vs Karnataka State Financial Corporation & ors., (2008) 7 SCC 639 (Para 24)

5. Central Bank of India Vs C. Bernard, (1991)1 SCC 319 (Para 25)

6. Nusli Neville Wadia Vs Ivory Properties & ors., (2020) 6 SCC 557 (Para 26)

7. Hridya Narain Roy Vs Ram Chandra Barna Sarma, AIR 1921 Cal 34 (FB) (Para 28)

8. Official Trustee Vs Sachindra Nath Chatterjee, AIR 1969 SC 823 (Para 28)

Present petition challenges assessment order dated 09.08.2021 passed by State Officer and show cause notice (DRC-01) dated 25.06.2021 issued by the State Officer i.e. Deputy Commissioner, Commercial Tax Saharanpur, Sector- 10, Saharanpur(B), U.P.

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Jayant Banerji, J.)

1. Heard Sri Shambhu Chopra, learned Senior Advocate, assisted by Mahima Jaiswal and Sri Saurabh Sharma,

learned counsel for the petitioner, Sri B.P. Singh Kachhawah, learned Standing Counsel for the respondent nos. 3,4 and 6 and Sri Krishna Ji Shukla, learned counsel for the respondent nos. 1 and 5.

FACTS

2. Briefly stated facts of the present case are that the petitioner claims to be engaged in the business of lubricants after obtaining registration under the Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'CGST Act') and the U.P. Goods and Services Tax Act, 2017 (hereinafter referred to as 'UPGST Act'). According to the petitioner as per division of work his case for the tax period 2017-18 (July, 2017 to March, 2018) was assigned to the Officer of Central Tax (hereinafter referred to as 'the Central Officer') but the show cause notice dated 25.6.2021 for assessment under section 73 of CGST Act/UPGST Act was issued by the Officer of the State Tax (hereinafter referred to as 'the State Officer') i.e. Dy. Commissioner, Commercial Tax Saharanpur, Sector 10, Saharanpur (B), Uttar Pradesh. The petitioner submitted reply to the show cause notice **but did not raise any objection** as to the jurisdiction on the ground of assignment of the case to Central Officer. The proper officer under the Act completed the assessment proceedings and passed the assessment order under section 73 of the UPGST Act/CGST Act dated 9.8.2021 for the tax period July, 2017 to March, 2018. Aggrieved the aforesaid assessment order dated 9.8.2021 the petitioner has filed the present writ petition praying to quash the show cause notice (DRC-01) dated 25.6.2021 issued by the State Officer i.e. the respondent no. 4 and the assessment order dated 9.8.2021 passed by the respondent no. 4.

SUBMISSIONS ON BEHALF OF THE PETITIONER

3. (i) Learned counsel for the petitioner submits that the impugned show cause notice and the impugned assessment order are without jurisdiction inasmuch as pursuant to the decision of the GST Council vide Agenda item no. 28 of the Minutes of the IX GST Council Meeting dated 16.1.2017, the designated committee passed the order no. 04/2018 dated 12.9.2018 issued by the Commissioner of Commercial Tax, Uttar Pradesh providing for single interface under the Act and whereby the petitioner i.e. taxpayer was assigned to the Central Government Officer. Therefore, the show cause notices issued by the State Officer i.e. the respondent no. 4 and the impugned assessment order passed by him both are without jurisdiction and, therefore, deserve to be quashed.

(ii) Even though the petitioner has not raised any objection as to the jurisdiction before the proper officer who issued the impugned show cause notice and passed the impugned assessment order, yet objection as to the jurisdiction can be well entertained in writ petition inasmuch as the question of jurisdiction goes to very root of the matter and renders the impugned show cause notice and the impugned assessment order to be null and void being without jurisdiction.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

4. Learned counsel for the respondents have supported the impugned show cause notice and the impugned orders.

DISCUSSION AND FINDINGS

5. Relevant provisions for the purposes of the controversy involved in the present writ petition are the provisions of Section 2(21), Section 2(91), Section 6 and Section 9 of the CGST Act/UPGST Act, which reproduced below:

Central Goods and Services Tax Act, 2017	Uttar Pradesh Goods and Services Tax Act, 2017
2(21) "central tax" means the central goods and services tax levied under section 9;	**2(21). "central tax"** means the central goods and services tax levied under section 9 of the Central Goods and Services Tax Act (Act No. 12 of 2017);
2(91) "proper officer" in relation to any function to be performed under this Act, means the Commissioner or the officer of the central tax who is assigned that function by the Commissioner in the Board;	2 (91). "proper officer" in relation to any function to be performed under this Act, means the Commissioner or the officer of the State tax who is assigned that function by the Commissioner;
6. Authorisation of officers of State tax or Union territory tax as proper officer in certain circumstances	**6. Authorisation of officers of State tax or Union territory tax as proper officer in certain circumstances**
(1) Without prejudice to the provisions of this Act, the officers appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act are authorised to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify.	(1) Without prejudice to the provisions of this Act, 2017 the officers appointed under the Central Goods and Services Tax Act, are authorised to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify.
(2) Subject to the conditions specified in the notification issued under sub-section (1),--	(2) Subject to the conditions specified in the notification issued under sub - section (1),-
(a) where any proper officer issues an order under this Act, he shall also issue an order under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as authorised by the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, under intimation to the jurisdictional	(a) where any proper officer issues an order under this Act, he shall also issue an order under the Central Goods and Services Tax Act 2017, as authorised by the said Act under intimation to the jurisdictional officer of central tax;
	(b) where a proper officer under the Central Goods and Services Tax Act, 2017 has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

officer of State tax or Union territory tax;

(b) where a proper officer under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

(3) Any proceedings for rectification, appeal and revision, wherever applicable, of any order passed by an officer appointed under this Act shall not lie before an officer appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act.

9. Levy and collection.

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the Uttar Pradesh goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

(2) The State tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel, shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

(3) Any proceedings for rectification, appeal and revision, wherever applicable, of any order passed by an officer appointed under this Act, shall not lie before an officer appointed under the Central Goods and Services Tax Act, 2017.

9.Levy and collection.

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

(2) The central tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The Government may, on the recommendations of the Council, by notification, specify

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.

in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

6. The "Goods and Service Tax Council" (for short GST Council) took a decision vide minutes of the **IX GST Council meeting held on 16.1.2017 (Agenda item no. 28)** in respect of **cross empowerment** to ensure single interface under the GST Act, as under:

"28. After further discussion, the Council agreed to the decisions as recorded below in respect of cross-empowerment to ensure single interface under GST.

i. There shall be a ***division of taxpayers*** *between the Central and the State tax administrations* ***for all administrative purposes****;*

ii. Of the total number of taxpayers ***below*** *Rs. 1.5 crore turnover, all administrative* ***control over 90% of the taxpayers shall vest with the State tax administration and 10% with the Central tax administration****;*

iii. In respect of the total number of taxpayers above Rs.1.5 crore turnover, all administrative control shall be divided equally in the ratio of 50% each for the Central and the State tax administration;

iv. The ***division of taxpayers in each State shall be done by computer at the State level based on stratified random sampling*** *and could also take into account the geographical location and type of the taxpayers, as may be mutually agreed;*

v. ***The new registrants shall be initially divided one*** *each between the Central and the State tax administration and at the end of the year, once the turnover of such new registrants was ascertained, those units with turnover below Rs.1.5 crore shall be divided in the ratio of 90% for the State tax administration and 10% for the Central tax administration and those units above the turnover of Rs.1.5 crore shall be divided in the ratio of 50% each for the State and the Central tax administration;*

vi. The division of the taxpayers may be switched between the Centre and the States at such interval as may be decided by the Council;

vii. The above arrangement shall be reviewed by the Council from time to time;

viii. ***Both*** *the Central and the State tax administration shall have the power to take* ***intelligence-based enforcement action in respect of the entire value chain****;*

ix. Powers under the IGST Act shall be cross-empowered to the State tax administration
on the same basis as under the CGST and the SGST Acts either under law or under Article 258 of the Constitution but with the exception that he Central tax administration shall alone have the power to adjudicate a case where the disputed issue relates to place of supply, or when an affected State requests that the case be adjudicated by the CGST authority and for such issues of export and import as may be discussed in the Law Committee of officers and brought back to the Council for decision;

x. The territorial water within the twelve nautical miles shall be treated as the territory of the Union of India unless the Hon'ble Supreme Court decides otherwise in the ongoing litigation on the issue but the power to collect the State tax in the

territorial waters shall be delegated by the Central Government to the States."

7. Pursuant to the aforesaid decision of the GST Council, a circular no. 01/2017 dated 20.9.2017 (F no. 166/cross empowerment/GST/2017) was issued by the GST Council, New Delhi providing that the State Level Committee comprising Chief Commissioner/Commissioner Commercial Taxes of respective States and jurisdictional Central Tax Chief Commissioners/Commissioners are already in place for effective coordination between the Centre and State and the said Committee may take necessary steps for **division of taxpayers** in each State.

8. Pursuant to the aforesaid circular the Committee constituted for the State of Uttar Pradesh passed order No. 04/2018 dated 12.9.2018 assigning the taxpayers registered in the State of U.P. in terms of the aforequoted decision of the GST Council.

9. It is admitted fact that the taxpayer i.e. the petitioner has been assigned to the Central Officer whereas the impugned show cause notice was issued by the State Officer i.e. the respondent no. 4 (Dy. Commissioner, Commercial Tax Saharanpur, Sector 10, Saharanpur (B), Uttar Pradesh) before whom, despite show cause notice, the petitioner did not raise any objection as to the jurisdiction and instead participated in the proceedings and submitted to his jurisdiction. Thereafter the respondent no. 4 passed the impugned assessment order creating certain demand against the petitioner. **It is thereafter that the petitioner filed the present writ petition and challenged the show cause notice and the assessment order solely on the ground that it is without jurisdiction.**

10. The word "Central Tax" has been defined under section 2(21) of the CGST Act/UPGST Act to mean that the Central Goods and Service Tax levied under section 9. The word "proper officer" has been defined under section 2(91) of the CGST Act/UPGST Act. Section 6 (1) of the CGST Act starts with a non obstante clause and provides that the officer appointed under the State Goods and Service Tax Act (for short SGST Act) or the Union Territory Goods and Service Act (for short UTGST Act) are authorized to be the proper officer for the purposes of this Act, subject to such condition as the Government shall, on the recommendations of the Council, by notification, specify. **Section 6(2)(a) of the CGST Act mandates** that where any proper officer under the CGST Act issues an order, he shall also issue an order under the SGST Act or the UTGST Act as authorized under those Acts, as the case may be, **under intimation to the jurisdictional officer of the State tax or the Union territory Tax. Clause (2) of sub section (2) of Section 6 of the CGST Act/UPGST Act mandates that where a proper officer under the SGST Act or the UTGST Act has initiated any proceedings on a subject-matter, no proceedings shall be initiated by the proper officer under the CGST Act on the same subject-matter.**

11. Section 6(1) of the UPGST Act also starts with non obstante clause and provides that officers appointed under the CGST Act are authorized to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification specify. Clause (a) of sub-Section (2) of Section 6 of the UPGST Act provides that where any proper officer issues an order under this Act, he shall also

issue an order under the Central Goods and Services Tax Act, 2017 as authorized by the said Act under intimation to the jurisdictional officer of central tax. **Clause (b) of sub-Section (2) of Section 6 of the UPGST Act provides that where a proper officer under the CGST Act has initiated any proceeding on a subject matter, no proceeding shall be initiated by the proper officer under the UPGST Act on the same subject matter.**

12. **From bare perusal of Section 6 of the CGST Act and the UPGST Act it is clear that a proper officer under the UPGST Act is also a proper officer under the CGST Act within his territorial jurisdiction. Likewise a proper officer appointed under the CGST Act is also the proper officer under the UPGST Act within his territorial jurisdiction. So as to avoid possibility of conflicting orders, an in built provision in both the CGST Act and UPGST Act has been made in Section 6 that when a proper officer under the CGST Act passes an order, he shall intimate it to the jurisdictional officer under the State Act or the Union territory Act and likewise when a proper officer under the UPGST Act passes an order, he shall intimate it to the jurisdictional officer of Central Tax. Thus a cross empowerment with sufficient provision to remove the possibility of conflicting orders has been provided under the CGST Act and UPGST Act.**

13. From the scheme of the Act, as briefly discussed above, it is clear that the proper officer as defined under the CGST Act and UPGST Act, both are proper officers within their territorial jurisdiction and have been conferred with jurisdiction and powers under both the Acts to exercise their jurisdiction as proper officers subject to a rider that if an order is issued by a proper officer under the State Act or the Union territory Act on a subject matter then on the same subject matter, order shall not be passed by a proper officer under the CGST Act and vice versa and the orders so passed shall be intimated to the other jurisdictional officer under the other Act.

14. Since proper officers under both the Acts have been empowered to exercise powers within their territorial jurisdiction and since both the set of officers i.e. under the CGST Act and UPGST Act are authorized to pass assessment orders, therefore, there arose necessity for division of work between two sets of officers, i.e. under CGST Act and UPGST Act having same territorial jurisdiction. Consequently,the GST Council evolved the formula in its IXth Meeting held on 16.01.2017 for division of work between two sets of proper officers which has been reproduced above, and consequent thereto the Committee constituted at the State level has distributed and assigned taxpayers for the purposes of assessment to both sets of proper officers.

15. **Thus the proper officer under the CGST Act and the proper officer under the UPGST Act, both are jurisdictional proper officers and have jurisdiction to pass assessment order with respect to an assessee within their territorial jurisdiction but for administrative purposes the order no. 04/2018 dated 12.9.2018 was issued by the Commissioner of Commercial Tax, U.P. in terms of the Agenda item no. 28 of the Minutes of the IX GST Council**

meeting dated 16.1.2017 and circular no. 01/2017 of the GST Council dated 29.1.2017.

16. In terms of the aforesaid order no. 04/2018 dated 12.9.2021 issued by the Commissioner, Commercial Tax, Uttar Pradesh and the Chief Commissioner of Central Tax, Meerut Zone, Lucknow, the assessment of petitioner under the Act was assigned to the Central Officer and not to the respondent no. 4. **However, the respondent no. 4 took up the matter and issued the impugned show cause notice dated 25.6.2021 which was replied by the petitioner without raising any objection as to jurisdiction on account of assignment of case to the Central Officer. It was also not brought to the notice of the respondent no. 4 by the petitioner that his case is assigned to a Central Officer. Instead, the petitioner participated in the assessment proceeding** and the assessing officer i.e. the proper officer (respondent No.4) has passed the impugned assessment order dated 9.8.2021, **which can be said to be contributory error of jurisdiction. The GST Act came into force from 01.07.2017. Prior to it the petitioner was registered under the U.P. VAT Act and was carrying on business in partnership. But he migrated as proprietary concern under the GST Act and carried the entire stock of the partnership firm as on 30.06.2017 to the proprietary concern. Neither on issuance of notice nor during the course of assessment proceedings, did the petitioner inform the respondent No.4 that his case was assigned to a Central Officer. After the assessment order dated 09.08.2021 was passed by the respondent No.4, it came to notice that the case was assigned to a Central Officer. Hence, the respondent No.4 wrote letters to the Central Officer who informed vide letters dated 22.11.2021 and 03.12.2021 that as per Act the proceedings shall be completed by the officer who initiated it, i.e. by the respondent No.4.**

17. Thus, the question involved in the present case is not as to the inherent lack of jurisdiction instead but the question is as to **whether the impugned show cause notice and the assessment order issued by the respondent No.4 are without jurisdiction due to assignment of the assessee to the Central Officer**? A further question would be as to **whether the impugned show cause notice or the assessment order would become void ab initio on account of non assignment of the case to the respondent no. 4 even when the petitioner submitted to the jurisdiction of the respondent no. 4 and participated in the proceeding without raising any objection as to the jurisdiction?**

18. Sub section (91) of Section 2 and Section 6 of the CGST Act/UPGST Act read with the minutes of the meeting of the GST Council dated 16.1.2017 agenda Item no. 28 and the order no. 04/2018 dated 12.9.2018 jointly issued by the State and Central authorities, leads to an irresistible conclusion that proper officer under the UPGST Act and proper officer under the CGST Act both have jurisdiction over assessees falling within their territorial jurisdiction but for administrative convenience, assignment of taxpayers have been made by the designated committee at the State level.

19. **Thus, a proper officer under the UPGST Act/CGST Act has inherent jurisdiction over assessees falling within his territorial jurisdiction but that**

jurisdiction has to be exercised as per cases assigned by the designated committee comprising Chief Commissioner/Commissioner, Commercial Taxes of respective States and jurisdictional Central Tax Chief Commissioners/Commissioners. In the present set of facts, the Chief Commissioner of Central Taxes, Lucknow and Meerut Zone, Lucknow and the Commissioner of Commercial Taxes, U.P. issued the aforesaid order no. 04/2018 assigning the taxpayers to proper officers and the case of the petitioner has been assigned to the proper officer under the CGST Act i.e. Central Officer and not to the respondent no. 4.

CONSEQUENCES OF "SUBMITTING TO THE JURISDICTION"

20. Present case is not a case of inherent lack of jurisdiction rather it is a case of error of jurisdiction on account of non allotment of case of the petitioner assessee to the respondent no. 4/State officer.

21. *In the case of* ***Municipal Commissioner, Kolkata and others Vs. Salil Kumar Banerji (2000) 4 SCC 108 (para 4)****, Hon'ble Supreme Court considered the validity of an order passed by a Tribunal not properly constituted. Hon'ble Supreme Court held that "...Even assuming that it ought to have consisted of three or more Members, had that objection been taken at the initial stage of the hearing of the appeal before the Tribunal, that position could have been rectified. Certainly, in circumstances such as these, the High Court ought not to have exercised its discretion in favour of the first respondent."*

22. In the case of ***Kedar Shashikant Deshpandey and others Vs. Bhor Municipal Council and others (2011) 2 SCC 654 (para 29)*** Hon'ble Supreme Court considered the principle "***submitting to the jurisdiction of the authority***" and held that "*it is well settled that if a person has submitted to the jurisdiction of the authority, he cannot challenge the proceedings on the ground of lack of jurisdiction of the said authority in further appellate proceedings...."*

23. In the case of ***A.R. Antulay Vs. R.S. Nayak and another (1988) 2 SCC 602 (para 234)***, a constitution Bench of Hon'ble Supreme Court held as under:

*"234. In dealing with this contention, one important aspect of the concept of jurisdiction has to be borne in mind. As pointed out by Mathew J. in Sethi vs. Kapur, (1972) 2 SCC 427, "**the word 'jurisdiction' is a verbal coat of many colours.". It is used in a wide and broad sense while dealing with administrative or quasi-judicial tribunals and subordinate courts over which the superior courts exercise a power of judicial review and superintendence. Then it is only a question of "how much latitude the court is prepared to allow" and "there is no yardstick to determine the magnitude of the error other than the opinion of the court**." But the position is different with superior courts with unlimited jurisdiction. These are always presumed to act with jurisdiction and unless it is clearly shown that any particular order is patently one which could not, on any conceivable view of its jurisdiction, have been passed by such court, such an order can neither be ignored nor even recalled, annulled, revoked or set aside in subsequent proceedings by the same court. This*

distinction is well brought out in the speeches of Lord Diplock, Lord Edmund-Davies and Lord Scarman in Re Racal Communications Ltd., [1980] 2 All E R 634. In the interests of brevity, I resist the temptation to quote extracts from the speeches here."

DIFFERENCE BETWEEN INHRENT LACK OF JURISDICTION AND ERROR OF JURISDICTION

24. In the case of ***H.V. Nirmala Vs. Karnataka State Financial Corporation and others (2008) 7 SCC 639*** (paras 13 and 14), Hon'ble Supreme Court has held as under:

"13. .....An authority may lack inherent jurisdiction in which case the order passed would be a nullity but it may commit a jurisdictional error while exercising jurisdiction. .....

14. .....A jurisdictional issue should be raised at the earliest possible opportunity. A disciplinary proceedings is not a judicial proceeding. It is a domestic tribunal. There exists a distinction between a domestic tribunal and a court. The appellant does not contend that any procedure in holding the enquiry has been violated or that there was no compliance with principles of natural justice."

25. In the case of ***Central Bank of India Vs. C. Bernard (1991)1 SCC 319 (para 9)***, Hon'ble Supreme Court considered the submission that in the event the respondent succeeded in getting the order of punishment quashed on a mere technicality and that too on the contention belatedly raised before the High Court for the first time and, therefore, the High Court was in error in directing payment of all consequential benefits.; and held as under:

"We think there is merit in this contention. If the objection was raised at the earliest possible opportunity before the Enquiry Officer the appellant could have taken steps to remedy the situation by appointing a competent officer to enquire into the charges before the respondent's retirement from service....."

26. In the case of ***Nusli Neville Wadia Vs. Ivory Properties and others (2020) 6 SCC 557*** (paras 20, 21 and 22) Hon'ble Supreme Court has explained the **meaning of the word "jurisdiction**" and distinction between **jurisdiction to entertain** and **error of exercise of jurisdiction or excess jurisdiction** and held as under :

"20. Jurisdiction is the power to decide and not merely the power to decide correctly. Jurisdiction is the authority of law to act officially. It is an authority of law to act officially in a particular matter in hand. It is the power to take cognizance and decide the cases. It is the power to decide rightly or wrongly. It is the power to hear and determine. Same is the foundation of judicial proceedings. It does not depend upon the correctness of the decision made. It is the power to decide justiciable controversy and includes questions of law as well as facts on merits. Jurisdiction is the right to hear and determine. It does not depend upon whether a decision is right or wrong. Jurisdiction means power to entertain a suit, consider merits, and render binding decisions, and "merits" means the various elements which enter into or qualify plaintiff's right to the relief sought. If the law confers a power to render a judgment or decree, then the court has jurisdiction. The court must have control over the subject matter, which comes within classification limits of law under which Court is established and functions.

21. The word "jurisdiction" is derived from Latin words "Juris" and "dico," meaning "I speak by the law" and does not relate to rights of parties as between each other but to the power of the court. Jurisdiction relates to a class of cases to which a particular case belongs. Jurisdiction is the authority by which a judicial officer takes cognizance and decides the cases. It only presupposes the existence of a duly constituted court having control over subject-matter which comes within classification limits of the law under which court has been established. It should have control over the parties litigant, control over the parties' territory, it may also relate to pecuniary as well as the nature of the class of cases. Jurisdiction is generally understood as the authority to decide, render a judgment, inquire into the facts, to apply the law, and to pronounce a judgment. ***When there is the want of general power to act, the court has no jurisdiction****. When the court has the power to inquire into the facts, apply the law, render binding judgment, and enforce it, the court has jurisdiction. Judgment within a jurisdiction has to be immune from collateral attack on the ground of nullity. It has co-relation with the constitutional and statutory power of tribunal or court to hear and determine. It means the power or capacity fundamentally to entertain, hear, and determine.*

22. ***Jurisdiction to entertain is distinguished from merits, error in the exercise of jurisdiction or excess of jurisdiction."***

27. In the case of **Nusli (supra)** vide paragraph 37 Hon'ble Supreme Court explained the **difference between "existence of jurisdiction" and "exercise of jurisdiction**" and held as under :

"37. There is a difference between the existence of jurisdiction and the exercise of jurisdiction. ***In case jurisdiction is exercised with material irregularity or with illegality, it would also constitute jurisdictional error. However, if a court has jurisdiction to entertain a suit but in exercise of jurisdiction, a mistake has been committed, though it would be a jurisdictional error but not lack of it. It may be a jurisdictional error open for interference in appellate or revisional jurisdiction."***

28. In the case of ***Hridya Narain Roy Vs. Ram Chandra Barna Sarma AIR 1921 Cal 34 (FB)*** quoted with approval by Hon'ble Supreme Court in the case of Official Trustee Vs. Sachindra Nath Chatterjee AIR 1969 SC 823 and Nusli (supra), it was stated that:

"jurisdiction may be defined to be the power of a court to "hear and determine a cause, to adjudicate and exercise any judicial power in relation to it:" in other words, by jurisdiction is meant "the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision". An examination of the cases in the books discloses numerous attempts to define the term "jurisdiction", which has been stated to be "the power to hear and determine issues of law and fact", "the authority by which the judicial officers take cognizance of and "decide causes"; "the authority to hear and decide a legal controversy", "the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them", ***"the power to hear, determine and pronounce judgment on the issues before the court"; "the power or authority which is conferred upon a court by the legislature to hear and determine causes between parties and to***

carry the judgments into effect"; *"the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution."*

29. In the case of **Nusli (supra)** Hon'ble Supreme Court vide paragraph 88 held that "*there is difference between existence of jurisdiction and exercise of jurisdiction. The existence of jurisdiction is reflected by the fact of amenabilities of the jurisdiction to attack in the collateral proceedings. If the court has an inherent lack of jurisdiction its decision is open to attack as nullity."*

30. From the scheme of the Act as discussed above it is evident that the respondent no. 4 being proper officer under the Act having territorial jurisdiction over the petitioner assessee is competent to exercise the powers conferred under the Act in respect of assessee, falling under his territorial jurisdiction. But as per minutes of the meeting of the G.S.T. Council and the circular issued in this regard, the distribution of work for administrative convenience was made and as per which the case of the petitioner was assigned to a central officer. Thus it is not a case that the state officer i.e. the respondent no. 4 lacks inherent jurisdiction but it is a case where the jurisdiction has been exercised by the respondent no. 4 in the absence of any objection or pointing out by the petitioner that the case has been assigned to a central officer. The jurisdiction upon a proper officer has been conferred by section 6 of the Act. Thus a proper officer has jurisdiction over the assessees for assessment falling under his territorial jurisdiction but in terms of the aforesaid work allotment order No. 04/2021 dated 12.9.2018 he was to take up those cases which have been allotted to him.

31. **Considering the facts and circumstances and discussions made above, we find that the impugned show cause notice and the impugned assessment order do not suffer from any inherent lack of jurisdiction and instead it is the result of contributory error of jurisdiction by the respondent no. 4.,** in the circumstances that the petitioner submitted to the jurisdiction of the respondent no. 4 without informing or without raising objection as to the assignment of the case to the central officer and after well participating in the assessment proceedings allowed the assessment order to be passed by the respondent no. 4. Had the petitioner objected to it at the initial stage or during the course of assessment proceedings, the position could have been rectified by the respondent no. 4 by informing the central officer to complete the assessment proceedings.

32. For all the reasons aforestated, the writ petition is **dismissed** leaving it open for the assessee-petitioner to challenge the impugned assessment order in appeal under section 107 of the CGST/UPGST Act.

(2022)04ILR A994
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.03.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 874 of 2010
With Writ Tax Nos. 875 of 2010, 353 of 2012, 13 of 2014

M/s Parmarth Steel & Alloys Pvt. Ltd., Bijnor ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Krishna Agrawal, Sri P. Agrawal

Counsel for the Respondents:
C.S.C.

A. Trade Tax Law – Reassessment - U.P. Trade Tax Act, 1948 - Section 21(1) - It is settled principle of law that proceedings u/s 21 of the Act, 1948 can be initiated if the material on which the Assessing Authority bases its opinion, is not arbitrary, irrational, vague, distant or irrelevant. There must be some rational basis for the assessing authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If such a basis exists, the assessing authority can proceed in the manner laid down in S. 21 of the Act, 1948. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. (Para 17)

B. Adequacy of grounds is not a matter which would be gone into by the High Court for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. The question as to whether that material is sufficient for making assessment or re-assessment u/s 21 of the Act would be gone into after notice is issued to the dealer and he has been heard in the matter or given an opportunity for that purpose. The assessing authority would then decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary. (Para 17)

Facts of the present case leave no manner of doubt that the Assessing Authority was having relevant material in his hands on the basis of which he had reason to believe that for the Assessment Years in question, the petitioners have evaded tax on undisclosed sales and made huge transactions of purchases and sales out of the Books of Account. (Para 18)

Writ petitions dismissed. (E-4)

Precedent followed:

1. St. of U. P. & ors. Vs Aryaverth Chawal Udyog (supra), (2015) 17 SCC 324 (Para 9)

2. The Commissioner of Sales-tax U.P. Vs M/s. Bhagwan Industries (P) Ltd., Lucknow, AIR 1973 SC 370 (Para 16)

Present petitions challenge notices for reassessment u/s 21(1) of the U.P. Trade Tax Act, 1948.

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Jayant Banerji, J.)

1. These cases have been remanded by the Hon'ble Supreme Court by order dated 28.8.2019 passed in civil appeals.

2. The aforesaid writ petitions have been filed challenging the notices for reassessment under Section 21(1) of the U.P. Trade Tax Act, 1948.

3. After the aforesaid order of the Hon'ble Supreme Court, these writ petitions were listed on 18.2.2021, 5.3.2021 and 4.3.2022.

4. On 4.3.2022, this Court passed the following order:

"Case called out. None appears for the petitioner to press this writ petition.

List/put up in the additional cause list in the week commencing 21.3.2022 alongwith connected matter."

5. Today, case has been called out. No one appears for the petitioners to press the writ petitions even in the revised call.

6. In the aforesaid Writ Tax No. 874 of 2010, Writ Tax No. 875 of 2010, Writ Tax No. 353 of 2012 and Writ Tax No. 13 of 2014, the petitioners have prayed for the following relief:

Relief as prayed in Writ Tax No. 874 of 2010	Relief as prayed in Writ Tax No. 875 of 2010	Relief as prayed in Writ Tax No. 353 of 2012	Relief as prayed in Writ Tax No. 13 of 2014
i) issue a suitable writ order or direction in the nature of writ of certiorari quashing the permission granted by the opposite party no. 3 on 30.4.2010 for the assessment year 2003-04, 2004-05, 2005-06, 2006-07 and the consequential notice under Section 21(1) for the assessment year 2003-04 **(ANNEXURE NO. 10 & 12)** of this Writ Petition as well as the notice issued under sub section 1 of section 21 of the Act by the opposite party no. 4 for the assessment year 2007-08 **(ANNEXURE NO. 12)** to this Writ Petition after summoning the	i) issue a suitable writ order or direction in the nature of writ of certiorari quashing the permission granted by the opposite party no. 3 on 30.4.2010 for the assessment year 2003-04, 2004-05, 2005-06 & 2006-07 and the consequential notice under Section 21(1) for the assessment year 2003-04 **(ANNEXURE NO. 11 & 13)** of this Writ Petition as well as the notice issued under sub section 1 of section 21 of the Act by the opposite party no. 4 for the assessment year 2007-08 **(ANNEXURE NO. 13)** to this Writ Petition after summon	i. Issue a writ, order or direction in the nature of certiorari quashing the impugned re-assessment proceedings for the assessment year 2005-06 under Sub Section (2) of Section 21 of the Act. ii. Issue a writ, order or direction in the nature of certiorari quashing the impugned notice dated 12.03.2012 (Annexure No. 1 to the writ petition) issued by the respondent no. 3 and further proceeding pending before respondent no. 3 for assessment year 2005-06 under Sub Section (2) of Section 21 of the Act. iii. Issue a writ, order or direction in the nature of certiorari quashing the approval dated 24.3.2011 for the assessment year 2004-05 granted by the Opposite Party No. 3 under subsection 2 of Section 21 **(ANNEXURE NO. 1)** to this Writ petition after summoning the records. iii) Issue a suitable writ order or direction in the nature of writ of mandamus/ prohibition directin

records. ii) issue a suitable writ order or direction in the nature of mandamus/prohibition directing/prohibiting the Opposite Party No. 4 not to impose and realise tax under section 21 of the Act for the assessment year 2003-04, 2004-05, 2005-06, 2006-07 & 2007-08 during the pendency of this Writ	ing the records. ii) issue a suitable writ order or direction in the nature of mandamus/prohibition directing/prohibiting the Opposite Party No. 4 not to impose and realise tax under section 21 of the Act for the assessment year 2003-04, 2004-05, 2005-06, 2006-07 & 2007-08 during the pendency of this	nature of mandamus prohibiting/ directing the respondent nos. 3 and 4 not to proceed in any manner in pursuance of notice dated 12.03.2012 (Annexure No. 1 to the writ petition) for assessment year 2005-06 under Sub Section (2) of Section 21 of the Act.	g/ prohibiting the Opposite Party no. 3 & 4 not to proceed in any manner in pursuance of the notice under Section 21 of the Act for the assessment year 2004-05, 2005-06 & 2006-07.	Petition before this Hon'ble Court or till the finalization of proceeding by the Central Excise Department. iii) issue a suitable writ order or direction in the nature of writ of mandamus directing the Opp. Parties not to take any action against the petitioner under Section 21 till the finalization of proceedings in	Writ Petition before this Hon'ble Court or till the finalization of proceeding by the Central Excise Department. iii) issue a suitable writ order or direction in the nature of writ of mandamus directing the Opp. Parties not to take any action against the petitioner under Section 21 till the finalization of		

pursuance of the search dated 10.7.2007 under the Central Excise Act, 1944.	proceedings in pursuance of the search dated 10.7.2007 under the Central Excise Act, 1944.		

7. Perusal of the reliefs sought by the petitioners reveal that notices under Section 21 of the UP Trade Tax Act, 1948 and the approval granted, relating to assessment years 2003-04, 2004-05, 2005-06 and 2006-07 have been challenged by the petitioners. The above noted first three writ petitions are pending in this Court from about a decade and the fourth writ petition is pending from about eight years. The order sending back the matter to this Court was passed by Hon'ble Supreme Court on 28.8.2019. Two and half years have also passed since the order of the Hon'ble Supreme Court. Perusal of the order-sheet as briefly noted above also shows that the petitioners are not appearing to press the writ petitions.

Since, none appears for the petitioners even in the revised call and also since there is an order of the Hon'ble Supreme Court with certain directions, therefore, we proceed to decide these old writ petitions with the assistance of the learned Standing Counsel.

8. Hon'ble Supreme Court, by the aforesaid order, has remitted back the matter with the following observation:

"As a result, the impugned judgment(s) are set aside and the proceedings are remanded to the High Court for reconsideration on merits in accordance with law and in light of the reported decision ***in Aryaverth Chawal Udyog (supra****)."*

9. In the case of **Aryaverth Chawal Udyog (supra)** reported in **(2015) 17 SCC 324** (paragraphs 28 to 30), Hon'ble Supreme Court has held as under:

"28. This Court has consistently held that ***such material on which the assessing Authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant****. It must bring home the appropriate rationale of action taken by the assessing Authority in pursuance of such belief.* ***In case of absence of such material, this Court in clear terms has held the action taken by assessing Authority on such "reason to believe" as arbitrary and bad in law.***

In case of the same material being present before the assessing Authority during both, the assessment proceedings and the issuance of notice for re-assessment proceedings, it cannot be said by the assessing Authority that "reason to believe" for initiating reassessment is an error discovered in the earlier view taken by it during original assessment proceedings. (See: Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan, (1980) 4 SCC 71).

29. ***The standard of reason exercised by the assessing Authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion****. The necessary sequitur is that a mere change of opinion while perusing the same material cannot be a "reason to believe" that a case*

of escaped assessment exists requiring assessment proceedings to be reopened. (See: Binani Industries Ltd. v. CCT,(2007) 15 SCC 435; A.L.A. Firm v. CIT, (1991) 2 SCC 558). If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion".

If an assessing Authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for re-assessment. ***Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing Authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment.***

30. ***In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion" and the material present before the assessing Authority****. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings under Section 21(1) of the Act on the basis of change in subjective opinion (CIT v. Dinesh Chandra H. Shah, (1972) 3 SCC 231; CIT v. Nawab Mir Barkat Ali Khan Bahadur, (1975) 4 SCC 360)."*

10. The aforequoted judgement in the case of **Aryaverth Chawal Udyog (supra)** has been reproduced by the Hon'ble Supreme Court in the aforesaid order dated 28.8.2019 while remanding the matter.

Writ Tax Nos.874 & 875, both of 2010:-

11. Perusal of the impugned order dated 13.04.2010 relating to Assessment Years 2003-04, 2004-05, 2005-06 and 2006-07 under proviso to Section 21(2) of the U.P. Trade Tax Act, 1948 (hereinafter referred to as "the Act, 1948'), reveals that the Additional Commissioner has granted the permission to invoke extended period of limitation to initiate proceedings for reassessment on the basis of huge documentary material received by the department in hard-disk and CD relating to the petitioners found in search/ survey conducted by the Central Excise Department on 10.07.2007 on the business premises of the petitioners and some other related premises. The materials received and materials coming in possession of the respondent-department revealed huge undisclosed sales/ purchases by the petitioner during the years in question. As per materials available on record, the documents received in hard-disk and CD revealed unaccounted sales of 1557 metric tons M.S. ingots apart from huge unaccounted purchases of raw material and scrape which were not disclosed during the course of regular assessment proceedings. The Additional Commissioner granted repeated opportunities to the petitioners to submit reply but on the dates fixed, the petitioners merely sought adjournments. As per impugned notices under Section 21(1) of the Act, 1948 for the Assessment Year 2003-04, the unaccounted/ undisclosed sales of M.S. ingots of 1557.142 MT came to light. As per impugned notice under Section 21(1) of the Act, 1948 for the Assessment Year 2007-08 (U.P.) for the period from April, 2007 to June, 2007, the undisclosed/ unaccounted sales of 6358.58 metric ton came to light on the basis of material on record. It also came to light on examination of the documentary materials available in the hard-disk and DVD that the

petitioners have made following unaccounted purchases of iron ingots from one M/s Jain Steel, Bijnor:

Assessment Year	Quantity in metric ton
2003-04	1353.51
2004-05	8808.74
2005-06	5728.865
2006-07	7757.930

12. Apart from above, the materials available in the hard-disk also revealed purchases of scrap by the petitioners from various dealers and sale of ingots to various local dealers and also to some Firms of Uttarakhand. It also came to light on the basis of materials available in the hands of the respondents that the petitioners made undisclosed purchases during the Assessment Year 2003-04 from M/s Kamakhya Steels Pvt. Ltd., Bijnore (658.28 MT). These details of evaded purchases/ sales which have been extracted above from the impugned notices under Section 21(1) of the Act, 1948. Evaded transactions in some greater detail are mentioned in the impugned notices.

Writ Tax No.13 of 2014:-

13. In this writ petition, the approval dated 24.03.2011 for the Assessment Year 2004-05 was granted by the Additional Commissioner under the proviso to Section 21(2) of the Act, 1948 noticing the information received by the Deputy Commissioner (Special Investigation Branch) Second Unit, Ghaziabad through letter No.659 dated 26.03.2010 from the Director General of Central Excise Intelligence, New Delhi regarding adverse material found in search/ survey conducted at the business premises of M/s Parmarth Iron Pvt. Ltd. Bijnor and some other units. The CD/ soft copy and hard-disk as received by the respondents revealed Sale Ledger Account and other particulars relating to the petitioner which revealed unaccounted/ evaded purchases/ sales of about Rs.4,31,35,901/- during the Assessment Year 2004-05. After following due procedure of law, the permission was granted by the Additional Commissioner under proviso to Section 21(2) of the Act.

14. As per notice for the Assessment Year 2004-05, it is evident that the respondents were having relevant information in their possession against the petitioner indicating huge evaded/ unaccounted transactions during the Assessment Year 2004-05.

Writ Tax No.353 of 2012:-

15. The impugned order granting permission under the proviso to Section 21(2) of the Act, 1948 for the Assessment Year 2005-06 was passed by the Additional Commissioner, Trade Tax on the basis of information received which revealed evaded/ unaccounted purchases/ sales of about Rs.2,31,81,000/- as evident from the Sale Ledger Account and other particulars available in the hard-disk and CD/ soft copy received from the Deputy Commissioner (SIB), Second Unit, Ghaziabad vide letter No.663, dated 27.03.2010, which is based on the report/ materials received from the Director General of Central Excise Intelligence, New Delhi.

16. In the case of **The Commissioner of Sales-tax U.P. vs. M/s. Bhagwan Industries (P) Ltd., Lucknow, AIR 1973 SC 370 (Paras 9 & 10)**, Hon'ble Supreme Court has held as under:

"9. The controversy between the parties has centered on the point as to

whether the assessing authority in the present case had reason to believe that any part of the turnover of the respondent had escaped assessment to tax for the assessment year 1957-58. Question in the circumstances arises as to what is the import of the words "reason to believe", as used in the section. ***In our opinion, these words convey that there must be some rational basis for the assessing authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If such a basis exists, the assessing authority can proceed in the manner laid down in the section. To put it differently, if there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of the turnover of a dealer has escaped assessment, it can take action under the section. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court or this Court, for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. At the same time, it is necessary to observe that the belief must be held in good faith and should not be a mere pretence.***

10. It may also be mentioned that at the stage of the issue of notice the consideration which has to weigh is ***whether there is some relevant material giving rise to prima facie inference that some turnover has escaped assessment. The question as to whether that material in sufficient for making assessment or re-assessment under section 21 of the Act would be gone into after notice is issued to the dealer and he has been heard in the matter or given an opportunity for that purpose. The assessing authority would then decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary."*** *(Emphasis supplied)*

17. It is settled principles of law that proceedings under Section 21 of the Act, 1948 can be initiated if the material on which the Assessing Authority bases its opinion, is not arbitrary, irrational, vague, distant or irrelevant. There must be some rational basis for the assessing authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If such a basis exists, the assessing authority can proceed in the manner laid down in Section 21 of the Act, 1948. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. The question as

to whether that material in sufficient for making assessment or re-assessment under section 21 of the Act would be gone into after notice is issued to the dealer and he has been heard in the matter or given an opportunity for that purpose. The assessing authority would then decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary.

18. Facts of the present cases as briefly noted above leaves no manner of doubt that the Assessing Authority was having relevant material in his hands on the basis of which he had reason to believe that for the Assessment Years in question, the petitioners have evaded tax on undisclosed sales and made huge transactions of purchases and sales out of the Books of Account. Therefore, the permission under the proviso to sub-Section (2) of Section 21 of the Act, 1948 for the Assessment Years in question have been lawfully granted by the concerned Additional Commissioner, Trade Tax and the notices under Section 21(1) of the Act, 1948 have been lawfully issued by the concerned Assessing Authorities to the petitioners for the Assessment Years in question. Under the circumstances, we do not find any merit in these writ petitions.

19. For all the reasons aforestated, **all the writ petitions are dismissed.**

(2022)04ILR A1002
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.04.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Matters Under Article 227 No. 660 of 2022

Munna Lal & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Prashant Agarwal

Counsel for the Respondents:
A.S.G., Sanjeev Singh

Shop lease expired-Cant Board issued willingness to renew the lease-Principal Director rejected the proposal-no renewal instead auction-Appeal-rejected-Lease expired after 30 years-only question to be considered was for fresh grant-Fresh grant alone could be considered for a public premise-constructed by cantonment board on cantonment land -through public auction.

Petition dismissed. (E-9)

List of Cases cited:

1. Accountant and Secretarial Services (P) Ltd. Vs U.O.I., 1988 (4) SCC 324

2. Hari Singh Vs Military Estate Officer, 1972 (2) SCC 239

3. New India Assurance Co. Ltd. Vs Nusli Neville Wadia & anr., 2008 (3) SCC 279

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

1. Heard learned counsel for the petitioner, Sri Varun Pandey, learned counsel appearing for respondent nos.1 to 4 and Sri Sanjeev Singh, learned counsel appearing for respondent nos.6 and 7.

2. Since the respondent no.5 is the Estate Officer i.e. Quasi-Judicial Authority, whose order has been challenged in this petition, there is no need to issue notice to the respondent no.5.

3. This petition has been filed challenging the judgement and order dated

05.01.2022 passed by the Learned Additional District and Sessions Judge, Court No. 19 in Miscellaneous Civil Appeal No.194 of 2019 arising out of order passed by the Estate Officer c/o Chief Executive Officer, Cantonment Board, Lucknow, dated 30.07.2019.

4. It has been argued by the learned counsel for the petitioners that Shop No.1, Block A, Nehru Road Shopping Complex, Sadar Bazar, Cantt Lucknow, was leased out to one Shri Munna Lal petitioner no.1 in an public auction held on 22.07.1981, for a monthly rent which was deposited by the lessee on 31.12.1981, in pursuance of sanction granted on 07.11.1981 by the General Officer Commanding-in-Chief, Central Command, Lucknow. The lease deed was signed on 16.03.1983. The original allottee Munna Lal continued to pay the monthly rent of Rupees 236.70/- and continued in occupation of the shop in question till his death on 31.03.1999. It has been argued that the petitioner no.2 Mohammad Saleem inherited the shop by virtue of a registered will made out by the original allottee Munna Lal in favour of Mohammed Saleem on 05.10.1989. Mohammed Saleem was in possession of the shop in question when the Cantonment Board through its Chief Executive Officer issued a letter dated 29.06.2013, to the Lessee Munna Lal (already dead) for renewal of lease which had expired in March, 2013. Mohammed Saleem who was in occupation of the shop informed the Cantonment Board on 05.07.2013 of the death of Munna Lal the original allottee, and of his having inherited the lease on basis of a registered Will. The Respondents also issued a letter on 31.1.2014 showing their willingness for consideration of renewal of lease but later on changed their mind as the proposal of the Cantonment Board was shot down by the Principal Director Defence Estates on 24.10.2014. Consequently, the Board also passed a resolution on 01.11.2014 for auction of all shops where the leases had expired.

5. The respondent nos.6 and 7 issued a letter dated 29.06.2013 to the petitioner for renewal of lease which had expired. Thereafter several correspondence took place between Mohd. Saleem and the Cantt Board showing willingness for consideration of lease renewal by the Cantt Board. However, the Cantt Board Resolution was not accepted by the Principal Director, Defence Estates, Central Command. The matter of renewal of lease remained pending. The respondent no.5 without declaring the petitioner no.2 as unauthorized occupant of the shop from a particular date, issued notice under sub-section (1) and clause (b) of sub-section (2) of Section 4 of Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as "the P.P.E. Act"). The said notice was issued only on 13.02.2015 giving five days' time instead of seven days' time to submit reply latest by 18.02.2015.

6. Mohammed Saleem submitted his reply and his willingness to clear all dues for consideration of renewal of lease in his name. He even deposited rent during the pendency of the proceedings under Sections 4 and 7 of the Act of 1971. An amount of Rs.17,386 was also demanded as damages by the respondent through notice dated 26.11.2018 which was deposited through cheque which was returned inexplicably by the respondent no.5 who passed an order of eviction on 30.07.2019 and also for payment of damages.

7. Mohd. Saleem being aggrieved filed an Appeal bearing Misc. Civil Appeal

No.194 of 2019 before the District Judge, Lucknow in the P.P.E. Act. Initially, an order of maintenance of status quo was passed while admitting the Appeal on 14.08.2019. Mohd. Saleem also filed an application under Order 41 Rule 27 of the C.P.C. on 15.10.2020 for taking additional evidence on record in Appeal, which was allowed. However, the additional evidence that was submitted by the petitioner was not taken into account and the Appeal was dismissed on 05.01.2022.

8. It has been argued by learned counsel for the petitioners that the respondent no.5 could not have adjudicated the dispute under the P.P.E. Act as it would amount to a person being judge in his own cause and the rule of bias would apply. It has also been argued that order passed by the respondent no.5 ignored the fact that the lease had been granted after sanction from the GOC-in-C, Central Command and a lower officer like the Estate Officer or even the Chief Executive Officer of the Cantt Board could not go against such sanction for grant of lease. It has also been argued that the replies of the petitioner no.2 were not considered and no reasonable opportunity of hearing was given by the respondent no.5. It has also been argued that under the P.P.E. Act, the provision for eviction is provided in Section 4 and 5, whereas Section 7 provides for claim for compensation. A joint order could have been passed under the Act as has been one by the respondent no.5 in his order dated 01.08.2019.

9. It has also been argued that during the pendency of the Appeal, the petitioner no.2 moved an application for transfer of the case under Section 24 of the C.P.C. as the Additional District and Sessions Judge/ Court No.19 did not have jurisdiction to decide the matter. Once such an application is moved and pending, it shall be deemed that jurisdiction of the learned court of Additional Sessions Judge stood transferred to the superior court for adjudication hence the order passed in Appeal was without jurisdiction. To substantiate his argument, learned counsel for the petitioners has referred to Section 9 of the P.P.E. Act sub-Section (1), wherein it has been provided that *"an Appeal shall be entertainable by an officer who shall be the District Judge of the District in which the Public Premises are situate or such other judicial officer in that district of not less than ten years standing as the District Judge may designate in this behalf."*

10. It has been submitted that learned Additional District Judge Pawan Kumar Rai did not possess ten years standing as the District Judge and therefore he could not have adjudicated the Appeal. The petitioners also moved an application on 06.12.2021 for keeping the appeal in abeyance till the transfer application is decided as the Presiding Officer of Court No.19 was lacking in jurisdiction in deciding the Appeal. However, such application was kept pending and the Appeal was dismissed.

11. It has also been argued by learned counsel for the petitioners that as per the Notification No. S.R.O. 235 of the Ministry of Defence dated 21.07.1978, no person can be judge for his own case and the Estate Officer was the complainant in this case, but as the Estate Officer he again decided the matter exercising jurisdiction under the P.P.E. Act.

12. It has also been argued that the Cantt Board had filed an order of rejection dated 24.10.2014 along with the copy of

the Board's Resolution C.B.R. No.02 dated 01.11.2014 before the District Judge to show that the proposal for renewal of lease had been rejected by the Competent Authority. However, such rejection order is absolutely illegal. The Principal Director, Defence Estate, Central Command, Lucknow was not empowered to allow or reject the renewal of lease as sanction of the original lease was granted by the GOC-in-C, Central Command, respondent no.2. Since the original sanction was given by respondent no.2 for executing lease deed in favour of the allottee, termination of such lease deed or any decision with regard to whether the allottee was entitled to renewal could only be taken by the GOC-in-C and not by the Principal Director, Defence Estate. As such the Resolution of the Cantt Board i.e. Resolution No.02 dated 01.11.2014 and the Cantt Board Resolution No.13 dated 24.05.2014 were both illegal.

13. The learned counsel for the petitioners has argued that the respondent no.5 had committed a manifest error of law in issuing notice on 09.02.2015 in the name of a dead person, namely, Munna Lal who had died on 31.12.1999. Such notice was void ab initio and the entire proceedings subsequent to such notice was also null and void in the eye of law. It has been argued that before such notice was issued the petitioner no.2 had informed through his letter dated 5.07.2013, the respondent no. 5 of the death of the original allottee Munna Lal, and of his inheriting the lease on the basis of a Will made out in 1989 by the original allottee. Such fact was also ignored by the District Judge altogether while rejecting the Appeal.

14. It was also argued before the Appellate Court that it was nowhere mentioned in the conditions of the lease deed that after expiry of term of 30 years, the said lease shall automatically stand cancelled. No notice of termination of tenancy was ever given.

15. In the response submitted by the Respondents in the Appeal, it had been stated that Shop No.1 with a total area of 140 ft.² had been allotted on the basis of a public auction held in 1981, in favour of one Munna Lal son of Baijnath. The lease deed was signed in January 1983 for an initial period of 10 years i.e. up to 1993, with a clause for renewal for a further period of five years at a time at the revised rates of rent for a total period of 30 years. When the Cantonment Board proposed renewal of lease with sitting allottees, a letter was issued in this regard to Munna Lal, son of Baijnath. However, reply was submitted by one Mohd Saleem, son of Abdul Majid on 05.02.2014 praying that lease be renewed in his favour as he was running the shop in the name of New Shehzada Watch House on the basis of an alleged Will made out in his favour by the original allottee. As per Clause (4) of the lease deed dated 16.01.1983 the lease had to be renewed initially after 10 years, that is in 1993, and thereafter every five years at the revised rate of rent. Such renewal was not done. After more than one year of expiry of total period of 30 years of the lease, a request was made for renewal of lease in favour of Mohammed Saleem. Mohammed Saleem was not the original allottee. He was only occupier of the shop. There was a condition in the original lease which prohibited creation of any right, title or interest by way of subletting, or in any other manner, by the original allottee in favour of a third person without prior permission of the Cantonment Board. No written permission was ever sought for, nor granted in favour of Mohammed Saleem to

continue to occupy the shop in question, in place of the original allottee Munna Lal. As there was a violation of the specific condition in the lease, such occupier as Mohammed Saleem became an Unauthorised Occupant in terms of section 2(g) of the Act of 1971.

16. It has been argued by Sri Sanjeev Singh that the learned Appellate Court while considering issue no.4 regarding validity of notice sent by the respondent no.5 to a dead person, namely, Munna Lal son of Baijnath, has observed that as per the original lease deed signed in 1983 only Munna Lal could have been recognised as an allottee. As per Condition No.4 of the lease, the allottee had to seek prior permission in writing from the Competent Authority for creating any right in favour of any third person. In spite of such a condition the original allottee Munna Lal did not seek prior permission to hand over the shop in question to Md Saleem during his lifetime. After his death in 1999, Mohd Saleem claimed to have inherited the shop on the basis of a Will allegedly made out by Munna Lal in his favour. The respondent no.5 could not have recognised Mohammed Saleem as a legitimate occuppant of the shop and therefore all proceedings were undertaken only on the basis of notice issued in the name of Munna Lal. The show cause notice and the eviction orders were legally issued under the Act of 1971 as Mohammad Saleem was an Un-authorised Occupant in terms of the Act of 1971 which recognised only Original allottee in accordance with the terms of the lease.

17. Sri Sanjeev Singh, learned counsel appearing for the respondent nos.6 and 7 has also pointed out Section 3 of the P.P.E. Act by which the Central Government may, by notification in the Official Gazette appoint any person being gazetted officer of Government, as it thinks fit, to be Estate Officers for the purpose of the Act provided that such an officer of a statutory authority shall only be appointed as an Estate officer in respect of the public premises controlled by that Authority.

18. In this case, the statutory authority in question is the Cantonment Board. The Estate Officer is a gazetted officer appointed by the Government of India for the purpose of P.P.E. Act. The validity of Section 3 was challenged in *Accountant and Secretarial Services (P) Ltd. Vs. Union of India*, 1988 (4) SCC 324 and in *Hari Singh Vs. Military Estate Officer*, 1972 (2) SCC 239. The Supreme Court however negated such challenge that one of the officers of the statutory authority was appointed as Estate Officer which was violative of Article 14 of the Constitution by observing thus:-

"32. Dr. Chitale, while initially formulating his arguments that the provision in 1971 Act appointing one of the officers of the respondent Bank as the Estate Officer is violative of Article 14. We do not see any substance in this contention. In the very nature of things, only an officer or appointee of the Government, statutory authority or corporation can be thought of for implementing the provisions of the Act. That apart, personal bias cannot necessarily be attributed to such officer either in favour of the Bank or against any occupant who is being proceeded against, merely because he happens to be such officer. Moreover, as pointed out earlier, the Act provides for an Appeal to an independent judicial officer against orders passed by the Estate Officer. These provisions do not, therefore, suffer from

any infirmity. In fact, Dr. Chitale did not pursue this objection seriously."

19. Such observations made by the Supreme Court in the case of *Accountant and Secretarial Services (P) Ltd.* (supra) were quoted with approval by the Supreme Court in *New India Assurance Company Ltd. Vs. Nusli Neville Wadia and another*, 2008 (3) SCC 279.

20. It has been argued by learned counsel for the respondent nos.6 and 7 that the learned counsel for the petitioners is himself misinterpreting Section 9 of the Act by which either the District Judge or any other Judicial Officer of ten years standing, appointed by the District Judge can decide the Appeal. It is not as if the Judicial Officer so nominated should be a District Judge of ten years standing as has been interpreted by the learned counsel for the petitioner.

21. Sri Sanjeev Singh has also argued that although initially there was a provision for renewal of lease after ten years for four subsequent periods of five years each on revised rent rates as applicable in the market area, such leases were never renewed after initial period of ten years. Further, the total of 30 years period came to an end in March, 2013 for the petitioner no.1. After such lease had expired in March, 2013 for the petitioner no.1 and for others on various other dates following 2013, the Cantt Board has initially resolved to renew the lease of the sitting allottees. When the Resolution was forwarded to the Principal Director Defence Estates, Central Command, it examined the issue and found that the leases that had already expired way back could not be renewed. Only fresh leases could be granted by way of public auction of the public property. The shops in question were situated in the main market of Sadar Bazar and therefore had to be auctioned in a public auction.

22. Learned counsel for the respondent nos.6 and 7 has pointed out from the order of the Estate Officer dated 01.08.2019 that every objection made by the petitioners was considered in detail by the Estate Officer but on perusal of the record, the Estate Officer was satisfied that the lease had not been renewed after the initial period of ten years which came to end in 1993. The maximum period for which the lease could have been treated as subsisting was 30 years which also expired in 2013. Therefore, in the order dated 30.07.2019, there was a mention of initial issuance of a notice under Section 4 (1) on 13.02.2015 calling upon the allottee to appear on 18.02.2015 and a combined notice under Section 4 sub-section (2) clause (b) (ii) of the Act was also issued calling upon the allottee to visit his office on 21.02.2015 to show cause with regard to why the lease should not be treated as terminated and opportunity was given to answer all material questions connected with the matter along with the opportunity to produce evidence in support of erstwhile allottees case. Such personal hearing was granted on 21.02.2015 to Sri Prashant Agarwal, Advocate, who appeared for noticees and requested for time to file written objections. Repeatedly, dates were fixed. In fact, although notice was issued on February, 2015, actual order deciding the matter was passed by the Estate Officer only on 30.07.2019 i.e. almost four and a half years time was granted to the noticee to make out his case and submit evidence in his favour. It was evident on perusal of records that the original allottee / lessee had failed to get renewal of lease deed coming at the end of each successive five years at

the revised rate to be determined on the basis of a fair market rent applicable in the area in question. The lease had expired before the Cantonment Board Resolution was passed initially proposing renewal of such lease therefore on expiration of lease, there was no question of renewal and such proposal was rightly rejected by the Principal Director, Defence Estates. After March, 2013, the possession or occupation of the shops in question by the allottees became illegal and unauthorized. The Petitioner no.2 did not submit any material to explain the continued occupation of the shop after the expiry of the total lease period of 30 years in March, 2013. The legal representative appearing on behalf of the petitioner no.2 also failed to establish right of renewal of lease deed. Hence notice under Section 4(1) (2)(b) (ii) of the P.P.E. Act was issued and thereafter by the same order, eviction was directed under sub-section (1) of Section 5. The petitioner no.2 was required to vacate the shop in question within 15 days from passing of the order and also to pay damages for unauthorized occupation @ Rs.236/- per month with effect from March, 2014.

23. Having heard learned counsel for the petitioners and the counsel appearing on behalf of the respondents, this Court has carefully perused the order passed by the Additional District Judge in Appeal no.194 of 2019. The Additional District Judge had first recorded the submissions made by the appellant which are in fact the same submissions as has been recorded by this Court in the foregoing paragraph of this order. The Additional District Judge recorded the submissions made by the counsel appearing for the Cantt Board and then framed points for determination.

24. The first point for determination was whether additional evidence as submitted by the appellant was admissible under Order 41 Rule 27 of the C.P.C. This point was decided in favour of the appellant on the ground that the document sought to be brought on record have been obtained by the appellant under Right to Information Act only in 2019.

25. The second point for determination was whether the notice issued on 13.02.2015 by the respondent no.5 was a valid notice under the P.P.E. Act. The Additional District Judge found on perusal of the provisions of Sections 4 and 5 of the P.P.E. Act that the time limit granted in Section 4 for showing cause to the noticee was seven days. Initially, notice which was given on 13.02.2015 asking noticee to appear on 18.02.2015. It then informed by the same notice that the noticee could appear on 21.02.2015 at 11:00 am in the office of the Estate Officer. Thus eight days' time was granted with effect from 13.02.2015 to 21.02.2015 which was more than the time required under Section 4(2) (b)(i). It has been observed by the Appellate Court that notice was rightly issued in the name of the Allottee Munna Lal and Mohd. Saleem could not have been issued notice as he was not the authorized occupant nor the allottee.

26. The third point was whether the Estate Officer was competent to pass the order impugned dated 01.08.2019 under the P.P.E. Act. The Additional District Judge considered the provisions of Section 3 of the P.P.E. Act and the fact that the Estate Officer being a Gazetted officer of the Cantt Board which is a statutory authority had been duly nominated to act as an officer under the P.P.E. Act.

27. With regard to the point no.4 as to whether the respondents had the right to evict the appellants and claim damages, the Additional District Judge has found that the notice was issued in a legal manner by an officer duly appointed under Section 3 of the Act. Time of almost four and a half years was granted to the appellant to present his case and thereafter a reasoned order was passed. The Additional District Judge considered Section 5 of the Act which requires only grant of opportunity. Such opportunity had indeed been granted. The Additional District Judge thereafter referred to the facts of the case that the appellant Mohd. Saleem was not the original allottee of the lease deed which had been executed in March, 1983 for ten years for rent of Rs.236/- per month with Munna Lal son of Baijnath, initially for a period of ten years and renewal was expected to be done every successive five years on a revised rate of rent for a total period of 30 years. The entire period of 30 years expired in March, 2013. It referred to the Cantt Board Resolution and also the order passed by the Principal Director, Defence Estates on 24.10.2014 and the Cantt Board's consequential Resolution passed thereafter on 01.11.2014.

28. After determining the four points in favour of the respondents, the fifth point for determination as to whether the appellant was entitled to any relief in the Appeal was decided against the appellant and the Appeal was dismissed by the Additional District Judge by his order dated 05.01.2022.

29. This Court finds from a perusal of the documents on record including from a perusal of the lease deed signed between Munna Lal s/o Baij Nath and the Cantt Board on 16.03.1983 that shops were constructed by the Cantt Board under a self-financed scheme wherein advance of Rs.14,200/- was deposited by Munna Lal s/o Baijnath on his successful bid of Rs.236.70/- per month. In consideration of a sum of Rs.14,200/- which was paid as advance towards rent, the rent of the shop in question in main Sadar Bazar was kept at a reasonable rate of Rs.236.70/- per month and half of the monthly rent alone was to be deposited and rest was to be adjusted from the advanced rent of Rs.14,200/-. The lessee was required to pay all taxes and other charges and to keep the premises in question in good and substantial repairs and on expiration of the lease or on termination of the said term of lease earlier, the lessee was required to peacefully yield up the same to the lessor. The allottee was prohibited from sub-letting or mortgaging in any manner or giving up any rights in the premises in question without the consent in writing of the lessor having been previously obtained. Several such conditions such as relating to how the sign board was to be affixed and other mundane matters were mentioned in the lease fixing the responsibility of the lessor for carrying out major structural repairs when required. Under condition (4) of the lease, it was provided that the lessor will on the request and at the cost of lessee at the end of the lease, and from time to time thereafter at the end of each successful five years period, up to a total period of 30 years shall renew the lease on rent as fixed for every renewed term of five years by the GOC-in-C, or his authorized officer, having regard to the rate of rent in the locality at that time. The lessee was required to get executed the renewed lease for each successive five years term, unless of course the lessor for reasons to be given in writing in notice, determined the lease.

30. In the case of the petitioners, the lease term ran out after 30 years in March, 2013. There could not have any question of consideration for renewal. The only question to be considered by the Cantt Board was for fresh grant. Fresh grant alone could be considered for a public premises like the shop in question which was constructed in the Cantonment land by the Cantt Board through public auction.

31. This Court finds no good ground to show interference in the order impugned.

32. The petition is ***dismissed***.

33. One month's time from today is granted to vacate the premises in question and hand over the peaceful and vacant possession to the respondent nos. 6 and 7.

34. The petitioners shall also be liable to pay damages as determined in the order dated 30.07.2019, as the said order has been affirmed by the District Judge and also by this Court.

(2022)04ILR A1010
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.03.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Matters Under Article 227 No. 837 of 2022
(Civil)

Seth Daryablal Manik Lal Tadaiya & Anr.
...Petitioners
Versus
Siddh Gopal Kudariya & Anr.
...Respondents

Counsel for the Petitioners:
Ms. Shreya Gupta, Sri Ravi Anand Agarwal

Counsel for the Respondents:
Ms. Rama Goel Bansal, Ms. Shalini Goel

Civil Law - Code of Civil Procedure, 1908 - Order XXI, Rules 97-101 and Section 151---Suit--For arrears of rent and ejectment--Decree-holder claimed to be landlord of first floor of the house No. 196 rented to respondent No. 2 at monthly rent of ` 100 since 1986--Respondent No. 2 defaulted in payment of rent since 1.6.2005--Notice terminating the tenancy and demanding arrears of rent on 12.7.2013 served on respondent No. 2 on 19.7.2013--Rent was not tendered--Suit filed on 13.8.2013 decreed on 28.3.2017--Revision filed thereagainst came to be dismissed--Tenant-respondent No. 2 challenged the same by filing petition under Article 227 of the Constitution--Same stood dismissed--Courts below dismissed application under Order XXI, Rule 97 on ground that present set of proceedings have been launched to linger on the case and to delay the execution of the decree--Executing court not obliged to determine a question merely because the resister or objector has raised it--Executing court obliged to determine question which was legally arisen between the parties and secondly it must be relevant for consideration and determination between the parties--Courts below rightly rejected the application under Order XXI, Rule 97, C.P.C. holding that it was a dilatory tactic by petitioners to stall the execution proceedings launched by the decree holder.

Writ petition dismissed. (E-9)

List of Cases cited:

1. Shreenath & ors. Vs Rajesh & ors. MANU/SC/0286/1998;

2. Brahmdeo Chaudhary Vs Rishikesh Prasad Jaiswal & ors. MANU/SC/0191/1997;

3. Silverline Forum Pvt. Ltd. Vs Rajiv Trust & ors. MANU/SC/0252/1998;

4. Bool Chand & ors. Vs Rabia & ors. MANU/SC/0867/2016;

5. Noorduddin Vs K.L. Anand MANU/SC/0533/1995;

6. N.S.S. Narayana Sarma & ors. Vs Goldstone Exports (P) Ltd. & ors. MANU/SC/0743/2001

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Ms. Shreya Gupta, learned counsel for the petitioners and Ms. Rama Goel Bansal, learned counsel for the respondent no. 1.

2. This is a petition filed under Article 227 of Constitution of India challenging the judgment and order dated 04.01.2022 passed by District Judge, Jhansi in S.C.C. Revision No. 39 of 2021 as well as judgment and order dated 30.10.2021 passed by Judge Small Causes, Jhansi in Misc. Case No. 28 of 2019 rejecting the application filed by objectors/petitioners under Order 21 Rule 97-101 C.P.C. and Section 151 C.P.C. and allowing the application 39-C filed by the decree-holder/respondent no. 1.

3. Facts in nutshell giving rise to the petition are that the decree-holder/respondent no. 1 filed a S.C.C. Suit No. 53/2013 against respondent no. 2 for arrears of rent and ejectment. The decree-holder, claiming himself to be the landlord of the first floor of House No. 196, Jawahar Chowk, City- Jhansi which was rented to respondent no. 2 at monthly rent of Rs.100/- since the year 1986. According to decree-holder/respondent no. 1, respondent no. 2 defaulted in payment of rent since 01.06.2005, despite demand. A notice was issued on 12.07.2013 which was served upon tenant-respondent no. 2 on 19.07.2013 determining the tenancy and demanding arrears of rent. When the rent was not tendered, a S.C.C. Suit No. 53 of 2013 was filed on 13.08.2013 which was decreed by the judgment and decree dated 28.03.2017 passed by Judge, Small Cause Court, Jhansi. Against the said order, S.C.C. Revision No. 24 of 2017 was filed which was dismissed by judgment dated 25.09.2019 passed by Additional District Judge/ Special Judge (S.C./S.T. Act), Jhansi.

4. The tenant-respondent no. 2 challenged both the orders before this Court through Writ Petition No. 8309 of 2019, under Article 227 of Constitution of India. This Court vide judgment dated 14.11.2019 dismissed the writ petition and found the tenant to be in arrears of rent and liable to be ejected. Immediately after two days on 16.11.2019, the present petitioners filed an application under Order 21 Rule 97-101 and Section 151 C.P.C. on the ground that the property in dispute was let out to the firm Seth Daryablal Manik Lal Tadaiya, whose proprietor was one Sunil Kumar Tadaiya who had died on 11.05.2015 and after his death, petitioner no. 2, Smt. Lata Tadaiya had become the proprietor of the firm. It was further contended that shop in question was let out to the firm in the year 1967 by one Shankar Lal Kudariya, father of decree-holder, respondent no. 1 and it was a partnership firm which continued to run till 1988, and after its dissolution the firm continued as a proprietorship. The firm had been paying rent to the father of decree-holder/ respondent no. 1. After death of Shankar Lal Kudariya, his son respondent no. 1 and his brother, Dr. Awadh Kishore took the rent. It was further stated in the application that firm had tendered rent from 01.10.2000 to 30.11.2004 amounting to Rs.10,000/- on 28.06.2008. According to the application, the decree-holder, respondent no. 1 in collusion with

respondent no. 2 had got the decree for eviction without information to the petitioners. In Para 9 of the application, it has been stated that it was for the first time in month of October, 2019 that petitioners got information regarding the judgment in the matter by Judge Small Cause Court. The said application was contested by the decree-holder/respondent no. 1 and an objection was filed wherein the contents made in the application were vehemently denied. It was stated that the petitioner no. 2, Smt. Lata Tadaiya is the sister-in-law of respondent no. 2 and after the writ petition was dismissed on 14.11.2019, the application under Order 21 Rule 97 C.P.C. was filed at the behest of respondent no. 2 through the petitioners. The Judge, Small Cause Court on 30.10.2021 dismissed the application which was registered as Misc. Case No. 28 of 2019 on the ground that the application was filed to delay the execution proceedings launched by decree-holder/ respondent no. 1 being Execution Case No. 29 of 2017. Against the said order, a S.C.C. Revision No. 39 of 2021 was filed which was also dismissed on 04.01.2022. Hence, the present petition.

5. Ms. Shreya Gupta, learned counsel for the petitioners submitted that both the courts below were not correct to reject the application filed by third party objectors/petitioners under Order 21 Rule 97-101 C.P.C. which enjoins the executing court to adjudicate all questions (including questions relating to right, title and interest in the property) arising between the decree-holder and the third party. According to her, the executing court should have framed issues and adjudicated the dispute that has arisen between the parties.

6. She further submitted that revisional court had wrongly recorded finding on the basis of rent receipt issued in the name of petitioner firm, paying rent through Sushil Kumar Tadaiya, respondent no. 2. The courts below by refusing to frame issues and give opportunity to petitioners to lead evidence is against the provisions of Rule 97-101 of Order 21 C.P.C. According to her, the petitioners have *prima facie* established a case through documentary evidence that petitioner firm was let out the shop in the year 1967 and at present it was sole proprietorship firm and judgment and decree passed by courts below were collusive and without hearing the petitioners. The courts have not followed the procedure as established under law. Reliance has been placed upon decision of Apex Court in case of **Shreenath and others vs. Rajesh and others, AIR 1998 SC 1827**; **Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal, AIR 1997 SC 856** and **Silverline Forum Pvt. Ltd. vs. Rajiv Trust, AIR 1998 SC 1754.**

7. Ms. Rama Goel Bansal, learned counsel appearing for the decree-holder/ respondent no. 1 submitted that present proceedings has been set up by judgment debtor, respondent no. 2 through petitioners, as the petitioner no. 2 is sister-in-law of respondent no. 2. She contended that the shop in question was let out in the year 1986 to respondent no. 2 who had been continuously paying the rent to respondent no. 1 and when default was committed the suit for arrears of rent and ejectment was filed which was decreed by the Judge, Small Causes on 28.03.2017 and the revision filed against the said judgment was also dismissed on 25.09.2019. The respondent no. 2 had challenged both the orders through writ petition and the writ petition was dismissed on 14.11.2019. According to Ms. Bansal, immediately after

the dismissal of the writ petition the present Misc. Case No. 28 of 2019 was filed by petitioners on 16.11.2019 to thwart the execution proceedings filed by the decree-holder/respondent no. 1 being Execution Case No. 29 of 2019. According to her, the said proceedings are only to delay the execution case and the decree-holder could not get the fruits fructified pursuant to judgment and decree passed by courts below. She has relied upon the decision of Apex Court in case of **Silverline Forum Pvt. Ltd. vs. Rajiv Trust and another, (1998) 3 SCC 723,** Para Nos. 10 to 15; **Bool Chand (D) Through Legal Heirs and others vs. Rabia and others, 2016 Supreme (SC) 1656; Noorduddin vs. Dr. K.L. Anand, (1995) 1 SCC 242; Shreenath and another vs. Rajesh and others, (1998) 4 SCC 543** and **N.S.S. Narayana Sarma and others vs. Goldstone Exports (P) Ltd. and others, (2002) 1 SCC 662.**

8. I have heard counsel for both the parties and have given careful consideration to the material on record.

9. The question which emerges for consideration is whether an application filed by a third party objector under Order 21 Rule 97-101 C.P.C. in execution proceedings, the same has to be mandatorily considered after framing of the issues and treating it to be a suit.

10. Before adverting to decide the issue in hand, a cursory glance of Order 21, Rule 35; Order 21, Rule 36 and Order 21 Rule 97 to 101 is necessary, which are extracted hereasunder:-

*"**35. Decree for immovable property.**--(1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.*

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building on enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

***36. Decree for delivery for immovable property when in occupancy of tenant**--Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.*

***97. Resistance or obstruction to possession of immovable property.**--(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in*

execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

***98. Orders after adjudication.**--(1) Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2),--*

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

***99. Dispossession by decree-holder or purchaser.**-- (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.*

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

***100. Order to be passed upon application complaining of dispossession.**--Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination,--*

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

***101. Question to be determined.**--All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."*

11. From the reading of sub-clause (1) of Rule 35 Order 21, it is clear that the executing court delivers actual physical possession of the disputed property to the decree-holder or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate

the property. The significance is of the words removing any person bound by the decree.

12. Rule 36 of Order 21 envisages that when the immovable property is in possession of a tenant or other person not bound by the decree, the Court delivers possession by affixing a copy of the warrant in some conspicuous place of the said property and proclaiming to be occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

13. While Order 21 Rule 97 envisages resistance or obstruction to the possession of immovable property when made in execution of a decree by "any person". This may be either by the person bound by the decree, claiming title through the judgment-debtor or claiming independent right of his own including a tenant not party to the suit or even a stranger. A decree-holder, in such a case, may make an application to the executing court complaining such resistance for delivery of possession of the property. Rule 101 provides for all questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 shall be determined by the Court dealing with the application and not by separate suit for this purpose. Rules 97 and 101 were amended by Amending Act of 1976 so as to shorten the litigation as the decree-holder could not get the fruits of the decree fructified due to long drawn battles.

14. Thus, from the conjoint reading of Rule 35 of Order 21, Rule 36 of Order 21 and Rules 97 to 101 of Order 21, it culls out that Rule 35 Order 21 deals with delivery of possession of an immovable property to the decree-holder by delivery of actual physical possession and removing any person in possession who is bound by the decree, while Order 21 Rule 36 provides only for a symbolic possession where the tenant is in actual possession. While Order 21 Rule 97 conceives of cases where delivery of possession to the decree-holder is resisted by any person. "Any person". "Any person" is wide enough to include even a person not bound by a decree or claiming right in the property on his own including that of a tenant including a stranger. Prior to 1976 Amendment, Rule 101 of Order 21 was different and by virtue of then Rule 103, a person was to file a suit for establishing his right, but post amendment one need not file suit even in such case as all disputes are to be settled by executing court itself finally under Rule 101 of Order 21 C.P.C.

15. In the case in hand, the eviction proceedings by decree-holder/ respondent no. 1 were launched against respondent no. 2 in the year 2013 and the suit was decreed on 28.03.2017. The respondent no. 2 had challenged the order through S.C.C. Revision which was also dismissed on 25.09.2019 and finally the matter stood decided by judgment of this Court dated 14.11.2019, writ petition filed by respondent no. 2 having been dismissed.

16. Present litigation was started at the behest of petitioners by filing application under Order 21 Rule 97-101 C.P.C. on 16.11.2019, immediately after two days of dismissal of the writ petition filed by respondent no. 2. The important fact for consideration is that petitioner no. 2 and respondent no. 2 are related to each other. Respondent no. 2 is brother-in-law of

petitioner no. 2 and real brother of Sunil Kumar Tadaiya, who is alleged to have died in the year 2015.

17. In the application filed by petitioners, it has been contended that the shop in question was let out by father of decree-holder/respondent no. 1 in the year 1967. It was a partnership firm and the same carried out the business till 1988, when it was converted into a proprietorship business and was rented by husband of petitioner no. 2, Sunil Kumar Tadaiya in the name of Seth Daryablal Manik Lal Tadaiya.

18. Both courts below have dismissed the application under Order 21 Rule 97 on the ground that the present set of proceedings have been launched as a dilatory tactics to linger on the case and so the decree be not executed in favour of respondent no. 1. The courts below have recorded finding that cheque which was issued for payment of rent from 2000 onwards was by Sushil Kumar Tadaiya, respondent no. 2, thus, the stand taken that partnership firm was reconstituted and the sole proprietorship continued by Sunil Kumar Tadaiya from 1988 onwards was against the material on record.

19. This Court finds from the reading of the application filed by petitioners that there is no disclosure as to the fact that who are the partners of the firm which was constituted in the year 1967 and until it was reconstituted as a sole proprietorship. The finding recorded by courts below to the extent that neither the application disclosed the said fact nor any material has been brought on record except the rent receipts which are issued in the name of respondent no. 2, Sushil Kumar Tadaiya in the year 2008 establishes the fact that he was in possession over the shop in dispute as the tenant.

20. This Court also finds that the petitioners have not disclosed any fact in relation to the partnership firm and its partners who were running the business from the shop in question, only a sketchy disclosure has been made in the application claiming themselves to be in possession of the property.

21. The Apex Court in case of **Silverline Forum Pvt. Ltd.** (supra) while dealing with somewhat similar issue under Order 21 Rule 97 held that all questions arising between the parties to a proceeding on an application under Rule 97, would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resister raised. According to the Court, the question which executing court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties. The Court further held that in adjudication process envisaged under Order 21 Rule 97(2) of the Code, the execution court can decide whether the question raised by a resister or obstructor legally arises between the parties. Relevant paragraphs 10 to 14 are extracted hereasunder:-

"10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under Rule 97 or Rule 99" shall be determined by the executing court, if

such questions are "relevant to the adjudication of the application". A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite of the judgment-debtor, the scope of the adjudication would be shrunk to the limited question whether he is such a transferee and on a finding in the affirmative regarding that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.

11. When a decree-holder complains of resistance to the execution of a decree it is incumbent on the execution court to adjudicate upon it. But while making adjudication, the court is obliged to determine only such question as may be arising between the parties to a proceeding on such complaint and that such questions must be relevant to the adjudication of the complaint.

12. The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resister raised it. The questions which the executing court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g., if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resister or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21 Rule 97(2) of the Code, the execution court can decide whether the question raised by a resister or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section.

13. In the above context we may refer to Order 21 Rule 35(1) which reads thus:

"35. (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property."

14. It is clear that the executing court can decide whether the resister or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21 Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. The court can make the adjudication on admitted facts or even on the averments made by the resister. Of course the court can direct the parties to

adduce evidence for such determination if the court deems it necessary."

22. In **Bool Chand** (supra), the Apex Court held that a genuine petition to execution of a decree can certainly be considered and frivolous objections which deprive the decree-holder of benefit of such decree should be discouraged. Relevant paras 11 and 12 are extracted hereasunder:-

"11. It is clear from the finding recorded by the courts below that the predecessor of the respondents was party to the sale certificate which the respondents never challenged. There is no evidence on record that they were in possession prior to the passing of the decree as they did not take part in proceedings in spite of knowledge of the proceedings for a long period of time. The suit was duly contested by the original defendants for a long period of 30 years. It could not, thus, be held that the original defendants had colluded with the appellant-plaintiffs. In this view of the matter, there was no justification for the High Court to have set aside the order of the courts below only by observing that the executing court had not recorded finding that regular enquiry, as suit, was not required. This observation is also against the record as the executing court has, after finding that the objections were misconceived in substance, held that no regular enquiry as a suit was required. There was thus, no infirmity in the finding recorded by the courts below in rejecting the objections.

12. While a genuine petition for execution of a decree can certainly be considered, the court cannot be oblivious of frivolous objections being filed after a decree is passed in long-drawn contested proceedings. Attempt to deprive the decree-holder of benefit of such decree should be discouraged by the court where such objection is raised. The impugned order is thus, clearly erroneous and unsustainable and not a result of sound judicial approach."

23. In **Noorduddin** (supra), the Apex Court held that the scheme of the Code pursuant to the amendment of 1976 appears to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution. Relevant paragraphs 8 and 9 are extracted hereasunder:-

"8. Thus, the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code Amendment Act, 1976, right of suit under Order 21, Rule 103 of 1908 Code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or

persons claiming right, title and interest in the immovable property in execution.

9. Adjudication before execution is an efficacious remedy to prevent fraud, oppression, abuse of the process of the court or miscarriage of justice. The object of law is to mete out justice. Right to the right, title or interest of a party in the immovable property is a substantive right. But the right to an adjudication of the dispute in that behalf is a procedural right to which no one has a vested right. The faith of the people in the efficacy of law is the saviour and succour for the sustenance of the rule of law. Any weakening like (sic) in the judicial process would rip apart the edifice of justice and create a feeling of disillusionment in the minds of the people of the very law and courts. The rules of procedure have been devised as a channel or a means to render substantive or at best substantial justice which is the highest interest of man and almameter (sic) for the mankind. It is a foundation for orderly human relations. Equally the judicial process should never become an instrument of oppression or abuse or a means in the process of the court to subvert justice. The court has, therefore, to wisely evolve its process to aid expeditious adjudication and would preserve the possession of the property in the interregnum based on factual situation. Adjudication under Order 21, Rules 98, 100 and 101 and its successive rules is sine qua non to a finality of the adjudication of the right, title or interest in the immovable property under execution."

24. In **Shreenath** (supra), the Supreme Court while considering the application under Order 21 Rule 97-101 relying upon the earlier decision in **Noorduddin** (supra) held as under:-

"1.The seeker of justice many a time has to take long circuitous routes, both on account of hierarchy of courts and the procedural law. Such persons are and can be dragged till the last ladder of the said hierarchy for receiving justice but even here he only breathes fear of receiving the fruits of that justice for which he has been aspiring to receive. The reach this stage is in itself an achievement and satisfaction as he, by then has passed through a long arduous journey of the procedural law with many hurdles replica of mountain terrain with ridges and furrows. When he is ready to take the bite of that fruit, he has to pass through the same terrain of the procedural law in the execution proceedings the morose is writ large on his face. What looked inevitable to him to receive it at his hands distance is deluded back into the horizon. The creation of the hierarchy of courts was for a reasonable objective for conferring greater satisfaction to the parties that errors, if any, by any of the lower courts under the scrutiny of a higher court be rectified and long procedural laws also with good intention to exclude and filter out all unwanted who may be the cause of obstruction to such seeker in his journey to justice. But this obviously is one of the causes of delay in justice. Of course, under this pattern the party wrongfully gaining within permissible limits also stretches the litigation as much as possible. Thus this has been the cause of anxiety and concern of various authorities, legislators and courts. How to eliminate such a long consuming justice? We must confess that we have still to go a long way before true satisfaction in this regard is received. Even after one reaches the stage of final decree, he has to undergo a long distance by passing through the ordained procedure in

the execution proceedings before he receives the bowl of justice."

25. In **N.S.S. Narayana Sarma** (supra), the Court considering the earlier decisions of Apex Court in case of **Shreenath** (supra) **and Silverline Forum Pvt. Ltd.** (supra) held as under:-

"15. Provision is made in the Civil Procedure Code for delivery of possession of immovable property in execution of a decree and matters relating thereto. In Order 21 Rule 35 provisions are made empowering the executing court to deliver possession of the property to the decree-holder if necessary, by removing any person bound by the decree who refuses to vacate the property. In Rule 36 provision is made for delivery of formal or symbolical possession of the property in occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy. Rules 97 to 101 of Order 21 contain the provisions enabling the executing court to deal with a situation when a decree-holder entitled to possession of the property encounters obstruction from "any person". From the provisions in these Rules which have been quoted earlier the scheme is clear that the legislature has vested wide powers in the executing court to deal with "all issues" relating to such matters. It is a general impression prevailing amongst the litigant public that difficulties of a litigant are by no means over on his getting a decree for immovable property in his favour. Indeed, his difficulties in real and practical sense, arise after getting the decree. Presumably, to tackle such a situation and to allay the apprehension in the minds of litigant public that it takes years and years for the decree-holder to enjoy fruits of the decree, the legislature made drastic amendments in provisions in the aforementioned Rules, particularly, the provision in Rule 101 in which it is categorically declared that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application shall be determined by the court dealing with the application and not by a separate suitand for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. On a fair reading of the Rule it is manifest that the legislature has enacted the provision with a view to remove, as far as possible, technical objections to an application filed by the aggrieved party whether he is the decree-holder or any other person in possession of the immovable property under execution and has vested the power in the executing court to deal with all questions arising in the matter irrespective of whether the court otherwise has jurisdiction to entertain a dispute of the nature. This clear statutory mandate and the object and purpose of the provisions should not be lost sight of by the courts seized of an execution proceeding. The court cannot shirk its responsibility by skirting the relevant issues arising in the case.(emphasis supplied)

16. Interpreting the provisions in these Rules, a three-Judge Bench of this Court in the case of Silverline Forum (P) Ltd. v. Rajiv Trust [(1998) 3 SCC 723] held : (SCC pp. 727-28, paras 10-12)

"10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101

stipulates that all questions "arising between the parties to a proceeding on an application under Rule 97 or Rule 99' shall be determined by the executing court, if such questions are "relevant to the adjudication of the application'. A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite of the judgment-debtor, the scope of the adjudication would be shrunk to the limited question whether he is such a transferee and on a finding in the affirmative regarding that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.

11. When a decree-holder complains of resistance to the execution of a decree it is incumbent on the execution court to adjudicate upon it. But while making adjudication, the court is obliged to determine only such question as may be arising between the parties to a proceeding on such complaint and that such questions must be relevant to the adjudication of the complaint.

12. The words "all questions arising between the parties to a proceeding on an application under Rule 97' would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resister raised it. The questions which the executing court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g., if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resister or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21 Rule 97(2) of the Code, the execution court can decide whether the question raised by a resister or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section."(emphasis supplied)"

26. Thus, from the reading of provisions of Order 21, Rule 97-101 C.P.C. and decisions rendered by Apex Court, it is clear that executing court is not obliged to determine a question merely because the resistor or objector has raised it. The question which the executing court is obliged to determine under Rule 101 must possess two adjuncts. Firstly, such question should have legally arisen between the parties and secondly, it must be relevant for consideration and determination between the parties.

27. In the present case, the third party objector came into picture for the first time immediately after the dismissal of the writ petition on 14.11.2019 by this Court alleging that they were not aware of the

proceedings which are going on since 2013 and for the first time came to know in October, 2019. The application under Order 21 Rule 97 C.P.C. was moved on 16.11.2019. The only fact disclosed in the application was that petitioner no. 1 which was a partnership firm was let out the shop in 1967 and continued as partnership firm till 1988 when it was converted into a sole proprietorship. Nowhere in the application, the details of the partners who constituted the firm was disclosed nor the date of dissolution of the partnership firm was mentioned. The supporting documents filed are rent receipts which are actually issued in the name of respondent no. 2, Sushil Kumar Tadaiya who is real brother of Sunil Kumar Tadaiya, the late husband of petitioner no. 2, who claims to be running the sole proprietorship since 1988.

28. The courts below had rightly rejected the application holding that it was a dilatory tactics by petitioners to stall the execution proceedings launched by decree-holder.

29. This Court finds that Apex Court had clearly interpreted Rule 97 read with Rule 101 of Order 21 post amendment wherein the executing court has to determine under Rule 101 Order 21 of the Code that the question raised has legally arisen between the parties and secondly the question must be relevant for consideration and determination between the parties.

30. In the present case, this Court finds that the application moved under Order 21 Rule 97 does not raise any question to be determined and is only an application by the sister-in-law of respondent no. 2 trying to stall and delay the execution proceeding filed by decree-holder.

31. In view of above, the question raised in the present case stands answered in view of decision of Apex Court in case of **Silverline Forum Pvt. Ltd.** (supra) followed in **Noorduddin** (supra) and **Shreenath** (supra) that only the question which has been legally raised by the parties and must be relevant for consideration and determination between them shall be considered and nothing beyond that.

32. Thus, considering the facts and circumstances of the case, this Court finds that no case is made out which warrants interference in the orders passed by the courts below.

33. Writ petition fails and is hereby dismissed.

34. Interim order stands discharged.

(2022)04ILR A1022
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 513 of 2018

Vinod Kumar Mishra & Ors. ...Appellants
Versus
National Insurance Co. Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Sri Ved Prakash Shukla

Counsel for the Respondents:
Sri Rajeev Ojha

Civil Law - Motor Vehicles Act, 1988 - Sections 166, 168 & 173-Compensation--Determination of--Deceased was going on her

Scooty--Offending truck coming from opposite direction driven very rashly and negligently hit the Scooty of deceased--She received fatal injuries and died during treatment in hospital--Accident not in dispute--Insurer did not challenge its liability--Issue of negligence stands decided--Appeal relates to quantum of compensation--Deceased met her end at the age of 21 years as a B. Tech student of third year--She had a promising career--Tribunal assessed her monthly income at ` 3,000 only--Deceased was going to be an engineer--Tribunal ought to have considered potential of the deceased to earn her livelihood--Motor Vehicles Act being a benevolent legislation, claimants are entitled to just compensation--Keeping in mind capability and potentiality of the deceased, her income should be assessed at ` 6,000 per month--40% of the income to be added towards future loss of income--Considering the educational qualification, family background and age of the deceased deduction of 50% towards her personal expenses held appropriate--Taking annual income at ` 6,000 x 12 = ` 72,000 and adding 40% towards future prospects total income assessed at ` 1 lac--After deduction of 50% towards personal expenses and applying multiplier of 18 loss of dependency worked out at ` 9.07,200--Further sum of ` one lac allowed towards non-pecuniary damages, total compensation determined at ` 10,07,200--Interest allowed @ 7.5% p.a. from date of claim petition till the amount is deposited.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Sarla Verma & ors. Vs Delhi Transport Corporation & ors. MANU/SC/0606/2009;

2. Meena Pawaia & ors. Vs Ashraf Ali & ors. MANU/SC/1088/2021;

3. Jakir Hussein Vs Sabir & ors. MANU/SC/0179/2015;

4. National Insurance Co.y Ltd Vs Pranay Sethi & ors. MANU/SC/1366/2017;

5. Munna Lal Jain & ors. Vs Vipin Kumar Sharma & ors. MANU/SC/0640/2015;

6. National Insurance Co. Ltd. Vs Mannat Johal & ors. MANU/SC/0589/2019;

7. Hansaguri Prafulchandra Ladhani & ors. Vs The Oriental Insurance Company Ltd. & ors. MANU/GJ/2100/2006

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal is preferred by the claimants-appellants for enhancement of compensation awarded to appellant by Motor Accident Claims Tribunal/Additional District Judge, Court No.16, Kanpur Nagar (*'Tribunal', for short*), vide judgment/award dated 9.11.2017 and decree dated 14.11.2017 in M.A.C.No.820 of 2010 (*Vinod Kumar Mishra & others vs. National Insurance Co.Ltd. & others*) whereby claimants/appellants was awarded Rs.4,71,500/-, with 6% rate of interest as compensation.

2. Brief facts of the case are that on 20.12.2008, the deceased was going on her scooty bearing No.UP78-BP/2060 in District-Kanpur Nagar. When she reached near Railway-crossing, GT Road within the jurisdiction of Police Station-Chakeri, a truck bearing No.UP78-AT/4739 coming from opposite direction, which was being driven very rashly and negligently by its driver hit the scooty of the deceased. In this accident, Kumari Anjali Mishra (deceased) sustained fatal injuries and died during the treatment in hospital. A police report was registered at concerned police station regarding the accident. The owner and insurer of aforesaid offending truck filed their respective written statements before the Tribunal. Driver of the truck did not participate in the proceedings. Aggrieved by the quantum of compensation with 6% per annum rate of interest, the appellants-claimants filed this appeal.

3. Heard Shri Ved Prakash Shukla, learned counsel for the appellants and Shri Rajeev Ojha, learned counsel for the respondents-Insurance Company.

4. The accident is not in dispute. The insurance company has not challenged the liability on it. The issue of negligence has attained finality. Now the only issue to be decided is the quantum of compensation awarded by the Tribunal. Entire factual scenario is not being narrated as the limited question in this appeal relates to the quantum only.

5. With regard to the quantum, learned counsel for the appellants submitted that the age of the deceased at the time of accident was just 21 years and she was student of B.Tech. and had passed 3rd Year; her career was very promissing. It is also submitted that the deceased was earning Rs.6,000/- per month by way of imparting tuitions, but learned Tribunal assessed her monthly income at Rs.3,000/- only. Further submission is that compensation under the heads of non-pecuniary damages is on the very lower-side; Tribunal has awarded Rs.2,500/- for loss of estate and Rs.10,000/- for funeral expenses. No amount regarding filial consortium has been awarded. It is next contended by counsel for the appellants that Tribunal has applied multiplier of 17 while it could have been 18 in the light of the judgment of Hon'ble Apex Court in the case of ***Smt.Sarla Verma vs. Delhi Transport Corporation*** *[2009 (2) TAC 677 (SC)*]. Learned counsel for the appellants-claimants has heavily relied on the following judgments:

A. ***Meena Pawaia and others vs. Ashraf Ali and others****, 2021 LawSuit (SC) 743,*

B. ***Jakir Hussain vs. Sabir and others****, 2015 LS (SC) 147*

6. Shri Rajiv Ojha, learned counsel appearing for Insurance Company, vehemently objected the contentions made by counsel for the appellants and submitted that deceased was only a student; she was not earning anything. It is further submitted that according to the averment of claim petition, the deceased was imparting tuitions and earning Rs.6,000/- per month, but no documentary evidence in this regard has been adduced by the appellants. Hence, the oral submission does not carry any weight, therefore, learned Tribunal has rightly assessed her income to be Rs.3,000/- per month; multiplier is also correctly applied. Learned counsel appearing for Insurance Co. has lastly submitted that there is no infirmity or illegality in the impugned judgment, which calls for any interference by this Court.

7. It is admitted fact that at the time of death, the age of the deceased was 21 years and it is also admitted and not opposed by respondents that she was the student of B.Tech. and had passed 3rd year. Even, if there is no documentary evidence regarding her imparting the tuitions and earning Rs.6,000/- per month, but learned Tribunal lost its sight from the fact that she was pursuing B.Tech., meaning thereby she was going to become an Engineer, if she had not met the unfortunate accident and died untimely-death.

8. For assessing the just compensation, in such cases where a promissing student has lost his/her life in unfortunate accident, Tribunals must keep in mind the potential of the deceased to earn his/her livelihood. It is not necessary that in every case, a promissing student had

some earning at the time of death, but he/she could have potential and capacity to earn, if the accident would not have occurred. The Motor Vehicles Act is a benevolent Act and the claimants are entitled to just compensation.

9. Hon'ble Apex Court in ***Meena Pawaia*** *(supra)* has held that even the labourers were getting Rs.5,000/- per month under the Minimum Wages Act. Even in 2012, therefore, Tribunal should not have assessed a meager income of a person, who has lost life in accident. Educational qualification and family background of such type of deceased persons should be kept in mind before assessing their income.

10. In the case in hand, it is very well proved that the deceased was 21 years of age and had passed 3rd Year Examination of B.Tech. So we are of the considered opinion that learned Tribunal has committed grave error in fixing her monthly income at Rs.3,000/- only. Keeping in mind the potentiality and capability of the deceased to earn in future, we are of the considered view that her income should be assessed not less than Rs.6,000/- per month as she was promissing B.Tech. Student. Therefore, her monthly income is assessed to be Rs.6,000/- per month. As far as the future loss of income is concerned, learned Tribunal has added 50% of the income, but in ***Meena Pawaia's*** case *(supra),* Hon'ble Supreme Court held that even in a case of a deceased, who was not serving at the time of death and had no income, their legal heirs shall also be entitled to future-prospects by adding future rise in income as held by Hon'ble Apex Court in the case of ***National Insurance Company vs. Pranay Sethi*** [*2014 (4) TAC 637 (SC)*] i.e 40% of the income shall be added for future loss of income, considering the educational qualification, family background etc. where the deceased was below the age of 40 years. Hence, we are not inclined to add 50% to the income of the deceased for future loss of income. Deceased was unmarried, therefore, the Tribunal was rightly deducted ½ for her personal expenses as envisaged by Hon'ble Apex Court in ***Munna Lal Jain vs. Vipin Kumar Sharma***, *2015 (3) TAC 1(SC).* Learned Tribunal has applied multiplier of 17, which is on lower-side and it should be of 18 according to the judgment of Hon'ble Apex Court in ***Smt.Sarla Verma (supra***). As far as non-pecuniary damages are concerned, the Tribunal has awarded only Rs.10,000/- towards funeral expenses, which are also on the lower-side. In the light of Judgment of ***Pranay Sethi (supra***), claimants shall be entitled to get Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses. Apart from it, the appellants shall also be entitled to get Rs.40,000/- for loss of filial consortium. Hence, the non-pecuniary damages are calculated at Rs.15,000/- + Rs.15,000/- + Rs.40,000/- = Rs.70,000/-, and as per the judgment of the Pranay Sethi (supra), these would be revised 10% every three years. Hence, we fix total lump-sum non-pecuniary damages at Rs.1,00,000/-.

11. Hence, the total compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

i.	Annual Income	Rs.6,000/- x 12	Rs.72,000/-
ii.	Percentage towards Future-Prospects	Rs.28,800/-	

	(40%)		
iii.	Total Income	Rs.72,000/- + Rs.28,800/-	Rs.1,00,800/-
iv.	Income after deduction of 1/2		Rs.50,400/-
v.	Multiplier applicable	18	
vi.	Loss of dependency	Rs.50,400/- x 18	Rs.9,07,200/-
vii.	Non-pecuniary Damages	Rs.1,00,000/-	
viii.	**Total Compensation**	Rs.9,07,200/- + Rs.1,00,000/-	Rs.10,07,200/-

12. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in ***National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)*** wherein the Apex Court has held as under:

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

13. Learned Tribunal has awarded rate of interest as 6% per annum, but we are fixing the rate of interest as 7.5% in the light of the above judgment.

14. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The Insurance Company shall deposit the amount within a period of 8 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. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd***., *[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 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.

(2022)04ILR A1027
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIVEK VARMA, J.

First Appeal From Order No. 3425 of 2016

Smt. Minakshi Srivastava & Ors.
...Appellants
Versus
Dheeraj Pandey & Ors. ...Respondents

Counsel for the Appellants:
Sri Satya Deo Ojha, Sri Shashi Prakash Rai

Counsel for the Respondents:
Sri Bajrang Bahadur Singh

Appellants have challenged the impugned award and decision -- illegal, arbitrary, without application of mind and cannot be sustained in the eyes of law -- injuries suggest that the driver of Minibus was driving the vehicle rashly and negligently -- issue is answered in the positive and in favour of the appellants -- principle of contributory negligence has been discussed time and again -- next issue which arises is that the matter has remained pending for long -- Total compensation - issue of rate of interest is concerned, it should be 7.5% .

Appeal allowed. (E-9)

List of Cases cited:

1. Varinderjit Singh Vs Tajinder Singh & ors. MANU/PH/0594/2007

2. Bhanwar Lal Verma Vs Sharad Tholia & ors. MANU/RH/0672/2005

3. Kusum Lata & ors. Vs Satbir & ors. MANU/SC/0165/2011

4. Saroj & ors. Vs Het Lal & ors. MANU/SC/1041/2010

5. Vimla Devi & ors. Vs National Insurance Comp. Ltd. & ors. MANU/SC/1290/2018

6. Sunita & ors. Vs Rajasthan State Road Transport Corp. & ors. MANU/SC/0204/2019

7. Rylands v Fletcher MANU/UKHL/0001/1868

8. Jacob Mathew Vs State of Punjab & ors. MANU/SC/0457/2005

9. Bithika Mazumdar & ors. Vs Sagar Pal & ors. MANU/SC/0152/2017

10. National Insurance Comp. Ltd. Vs Pranay Sethi & ors. MANU/SC/1366/2017

11. Sarla Verma & ors. Vs Delhi Transport Corporation & ors. MANU/SC/0606/2009

12. National Insurance Comp. Ltd. Vs Mannat Johal & ors. MANU/SC/0589/2019

13. A.V. Padma & ors. Vs R. Venugopal & ors. MANU/SC/0065/2012

14. Hansaguri Prafulchandra Ladhani & ors. Vs The Oriental Insurance Company Ltd. & ors. MANU/GJ/2100/2006

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J & Hon'ble Vivek Varma, J.)

1. Heard Sri Shashi Prakash Rai, learned counsel for the appellants, Sri Bajarang Bahadur Singh, learned counsel for the owner-respondent no.1. None present on behalf of driver-respondent no.2 and insurance company-respondent no.3.

2. By way of this appeal the appellants have felt aggrieved by the order passed by Claims Tribunal, whereby the Claims tribunal dismissed the claim petition being M.A.C.P. No. 21 of 2015.

3. Brief facts of the case culled out from the record are that, on 23.11.2014 at about 6.30 p.m. when the deceased was plying his Hero Honda motorcycle bearing No. U.P. 63 L/0421 and was going from Pathkhura to his house at that time near Paramhans Ashram respondent no.2 drove Minibus bearing No. U.P. 65 R/9955 and rashly and negligently dashed with the motorcycle and the deceased came under the bus and his motorcycle was also damaged. The people around him called 108 ambulance and he was sent to Rajgarh Community Centre but as he was serious he was sent to Sadar Hospital, Mirzapur, there also he was not treated but he was sent to Popular Hospital, Varanasi where he was admitted but as his health did not improve he was moved to B.H.U. hospital, where during treatment on 25th November 2014 he breathed last and succumbed to the injuries. On his death, his family was under shock, they could not lodge the first information report in time. The first information report was lodged by his brother on filing of the claim petition the respondent Nos. 1 and 2 filed their reply, which was one of negation contending that the vehicle was not involved in the accident and that the vehicle was permitted to ply between Mirzapur to Ghazipur and his vehicle could not have been at the place where the accident took place. The police took the vehicle and filed the charge-sheet. Later on, the driver of the Minibus was charge-sheeted and he was released on bail, is an admitted position of fact which has been brushed aside by the Tribunal. The respondent no.3 insurance company on the contrary took a stand that it was the deceased who was negligent and he dashed with the bus. The Tribunal framed five issues. The first and the fifth issue has been held against the appellants. The written statement of the insurance company ought to have been looked into by the Tribunal before brushing aside the judgment and not relying on the authoritative pronouncements in **Varinderjit Singh Vs. Tajinder Singh & others, 2008 (4) TAC 250 Punjab and Haryana, Devi Prasad Vs. Zahur Khan, 2001 (2) TAC 419 Madhya Pradesh, and Bhanwar Lal Verma Vs. Sharad Dholiya, 2007 ACJ 52.**

4. The appellants have challenged the impugned award and decision on the following amongst grounds that the order passed by the Tribunal is illegal, arbitrary, without application of mind and cannot be sustained in the eyes of law.

5. It is submitted by learned counsel for the appellants that the court below has failed to consider, while passing the impugned order, that the insurance company of the vehicle/ respondent no.3 admitted that the accident took place by his vehicle but contended that accident occurred due to negligence of deceased. In support of his arguments, Sri S.D. Ojha, learned counsel for the appellants has relied on the following decisions in **(i) Kusum Lata and others Vs. Satbir and others, 2011 (2) Supreme 207; (ii) Saroj and others Vs. Het Lal and others, (2011) 1 SCC 388; and (iii) Vimla Devi and others Vs. National Insurance Company Limited and others, 2019 (133) ALR 768; Sunita and others vs. Rajasthan State Road Transport Corporation and another AIR 2019 SC 994** so as to contend that the petition has been dismissed by assigning reasons which are not germane.

6. It is further submitted in reply that it was the driver of the motorcycle, who was driving the vehicle rashly and

negligently. The facts prove that the vehicle Minibus was involved in the accident.

7. The claimants examined the widow of the deceased, PW 2 Ikbal Ahmad, who was an eye witness and PW 3 Kamlesh Kumar Srivastava, who had lodged the first information report. As far as the respondents are concerned, DW 1 has been examined. The appellants filed chick F.I.R., post-mortem report, report of the Panchnama, the release memo of the Mini Bus, death certificate of the deceased, medical certificate of Mirzapur doctor, Popular Hospital and death certificate by Tehsildar of Chunar. The voter I.D. and all other documentary evidence to prove involvement of vehicle and the income of the deceased were also produced. The respondent no.1 filed the fitness certificate, permit, insurance and the driving licence of the driver.

8. The respondent no.3 did not examine any witness. The Tribunal has dismissed the claim petition despite the fact that the respondent insurance company had taken the plea that the accident occurred due to the negligence of the driver, who had lost his balance. The Tribunal did not believe the testimony of the wife as she did not disclose, who gave her number of Minibus. It is held that PW 2 cannot be accepted as an eye witness as he also did not give the number of the bus and that the first information report was against an unknown vehicle and therefore, the charge-sheet was not acceptable.

9. The evidence on record which has been brushed aside by the Tribunal is without any basis. The PW 1 did not give the name, number of vehicle involved. The chick F.I.R. did not give the number of Minibus and that PW 3 who registered the F.I.R. also did not give the number of Minibus. The fact that the evidence of all these three witnesses have not been controverted even except the filing of written statement by the owner. The driver of the vehicle never complained that he has falsely implicated. The F.I.R. also states that Minibus was involved in the accident. The charge-sheet is a prima facie proof of involvement of the vehicle, the owner no where contends that his bus was not on the road.

10. On the contrary, while going through the record, it is very clear that the vehicle had permit to ply at the place where the accident occurred and therefore, the statement of the owner could not have been believed. The route permit discussed by the learned Tribunal also goes to show that the vehicle was having a permit to ply on the road which is in the accident. The fitness certificate and permit is there from Mirzapur to Ghazipur via Chunar Varanasi Saidpur and therefore, they contend that the vehicle did not have permit to ply on the said road is also a wrong statement on the record made by the owner against whose driver charge-sheet is led, thus on preponderance of probability the finding of the Tribunal cannot be accepted. We quantified in our view by the judgment of Apex Court in the case of Sunita (Supra). The recent judgement of the division bench in the case of First Appeal From Order No.1902 of 2010 (**Ranjeet Singh v. Oriental Insurance Co. Ltd. and another**) decided on 4.3.2022 will enure for the benefit of the appellant's herein.

11. In view of the above, we cannot concur with the learned Judge that it was not proved that the driver of the mini bus had not driven the bus rashly and negligently. The injuries suggest that the

driver of Minibus was driving the vehicle rashly and negligently. Hence, the said issue is answered in the positive and in favour of the appellants.

12. The appreciation of evidence as held by the Apex Court in the case of **Kusum Lata, Saroj and Vimla Devi (supra)** will not permit us to concur with the learned Tribunal. The finding is perverse.

13. Having heard the learned counsel for the parties, let us consider the issue of negligence from the perspective of the law laid down.

14. 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.

15. 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.

16. 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

17. The next issue which arises is that the matter has remained pending for long, the record and proceedings are before this Court and the matter whether be remanded to the Tribunal or decided here? The answer is in the affirmative as per the judgments of the Apex Court in **Bithika Mazumdar and another Vs. Sagar Pal**

and others, (2017) 2 SCC 748 and of this Court in **F.A.F.O. No. 1999 of 2007 (Oriental Insurance Company Limited vs. Smt. Ummida Begum and others)** and in **F.A.F.O. No. 1404 of 1999 (Smt. Ragini Devi and others Vs. United India Insurance Company Limited and another**) decided on 17.4.2019 where in it has been held that if the record is with the appellate Court, it can decide compensation instead of relegating the parties to the Tribunal.

18. Hence, as far as quantum is concerned, this Court after hearing the learned counsels for the parties and perusing the judgment and order impugned, finds that the deceased was even hospitalised for quite some time and he was earning Rs.33,523/-per month by way salary as he was Lekhpal, namely Rs.4,02,276/- per year. To which, as the deceased was 47 years of age, 30% of the income requires to be added in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. Further, one third requires to be deducted as his personal expenses as he was survived by his wife and three minor daughters aged about 19, 16 and 13 years. As the deceased was in the age bracket of 47 years, the applicable multiplier would be 13 in view of the decision in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121**. In addition to that, Rs.75,000/- is granted towards conventional heads.

19. Hence, the total compensation payable to the appellants is computed herein below:

i. Income : Rs.33,523/- (Rs.4,02,276/- per year)

ii. Percentage towards future prospects : 30% namely Rs.10,057/- (rounded up)

iii. Total income : Rs.33,523 + 10,057 = Rs.43,530/-

iv. Income after deduction of 1/3rd towards personal expenses of the deceased : Rs.29,020/-

v. Annual income : Rs.29,020 x 12 = Rs.3,48,240/-

vi. Multiplier applicable : 13

vii. Loss of dependency: Rs.3,48,240 x 13 = Rs.45,27,120/-

vii. Amount under non pecuniary damages : Rs.75,000/-

viii. Total compensation : Rs.46,02,120/-

20. 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."

21. No other grounds are urged orally when the matter was heard.

22. In view of the above, the appeal is allowed. Judgment and order 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 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.

23. 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.

24. 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.

25. 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 judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

(2022)04ILR A1033
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAY TYAGI, J.

First Appeal From Order No. 1221 of 2004

Smt. Kamlesh Sharma & Ors. ...Appellants
Versus
United India Insurance Co. Ltd. & Anr. ...Respondents

Counsel for the Appellants:
Sri D.P. Verma, Sri B.P. Verma

Counsel for the Respondents:
Sri Devendra Kumar

Civil Law - Motor Vehicles Act, 1988 - Sections 166, 168 and 173---Compensation--Tribunal held the driver of the tanker negligent to the extent of 25% and bus driver 70%--Owner and driver of the bus not joined as party--Tribunal granted compensation to the tune of 25% being the liability of the tanker-- Tribunal did not allow compensation to the extent of 70% of the negligence on part of the bus driver--Deceased not author or co-author of the accident--He was hit by bus and then by the tanker--Decision of Tribunal on point of negligence to the extent of 70% on part of the Bus and 25% on the tanker upheld--Driver of the bus did not step into the witness box--Insurer could have examined the driver of the bus by filing application for procuring his presence before the Tribunal--Negligence of

deceased to the extent of 5% decided by the Tribunal affirmed--Insurance Company to be saddled with 95% liability with right to recover 70% from bus-owner and 30% from the owner of the tanker--Income of deceased taken at ` 90,000 per annum--Multiplier applicable would be 13--Loss of dependency determined at ` 9,75,000--Total compensation assessed at ` 10,75,000 by adding ` 1 lakh under non-pecuniary heads--Interest allowed @ 7.5%.

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Company Limited Vs Pranay Sethi & ors. MANU/SC/1366/2017;

2. Vimal Kanwar & ors. Vs Kishore Dan & ors. MANU/SC/0460/2013;

3. Rylands v Fletcher MANU/UKHL/0001/1868;

4. Jacob Mathew Vs St. of Pun. & ors. MANU/SC/0457/2005;

5. Khenyei Vs New India Assurance Co. Ltd. & ors. MANU/SC/0582/2015;

6. T.O. Anthony Vs Karvarnan & ors. MANU/SC/7181/2008;

7. Anita Sharma & ors. Vs The New India Assurance Co. Ltd. & ors. MANU/SC/0928/2020;

8. National Insurance Company Ltd. Vs Mannat Johal & ors. MANU/SC/0589/2019;

9. A.V. Padma & ors. Vs R. Venugopal & ors. MANU/SC/0065/2012;

10. Hansaguri Prafulchandra Ladhani & ors. Vs The Oriental Insurance Company Ltd. & ors. MANU/GJ/2100/2006

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri B.P. Verma, learned counsel for the appellants, Sri Devendra Kumar, Advocate has absented himself even in the third round. We have perused the award and record of the Tribunal impugned.

2. This appeal, at the behest of the claimants, challenges the judgment and order dated 6.2.2004 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.1, Meerut (hereinafter referred to as 'Tribunal') in M.A.C.No.494 of 2002 awarding a sum of Rs.1,77,375/- with interest at the rate of 7% as compensation.

3. Brief facts as culled out from the record are that on 26.2.2002, the deceased-Satyadev Sharma was going on scooter No. U.P.-15 G/7219 from L. Block Shastri Nagar to Tejgarhi and when he reached near Bank of Baroda then Tanker No. U.P.No.9002 hit the scooter from behind. He was treated in Lokpriya Hospital Meerut and Apolo Hospital Delhi and ultimately on 4.3.2002, he died. A very strange accident has occurred whereby a young person after being hit by a bus and tanker, died after about ten days in the hospital. Tribunal very strangely granted compensation to the tune of only 25% whcih was the liability of the tanker. The Tribunal held the driver of the bus to be negligent to the tune of 70% but did not grant compensation as according to the Tribunal, having not joined the owner or the driver of the said bus disentitled the claimants from claiming compensation. The better option for the Tribunal was to direct the driver and owner of the bus to be joined as respondents but neither the insurance company of the tanker gave such application. In this backdrop, that we are called upon to decide the liability and the compensation awardable to the legal heirs of the deceased. The deceased was aged about 46 years and was working as Labour and Industrialk Law Concultation as well

as Manager (Legal) in Sanghal Paper Ltd. And was earning Rs.20,000/- per month.

4. The accident is not in dispute. The issue of negligence decided by the Tribunal is in dispute. Apportionment of negligence is under challenge. The respondent has not challenged the liability imposed on them. The only issue to be decided by this Court is, the quantum of compensation awarded for which we have minutely scanned the record. The involvement of three vehicles; bus, truck and scooter driven by deceased is not in dispute. The dispute is non-grant of 70% of compensation attributed to the negligence of bus driver.

5. It is submitted by learned counsel for the appellant that the deceased was 46 years of age at the time of accident and was in the job and was having labour consultancy as Manager(Legal) in Sanghal Paper Ltd. and was earning Rs.20,000/- per month. His income was considered by the Tribunal to be Rs.75,000/- per annum which according to the counsel for the appellants is on the lower side and should be considered at least Rs.20,000/- per month. It is further submitted that the Tribunal has not granted any amount 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).**

6. As against this, learned counsel for the Insurance Company has submitted that the award does not require any interference as the date of accident is 26.7.2002 and the decision of the Tribunal is prior to the judgment of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** and therefore the Tribunal has not committed any error in not granting the future loss of income. It is further submitted that the judgment of Supreme Court in **Vimal Kanwar and Others Versus Kishore Dan and others (2013) 7 SCC 476** which has been pressed into service by learned counsel for appellant cannot apply in the facts of this case as the deceased was self employed and the Tribunal has committed no error.

7. Having heard the learned counsel for the appellant and having perused the record as the issue of negligence is under challenge rather apportionment and non-grant of 70% of amount, the issue of negligence is discussed herein below.

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.*

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. 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 (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. In this case the deceased was not the author or the co-author of the accident. On facts, the deceased was plying the vehicle. The deceased was not by bus and then by tanker. The Tribunal has held **non joinder** of bus for deduction of compensation, 70% could not be deducted from compensation payable by deceased. We uphold the decision as far as negligence of all the three driver is concerned, but hold that the insurance company has to be saddled with 95% of liability with right to recover the finding of facts as far as negligence apportioned by the Tribunal is not disturbed as the facts goes to show that the driver of the bus did not stepped into the witness box. The Tribunal or the insurance company would have examined the driver by filing an application for procuring his presence before the Tribunal which was not done. We hold the bus driver to be 70% negligent and the driver of the tanker to be 25% negligent. Negligent of deceased has decided by Tribunal to be 5% is maintained in the facts of this case.

Re-computation of Compensation :-

13. This Court finds that the accident occurred on 26.7.2002 causing death of Satya Deo Sharma who was 46 years of age at the time of accident. The Tribunal has assessed his income to be Rs.75,000/- per year which according to this Court, in the year of

accident, would be at least Rs.90,000/- on the basis of evidence produced before the Tribunal both oral and documentary. The Tribunal has committe3de error in not considering income tax return and their mean has to be calculated. We are fortified in our view by the decision in Anita Sharma Vs. New India Assurance Company Limited (2021) 1SCC 171. To which as the deceased was in the age bracket of 46-50, 25% of the income will have to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. The amount under non-pecuniary heads should be at least Rs.1,00,000/- in view of the decision in **Pranay Sethi (Supra)** as every three years 10% be added to Rs.70,000/-. In view the facts and circumstances of the case, this Court feels no interference is called for as far as deduction of personal expenses is concerned.

14. The total compensation payable is recalculated and is computed herein below:

i. Annual Income Rs.90,000/-

ii. Percentage towards future prospects : 25% namely Rs.22,500/-

iii. Total income : Rs.90,000/- + Rs.22,500/- = Rs.1,12,500/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.75,000/-

v. Multiplier applicable : 13

vi. Loss of dependency: Rs.75,000/- x 13 = Rs.9,75,000/-

vii. Amount under non pecuniary heads : Rs.1,00,000/-Rs.70,000/- + Rs.30,000/-
)

viii. Total compensation : Rs.10,75,000/-

ix. Compensation payable to claimants after deductions of 5% negligence on the part of the deceased : Rs.10,75,000/- - Rs.53,750/- = Rs.10,21,250/-.

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. It is submitted by learned counsel for the appellant that it is not necessary but to join to other tort feasor as held in the decision of the Apex Court in **Khenyei (Supra)**. The Tribunal while computing the amount held that only 25% would be payable as that was the liability of the insurance company and the owner of the tanker. The owner of the bus and the number of bus was also there before the Tribunal and it could have directed the claimant to join the said other tort feasor also. The decision of the Tribunal is against the settled legal principals of law, hence is up turned.

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 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 award and 6% thereafter till the amount is deposited. The amount already deposited be deducted from the amount to be deposited. The insurance company would be at liberty to recover 70% amount from the co-tort-feasor, namely; bus whose number is given in the record. The deduction of 70% on the basis that the driver and owner of the bus was not been joined and that the deceased was negligent to the tune of 5% and, therefore, only 25% of the amount is payable is against the principal enunciated in Khenyei (Supra). Qua the appellant, it was a case of composite negligence coupled with contrary negligence to the tune of 50% of the deceased and, therefore, the amount will have to be compensated by the respondent and the insurance company is given recovery rights from the other tort-feasor.

18. 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.

19. 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 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.

20. 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.

21. Record be transmitted to the Tribunal forthwith.

(2022)04ILR A1041
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2022

BEFORE

THE HON'BLE DR. KAUSHL JAYENDRA THAKER, J.

First Appeal From Order No. 1046 of 1992

New India Assurance Co. Ltd., Kanpur ...Appellant

Versus

Dr. Smt. Sunita Jain & Ors. ...Respondents

Counsel for the Appellant:
Sri Arun Kumar Shukla, Sri Vineet Saran, Sri A.B. Saran

Counsel for the Respondents:
Sri Shashi Kant, Sri Rama Nand Gupta, Sri S.P. Srivastava, Sri Vinod Sinha

Civil Law - Motor Vehicles Act, 1939 - Section 110A--Motor Vehicles Act, 1988--Sections 147 & 149—Compensation-deceased was a -Claim petition filed under Section 110A of the Act of 1939- Deceased met his death at the age of 49 years--He could have served for a further period of 9 years--Adding 25% towards future prospects and deducting 1/3rd towards personal expenses of the deceased -Applying multiplier of 13- loss of dependency determined - Further amount allowed towards non-pecuniary damages and ` towards medical - Insurer to pay interest @ 6% from date of filing of claim petition till award as the claimants have remained unrepresented throughout.

Appeal and cross-objections partly allowed. (E-9)

List of Cases cited:

1. Lakkamma & ors. Vs The Regional Manager, United India Insurance Co. Ltd. & ors. MANU/SC/0416/2021

2. United India Insurance Co. Ltd. Vs Gian Chand & ors. MANU/SC/0953/1997

3. Pappu & ors. Vs Vinod Kumar Lamba & ors. MANU/SC/0019/2018

4. National Insurance Company Limited Vs Pranay Sethi & ors. MANU/SC/1366/2017

5. Meena Pawaia & ors. Vs Ashraf Ali & ors. MANU/SC/1088/2021

6. Vimal Kanwar & ors. Vs Kishore Dan & ors. MANU/SC/0460/2013

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Arun Kumar Shukla, learned counsel for the appellant. None has appeared for the respondents.

2. By way of this appeal, the New India Assurance Co. Ltd., has challenged the judgment and award dated 19.5.1992 passed by Motor Accident Claims Tribunal/1st Additional District Judge, Kanpur Nagar in Claim Petition No.125 of 1985 awarding sum of Rs.5,60,000/- as compensation with 12% rate of interest. The deceased was survived by widow, two sons and mother. Cross objections came to be filed belatedly and, therefore, though the delay is condoned, it goes without saying that while discussing grant of interest, this aspect has to be considered as per judgment of the Apex Court in **Lakkamma and Others Vs. The Regional Manager M/s United India Insurance Co. Ltd., AIR 2021 SC 3301**.

3. By way of this appeal, the Insurance Company has challenged the award and the formal order mainly on two grounds namely that the vehicle was unauthorizedly taken out of the garage and driver had no driving license where it was sent for repairs by the owner of the vehicle and that the compensation awarded is on the higher side.

4. Brief facts as culled out from the record and the judgment of the Tribunal as from 1992 though the appeal is pending, record has not been summoned. The reason being it is an admitted position of fact that issue number 3 which has been decided by the Tribunal is against the principle laid down by the Apex Court way back in the year 1997 in the case of **United India Insurance Co. Ltd. v. Gian Chand and others, AIR 1997 SC 3824**. Recent judgment of **Apex Court in Pappu and**

others v. Vinod Kumar Lamba and another, 2018 (1) TAC 360.

5. The factual scenario as it emerges is that the deceased met with the vehicular accident because of the negligence of the driver of the opposite vehicle. The issue of negligence decided by the Tribunal is not in dispute.

6. The Insurance Company has challenged the judgment contending that finding of the Tribunal is wrong and incorrect as the statement of Ajay Malhotra could not have been relied upon in as much as in fact for which documentary evidence was available but was not produced by the person in whose possession vehicle was and his oral statement cannot be relied upon regarding the fact that driver had driving license.

7. The Insurance Company has raised the ground that if the Ajay Malhotra had any driving license for driver cum mechanic Mahesh employed by him that should have been produced before the Tribunal to prove that fact and, therefore, the Insurance Company had no way of laying its hands on the aforesaid document.

8. It is also a ground that decision of the Supreme Court which has been cited, there was no element of driving involved and as such that ruling is not applicable to the present case. It has also been averred that the owner having specifically stated that he did not permit the garage owner to take out the vehicle on road that means the vehicle was being driven without the permission of the owner and as such the owner as well as the insurer cannot be held liable for the same.

9. It is next averred that the license being in possession of the respondent, Kanpur Tractors and their employee and the same having not been produced, the Tribunal should have drawn an adverse inference against them and the Tribunal has erred in law in holding that Mahesh, respondent, was having a valid driving license.

10. It is lastly averred that the amount awarded is highly excessive inasmuch as the income of the deceased was assessed at Rs.6,000/- per month and since he would have been spending a substantial amount for personal expenses, the sum of Rs.5,60,000/- as award is highly excessive.

11. Neither the driver of the vehicle nor the owner namely respondent No.6 filed any documentary evidence so as to bring on record that the vehicle was driven with knowledge of the original owner of the vehicle whose name appeared in the R.T.O records.

12. The judgment as far as issue no.3 is concerned, the onus is shifted on the Insurance Company so as to prove that the vehicle was being driven without license. It was denied that the tempo was ever brought to the garage by respondent No.6 rather the owner did not even file the license of the mechanic who had taken the vehicle outside. The stand of respondent No.6 has not been believed as the F.I.R., Charge-sheet and written statement of the original owner has been brought on record which proves that he had given the vehicle to respondent No.6 for repairs.

13. Sri R.K. Arora, who is the owner of the tempo has categorically mentioned that respondent No.7 was driving the tempo which was given for repairs. The owner of garage where Mahesh was employed is respondent No.6. The Insurance Company has categorically mentioned that there was

breach of policy condition. Section 147 and 149 of the Motor Vehicles Act, 1988 reads as follows:

*"**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 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

(ii) 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"

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.--

"(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (l) of section 147 (being a liability covered by the terms of the policy) 1[or under the provisions of section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:--

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

(i) a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by

virtue of the provisions of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India: Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect: Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be. Explanation.--For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted under section 165 and "award" means an award made by that Tribunal under section 168" for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India: Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect: Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be. Explanation.--For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted under

section 165 and "award" means an award made by that Tribunal under section 168"

14. The principle enunciated by the learned Tribunal cannot be concurred by the undersigned as the driving license was not filed. Issue No.6 only states that respondent No.6 conveys that the driver had driving license but the same was not filed which is an admitted position of fact as it emerges from the finding of fact in Issue No.6. The Tribunal casts burden on the Insurance Company to prove that the driver had no driving license. This could not have been done in the absence of driving license being produced.

15. Decisions in **Gian Chand and others (Supra)** and **Pappu & others (Supra)** will apply in full force.

16. By interim relief, the Insurance Company was directed to deposit the entire amount and, therefore, this Court directs recovery of the amount from respondent Nos. 6 & 7, the tort feasors and the person where the vehicle was sent for repair. The owner of the garage, respondent No.6 would be vicariously liable. However, in view of the Division Bench Judgment in FIRST APPEAL FROM ORDER No. - 3659 of 2018 **(Smt. Vimla Devi And 4 Ors. v. United India Insurance Co. Ltd. And 2 Ors**) where the undersigned is also signatory will apply to the facts of this case also. The tort-feasors is the person who drove the vehicle and the owner would be vicariously liable to whom the vehicle was pledged for/given for repairs by the original owner and, therefore, the custody of the vehicle would play a vital role. The original owner had not authorized the drive to take out the vehicle as is clear from the written statement of the owner of the vehicle, hence, the respondent No.6 would be liable for the deeds of his driver. However, the Insurance Company would prove the fact that the owner was aware about the fact that driver did not have driving license. In our case, though ample opportunity is given to the owner of garage, he or his driver has not produced any license nor have they appeared before this Court.

17. This takes this Court to the cross objections filed by the claimants.

18. The fact that the deceased was a doctor by profession in the year of accident. The accident occurred when the old Act was in vogue and the litigation was filed under the Motor Vehicles Act, 1939. The claimants had claimed Rs.16,60,000/- by way of compensation. Both the Insurance Company and the claimants have challenged the award whereby the Tribunal granted sum of Rs. 5,60,000/-. The Tribunal has granted conditional interest at the rate of 12% if the Insurance Company did not deposit the said amount within one month and and directing that the interest to be paid from the date of award. This has also been challenged by claimants by filing their cross objection. While going through the decision and appended documents, it transpires that the deceased was doctor by profession and on 22.5.1985 in the afternoon when he was plying on a scooter and when he was near Medical College, Kanpur, the vehicle insured with the appellant-Insurance Company came and dashed with the said service and the deceased died after three days due to the injuries. This aspect and aspect of negligence decided by the Tribunal is not in dispute. The deceased was aged 49 years and could have served for a

period of 9 years it is on this basis that multiplier of 9 has been granted by the Tribunal.

19. The Tribunal on a lump sum basis considered that Rs.12,60,000/- would be admissible and the claimants had demanded Rs.16,45,000/-. The Tribunal deducted 1/3rd towards personal expenses of the deceased and recalculated the figure to Rs.8,40,000/-. The Tribunal again deducted 1/3rd which could not have been done. The amount will have to be recalculated even if we consider the income of the deceased to be Rs.8,000/- per month, to which 25% will have to be added as per the judgment in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093** 1/3rd has to be deducted and that is how calculation would have to be made. The direction that the amount would carry 12% rate of interest if the amount is not paid within on month, the said conditional grant of interest could not have been done even under the Act, 1939 and therefore, the same is quashed. The rate of interest even in the year 1992 could not have been granted at 12%, to that aspect, the appeal of Insurance Company requires to be allowed. The multiplier applied would be on the basis of age of deceased and consideration of multiplier on the basis of remainder of service could not have been done in light of the decision of **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093 and Smt. Meena Pawaia & others Vs. Ashraf Ali and others 2021 0 Supreme (SC) 694,** the multiplier applicable would be 13. The Tribunal has deducted the amount of pension which could not have been deducted. in view of decision in **Vimal Kanwar and Others Vs. Kishore Dan and others, 2013 (3) T.A.C. 6 (S.C.).** I grant Rs.20,000/- for medical expenses.

20. Hence, the total compensation payable to the appellant is computed herein below:

i. Monthly Income : Rs. 8,000/-

ii. Percentage towards future prospects : 25% of income : 2000

iii. Total income : Rs. 10000

iv. Income after deduction of 1/3rd towards personal expenses of the deceased : Rs.7,000 (rounded figure)

v. Annual Loss : 84,000/-

vi. Multiplier applicable : 13

vii. Loss of dependency: Rs.10,92,000/-

viii. Amount under non pecuniary damages : 40,000/-

ix. Medical Expenses : 20,000/-

ix. Total compensation : 11,52,000/-

21. In view of the above, this appeal and the cross objections are partly allowed. The judgment and decree shall stand modified. The amount be deposited by the Insurance Company within 12 weeks from today at 6% rate of interest as repo rate are day in day out reducing and as the matter has remained pending since 1992 for no fault of the Insurance Company, the interest would be payable only for the period from date of filing of the claim petition till award as the claimants have remained unrepresented throughout except filing of claim petition. The counsel for the respondent-claimants has remained absented but as the Court on appeal has decided all the issues and granted just

compensation even in absence of the counsel for the claimants, this order is passed. Recovery rights are granted to the appellant against respondent nos. 6 & 7.

22. As the record is not before this Court, the Tribunal shall disburse the amount.

(2022)04ILR A1050
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.02.2022

BEFORE

THE HON'BLE DR. KAUSHLENDRA JAYENDRA THAKER, J.
THE HON'BLE VIVEK VARMA, J.

First Appeal From Order No. 3659 of 2018
& First Appeal From Order No. 2679 of 2015

Smt. Vimla Devi & Ors. ...Appellants
Versus
United India Insurance Co. Ltd. & Ors. ...Opp. Parties

Counsel for the Appellants:
Sri Akhilesh Chandra Srivastava, Sri Ramesh Chandra Pathak, Sri Aditya Singh Parihar

Counsel for the Opp. Parties:
Sri Sushil Kumar Mehrotra, Sri Girish Kumar Srivastava, Sri Neeraj Chandra Srivastava, Sri Snehil Srivastava

Civil Law - Motor Vehicles Act, 1988 - Sections 166, 168, 173, 147 & 149-- Compensation--Determination of--Deceased & ors. were returning home from Lucknow in a car--Driver of car noticed that the vehicle coming from opposite side can collide with the car moved to his left when the car collided with the railing of the road side culvert--All the occupants sustained injuries--Deceased succumbed to his injuries during treatment at District Hospital--Claimants legal heirs of the deceased filed claim petition--Tribunal awarded a sum of ` 22,98,900--For composite/contributory negligence deceased or person concerned should be shown to have contributed either to the accident or the impact of the accident could have been minimised if he had taken due care--Plea that driver was not negligent rejected--It is a case of composite negligence and the owner, driver and insurer would be liable to pay the compensation--Taking monthly income of ` 32,000 p.m. and adding 20% towards future loss total income worked out at ` 38,400--After deduction of 1/4th towards personal expenses, annual income computed' at ` 3,45,600--Applying multiplier of 11, the loss of dependency determined at ` 38,01,600--Further amount of ` 1,20,000 granted towards non-pecuniary heads to determine total compensation at ` 39,21,600--Interest allowed @ 7.5% p.a. from date of filing of the claim--TDS to be deductible.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Vimal Kanwar & ors. Vs Kishore Dan & ors. MANU/SC/0460/2013;

2. Sarla Verma & ors. Vs Delhi Transport Corporation & ors. MANU/SC/0606/2009;

3. U.P.S.R.T.C. Vs Mamta & ors. MANU/SC/0185/2016;

4. Singh Ram Vs Nirmala & ors. MANU/SC/0200/2018;

5. Shamanna & ors. Vs The Divisional Manager, The Oriental Insurance Co. Ltd. & ors. MANU/SC/0828/2018;

6. Ram Chandra Singh Vs Rajaram & ors. MANU/SC/0853/2018;

7. Rylands v Fletcher MANU/UKHL/0001/1868;

8. Khenyei Vs New India Assurance Co. Ltd. & ors. MANU/SC/0582/2015;

9. T.O. Anthony Vs Karvarnan & ors. MANU/SC/7181/2008;

10. New India Assurance Co. Ltd. Vs Urmila Shukla & ors. MANU/SC/0595/2021;

11. Malarvizhi & ors. Vs United India Insurance Company Limited & ors. MANU/SC/1700/2019;

12. United India Insurance Co. Ltd. Vs Indiro Devi & ors. MANU/SC/0678/2018;

13. Oriental Insurance Company Ltd. Vs Mangey Ram & ors. MANU/UP/2290/2019;

14. Kirti & ors. Vs Oriental Insurance Co. Ltd. MANU/SC/0004/2021;

15. National Insurance Company Limited Vs Pranay Sethi & ors. MANU/SC/1366/2017;

16. National Insurance Company Ltd. Vs Mannat Johal & ors. MANU/SC/0589/2019;

17. Hansaguri Prafulchandra Ladhani & ors. Vs The Oriental Insurance Company Ltd. & ors. MANU/GJ/2100/2006;

18. A.V. Padma & ors. Vs R. Venugopal & ors. MANU/SC/0065/2012

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Vivek Varma, J.)

1. Heard Shri Aditiya Singh Parihar, learned counsel for the claimants and Shri S. K. Mehrotra, learned counsel for the Insurance Company. None appears for owner or driver of the vehicle.

2. Both these appeals arise out of the same award/decree. The First Appeal From Order No. 3659 of 2018 is preferred by the original claimants for enhancement of compensation whereas First Appeal From Order No. 2679 of 2015 has been filed by the Insurance Company with which the vehicle was insured challenging the findings as far as fixing their liability, compensation granted and on ground of contributory negligence of deceased.

3. Brief facts as culled out from the record are that in the night of 29/30.05.2011 Haridas Gautam, Vijay Gautam and Pankaj Kumar Sharma were returning to their home from Lucknow in a Maruti WagonR car bearing registration no. U.P-51/N-6061 which according to the petitioner was driven by respondent no. 3-Shiv Shankar @ Pappu. On 30.05.2011 at 4:00 a.m when they reached ahead of petrol pump of village Rithiya on Lucknow Main Road driver Shiv Shankar @ Pappu was driving the car rashly and negligently when he saw a vehicle coming from opposite side and with presumption that his car can collide with the coming vehicle he moved his car to very left of his side due to which the car collided with the railing of the road side culvert as a result of which Haridas Gautam and Vijay Gautam sustained several injuries on the other hand Pankaj Kumar Sharma and driver Shiv Shankar @ Pappu sustained minor injuries. Haridas Gautam and Vijay Gautam were taken to the District Hospital for treatment where Haridas Gautam succumbed to his injuries and Vijay Gautam was treated for his injuries.

4. It is an admitted fact that the claimants are legal representative of the deceased. The deceased was 53 years of age at the time of accident. He was working as a Chief Pharmacist in District Women Hospital, Basti. He was survived by his wife, two minor sons and two major daughters. The Tribunal considered his income to be Rs. 26,900/-p.a, deducted 1/4th towards personal expenses of the deceased, granted multiplier of 9 and granted Rs.1,00,000/- towards compensation for loss of consortium, granted Rs. 10,000/- towards for loss of estate, granted Rs. 10,000/- towards funeral expenses and ultimately assessed the total compensation to be Rs. 22,98,900/-.

5. Shri Aditya Singh Parihar, learned counsel for the claimants-appellants has submitted that the tribunal has deducted 20% by way of income tax and other emoluments which is not in consonance with the judgment of **Vimal Kanwar and Others Versus Kishore Dan and others (2013) 7 SCC 476**. Learned counsel has submitted that tribunal has granted multiplier of 9 in-place of 11 which is required to be granted as per the judgement of **Sarla Verma Vs. D.T.C, AIR 2009 SC 3104**. It is submitted that no amount under loss of future prospect is granted relying on decision of **Sarla Verma (supra)** as deceased was above 50 years of age.

6. As both the appeals raise different issues we will be obliged to decide all the issues raised in both the appeals as per the judgment of the Apex Court in the case of **U.P.S.R.T.C Vs. Km. Mamta and Others, AIR 2016 SC 948**. The issues which are raised by the Insurance Company are enumerated as follows:-

(a) The award and decree is bad as it was Vijay Gautam who was driving the vehicle and not Shiv Shankar @ Pappu;

(b) That there is a delay of about 26 months in lodging the F.I.R. and about two and half years delay in filing the claim petition;

(c) That there is no finding to the fact that accident in question occurred due to rash and negligent driving of the driver of Maruti Car and who is liable to pay the claimants;

(d) That the compensation awarded towards consortium and other heads is on the higher side;

(e) The claimants have also challenge quantum of compensation.

Issue (a) and (c) As far as the facts go it is an admitted position that the driver was one Shiv Shankar @ Pappu to whom the owner had entrusted the vehicle but from the evidence on record it is proved that the charge sheet was laid against Vijay Gautam who was also injured in the accident. The oral testimony of the driver D.W.-1- Shiv Shanker also corroborates this fact, in that view of the matter the finding of fact that the vehicle was been driven by Shiv Shankar @ Pappu could not be permitted to stand. Infact the said finding is contrary to the statement and testimony of the driver of the vehicle that he was not driving the vehicle at the time when the accident took place could not be disbelived just because he was a licensed driver. The fact Shiv Shankar @ Pappu was in the vehicle only would not make him liable as driving the vehicle in absence of any other evidence being led. In that view of the matter we hold that the vehicle was being driven by the Vijay Gautam. The factum of knowledge that vehicle was driven by Vijay Gautam and not by Shiv Shankar @ Pappu and to take benefit of this fact, we would have to peruse Section 147 and Section 149 of the Motor Vehicle Act, 1988. Section 147 read with Section 149 of Motor Vehicle Act, 1988 read as follows:-

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 bodily27 [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

(ii) 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.

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.--

(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (l) of section 147 (being a liability covered by the terms of the policy) 1[or under the provisions of section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:--

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

(i) a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect: Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be. Explanation.--For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted under section 165 and "award" means an award made by that Tribunal under section 168.

In view of the provisions 147 and 149 of the M.V. Act, the insurance company has not proved that the owner has entrusted the vehicle to Vijay Gautam or the owner was aware that Vijay Gautam would drive the vehicle. It is evident from the factual data that owner had entrusted the vehicle to a person who was qualified to drive the vehicle. It is not known whether she was put to question regarding the vehicle being driven by Shri Gautam. The fact that the O.D claim was granted for which Shri Aditiya Singh Parihar has relied on the following two decisions: F.A.F.O No. 404 of 2013 and F.A.F.O No. 410 of 2013 decided by Division Bench of this Court on 06.02.2013, so as to contend that recovery rights could not be granted and in alternative it is submitted that even if it has to be granted on ground that there was breach of policy condition which caused accident with a rider that the appellant insurance company shall prove as held by

the Apex Court in **Singh Ram Vs. Nirmala and others, AIR 2018 SC 1290** that the owner was aware that the vehicle was drived by Vijay Gautam as it is not proved by the insurance company that Vijay Gautam had no license to drive the vehicle and therefore having not proved that Vijay Gautam did not have any driving license, this Court in view of the judgment of the Apex Court grants recovery rights but with this rider that it will be incumbent of the insurance company to prove that Vijay Gautam who was driving the vehicle had no license to drive the said vehicle and over and above that vehicle owner was aware that Vijay Gautam was driving the said vehicle with her explicit permission. It is not the case of the insurance company that the driver had no valid license, the owner and P.W.-1 have deposed that the vehicle was driven by Shiv Shankar @ Pappu who had a valid driving license. Even in case where it has been found that the driving license was fake the Courts in **Singh Ram (Supra)** have directed the insurance company to pay the compensation and recover from the owner cum driver. In our case the owner is on a much better ground. In the case of **Shamanna and another Vs. Divisional Manager, Oriental Insurance Company Ltd. and others, AIR 2018 SC 3736**, the driver who was not possessing a valid driving license the insurer was held liable to pay compensation and recover the same from the owner. Our case is covered by judgment of **Ram Chandra Singh Vs. Rajaram and others, AIR 2018 SC 3789** and therefore in this matter when the execution is filed, the question of liability of the owner to repay the Insurance Company will have to be examined by the tribunal.

Issue (b) The finding not being perverse is not disturbed as there is no period for filing claim petition and the claimants being in shock F.I.R. was filed belatedly.

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.

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.

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

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

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 minimized if he had taken care. In this case the deceased was not the author or the co-author of the accident. Hence, the ground that driver was not negligent is rejected.

As far as the question of negligence of deceased is concerned, it is case of composite negligence and therefore the driver, the owner and the insurance company would be liable to pay compensation as the deceased was not the author of the accident with recovery rights given to insurance company.

Issue (d) Compensation to be awarded and as raised by claimants that compensation granted is inadequate and requires enhancement.

The deceased was Chief Pharmacist which is an admitted position of fact, his income has been considered Rs. 26,900/- p.m by the tribunal. The tribunal has not added any amount on the head of future loss of income by assigning reasons. On the basis of judgement of **Sarla Verma Vs. D.T.C, AIR 2009 SC 3104** was considered by the tribunal. Shri Aditiya Singh Parihar, learned counsel appearing for the claimants contended that tribunal has granted multiplier of 9 in-place of 11 which is required to be granted as per the judgement of **Sarla Verma (supra).**

While going through the record, it is clear that the income of the deceased was Rs. 34,000/- p.m and from the salary slip it is clear that Rs. 6000/- p.a was to be deducted as income tax. The slab in the year 2011 was not 20% for a person earning less than Rs. 5 lacs per annum as other tax deduction would also have been claimed by the deceased.

The tribunal in our view has committed a error in granting multiplier of 9 despite the fact that it has relied on the judgement of **Sarla Verma (supra)** and has reproduce the tabulation. The age of the deceased was in the age bracket of 51-55 years, the tribunal took the view and come to the conclusion that as per the judgment of **Sarla Verma (supra)** no amount be added to the income where the person is above 50 years. In our case we would fall back on the rules and the recent judgment of the Apex Court in **National India Assurance Co. Ltd. Vs. Urmila Shukla, 2021 ACJ 2081**, to add future loss of income. The tribunal even considered the salary certificate of the deceased where the income mentioned to be was Rs. 34,086/- p.m., the tribunal deducted house rent allowance and deducted 20% by way of income tax which according to counsel for the appellants was not in consonance with the judgment of **Vimal Kanwar and Others Versus Kishore Dan and others (2013) 7 SCC 476**. We in principle agree with the learned counsel for claimants as even in the salary certificate only Rs. 500/- p.m has been deducted towards tax at source. The deduction could be Rs. 6000/- p.a and some amount can be deducted as per decision titled **Vimal Kanwar and Others Versus Kishore Dan and others (2013) 7 SCC 476**. Learned counsel for claimants has heavily relied on the judgments decided by Division Bench of this Court on 06.02.2013 in F.A.F.O No. 404 of 2013 and F.A.F.O No. 410 of 2013 and contended that deceased was a third party covered by the policy and therefore, whether recovery rights are granted or not would make no difference to him as the Insurance Company would be liable to the third party.

This takes this Court to the quantum of compensation grantable to claimants. 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 1**. will enure for the benefit of the claimants.

7. It could not be culled out from record that on what basis, the Tribunal has deducted certain pecuniary benefits from the income of deceased. The income of the deceased in the year of accident and looking to his job has to be considered to be Rs. 32,000/- per month as the deceased was in the age bracket of 51-55 years, 20% as future loss of income requires to be added in view of U.P. M.V rules and decision in **Urmila Shukla (Supra**) as the deceased was survived by his wife, two minor sons and two major daughters who were unmarried 1/4th could have been the expenses borne on himself. The claimants would be entitled to multiplier of 11 and not 9 as per the judgment of **National Insurance Company Ltd. Vs. Pranya Sethi 2017 (13) SCALE**. Rs. 1,20,000/- granted for non pecuniary damages is not disturbed.

8. Hence, the total compensation payable to the appellants is computed herein below:

i. Income Rs 32,000/-p.m

ii. Percentage towards future prospects : 20% namely Rs. 64,00/- p.m

iii. Total income : Rs. 32,000 + Rs. 64,00 = Rs. 38,400/- p.m

iv. Income after deduction of 1/4th : Rs. 28,800/- p.m

v. Annual Income : Rs. 28,800 x 12 = 3,45,600/- p.a

vi. Multiplier applicable : 11

vii. Loss of dependency: Rs.3,60,000 x 11 = Rs.38,01,600/-

viii. Amount under non-pecuniary head : 1,20,000/-

ix. Total compensation : Rs. 39,21,600/-

9. 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."

10. In view of the above, both the appeals are allowed. Compensation is recalculated. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondents shall jointly and severally be liable to pay the amount to the claimants.

11. Having held that the Insurance Company can recover the amount from the

owner and driver if it is proved that the owner was aware and had given the vehicle to Shri Haridas Gautam to drive and that Haridas Gautam had no license to drive the vehicle the recovery rights are given, are these facts being proved by Insurance Company.

12. The respondent-Insurance Company shall deposit the additional amount after recalculating within a period of 12 weeks from today with interest at the rate of 7.5% per annum 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. 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 claimants for any financial year exceed Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' (T.D.S) 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 no T.D.S shall be deductible.

14. The registry of 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.

15. 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 by tribunal seeing the disbursement status of applicants /claimants.

16. Record be sent back to tribunal forthwith.

17. This Court is thankful to both the learned Advocates for ably assisting this Court.

(2022)04ILR A1062
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 925 of 2009

Shyam Sunder & Ors. ...Appellants
Versus
Ram Kishan & Anr. ...Respondents

Counsel for the Appellants:
Sri A.K. Ojha

Counsel for the Respondents:
Sri Rahul Sahai

Civil Law - Motor Vehicles Act, 1988 - Sections 166, 168 & 173---Compensation--Determination of--Case of the claimants that deceased was coming to his hostel with his brother when he reached in front of his hostel offending motor-cycle driven rashly and negligently hit him from behind- monthly income was ` 6,000 from tuitions and coaching--Insurer has not challenged its liability- Award granted towards future loss of income and under other heads of pecuniary damages- future prospects granted- applying multiplier of 18 - Funeral expenses and loss of estate granted.

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Comp. Ltd. Vs Pranay Sethi & ors. MANU/SC/1366/2017

2. Munna Lal Jain & ors. Vs Vipin Kumar Sharma & ors. MANU/SC/0640/2015

3. Sarla Verma & ors. Vs Delhi Transport Corporation & ors. MANU/SC/0606/2009

4. Kurvan Ansari & ors. Vs Shyam Kishore Murmu & ors. MANU/SC/1068/2021

5. National Insurance Company Ltd. Vs Mannat Johal & ors. MANU/SC/0589/2019

6. Hansaguri Prafulchandra Ladhani & ors. Vs The Oriental Insurance Company Ltd. & ors. MANU/GJ/2100/2006

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the claimants have challenged the judgment and order dated 29.11.2008, passed by Motor Accident Claims Tribunal, Jhansi (*herein after referred to as 'the Tribunal'*) in MACP No.292 of 2007 (*Shyam Sunder and others vs. Ram Kisan and another*), awarding a sum of Rs.2,66,000/- as compensation to the claimants with interest at the rate of 6% per annum.

2. The claim petition was filed by the appellants, parents and brothers of the deceased before the Tribunal with the averments that on 9.5.2007 at about 9:45 p.m., the deceased Bhupendra was coming to his hostel with his brother at Panwadi Road, Rath, District-Hameerpur and when he reached in front of his hostel, a motorcycle bearing No.UP-C-1676 hit him from behind. Motorcycle was being driven by its driver very rashly and negligently. In this accident, the deceased sustained grievous injuries and died on the way to the hospital. The deceased was 24 years of age and his monthly income was Rs.6,000/- by imparting tuitions and coaching.

3. Heard Shri A.K. Ojha, learned counsel for the appellants and perused the judgment of the Tribunal.

4. The accident is not in dispute. The insurance company has not challenged the liability on it. The issue of negligence has attained finality. Now the only issue to be decided is the quantum of compensation awarded by the Tribunal.

5. Learned counsel for the appellants has submitted that the deceased was unmarried boy of 24 years age. He is in the profession of imparting tuitions and coaching by which his monthly income was Rs.6,000/-, but the learned Tribunal did not consider the aforesaid facts and assessed his monthly income only at Rs.3,000/-. It is emphatically submitted by learned counsel for the appellants that the deceased was having a very bright future as he was well-educated, but the Tribunal has not awarded any sum towards loss of future income. It is next submitted that the learned Tribunal has awarded only Rs.2,000/- for funeral expenses, which is on lower side. Moreover, no amount is awarded in other

heads of non-pecuniary damages, such as loss of estate and loss of filial consortium. Rate of interest is awarded oly 6%, which is also on lower side. No other point in calculating the compensation is disputed by the appellants.

6. It is admitted fact that the deceased was 24 years of age at the time of accident. He was educated person. It is alleged that he was earning Rs.6,000/- per month by imparting tuitions. Keeping in view the fact that the age of the deceased was 24 years and he was educated and the accident had taken place in the year 2007, we fix his monthly income as Rs.6,000/- per month, namely Rs.72,000/- per annum.

7. The Tribunal has not added any percentage of amount towards future loss of income, which is, in our opinion, grave error. Since, the deceased will fall within the category of self-employed and his age was 24 years at the time of accident, 40% shall be added towards future prospects as held by Hon'ble Apex Court in ***National Insurance Company vs. Pranay Sethi*** [*2014 (4) TAC 637 (SC)]*. Hon'ble Apex Court has also held in ***Munna Lal Jain vs. Vipin Kumar Sharma*** [*2015 (3) TAC 1 (SC*)] that if the deceased was unmarried, 1/2 shall be deducted for his personal expenses. In this case, Hon'ble Apex Court has also held that multiplier will be applied with reference to the age of the deceased. Therefore, keeping in view the age of the deceased, multiplier of 18 will be applied in the light of the judgment of Hon'ble Apex Court in the case of ***Smt.Sarla Verma vs. Delhi Transport Corporation*** [*2009 (2) TAC 677 (SC)]*. As far as non-pecuniary damages are concerned, the Tribunal has awarded Rs.2,000/- for funeral expenses, which is on very lower-side. In the light of judgment of ***Pranay Sethi (supra),*** claimants shall be entitled to get Rs.15,000/- each for loss of estate and funeral expenses. Rs.40,000/- x 2 = Rs.80,000/- towards filial consortium is granted in the light of the judgment of Hon'ble Apex Court in the case of ***Kurvan Ansari alias Kurvan Ali and another vs. Shyam Kishore Murmu and another*** [*2021 (4) TAC (SC)]* .

8. Hence, the total compensation, in view of the above discussions, payable to the appellants-claimants is being recalculated herein below:

i.	Annual Income	Rs.6,000/- x 12	Rs.72,000/-
ii.	Percentage towards Future-Prospects (40%)	Rs.72,000/- x 40%	Rs.28,800/-
iii.	Total Income	Rs.72,000/- + Rs.28,800/-	Rs.1,00,800/-
iv.	Income after deduction of 1/2	Rs.1,08,000/- - Rs.50,400/-	Rs.50,400/-
v.	Multiplier applicable	18	
vi.	Loss of dependency	Rs.50,400/- x 18	Rs. 9,07,200/-
vii.	Funeral Expenses		Rs.15,000/-
viii.	Loss of Estate		Rs.15,000/-
ix.	Filial Consortium	Rs.40,000/- x 2	Rs.80,000/-
x.	**Total Compensation**		**Rs.10,17,200/-**

9. 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."

10. Learned Tribunal has awarded rate of interest as 7% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

11. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The Insurance Company shall deposit the amount within a period of 8 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. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd.,*** [*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 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.

(2022)04ILR A1065
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.04.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

First Appeal From Order No. 273 of 2021

Ram Badal Mishra ...Appellant
Versus
U.O.I. ...Respondent

Counsel for the Appellant:
Pradeep Kumar Singh, Amrita Singh, Manish Kumar Srivastava

Counsel for the Respondents:
Manendra Nath Rai, Mahendra Kumar Misra

Civil Law - Railway Claims Tribunal Act, 1987 - **Section 23-**--Condonation of delay--Appeal for--Delay of three years and six months in filing claim petition--Dismissal of application for condonation of delay along with claim

application- Claim was filed with considerable delay but the Tribunal was required to have taken a pragmatic approach -no finding that delay occasioned in filing claim was deliberate, wilful or intentional on part of claimant- Impugned order set aside.

Appeal allowed. (E-9)

List of Cases cited:

1. Steel Authority of India Ltd. & ors. Vs National Union Water Front Workers & ors. MANU/SC/0515/2001

2. Prem Singh & ors. Vs Birbal & ors. MANU/SC/8139/2006

3. Manoharan Vs Sivarajan & ors. MANU/SC/1192/2013

4. State of Bihar & ors. Vs Kameshwar Prasad Singh & ors. MANU/SC/0358/2000

5. Collector, Land Acquisition, Anantnag & ors. Vs Katiji & ors. MANU/SC/0460/1987

6. New India Insurance Co. Ltd. Vs Shanti Misra MANU/SC/0547/1975

7. H.H. Brij Indar Singh Vs Lata Kanshi Ram & ors. MANU/PR/0033/1917

8. Shakuntala Devi Jain Vs Kuntal Kumari & ors. MANU/SC/0335/1968

9. Concord of India Insurance Co. Ltd. Vs Nirmala Devi & ors. MANU/SC/0384/1979

10. Mata Din Vs A. Narayanan MANU/SC/0621/1969

11. St. of Ker. Vs E.K. Kuriyipe & ors. MANU/SC/0598/1980

12. Milavi Devi Vs Dina Nath MANU/SC/0756/1981

13. O.P. Kathpalia Vs Lakhmir Singh (Dead) & ors. MANU/SC/0322/1984

14. G. Ramegowda & ors. Vs Special Land Acquisition Officer, Bangalore MANU/SC/0161/1988

15. The Scheduled Caste Co-operative Land Owning Society Ltd., Bhatinda Vs U.O.I. (UOI) & ors. . MANU/SC/0183/1991

16. Binod Bihari Singh Vs U.O.I. (UOI) MANU/SC/0194/1993

17. Shakambari and Co. Vs U.O.I. (UOI) MANU/SC/0413/1992

18. Warlu Vs Gangotribai & ors. MANU/SC/0080/1994

19. State of Haryana Vs Chandra Mani & ors. MANU/SC/0426/1996

20. Special Tehsildar, Land Acquisition, Kerala Vs K.V. Ayisumma MANU/SC/0694/1996

21. Nand Kishore Vs St. of Pun. MANU/SC/0831/1995

22. N. Balakrishnan Vs M. Krishnamurthy MANU/SC/0573/1998

23. Perumon Bhagvathy Devaswom Vs Bhargavi Amma (Dead) by LRs. & ors. MANU/SC/7894/2008

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

(1) Heard Mr. Manish Kumar Srivastava, learned counsel for appellant and Mr. Mahendra Kumar Mishra, learned counsel for respondent.

(2) First Appeal From Order under Section 23 of the Railway Claims Tribunal Act, 1987 has been filed against order dated 30.09.2021 whereby application for condonation of delay in filing claim has been dismissed along with the claim application.

(3) Vide order dated 26.11.2021, appeal had been admitted while summoning the lower court records, which have been forwarded by the tribunal concerned.

(4) Learned counsel for appellant submits that upon death of Late Ajay Kumar, on 05.07.2015, the appellant who is his father and dependent went into shock and was mentally disturbed for a prolonged time due to which claim application was filed with a delay of three years and six months. It is submitted that in the application for condonation of delay, cogent ground had been indicated for filing the claim application with considerable delay. It is submitted that the delay in filing claim application was neither deliberate nor intentional and occasioned only due to advice of counsel as per which considerable time was lost in obtaining police reports and other papers to establish death of deceased. It is submitted that the aforesaid factors have been completely ignored by the Tribunal while rejecting claim on the ground of delay. It is submitted that the provisions of Act being beneficial in nature, the Tribunal should have leaned towards hearing on merits instead of rejecting the claim application on technicalities.

(5) Learned counsel appearing on behalf of respondent Union of India has refuted submissions advanced by learned counsel for appellant with the submission that no cogent explanation was furnished by the claimant for filing claim application after three years and six months. It is submitted that actually the claim has been filed after four years, five months and 25 days from the date of alleged accident and it is only after excluding one year limitation that the delay comes to three years five months and 25 days as on the date of filing of claim application. It is submitted that such a delay was clearly intentional and willful particularly since the delay has not been precisely explained and as such was rightly rejected by the Tribunal.

(6) Upon consideration of submissions advanced by learned counsel for parties and perusal of material available on record, it is evident that claim application of the appellant has been rejected by means of impugned order, while rejecting application for condonation of delay on the ground that reason for delay has been given only in general terms and has not been explained satisfactorily.

(7) Considering the aforesaid submissions, the following point of determination is being framed:

(i) Whether the Tribunal erred in law in rejecting the claim application on the ground of limitation without adverting to purpose of the Railway Claims Tribunal Act, 1987?

(8) With regard to aforesaid proposition regarding condonation of delay, it is apparent that there was an actual delay of more than four years in filing claim from the date of alleged accident but it is also important to bear in mind that the concept of compensation for accident arising out of and due to use of Railway in terms of Railway Claims Tribunal Act, 1987 is clearly a beneficial legislation. The introduction and statement of objects and reasons of the Act of 1987 clearly indicates that the Act has been introduced to make the Indian Railways accountable to Indian Citizens in a democratic setup and to make it more efficient and accountable. As such, the aspect of condonation of delay is required to be seen in the context of a beneficial legislation enacted for the purposes of awarding compensation to persons who are injured or die due to an accident arising out of use of Railway property.

(9) Considering the said fact that the Act is a beneficial piece of legislation, normal conditions for condonation of delay

in such situations are required to be relaxed.

(10) Hon'ble the Supreme Court in the case of ***Steel Authority of India Ltd. and others versus National Union Water Front Workers and others*** reported in ***2001 (19) Lucknow Civil Decision 1339*** has clearly held as follows:-

"9. ..... It is now well settled that in interpreting a beneficial legislation enacted to give effect to directive principles of the state policy which is otherwise constitutionally valid, the consideration of the Court cannot be divorced from those objectives. In a case of ambiguity in the language of a beneficial labour legislation, the Courts have to resolve the quandary in favour of conferment of, rather than denial of, a benefit on the labour by the legislature but without rewriting and/or doing violence to the provisions of the enactment".

(11) It is thus clear that while interpreting a beneficial legislation, an effort has to be made to give effect to the objective of the enactment, which in the present case is consideration of claim for compensation in view of loss suffered to the life or person of an individual.

(12) It is also settled proposition of law as held by Hon'ble the Supreme Court in the case of ***Prem Singh and Others Versus Birbal and others*** reported in ***(2006) 5 SCC 353*** that limitation is statute of repose. It ordinarily bars remedy but does not extinguish a right with the only exception to be found in Section 27 of the Limitation Act 1968 pertaining to institution of suit for possession of any property.

(13) With regard to the concept of condonation of delay, Hon'ble the Supreme Court in the case of ***Manoharan*** versus ***Sivaranjan and others*** reported ***in (2014) 4 Supreme Court Cases 163*** has held as follows:-

*"**Answer to Point (ii)***

***8**.In State of Bihar v. Kameshwar Prasad Singh [(2000) 9 SCC 94 : 2000 SCC (L&S) 845], it was held that power to condone the delay in approaching the court has been conferred upon the courts to enable them to do substantial justice to the parties by disposing the cases on merit. The relevant paragraphs of the case read as under: (SCC pp. 102-104, paras 11-13)*

"11. Power to condone the delay in approaching the court has been conferred upon the courts to enable them to do substantial justice to parties by disposing of matters on merits. This Court in Collector (LA) v. Katiji [(1987) 2 SCC 107 : 1989 SCC (Tax) 172] held that the expression "sufficient cause' employed by the legislature in the Limitation Act is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice--that being the life-purpose for the existence of the institution of courts. It was further observed that a liberal approach is adopted on principle as it is realised that: (SCC p. 108, para 3)

"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The

doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.'

12. After referring to the various judgments reported in New India Assurance Co. Ltd. v. Shanti Misra [(1975) 2 SCC 840 : (1976) 2 SCR 266] , Brij Indar Singh v. Kanshi Ram [(1916-17) 44 IA 218 : (1917) 6 LW 592 : ILR (1918) 45 Cal 94] , Shakuntala Devi Jain v. Kuntal Kumari [AIR 1969 SC 575 : (1969) 1 SCR 1006] , Concord of India Insurance Co. Ltd. v. Nirmala Devi [(1979) 4 SCC 365 : 1979 SCC (Cri) 996 : (1979) 118 ITR 507] ,Lala Mata Dinv. A. Narayanan[(1969) 2 SCC 770 : (1970) 2 SCR 90] ,State of Keralav. E.K. Kuriyipe [1981 Supp SCC 72] , Milavi Devi v.Dina Nath [(1982) 3 SCC 366] ,O.P. Kathpalia v. Lakhmir Singh [(1984) 4 SCC 66] , Collector (LA) v. Katiji [(1987) 2 SCC 107 : 1989 SCC (Tax) 172] , Prabha v.Ram Parkash Kalra [1987 Supp SCC 339] ,G. Ramegowdav. Land Acquisition Officer[(1988) 2 SCC 142 : (1988) 3 SCR 198] ,Scheduled Caste Coop. Land Owning Society Ltd. v.Union of India [(1991) 1 SCC 174] ,Binod Bihari Singhv.Union of India[(1993) 1 SCC 572 : AIR 1993 SC 1245] ,Shakambari & Co. v. Union of India [1993 Supp (1) SCC 487] ,Ram Kishan v.U.P. SRTC[1994 Supp (2) SCC 507] and Warlu v. Gangotribai [1995 Supp (1) SCC 37] this Court inState of Haryana v.Chandra Mani [(1996) 3 SCC 132 : (2002) 143 ELT 249] held: (SCC p. 138, para 11)

"11. ... The expression "sufficient cause" should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-à-vis private litigant could be laid down to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally

injured while State is an impersonal machinery working through its officers or servants.'

To the same effect is the judgment of this Court in Tehsildar (LA) v. K.V. Ayisumma [(1996) 10 SCC 634 : AIR 1996 SC 2750] .

13. In Nand Kishore v. State of Punjab [(1995) 6 SCC 614 : 1996 SCC (L&S) 57 : (1995) 31 ATC 787] this Court under the peculiar circumstances of the case condoned the delay in approaching this Court of about 31 years. In N. Balakrishnan v. M. Krishnamurthy [(1998) 7 SCC 123 : (2008) 228 ELT 162] this Court held that the purpose of the Limitation Act was not to destroy the rights. It is founded on public policy fixing a life span for the legal remedy for the general welfare. The primary function of a court is to adjudicate disputes between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. The object of providing legal remedy is to repair the damage caused by reason of legal injury. If the explanation given does not smack mala fides or is not shown to have been put forth as a part of a dilatory strategy, the court must show utmost consideration to the suitor. In this context it was observed in N. Balakrishnan v. M. Krishnamurthy [(1998) 7 SCC 123 : (2008) 228 ELT 162] : (SCC p. 127, para 9)

"9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court."

"In ***Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (dead) by LRs, (2008) 8 SCC 321****, it is observed that the words sufficient cause for not making the application within the period of limitation should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the each case and also the type of case. It was held that word 'sufficient cause' occurring in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice.*

In ***K. Subbarayudu and others Vs Special Deputy Collector (Land Acquisition) (2017) 12 SCC 840****, Hon'ble Supreme Court in paragraph 11 has held that the term "sufficient cause" is to receive liberal construction so as to advance substantial justice. When no negligence, inaction or want of bona fides is attributable to the appellants, the Court should adopt a justice-oriented approach in condoning the delay."*

(14) Upon applicability of aforesaid judgment in the present case, it is apparent

that the Tribunal has taken a very pedantic and hidebound view of the application for condonation of delay. It is no doubt true that the claim was filed with considerable delay but the Tribunal was required to have taken a pragmatic approach to advance the cause of merit and justice instead of rejecting the application for condonation of delay merely on the ground of delay of three years and six months.

(15) Considering the fact that claim application was filed in terms of a beneficial enactment, it was incumbent upon the Tribunal to have taken a pragmatic and justice oriented approach in condoning delay in filing claim application which related to death of the claimant's son. The tribunal has not recorded any finding that delay occasioned in filing the claim was deliberate, willful or intentional on the part of claimant. Without recording any such finding, the Tribunal was not required to have rejected the claim application. As a result the point of determination is answered in the affirmative in favour of appellant.

(16) In view of aforesaid observations, it is apparent that impugned order dated 30.09.2021 is not in accordance with law and is therefore set aside. The appeal succeeds and is allowed. The application for condonation of delay in filing claim petition consequently stands allowed. The matter is remitted to the Tribunal concerned for consideration afresh of the claim application on merits.

(17) Office is directed to remit the lower court record expeditiously for the said purpose.

(2022)04ILR A1071
APPELLATE JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 10.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 568 of 1991

New India Assurance Co. Ltd. ...Appellant
Versus
Smt. Munni Devi & Ors. ...Opp. Parties

Counsel for the Appellant:
Sri S.P. Lal, Sri Rajesh Ji Verma

Counsel for the Opp. Parties:
Sri Siddharth, Sri H.K. Gupta, Sri K.K. Srivastava

Civil Law - Workmen's Compensation Act, 1923 - Section 4A--Accident-Murder during course of employment--Where dominant intention of the felonious act is to kill any person--Such killing is not accidental murder--If cause of murder or act of murder was not originally intended and same is caused in furtherance of any other felonious act, then such murder is accidental murder--In the present case, deceased was in employment when the incident occurred--Deceased died due to employment injuries.

Appeal dismissed. (E-9)

List of Cases cited:

1. Rita Devi & ors. Vs New India Assurance Co. Ltd. & ors. MANU/SC/0312/2000

2. Golla Rajanna & ors. Vs The Divisional Manager & ors. MANU/SC/1515/2016

3. Mackinnon Mackenzie and Co. (P) Ltd. Vs Ibrahim Mahmmed Issak MANU/SC/0310/1969

4. Regional Director, E.S.I. Corporation & ors. Vs Francis De Costa & ors. MANU/SC/0117/1997

5. Malikarjuna G. Hiremath Vs The Branch Manager, The Oriental Insurance Co. Ltd. & ors. MANU/SC/0202/2009

6. Shakuntala Chandrakant Shreshti Vs Prabhakar Maruti Garvali & ors. MANU/SC/8649/2006

7. Mewar Textile Mills & ors. Vs Kushali Bai & ors. MANU/RH/0105/1959

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri S.P. Lal, learned counsel for the appellant and perused the judgment and order impugned. None appeared on behalf of sole respondent though notices were issued.

2. The appellant has challenged the order dated 28.6.1991 of the Commissioner, Employee‟s Compensation whereby compensation of Rs.80,664/- has been awarded to claimant/respondent for death of her husband who was murdered while in employment.

3. While issuing notice, this Court had called for the record of the Court below.

4. Whether the murder of the deceased, Ved Prakash was an "accident" arising out of and during the course of his employment ? The law on this issue is well settled by the Supreme Court in ***Rita Devi v. New India Assurance Co. Ltd., 2000 ACJ 801 (SC).*** The Supreme Court drew distinction between a "murder" which is not an accident and a "murder" which is an accident. The Supreme Court laid down the test that if the dominant intention of the felonious act is to kill any particular person, then such killing is not accidental murder but a murder simpliciter. However, if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act, then such murder is an accidental murder. Para 10 of the judgment is relevant and is reproduced hereunder:

"10. The question, therefore is, can a murder be an accident in any given case? There is no doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a "murder" which is not an accident and a "murder" which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder."
(Emphasis supplied)

6. In Rita Devi (supra), the deceased was employed to drive an auto rickshaw for ferrying passengers on hire. On the fateful day, the auto rickshaw was parked in the rickshaw stand at Dimapur when some unknown passengers engaged the deceased for a journey. As to what happened on that day is not known. It was only on the next day that the police was able to recover the body of the deceased but the auto rickshaw in question was never traced out. The owner of the auto rickshaw claimed compensation from the insurance company for the loss of auto rickshaw. The heirs of the deceased claimed compensation for the death of the driver on the ground that the death occurred on account of accident arising out of use of the motor vehicle. The Apex Court held that the murder to be an

accidental murder. Para 14 is quoted below:-

"14. Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the autorickshaw, was duty bound to have accepted the demand of fare-paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the autorickshaw and in the course of achieving the said object of stealing the autorickshaw, they had to eliminate the driver of the autorickshaw then it cannot but be said that the death so caused to the driver of the autorickshaw was an accidental murder. The stealing of the autorickshaw was the object of the felony and the murder that was caused in the said process of stealing the autorickshaw is only incidental to the act of stealing of the autorickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing theft of the autorickshaw."

(Emphasis supplied)

7. In Rita Devi (supra), the Supreme Court relied on Challis v. London and South Western Railway Company, (1905) 2 KB 154 and Nisbet v. Rayne & Burn, (1910) 1 KB 689 to draw the distinction between the felonious act which accidentally results in death and a murder simpliciter. Paras 11 to 13 of the judgment are reproduced hereinbelow:

"11. In Challis v. London and South Western Rly. Co. [(1905) 2 KB 154 : 74 LJKB 569 : 93 LT 330 (CA)] the Court of Appeal held where an engine driver while driving a train under a bridge was killed by a stone wilfully dropped on the train by a boy from the bridge, that his injuries were caused by an accident. In the said case, the Court rejecting an argument that the said incident cannot be treated as an accident held:

"The accident which befell the deceased was, as it appears to me, one which was incidental to his employment as an engine driver, in other words it arose out of his employment. The argument for the respondents really involves the reading into the Act of a proviso to the effect that an accident shall not be deemed to be within the Act, if it arose from the mischievous act of a person not in the service of the employer. I see no reason to suppose that the legislature intended so to limit the operation of the Act. The result is the same to the engine driver, from whatever cause the accident happened; and it does not appear to me to be any answer to the claim for indemnification under the Act to say that the accident was caused by some person who acted mischievously."

12. In the case of Nisbet v. Rayne & Burn [(1910) 2 KB 689 : 80 LJKB 84 : 103 LT 178 (CA)] where a cashier, while travelling in a railway to a colliery with a large sum of money for the payment of his employers' workmen, was robbed and murdered. The Court of Appeal held:

"That the murder was an ,,accident" from the standpoint of the person who suffered from it and that it arose ,,out of" an employment which involved more than the ordinary risk, and consequently that the widow was entitled to compensation under the Workmen's Compensation Act, 1906. In this case the Court followed its earlier judgment in the case of Challis [(1905) 2 KB 154 : 74 LJKB 569 : 93 LT 330 (CA)] . In the case of Nisbet [(1910) 2 KB 689 : 80 LJKB 84 : 103 LT 178 (CA)] the Court also observed that ,,it is contended by the employer that this was not an "accident" within the meaning of the Act, because it

was an intentional felonious act which caused the death, and that the word "accident" negatives the idea of intention". In my opinion, this contention ought not to prevail. I think it was an accident from the point of view of Nisbet, and that it makes no difference whether the pistol shot was deliberately fired at Nisbet or whether it was intended for somebody else and not for Nisbet."

13. The judgment of the Court of Appeal in Nisbet case [(1910) 2 KB 689 : 80 LJKB 84 : 103 LT 178 (CA)] was followed by the majority judgment by the House of Lords in the case of Board of Management of Trim Joint District School v. Kelly[1914 AC 667 : 83 LJPC 220 : 111 LT 305 (HL)]."

5. In Rita Devi (supra), the Supreme Court compared the provisions of the Motor Vehicles Act and the Workmen Compensation Act and held that the object of both the Acts was to provide compensation to the victims of the accidents and the judicial interpretation of the word "death" in both the Acts is the same. Para 15 of the judgment is reproduced hereunder:-

"15. Learned counsel for the respondents contended before us that since the Motor Vehicles Act has not defined the word "death" and the legal interpretations relied upon by us are with reference to the definition of the word "death" in the Workmen's Compensation Act the same will not be applicable while interpreting the word "death" in the Motor Vehicles Act because according to her, the objects of the two Acts are entirely different. She also contends that on the facts of this case no proximity could be presumed between the murder of the driver and the stealing of the autorickshaw. We are unable to accept this contention advanced on behalf of the respondents. We do not see how the object of the two Acts, namely, the Motor Vehicles Act and the Workmen's Compensation Act are in any way different. In our opinion, the relevant object of both the Acts is to provide compensation to the victims of accidents. The only difference between the two enactments is that so far as the Workmen's Compensation Act is concerned, it is confined to workmen as defined under that Act while the relief provided under Chapter X to XII of the Motor Vehicles Act is available to all the victims of accidents involving a motor vehicle. In this conclusion of ours we are supported by Section 167 of the Motor Vehicles Act as per which provision, it is open to the claimants either to proceed to claim compensation under the Workmen's Compensation Act or under the Motor Vehicles Act. A perusal of the objects of the two enactments clearly establishes that both the enactments are beneficial enactments operating in the same field, hence the judicially accepted interpretation of the word "death" in the Workmen's Compensation Act is, in our opinion, applicable to the interpretation of the word "death" in the Motor Vehicles Act also."

6. The apex Court recently has held that unless this Court finds perversity in the finding of fact, it should not easily interfere with finding of fact. I am supported in my view **Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC)**. The finding of fact is that the deceased was an employee who had sustained employment injury and died.

7. I am supported in my view by the decision of the Apex Court in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt.**

Sujatha decided on 2.11.2018 wherein it has been held that the Court has held as under:

"15. Such appeal is then heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not. Whether the appeal involves a substantial question of law or not depends upon the facts of each case and needs an examination by the High Court. If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law.

16. Now coming to the facts of this case, we find that the appeal before the High Court did not involve any substantial question of law on the material questions set out above. In other words, in our view, the Commissioner decided all the material questions arising in the case properly on the basis of evidence adduced by the parties and rightly determined the compensation payable to the respondent. It was, therefore, rightly affirmed by the High Court on facts.

17. In this view of the matter, the findings being concurrent findings of fact of the two courts below are binding on this Court. Even otherwise, we find no good ground to call for any interference on any of the factual findings. None of the factual findings are found to be either perverse or arbitrary or based on no evidence or against any provision of law. We accordingly uphold these findings."

8. This Court, recently in **F.A.F.O. 1070 of 1993 (E.S.I.C. Vs. S. Prasad)** decided on 26.10.2017 has followed the decision in **Golla Rajana (Supra)** and has held as follows:

"The grounds urged before this Court are in the realm of finding of facts and not a question of law. As far as question of law is concerned, the aforesaid judgment in ***Golla Rajanna Etc. Etc. Versus Divisional Manager and another (supra)*** *in paragraph 8 holds as follows "the Workman Compensation Commissioner is the last authority on facts. The Parliament has thought it fit to restrict the scope of the appeal only to substantial questions of law, being a welfare legislation. Unfortunately, the High Court has missed this crucial question of limited jurisdiction and has ventured to re-appreciate the evidence and recorded its own findings on percentage of disability for which also there is no basis."*

9. The learned counsel for the appellant urged at the time of the hearing that the murder cannot be said to be employment injury and under the Employee‟s Compensation Act. It was further submitted that the murder did not arise out of and during the course of employment of the deceased. However, it was not disputed that the deceased was an employee.

10. In Mackinnon Machenzie v. Ibrahim Mahmmed Issak, (1969) 2 SCC 607, Regional Director, E.S.I. Corporation v. Francis De Costa, (1996) 6 SCC 1, Malikarjuna G. Hiremath v. Branch Manager, Oriental Insurance Co. Ltd., (2009) 13 SCC 405, Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali, (2007) 11 SCC 668, Laxmanrao v. Maharashtra State Electricity Board, 2015 ACJ 2509 and Mewar Textile Mills v. Kushali Bai, (1960) II LLJ 369 similar view is taken.

11. The murder of deceased was an accident for the purpose of grant of

compensation under the Employee"s Compensation Act, 1923. The deceased found himself at a spot where he was assaulted and murdered only because of his employment as the deceased was on duty of his employer.

12. While going through the record, it is very clear that this appeal will have to fail and, accordingly, it is held that the deceased died due to employment injuries.

13. Going by the factual scenario, the deceased was in employment when the incident occurred. The award dated 28th July, 1991 goes on the premises. The judgment of this Court in 2012 will also enure for the benefit of the claimants.

14. This court unable to accept the submission of learned counsel for Insurance Company that the policy was for private Car. It has not been proved whether there is any breach of policy decision under the Workmen's Compensation Act, 1923 even if it was proved that the vehicle was being applied for higher area remote. It is annexed that the accident occurring because of employment injury and, therefore, the deceased driver had taken the Car at the instance of the owner, no questions of law was framed while admitting this appeal rather there is no question of law whether the murder was during employment or not is a question of fact which has been answered against the Insurance Company.

15. In view of the above, the appeal fails and is **dismissed**. The so called questions of law framed by the Insurance Company are answered against it. In fact the substantial questions of law raised are questions of fact.

16. Interim relief, if any, shall stand vacated forthwith.

17. This court records the absence of learned counsel for the respondents.

18. This Court is thankful to learned counsel for the appellant for getting this very old matter disposed off.

19. The record be transmitted to the Workmen Commissioner.

20. The amount lying in the fixed deposits will be disbursed to the claimants immediately as more than 31 years has elapsed since the appal was preferred.

(2022)04ILR A1076
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 2271 of 1991
With
First Appeal From Order No. 2288 of 2007

New India Assurance Co. Ltd. ...Appellant
Versus
Smt. Laxmi Devi & Ors. ...Opp. Parties

Counsel for the Appellant:
Sri Rakesh Bahadur

Counsel for the Opp. Parties:
Sri Nigmendra Shukla

Civil Law - Motor Vehicles Act, 1988 - Sections 166, 168 & 173--Compensation-Deceased suffered multiple injuries and succumbed to them-Nothing in post mortem to show that the deceased was under influence of alcohol--There was collusion on right side of the truck--Deceased contributed to the accident to

the extent of 25%--Age of deceased was 39 years--Multiplier applicable would be 15-- sum added thereto towards future prospects @ 40%-Applying multiplier of 15- loss of dependency determined - sum allowed towards non-pecuniary heads to determine the amount of compensation at ` After deducting 25% towards negligence on part of the deceased, compensation payable to claimants modified--Interest allowed @ 7.5% p.a.

Appeals partly allowed. (E-9)

List of Cases cited:

1. Mangal Singh Vs Rajasthan State Road Transport Corp. & ors. MANU/RH/0364/2002

2. Rylands v Fletcher MANU/UKHL/0001/1868

3. Jacob Mathew Vs St.of Pun. & ors. MANU/SC/0457/2005

4. Kaushnuma Begum & ors. Vs The New India Assurance Co. Ltd. & ors. MANU/SC/0002/2001

5. Chhuttan Lal Batham Vs Shyam Lal & ors. MANU/MP/1246/2005

6. Smt. Gaura Devi ors. Vs Shahzad Khan & ors. MANU/UP/1894/2012

7. Sunita & ors. Vs Rajasthan State Road Transport Corporation & ors. MANU/SC/0204/2019

8. National Insurance Co. Ltd. Vs Pranay Sethi & ors. MANU/SC/1366/2017

9. National Insurance Co. Ltd. Vs Mannat Johal & ors. MANU/SC/0589/2019

10. A.V. Padma & ors. Vs R. Venugopal & ors. MANU/SC/0065/2012

11. Hansaguri Prafulchandra Ladhani & ors. Vs The Oriental Insurance Company Ltd. & ors. MANU/GJ/2100/2006

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Rakesh Bahadur, learned counsel for-New India Assurance Co. Ltd. and Sri Nigamendra Shukla, learned counsel for claimants.

2. Both the New India Assurance Co. Ltd. and claimants have challenged the judgment and order dated 19.05.2007 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.4, Bulandshahar (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No. 283 of 2005, awarding compensation of Rs.8,02,500/- with interest at the rate of 9%.

3. The accident took place on 13.7.2005 when the deceased along with Vinay Kumar and minor Anjali was going on the scooter, at that point of time, the truck suddenly gave the signal for turning towards right side and that is how the accident occurred in which, the deceased sustained multiple fractures and minor Anjali and Vinay Kumar also sustained injuries. The F.I.R. was lodged at the police station. The postmortem of the dead body was conducted on 14.7.2005. The deceased was a person of 39 years of age. The respondent-owner of the vehicle contended that the vehicle was not involved in the accident. It was contended that the accident occurred due to rash and negligent driving of the scooterist. The Insurance Company also file its reply which was one of denial and contended that there was breach of policy condition and that the vehicle was not involved. The Tribunal after hearing arguments and perusing the oral testimony as well as documentary evidence, returned the finding of negligence disbelieving the oral testimony of D.W.1-Driver Qudir by placing reliance on **Mangal Singh Vs. Rajasthan State Road Transport Corporation, Jaipur, 2002 (3) TAC 216**

(Raj) and awarded a sum of Rs. 8,02,500/- with interest at the rate of 9%. The Tribunal has considered the income of the deceased to be Rs.6,000/- per month, granted multiplier of 16, deducted 1/3rd towards personal expenses and granted loss of consortium Rs. 5000/- each to claimant nos. 2 to 6 for loss of fatherly affection and Rs. 9500/- for other non pecuniary damages.

4. The learned counsel for the appellant-Insurance Company has contended that the facts go to show that the truck was involved in the accident and in the alternative, the deceased was also negligent as he was driving the vehicle having two pillion riders and, lastly, it is contended that the compensation awarded is on the higher side.

5. As against this the counsel for the claimants has contended that the F.I.R., Charge-sheet and testimonies of the witness conclusively prove that the vehicle was involved and the driver of the truck was the sole author of the accident and that compensation requires to be recapitulated as amount under the head of future loss of income has not been granted.

6. While dealing with submission on issue of negligence raised by the learned counsel for the appellant, it would be relevant to discuss the principles for deciding contributory negligence and for that the principles for considering negligence will also have to be looked into.

7. 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 though it 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.

8. The principle of contributory negligence has been discussed time and again. A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place and that amount will be deducted from the compensation payable to him if he is injured and to legal representatives if he dies in the accident.

9. 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

10. Learned counsel for the appellant has relied on the decision in **Kaushnuma Begum vs. New India Assurance Company Ltd., 2001 (2) SCC 9** and **Chhuttan Lal Batham vs. Shyam Lal and others, 2005 (2) T.A.C. 753 (M.P.) and Smt. Gaura Devi and others v. Shahzad Khan and others, 2013 (1) TAC 606 (ALL).**

11. The finding of fact that the driver is an entrusted witness and cannot be relied on is a finding which cannot be sustained. No doubt driving with two pillion should be the reason for causing the accident. In our case, just because the deceased was driving the vehicle with two pillions was not in itself reason for the accident to take place. Rather, it was a fatal accident. The evidence of the driver of the truck goes to show that the vehicle was involved in the accident though there was a child of 13 years on the scooter, there is a collusion on the right side of the truck and, therefore, also the submission of the counsel for the appellant has to be accepted. The F.I.R. was given by the driver of the truck. The truck became stationery. The postmortem nowhere mentioned that the deceased was under influence of alcohol. Hence, this Court holds that the deceased has also contributed to the accident having taken place to the tune of 25%.

12. This takes this Court now to the issue of compensation. I am unable to subscribe to the submission of Sri Rakesh Bahadur that as there was no document to prove the income, the amount of Rs.6000/- granted is on the higher side. The evidence led proves that he was a skilled tailor and, therefore, his potential to earn has also to be considered and, therefore, I maintain the income granted by the Tribunal on the basis of recent judgment of the Apex Court in **Sunita and others Vs. Rajasthan State Road Transport Corporation and Another, 2019 LawSuit (SC) 190**. The Tribunal has not granted any amount towards future loss of income. The deceased was below the age of 40 years and was having his own business, hence, 40% of the income will have to be added in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. The multiplier is recalculated as the deceased was 39 years of age, hence, the multiplier would be 15. The deduction towards personal expenses of the deceased is just and proper, hence, is not disturbed. As far as the amount under the head of non-pecuniary damages is concerned, it should be Rs.70,000/- + 10% rise in every three years in view of the decision in **Pranay Sethi (Supra)**, hence, the claimants would be entitled to Rs.1,00,000/- (rounded figure) under non-pecuniary heads.

13. Hence, the total compensation payable to the appellants is computed herein below:

i. Monthly Income Rs 6000

ii. Percentage towards future prospects : 40% namely Rs.2400/-

iii. Total income : Rs.6000 + 2400 = Rs.8,400/-

iv. Income after deduction of 1/3rd : Rs.5600/-

v. Annual income : 5600 x 12 = 67,200

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.67,200 x 15 = Rs.10,08,000/-

viii. Amount under non-pecuniary head : 1,00,000/-

ix. Total compensation : 11,08,000/-

x. Compensation payable to claimants after deductions of 25% negligence on the part of the deceased : 11,08,000 - 2,77,000 = 8,31,000/-

14. From the record, it is seen that the appellant has been ordered to deposit a sum of Rs.8,02,500/- along with interest accrued. The Tribunal had granted interest at 9% which according to repo rate should be 7.5% as per the reasoning given below.

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, both the appeals are partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The Insurance Company would recalculate the amount 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.

17. 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.

18. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagauri 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.

19. 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 judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

20. Record be sent back to the Tribunal forthwith.

(2022)04ILR A1082
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.04.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 4432 of 2019

Govind ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Bhola Singh Patel, Brij Mohan Sahai, Monika Singh, Pawan Kumar Singh, Pravin Kumar Verma

Counsel for the Respondents:
G.A., Sudhir Kumar Srivastava

A. Long detention in jail.—Mere long detention in jail does not entitle an accused for bail. It all depends upon the facts and circumstances of the particular case.

Application rejected. (E-11)

List of Cases cited:-

Rajesh Ranjan Yadav Vs CBI through it's Director (2007)1 SCC 70

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri B.M. Sahai, assisted by Sri Pawan Kumar Singh, learned counsel for the applicant, Sri Rajeev Kumar Verma, learned AGA and Sri Sudhir Kumar Srivastava, learned counsel for the complainant.

2. Learned counsel for the applicant has submitted that the present applicant is in jail since 01.09.2017 in Case Crime No.410 of 2017, under Section 376 IPC and Sections 3/4 POCSO Act, Police Station Vikas Nagar, District Lucknow. He has further submitted that the present applicant has been falsely implicated in the case as he has not committed any offence as alleged. As per the prosecution story so narrated in the FIR, the present applicant has made oral sex with the daughter of the complainant/ informant, who is aged about eight years. As per the FIR, when the daughter of the complainant was vomiting after meal, the complainant asked about the reason for vomiting, then she told that the present applicant has made oral sex with her.

3. Sri Sahai has submitted that the entire prosecution story is false and concocted inasmuch as the family of the complainant was tenant of the present applicant and when the present applicant had told the complainant to vacate his house, this false story was created.

4. Sri Sahai has drawn attention of this Court towards Annexure No.RA-1 of

the Rejoinder Affidavit, which is a typed statement of PW-2, mother of the victim, wherein she has stated that her husband along with her daughter went to the police station to lodge the FIR but what has been written in the FIR was not known to her as she was not informed about the narration of the FIR. He has also drawn attention of this Court towards Annexure No.RA-2 of the Rejoinder Affidavit, which is an order dated 18.11.2021 passed by this Court in Criminal Appeal No.5415 of 2018, Sonu Kushwaha Vs. State of U.P., relying upon paras 17 & 21 thereof, which reads as under:-

"17. From the perusal of the provisions of P.O.C.S.O. Act, it is clear that offence committed by appellant neither falls under Section 5/6 of P.O.C.S.O Act nor under Section 9(M) of P.O.C.S.O. Act because there is pentrative sexual assault in the present case as appelalnt has put his penis into mouth of victim. Putting penis into mouth does not fall in the category of aggravated sexual assault or sexual assault. It comes into category of pentrative sexual assault which is punishable under Section 4 of P.O.C.S.O. Act.

21. The court below has awarded the appellant to undergo 10 years rigorous imprisonment and fine of Rs. 5000/- under Section 6 of P.O.C.S.O. Act and under Section 6 of P.O.C.S.O. Act, minimum sentence is 10 years which may extend to imprisonment for life whereas under Section 4 of P.O.C.S.O. Act minimum sentence is 7 years but which may extend to imprisonment for life also. Learned court below has awarded minimum sentence provided under Section 6 of P.O.C.S.O. Act and accordingly, it would be appropriate to award the sentence to appellant under Section 4 of P.O.C.S.O. Act, seven years of rigorous imprisonment which is minimum provided in that Section and fine of Rs. Rs. 5,000/-, in default, three months additional simple imprisonment."

5. On the basis of aforesaid paras, Sri Sahai has tried to submit that in the present case, maximum sentence for the alleged offence committed may be seven years and the present applicant has already served about four years and seven months in jail, therefore, considering the period of incarceration, the present applicant may be released on bail.

6. Learned AGA has opposed the aforesaid prayer of Sri Sahai and has submitted that the offence in question is so heinous in nature, therefore, the present applicant may not be released on bail. He has drawn attention of this Court towards para-15 F, i.e. details regarding sexual violence, of the medical examination report, which provides that penis was penetrated in the mouth of the victim. Learned AGA has submitted that since this is a case of oral sex so there might not be any other injury on the body of the victim.

7. Learned AGA and learned counsel for the complainant have further submitted that the statement of the victim/prosecutrix has been recorded under Section 164 Cr.P.C. wherein she has categorically stated that she is a girl of eight years. Her father is Chhotelal Kashyap. She studies in Class-1. The applicant used to call her in his house and show porn movies (gandi-gandi picture). In that picture, both the male and female were naked. Thereafter, he brought her to the roof and asked to take his penis in her mouth. She explained that the penis is the part which is used for urination. Therefore, both the counsels for the opposite parties have submitted that this case shall fall within Section 3 (a) and

Section 4 (2) of the POCSO Act, which provides maximum punishment for life also. Therefore, the present bail application may be rejected.

8. Heard learned counsel for the parties and perused the material available on record.

9. At the very outset, it would be apt to reproduce the relevant part of Section 375 IPC, Sections 3 (a) and 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act"), which reads 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, ..."

10. Sections 3 (a) & 4 of the POCSO Act are as under:-

*"**3. Penetrative sexual assault**. - A person is said to commit "penetrative sexual assault" if -*

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or"

"4. Punishment for penetrative sexual assault. - [(1)] Whoever commits penetrative sexual assault 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 shall also be liable to fine.

[(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]"

11. Therefore, it is clear that a man is said to have committed rape if he penetrates his penis into the mouth of a woman. Section 376 IPC provides punishment for rape, which would be not less than ten years but may extend to the imprisonment for life and shall also be liable to fine.

12. Further, in view of Section 3 (a) of POCSO Act, the applicant has committed penetrative sexual assault with the prosecutrix and as per Section 4 (2) of POCSO Act, if any person commits penetrative sexual assault on a child below sixteen years of age shall be punishable with imprisonment for a term which shall not be less than twenty years, but may extend to imprisonment for life. Therefore, in view of the aforesaid provision of law, the maximum punishment in the given circumstances may be awarded upto life. For the offence of rape, the punishment may extend to the imprisonment for life also.

13. The victim/prosecutrix in her statement recorded under Section 164 Cr.P.C. has categorically informed that the present applicant committed oral sex with her. The victim/prosecutrix was about 8 years at the time of incident, therefore, at the stage of bail, it cannot be presumed that she has given such statement under the influence of her parents. Besides, the medical examination report supports her allegation wherein it has been verified that the penis was penetrated in the mouth of the victim/prosecutrix.

14. To me, mere long detention in jail does not entitle an accused for bail. Further, it all depends on the facts and circumstances of each case as there is no straight jacket formula for granting bail. Therefore, period of long incarceration may be considered as one of the grounds for granting bail, but it depends upon facts and circumstances of the particular case. The Hon'ble Apex Court in re; **Rajesh Ranjan Yadav v. CBI through its Director, (2007) 1 SCC 70**, has observed as under:-

"..... None of the decisions cited can be said to have laid down any absolute and unconditional rule about when bail should be granted by the Court and when it should not. It all depends on the facts and circumstances of each case and it cannot be said there is any absolute rule that the mere fact that the accused has undergone a long period of incarceration by itself would entitle him to be enlarged on bail."

15. Considering the totality of the facts and circumstances of the issue in question, medical examination report, statement of the prosecutrix recorded under Section 164 Cr.P.C. and the provisions of law i.e. Section 375 IPC, Section 3 (a) and Section 4 of POCSO Act, I do not find any substance in the arguments of learned counsel for the applicant, looking to the peculiar facts and circumstance of the present case, that the applicant has already served about four years and seven months' period in jail, so he may be enlarged on bail considering his period of incarceration. I am conscious about the fact that the guilt of any person can be established before the learned trial court and no observation should be given affecting the trial, but on the basis of aforesaid material available on record, prima facie, I am not inclined to grant bail to the present applicant.

16. Accordingly, the bail application is **rejected** on merits.

17. Before parting with, it is expected that the trial shall be concluded with expedition. Further, the learned trial court may take all coercive measures as per law if either of the parties do not co-operate in the trial properly. The learned trial court shall fix short dates to ensure that trial is concluded at the earliest.

18. Let the copy of this order be provided to the learned trial court through District & Sessions Judge, Lucknow by the Registry of this Court within a week for its compliance.

(2022)04ILR A1085
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.04.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Crl. Misc. Bail Application No. 12363 of 2021

Nirmala ...Applicant

Versus

State of U.P. ...Opp. Party

Counsel for the Applicant:
Naresh Chandra, Paltoo Ram Gupta

Counsel for the Opp. Party:
G.A.

A. Parity—Applicant is entitled ot be released on bail on the ground of parity by moving second or third or any other bail application in a circumstances that at a later date a co-accused of the same criminal case with a similar role was granted bail.

Application rejected. (E-11)

List of Cases cited:-

Nanha Vs St. of U.P. 1993 Crl.L.J. 938

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri P.R. Gupta, learned counsel for the applicant and Ms. Kiran Singh, learned A.G.A.

2. This is the second bail application. First bail application was rejected on 18.3.2021 by Hon'ble Vikas Kunvar Srivastav, J. vide Bail No.3356 of 2021.

3. In view of the order of Hon'ble the Chief Justice dated 13.11.2018, if the Hon'ble Court, which has rejected the bail application of an accused, is not sitting at the place where subsequent bail application has been filed, the same shall be put up before the regular Court, therefore, this bail application has been put up before the regular Court. It has been noted that the Hon'ble Court, which has rejected the first bail application, is presently not sitting at Lucknow where this second bail application has been filed.

4. As per Sri Gupta, the present applicant, who is a lady, is in jail since 24.11.2020 in Case Crime No.0206 of 2020, under Sections 147, 323, 302/34, 336 & 506 IPC, Police Station ? Asoha, District ? Unnao.

5. Sri Gupta has submitted that he is conscious about the fact that he cannot raise any arguments or take any ground in the second bail application, which could have been taken in the first bail application, therefore, he shall not be repeating any arguments or grounds, which have already been considered by this Court while rejecting the first bail application of the present applicant on 18.3.2021.

6. Sri Gupta has submitted that he shall be pressing this second bail application on the solitary ground that after rejection of bail application of the present applicant on 18.3.2021, this Court granted bail to co-accused Bahadur in Bail No.7523 of 2021 on 5.10.2021. Further, other co-accused persons, namely, Bablu has been granted bail in Bail No.5287 of 2021 on 9.11.2021; Kamal has been granted bail in Bail No.12888 of 2021 on 22.11.2021 and Deepu has been granted bail in Bail No.8149 of 2021 on 7.12.2021 as orders of those accused persons have been shown to the Court, which are taken on record.

7. Sri Gupta has drawn attention of this Court towards the decision of Division Bench of this Court in re; **Nanha S/O Nabhan Kha vs. State of U.P**., reported in **1993 CriLJ 938**, wherein the question was considered as to whether any accused may be entitled for bail in his/her subsequent bail application, if after rejection of his/her bail, the other co-accused persons have been granted bail. In para-1 of the judgment, the aforesaid question has been indicated, which reads as under:-

1. In the third bail application moved by the petitioner for bail in case Crime No.

53 of 1989 under Section 302, IPC of P.S. Ganj, district Rampur Hon'ble N.L. Ganguli, J. has referred the following question to a larger Bench for an authoritative pronouncement:--

"Whether an accused is entitled to be released on bail on the ground of parity by moving a second or third bail application in a circumstance that at a later date a co-accused of the same criminal case with a similar role was granted bail by the another Hon'ble Judge before whom without disclosing the fact that the bail application of another co- accused with similar role had already been rejected, by another Bench, bail was granted."

8. While replying the aforesaid question, the Devision Bench of this Court in re; **Nanha** (supra) has observed in paragraphs 53 & 58 as under:-

"53. There are large number of cases of this Court in which the question of parity in the matters of bail has been considered earlier and the weight of judicial authority is in favour of the principle of parity being followed. In the case of Hadi v. State, 1986 Allahabad Criminal Cases 390 Hon'ble Parmeshwari Dayal, J. bailed out the accused on the ground that co-accused had been bailed out earlier. In another case of Sanwal Das Gupta v. State of U.P., 1986 Allahabad Criminal Cases 79, D.N. Jha, J. observed that where bail was granted to a co-accused then even the Magistrate can admit co-accused to maintain parity. In the case of Ram Roop Vs. State of U.P. 1987 Criminal Rulings 30, this Court observed that a co-accused having similar role having been granted bail another co-accused should also be granted bail. In the case of Ali Hussain v. State of U.P., 1990 U.P. Criminal Rulings 93, Hon'ble S.K. Dhaon, J. placed reliance on the Supreme Court's case of Kallu (supra) and granted bail on the ground of parity. In a unreported decision of this Court in Criminal Misc. Bail Application No. 1360 of 1987 Rai Munna v. State of U.P. Hon'ble G.P. Mathur, J. granted bail on the ground of parity though the Hon'ble Judge clearly observed that he was still of the opinion that the applicant was not entitled to bail on merits, but, however, as his case was not distinguishable from the case of co-accused the bail was granted on the ground of parity. In his judgment in Sobha Ram's case (supra) Hon'ble V.N. Mehrotra, J. has considered some more unreported decisions of this Court in which bail has been granted on the ground of parity. I respectfully agree with the view of Hon'ble V.N. Mehrotra, J.

58. The word 'parity' means the state or condition being equal or on a level; equality; equality of rank or status (See Shorter Oxford English Dictionary 1936 Ed.). In other words it means being placed at the same footing. All the accused of a case always do not stand on the same footing. While considering bail of different accused the court has to find out whether they stand on the same footing or not. Even if role assigned to various accused is same yet they may stand on different footing. The case of Cap. Jagjeet Singh (supra) is an illustration wherein the Supreme Court distinguished the case of Capt. Jagjeet Singh on the ground that he was in touch with foreign agency and leaking out secrets. The Supreme Court in the case of Gur Charan Singh v. Delhi Administration, AIR 1978 SC 179 : (1978 Cri LJ 129) laid down that the considerations for grant of bail are inter alia the position and status of the accused with reference to the victim and the witnesses; likelihood of the accused; fleeing from justice; of repeating offence; of jeopardising his own life, being

faced with grim prospect of possible conviction in the case; of tampering with witnesses; and the like. These are additional factors which are to be judged in the case of individual accused and it may make the cases of different accused distinguishable from each accused. At the same time if there is no real distinction between the individual case of accused the principle of parity comes into play and if bail is granted to one accused it should also be granted to the other accused whose case stands on identical footing."

9. The aforesaid question was replied in favour of the accused in para-61 of the case in re; **Nanha** (supra), which reads as under:-

"61. My answer to the points referred to is that if on examination of a given case it transpires that the case of the applicant before court is identical, similar to the accused, on facts and circumstances who has been bailed out, then the desirability of consistency will require that such an accused should also be released on bail. (Exceptional cases as discussed above apart). As regards the second part of the question, answer is that it is not at all necessary for an accused to state in his bail application that the bail application of a co-accused has been rejected previously."

10. In the light of aforesaid judgment, learned counsel for the applicant has tried to demonstrate the impugned FIR wherein general role has been assigned against all five accused persons including the present applicant and no specific role has been assigned to the present applicant, therefore, even as per the prosecution, since the present applicant has been attributed the general role and no specific role has been attributed to her, her case may be considered on the principles of parity. Besides, the present applicant being a lady, she may be extended the benefit of Section 437 Cr.P.C. considering her period of incarceration in jail i.e. about one year and six months. He has further submitted that charge sheet has already been filed, therefore, there is no apprehension of absconding or tampering the evidence or witnesses. He undertakes that the applicant shall co-operate with the trial proceedings and shall not misuse the liberty of bail, if so granted by this Court. Further, the applicant shall abide by all terms and conditions of the bail order.

11. Learned A.G.A has, however, opposed the prayer for bail but he has not disputed the aforesaid submissions of learned counsel for the applicant.

12. Considering the fact that in the FIR, general role has been attributed to all accused persons including the present applicant and co-accused persons, namely, Bahadur, Bablu, Kamal and Deepu have been enlarged on bail, therefore, on the basis of principles of parity, the present applicant may be enlarged on bail. Besides, the applicant being a lady is entitled for the benefit of Section 437 Cr.P.C. Therefore, further considering the decision of the Division Bench of this Court in re; Nanha (supra) wherein various decisions of the Hon'ble Apex Court have been considered, I find that question of the present case i.e. consideration of second bail on the ground that subsequent to rejection of the bail of the present applicant, other co-accused persons have been granted bail is squarely covered, therefore, this is the more reason to grant bail to the present applicant. Accordingly, without entering into merits of the case, the bail application is allowed.

13. Let applicant- Nirmala be released on bail in the aforesaid case crime number on her furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

(i) The applicant shall file an undertaking to the effect that she shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through her counsel. In case of her absence, without sufficient cause, the trial court may proceed against her under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure her presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against her, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against her in accordance with law.

(v)The applicant shall not leave India without previous permission of the court.

(2022)04ILR A1089

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.04.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Crl. Misc. Bail Application No. 2610 of 2022

Bhaiya Ram ...Applicant

Versus

State of U.P. ...Opp. Party

Counsel for the Applicant:
Ravi Shankar Mishra, Pranav Trivedi

Counsel for the Opp. Party:
G.A.

A. Delay in Trial.-- Period of long incarceration of the applicant, poor progress of trial despite the specific direction by the Court, all fact/material witnesses have been examined and there is no likelihood to conclude the trial in near future.

Application allowed. (E-11)

List of Cases cited:-

1. U.O.I.Vs K.A. Najeeb AIR 2021 SC 712

2. Paras Ram Bishnoi Vs Director, C.B.I. Criminal Appeal No. 693/2021(arising out of SLP(Criminal) No. 3610/2020

3. Saudan Singh Vs St. of U.P. Criminal Appeal No. 308/2022(arising out of SLP(Criminal) No. 4633/2021)

4. Gokarakonda Naga Saibaba Vs St. of Mah. (2018)12 SCC 505

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ravi Shankar Mishra, learned counsel for the applicant and Sri Hans Raj Verma, learned A.G.A. for the State.

2. It has been contended by the learned counsel for the applicant that the applicant is in jail since 3.1.2015 in Case Crime No. 294 of 2014 u/s 147, 148, 149, 323,324, 504,506,452, 307, 308, 304 IPC, P.S. Raniganj, District Pratapgarh. It has been submitted that the applicant has been falsely implicated in this case as he has not committed any offence as alleged.

3. Sri Mishra has filed questionnaire being issued from the learned trial court dated 22.4.2022, the same is taken on record.

4. At the very outset the learned counsel for the applicant has submitted that since the present bail application being fourth bail application, therefore, he shall not advance any arguments or raise any ground which could have been taken at the time of rejection of first, second or third bail application. He has submitted that he shall argue the present bail application on a limited ground to the effect that the present applicant is in jail since 3.1.2015, about seven years and four months and despite the specific directions have been issued by this Court twice to conclude the trial within time frame, there was no good progress in the trial inasmuch as out of total 15 prosecution witnesses nine prosecution witnesses have been examined, out of them all fact witness (P.W.-1 to P.W. -7) have been examined and in given circumstances there is no likelihood to conclude the trial in near future, therefore, the period of incarceration of the present applicant and the progress of trial may be considered in view of dictum of Apex Court in re: ***Union of India vs. K.A. Najeeb reported in AIR 2021 Supreme Court 712 and in the case of Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation passed in Criminal Appeal No. 693 of 2021 (Arising out of SLP (Crl) 3610 of 2020)*** enlarge the present applicant on bail.

5. Sri Mishra has drawn attention of this Court towards the certified copy of the questionnaire which indicates that nine prosecution witnesses have been examined and the next date has been fixed for 25.4.2022 for examination of other prosecution witnesses.

6. The first bail application was rejected by Hon. Mahendra Dayal, J. (since retired) on 29.3.2016 (Annexure no. 3). The second bail application was rejected by Hon. Prashant Kumar, J. on 25.7.2018 (Annexure no. 4) and the third bail application has been rejected by Hon. Mohd. Faiz Alam Khan, J. on 2.7.2021. In terms of orders of Hon. the Chief Justice dated 13.11.2018 if any Hon'ble Court is not sitting at the place where any bail application is listed which has already been rejected by him or her, the regular Court may hear such bail application, therefore, the present bail application has been put up before this Court.

7. While rejecting the second bail application on 25.7.2018 this Court has observed as under :

"However, it appears that the applicant is in custody since 03.11.2015, thus, the court below is directed to expedite the trial and if possible, conclude the same, within six months."

8. While rejecting third bail application on 2.7.2021 this court has observed as under :

"However, having regard to the fact that the applicant is detained in prison in this case for the last seven years and only

five prosecution witnesses have been testified before the trial court, the trial court is directed to conduct the trial of the case pending before it by fixing at least two dates in a week and ensure that on all dates fixed, the remaining prosecution witnesses are examined. The trial court is further directed to conclude the trial within six months from today."

9. In all the three rejection orders this Court has briefly considered the facts and circumstances of the issue in question.

10. While rejecting third bail application on 2.7.2021 this Court has taken cognizance of the fact that by that time five prosecution witnesses had been examined, therefore, this Court was of the view that the trial should be concluded within a period of six months and rejected said bail application. About ten months period have passed since 2.7.2021 but there was no good progress in the trial proceedings inasmuch as only four more prosecution witnesses have been examined including all fact witnesses, two Doctors, two Sub-Inspectors. Six prosecution witnesses are yet to be examined. Thereafter, the defence witnesses would be examined and the trial would be concluded after adopting due procedure of law. In carrying out aforesaid exercise there is no possibility of conclusion of trial in near future, therefore, the present applicant may be enlarged on bail.

11. The learned counsel for the applicant has given an undertaking on behalf of applicant that the applicant shall not misuse the liberty of bail and shall cooperate with the trial proceedings and shall abide by all terms and conditions of bail, if granted.

12. Learned A.G.A. has opposed this bail application by submitting that this is fourth bail application and since no new grounds have been raised by the present applicant, therefore, this bail application may be rejected.

13. On being confronted the learned AGA on the point that despite the two orders being passed by this Court on 25.7.2018 and 2.7.2021 to expedite the trial within six months there was no progress in the trial and the present applicant is in jail for about seven years and four months, learned AGA has submitted that since the aforesaid fact is matter of record, therefore, he has nothing to say on this point.

14. Heard learned counsel for the parties and perused the record as well as the questionnaire dated 22.4.2022 produced today itself.

15. At the very outset, I must express my anguish towards the approach of the learned trial court by not following the direction of this Court in its letter and spirit. When this Court vide order dated 25.7.2018 has directed to conclude the trial within six months, the trial should have been concluded within six by adopting coercive methods and also by taking recourse of section 309 Cr.P.C. It is noted here that at that point of time the Pandemic Covid -19 was not there. Further, when this Court has taken notice of the fact on 2.7.2021 while rejecting their bail application that five prosecution witnesses have already been examined, at least in a period of about ten months the trial should have been concluded but still six prosecution witnesses are to be examined, defence witnesses are to be examined and other legal formalities are required to be followed, therefore, this approach of the

learned trial court may not be appreciated. When the learned trial court is having the powers enshrined u/s 309 Cr.P.C. to conclude the trial on day to day basis and they are armed with coercive powers, I fail to understand as to why such provisions of law has not been adopted to conclude the trial within time frame as directed by this Court twice.

16. The Apex Court in re: ***Union of India vs. K.A. Najeeb (supra)*** has held as under :

"This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail."

17. In the case of ***Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation (supra)*** the Apex Court has held as under :

"On consideration of the matter, we are of the view that pending the trial we cannot keep a person in custody for an indefinite period of time and taking into consideration the period of custody and that the other accused are yet to lead defence evidence while the appellant has already stated he does not propose to lead any evidence, we are inclined to grant bail to the appellant on terms and conditions to the satisfaction of the trial court."

18. The Hon'ble Supreme Court in ***Criminal Appeal No.308 of 2022, @ SLP (Crl.) No.4633 of 2021; Saudan Singh Vs. The State of Uttar Pradesh*** vide order dated 25.02.2022 has held that if the accused person is in custody for around eight years pending his criminal appeal before the appellate court, he may be granted bail on the terms and conditions to the satisfaction of the learned trial Court.

19. Besides, as per dictum of the Hon'ble Apex Court in re; ***Gokarakonda Naga Saibaba v. State of Maharashtra, (2018) 12 SCC 505***, wherein it has been held that if all fact/ material witnesses have been examined, the bail application of the accused may be considered.

20. Therefore, without entering into the merits of the case, I am considering the period of incarceration of the present applicant in jail i.e. 7 years and 4 months and poor progress of trial despite the specific direction being issued by this court twice. Notably, all fact/material witnesses have been examined. There is no likelihood, in view of the progress of the trial, to conclude the trial in near future. Therefore, the aforesaid grounds entitles the present applicant to be released on bail and aforesaid grounds may be considered as appropriate ground to grant bail while

disposing of the fourth bail application of the present applicant.

21. Accordingly, the present bail application is ***allowed.***

22. Let the applicant Bhaiya Ram, involved in aforesaid case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(v) The applicant shall not leave the country without permission of the Court concerned.

23. Before parting with, it is expected that the trial shall be concluded with expedition in terms of Section 309 Cr.P.C. Further, the learned trial court may take all coercive measures as per law if either of the parties do not co-operate in the trial properly. The learned trial court shall fix short dates to ensure that trial is concluded at the earliest.

(2022)04ILR A1093
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.04.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Crl Appeal No. 1826 of 1983

Prem & Ors. ...Appellants
Versus
State ...Respondent

Counsel for the Appellants:
Sri Ajay Kumar Pandey, Sri Bharat Singh, Sri Preet Pal Singh Rathore, Sri Satish Trivedi (Senior Adv.)

Counsel for the Respondents:
A.G.A., Sri S.S. Tomar

A. Section 482 Cr.P.C.- Mere consistency or congruity in the testimony of the prosecution witnesses is not the sole test of truth as even falsehood can be given an adroit appearance of truth so that truth disappears and falsehood comes on the surface. Therefore, what the court

has to look at and assess is whether the prosecution evidence coupled with the surrounding circumstances has a ring of truth about it or there arises a strong suspicion and high probability of false implication of the accused put on trial. It is well settled that while witnesses may lie, circumstances will not.

The Investigating Officer of the case has not been examined to explain non-mentioning of the case details in the chitthi majroobi as well as various memos prepared during investigation so as to satisfy in respect of prompt lodging of F.I.R. Further, the police clerk who registered the F.I.R. is also not produced as a witness. Therefore, merely because the defence did not question the police witness on the issue whether F.I.R. was ante timed or not it would not absolve the prosecution to prove it's case beyond reasonable doubt.

The informant has taken the commission of dacoity in the village as an opportunity to falsely implicate persons with whom he had enmity.

Appeal allowed. (E-11)

List of Cases cited:-

1. Chandrabhan Vs State 1981 CRLJ 196

2. Siyaram Rai Vs St. of Bihar (1973)3 SCC 241

3. Laxman Prasad Vs St. of Bihar 1981(Supp) SCC 22

(Delivered by Hon'ble Manoj Misra, J.)

1. This appeal is against the judgment and order dated 03.08.1983 passed by Special Judge, Badaun in Sessions Trial No. 318 of 1981 thereby, convicting the appellants under Sections 396 I.P.C. and sentencing them to imprisonment for life. The appeal was filed by seven persons, namely, Prem, Mohar Singh, Ramesh, Banwari, Bhagwan Singh, Rajendra and Rajpal. Out of them, appellant no.1 (Prem); appellant no.3 (Ramesh); and appellant no.4 (Banwari) have died and their appeal was abated by order dated 20.11.2015. Therefore, this appeal survives for appellant no.2 (Mohar Singh son of Nathu); appellant no.5 (Bhagwan Singh son of Happu); appellant no.6 (Rajendra son of Happu); and appellant no.7 (Rajpal son of Khannu).

INTRODUCTORY FACTS

2. On an oral report made by Ganga Sahai (PW-1), a first information report (FIR) (Exb. Ka-1) was registered on 16.05.1980, at 22:00 hours, as Case Crime No. 96 of 1980, under Section 395/397 I.P.C., at P.S. Sahaswan, district Budaun, against twelve persons out of whom, eight persons, namely, Gajram (not put to trial as he had died), Prem (appellant no.1 - died during appeal), Mohar Singh (appellant no.2), Ramesh (appellant no.3 - died during appeal), Banwari (appellant no.4 - died during appeal), all sons of Nathu; Bhagwan Singh (appellant no.5), Rajendra (appellant no.6), both sons of Happu; and Rajpal (appellant no.7), son of Khannu, were named. In the FIR it is alleged that at about 9 pm while informant's brother Ram Singh (the deceased) and informant's nephew Ranbir Singh (PW-4), son of the deceased Ram Singh, were at their shop, the informant heard their shrieks. In response, the informant and his brother Dhan Singh (PW-2) and others picked up lathi, torches and went to the spot. Where they saw, informant's brother - Ram Singh and informant's nephew - Ranbir Singh being assaulted by 10-12 persons, who had guns, pistol, Ballam. When the informant party challenged them, one of the miscreants assaulted Ranbir Singh with Ballam and, a fellow villager, namely, Gajram son of Khayali, shot Ram Singh and aimed at the informant party, which terrified the informant party and they retreated to the

safety of their homes and from there they started pelting brickbats, etc. upon the miscreants. But the miscreants (i.e. dacoits) kept looting articles. In the meantime, informant's wife set haystack on fire, which lit the area. After looting the house of the informant, the dacoits went to the house of Nem Chand son of Lakhan (not examined), and as soon as Kalyan son of Lakhan (not examined) opened the door, a shot was fired at him by a dacoit and the pellets of that shot struck Kalyan's wife Champa Devi (not examined). Thereafter, the dacoits went to the house of Saudan Singh (not examined), Hari Ram (PW-5), Naresh Pal (not examined) and Baburam (not examined) and looted articles. It is alleged that the dacoits took away mare of Hari Ram (PW-5). After looting the articles, the dacoits went away towards west. After alleging as above, it was stated that amongst 12 persons who committed dacoity, the informant party, in the light of torches, etc., could identify 8 fellow villagers, namely, Gajram, Prem, Mohar Singh, Ramesh, Banwari, Bhagwan Singh, Rajendra and Rajpal. Having made the allegations as above, it was also alleged that the accused Bhagwan Singh had falsely implicated the informant in the murder of Bhure and Happu; in respect of which, a case is pending. It was alleged that because of that case, the present set of named accused were inimical to the informant. It was also alleged that out of 10-12 dacoits, Gajram and 2 or 3 others were wearing Khakhi coloured clothes whereas, the rest were normally dressed. The FIR also gave details of the articles looted.

3. On a Chhitthi Majroobi (letter for medical examination of the injured), dated 16.05.1980, Ranbir Singh (PW-4) was medically examined for his injuries on 17.05.1980, at 1 am, at PHC - Sahaswan. The injury report (Exb. Ka-5), the genuineness of which was admitted, reveals following injuries:-

(i) Incised wound 0.5 cm x 0.25 cm x muscle deep on left side of chest, 3 cm below left nipple;

(ii) Incised wound 1.5 cm x 0.25 cm x muscle deep on front of abdomen on right side, 1 cm above the umbilicus.

According to the opinion of doctor, all injuries were simple in nature, caused by sharp edged weapon; and fresh in duration.

4. Similarly, Smt. Champa Devi was also examined on 17.05.1980 at PHC Sahaswan. Her injury report (Exb. Ka-6) reveals following injuries:-

(i) Firearm wound of entry 0.25 cm x 0.25 cm x skin deep on outer side of right upper arm, 4 cm above the elbow joint.

According to the opinion of the doctor, injury was simple, caused by firearm; and fresh in duration.

NOTE: The defence accepted the genuineness of this document and therefore it was marked an Exhibit.

Interestingly, in this injury report, the time of examination mentioned is 2 pm on 17.05.1980.

5. The other injured, namely, Ram Singh, died on 08.06.1980, at about 3.20 pm, in the District Hospital. His post-mortem examination was conducted on 09.06.1980 at 4 pm. The post-mortem report (Exb. Ka-4) of which the genuineness was admitted, reveals that he died of Septic due to Pus formation. It be noticed that there is no dispute that the deceased (Ram Singh) had suffered gun shot injuries in the incident.

6. Sri R.D. Yadav, S.O., Sahaswan (not examined) started the investigation. He

collected the kerosene lamp (Dibby) of the informant as also the torches in the light of which the incident could be seen. The custody of these items were provided back to its owners of which custody memos were separately prepared, which were exhibited as Exhibit Ka-2 and Ka-3, respectively. He collected blood-stained and plain-earth from two spots, namely, the shop of Ram Singh and the house of Kalyan, of which memos were separately prepared and exhibited as Exhibit Ka-8 and Ka-12, respectively. He collected two empty cartridges from near the shop of Ram Singh of which a memo was prepared and exhibited as Exhibit Ka-9. He also collected sample of burnt ash from near the house of the informant of which a memo was prepared and exhibited as Exhibit Ka-10. He also prepared a custody memo of lantern, alleged to have been lit in the shop of Ram Singh, which was exhibited as Exhibit Ka-11. He prepared a custody memo of a kerosene lamp (Dibby) lit in the house of Kalyan at the time of the incident, which was exhibited as Exhibit Ka-13. He prepared a memo of lifting empty cartridge and pellets from the house of Kalyan, which was exhibited as Exhibit Ka-14. He also prepared a memo of collection of blood stained Dhoti of injured Kalyan, which was exhibited as Exhibit Ka-15. Inquest with regard to the deceased - Ram Singh, was held at the mortuary of Civil Hospital, Bareilly on 08.06.1980. The genuineness of the inquest report was admitted and it was exhibited as Exhibit Ka-20. After investigation, charge-sheet (Exb. Ka-16) was submitted on 18.07.1980 by PW-6 (the second investigating officer) against 7 persons (i.e. only the named accused-the appellants), with a remark that the other named accused Gajram had died. On the charge-sheet, after taking cognisance, on 09.08.1982 charges relating to offences punishable under Sections 396 and 307 I.P.C. were framed.

7. During the course of trial, six prosecution witnesses were examined, namely, PW-1 Ganga Sahai - informant, PW-2 - Dhan Singh (the brother of the informant); PW-3 - Kallu (one of the victims of dacoity, who was declared hostile); PW-4 -Ranbir Singh (the son of the deceased and nephew of the informant - the person injured); PW-5 - Hari Ram (one of the victims of dacoity); and PW-6 - P.P. Mishra (the investigating officer who submitted charge-sheet).

8. The incriminating circumstances appearing in the prosecution evidence were put to the accused for recording their statement under Section 313 Cr.P.C. The surviving appellant Mohar Singh claimed that he has been falsely implicated; that in the murder of Happu and Bhure, Ganga Sahai was an accused, wherein he was a witness, therefore, he has been falsely implicated. Appellant-Bhagwan Singh stated that in the murder of his father (Happu), Ganga Sahai (the informant), Ram Singh (the deceased), Ranbir Singh (PW-4), Dhan Singh (PW-2), and Hari Ram (PW-5) were all accused therefore, he has been falsely implicated. Appellant-Rajendra gave identical statement as given by Mohar Singh, which is, that he is a witness in the murder of Happu and Bhure. Whereas, appellant-Rajpal claimed that he is an associate of Rajendra and Bhagwan Singh therefore, he has been falsely implicated.

9. The trial court held that the factum of armed dacoity is proved; the death of one of the victims of dacoity, after 21 days of hospitalisation, on account of septicaemia as a result of injuries received

at the time of dacoity, is proved; the injuries of PW-4 are also proved; the first information report was lodged promptly; that PW-4, the injured witness, and other persons in whose house dacoity was committed, have disclosed the presence of the accused-appellants, therefore, there is no reason to doubt their version, hence, they were all liable to be convicted under Section 396 I.P.C. As the charge of an offence punishable under section 307 IPC was found covered by the charge of dacoity, no separate conviction on that charge was recorded.

10. We have heard Sri Ajay Kumar Pandey along with Sri Bharat Singh for the surviving appellants - Mohar Singh, Bhagwan Singh, Rajendra and Rajpal; Sri Pankaj Saxena along with Sri Amit Sinha, learned A.G.A., for the State; and have perused the record.

SUBMISSIONS ON BEHALF OF THE SURVIVING APPELLANTS

11. Learned counsel for the appellants submitted that this is an interesting case where all the named accused except Rajpal (appellant no.7) are residents of the same village where the dacoity is alleged to have been committed. Twelve persons are said to have participated in the dacoity including 8 named accused. It is an admitted fact that in the murder of Happu and his brother Bhure, Ganga Sahai (the informant), Dhan Singh (PW-2); Hari Ram (PW-5); Ram Singh (the deceased); and Ranbir Singh (PW-4) were accused. Interestingly, amongst all the witnesses of fact, PW-3, who is not an accused in the murder of Happu, has not disclosed the name of any of the dacoits and has stated that he could not recognise them. It cannot be a mere coincidence that only those victims of dacoity have named the accused who held enmity with the named accused; whereas those who held no enmity have not named the accused-appellants. The prosecution has not led any evidence to show that the accused-appellants were men of criminal antecedents or were dreaded dacoits against whom reports were there from before, or were proclaimed offender who cared a damn about law and order, under these circumstances, it is unbelievable that the accused-appellants, if were to commit dacoity in their own village, would not cover their faces to hide their identity. The prosecution story to the extent of participation of the accused appellants in the dacoity, without masking their identity, defies logic, and is a circumstance which suggests that the informant has taken the factum of dacoity as an opportunity to falsely implicate the accused- appellants.

12. It has been urged that in the prosecution evidence it has come that, out of 12 dacoits, four had sported police dress (*Khakhibana*). Thus, part of the gang of dacoits were hiding their identity, under these circumstances, it is unacceptable that those who were residents of the same village would not hide their identity. This clearly indicates that it is a case of false implication.

13. As regards prompt lodging of the first information report, the learned counsel for the appellants submitted that the first investigation officer of the case and the clerk/constable who registered the report have not been produced as a witness therefore, the accused-appellants were deprived of the opportunity to elicit from them that the FIR was ante-timed. In this regard it was pointed out that various memorandums prepared on 17.05.1980, during the course of investigation, namely,

Exhibit Ka-2, Exhibit Ka-3, Exhibit Ka-8, Exhibit Ka-9, and Exhibit Ka-11, which all appear to be in one handwriting, do not bear the case crime number and other details of the case in connection with which those memorandums were prepared whereas, Ex-Ka-10 which is in same writing carries the case crime number in English language, which appears interpolated. But, interestingly, Exhibit Ka-12, Exhibit Ka-13, Exhibit Ka-14, Exhibit Ka-15, which were also prepared on 17.05.1980, appear in a different handwriting though, they carry the case crime number. Most importantly, the *majroobi chitthi* (letter for examination of the injured) of PW-4 and Champa Devi (not examined), marked Exb Ka-5 and Exb Ka-6, do not bear the case details which is suggestive of the fact that when they were sent for medical examination, no first information report had come into existence. It has also been urged that as per the Chik FIR (Exb. Ka-1), the FIR was lodged at 22.00 hours (10 pm) on 16.05.1980, whereas, if the incident occurred at 9 pm on 16.05.1980, as is the case, and the distance between the place of the incident and the police station is 3 kms, the same appears too prompt. Further, the FIR has been made orally yet, it is a detailed report which, keeping in mind that there were several victims of dacoity who had also sustained injuries and required immediate attention, would suggest that it was made with composure and after deliberation. This circumstance, by itself, evokes suspicion with regard to the report being ante-timed.

14. It was urged that as all the witnesses were highly inimical and interested, there was a need for corroboration from independent evidence such as recovery of the weapons of assault or the articles looted or by deposition of those victims of dacoity who were not inimical to the accused-appellants. But, interestingly, this is a case where there is no recovery, either of the weapon of assault or of the looted articles, either from the accused-appellants or from anybody else. It was also urged that the first investigating officer of the case has not been examined and no reason for his non-examination has come in the testimony of the police officer who proved the police papers by proving the signature of the first investigating officer. Under the circumstances, the testimony of highly interested witnesses have got no corroboration from other material.

15. Lastly, learned counsel for the appellants submitted that the trial court overlooked an important feature, which is, that in the testimony of all the prosecution witnesses, except for naming the accused-appellants as being part of the Gang, there is no disclosure about the role played by the accused-appellants during the course of dacoity. Further, there is nothing in the testimony to show as to with what weapon the accused-appellants were armed and who inflicted which injury and to whom. Absence of disclosure in this regard, according to the counsel for the appellant, is a clinching circumstance suggestive of the fact that the informant took advantage of the occurrence of dacoity to implicate persons with whom he held enmity. It is thus a case where the prosecution story as regards the involvement of the accused-appellants in the dacoity is shrouded in suspicion and that suspicion has not been dispelled by the prosecution, therefore, the appellants are entitled to the benefit of doubt. It has been prayed that the judgment and order of the trial court be set aside.

SUBMISSIONS ON BEHALF OF THE STATE

16. Per contra, the learned A.G.A. submitted that as the factum of dacoity is duly substantiated and not seriously

disputed and the first information report has been lodged promptly; there being an injured witness to disclose the presence of the accused-appellants as part of the Gang, it stood proved that the appellants were part of armed dacoits that committed murder in the act of looting, which, by itself, is sufficient to convict the appellants under Sections 396 I.P.C. therefore, the judgment and order of the trial court calls for no interference.

17. As regards the possibility of false implication and the argument that the accused being residents of the same village would not have participated in dacoity without masking their faces, the learned A.G.A. submitted that there is no hard and fast rule that a person committing dacoity in his own village would always mask his identity. It is the psychology of the criminal that lets him take such a decision and that psychology is not for the court to guess. Often, criminals to show their devil may care attitude do not care to mask their face. In this context, the learned counsel for the appellants placed reliance on certain observations in the impugned judgment as also on a decision of the apex court in the case of Siyaram v. State of Bihar, 1973 (3) SCC 241.

18. On the issue of the FIR being ante-timed, the learned A.G.A. submitted that no suggestion has been given to PW-1 (the informant) that the FIR was ante-timed therefore, the appellants cannot take advantage of non-examination of the investigating officer or the police clerk, who made entries on the oral report.

19. In respect of absence of evidence with regard to recovery of incriminating material from any of the accused-appellants, the learned A.G.A. submitted that this may be a lapse on the part of the investigating officer of which the benefit should not go to the accused, because here, there is a credible ocular account of the incident. It has been urged that once the factum of dacoity is proved beyond doubt and the presence of the appellants as part of that gang of dacoits has been proved by an injured witness, the trial court stood justified in recording conviction therefore, the appeal deserves to be dismissed.

PROSECUTION EVIDENCE

20. Before we proceed to weigh the rival submissions, it would be apposite to have a glimpse at the prosecution evidence in some detail. The prosecution examined six witnesses. Their testimony, in brief, is as follows:-

20 (i) PW-1- Ganga Sahai. He is the informant, brother of deceased (Ram Singh) and uncle of injured Ranbir Singh. He states that at the time of dacoity, Ram Singh and Ranbir Singh (PW-4) were at their general merchandise shop in the village. PW-1 heard their shrieks. On hearing their shrieks, PW-1, Roopram (not examined), Dhan Singh (PW-2), Munsi (not examined), Babu Ram (not examined), Saudan Singh (not examined), Sukhram (not examined) and others went to the spot with lathi and torches, there they saw 10-12 men armed with Guns, Pistols, Ballam and Gandasa assaulting PW-1's brother and nephew. When PW-1 and his men arrived and intervened, the dacoits assaulted PW-4 with Ballam and Gajram and Bhagwan Singh fired from their guns at the interveners, who took shelter of the wall of their house and started pelting stones/bricks at the dacoits. Thereafter, the dacoits looted articles from the house of PW-1, including his brothers, as also from the house of

Dhan Singh, Ram Singh and Munsi. At that time, to lit the area, PW-1's wife set straw leaves on fire. The dacoits thereafter entered the house of Nem Chand and also fired a shot at Kallu (PW-3) i.e. brother of Nem Chand. The pellets of that shot, hit Champa Devi i.e. wife of PW-3. Thereafter, the dacoits committed dacoity in the house of Babu, Saudan, Hari Ram (PW-5) and Naresh Pal (not examined) and they took away the mare of Hari Ram. After committing dacoity, the dacoits escaped towards the west. PW-1 stated that on account of the injuries received in the incident, PW-1's brother-Ram Singh died twenty four days later. After narrating the incident as above, PW-1 stated that at the spot he had spotted Gajaram, Bhagwan Singh (appellant no.5), Rajendra (appellant no.6), Prem (appellant no.1), Ramesh (appellant no.3), Mohar Singh (appellant no.2), Rajpal (appellant no.7) and Banwari (appellant no.4). He stated that except for Rajpal, all the other accused are residents of the village of PW-1. In respect of Rajpal, he stated that he used to visit the village often with Gayaram. PW-1 also stated that prior to this incident, Happu (father of Bhagwan Singh - appellant no.5) was murdered in which Bhagwan Singh had implicated PW-1 and his brothers along with 14 others, which case is pending. He also stated that because of that case there is enmity. PW-1 stated that after the incident got over, he took the injured to the police station. There, on his oral report, the first information report was written which was thumbed marked by him. The said report was exhibited as Exb. Ka-1. Thereafter, the police station incharge recorded his statement and sent the injured to the hospital. He stated that when the investigating officer had come to the village he had seized the Dibby (kerosene lamp) and it was handed over to his custody. He also proved the custody memo of the torch/batteries.

20(ia) In his cross-examination, he stated that along with Happu (the father of Bhagwan Singh), Happu's brother Bhure was also killed in the incident which had taken place a year before the present dacoity. He admitted that in that case, PW-1 and his brothers were implicated along with Hari Ram, Mahesh, Bhawan Lal, Bhan Singh, Munsi, Saudan. He stated that in that case including him and his family members i.e. brothers and nephews, there were about 10 accused. He admitted that in that case, Prem (appellant no.1) and Mohar Singh (appellant no.2) were witnesses. He also admitted that Ramesh (appellant no.3) and Banwari (appellant no.4) are real brothers of appellant no.2 (Mohar Singh) whereas, Rajendra (appellant no.6) and Bhagwan Singh (appellant no.5) are sons of Happu and brother of Bhure. Rajpal (appellant no.7) is nephew of Bhagwan Singh (appellant no.5) and Rajendra (appellant no.6).

20(ib) On further cross-examination, he stated that his brother Saudan Singh was abducted by criminals in respect of which a case was lodged against Bhagwan Singh (appellant no.5), Rajendra (appellant no.6) and Gajram but they were all acquitted. He also stated that about 8-10 years back, there was another incident in connection with which there was a case against Ram Singh (the deceased) in connection with which Gajram and Malkhan were tried but acquitted. He added that after this incident, Gajram absconded and is no longer residing in the village.

20 (ic) In respect of the distance between PW-1's house and deceased's shop, he stated that the distance between the two would be about 100 paces and in between, there are many other houses. He stated that at the time of the incident, he was sitting in

his house on a cot where Roopram, Dhan Singh, Munsi and Saudan were also sitting. He stated that by the time he reached the spot, he heard a gunshot and cries; responding to that noise, they all took lathi to go to the spot. When PW-1 arrived at the spot, he saw his brother (the deceased) and his nephew (PW-4) being assaulted. PW-1 stated that when he reached the spot, the accused pushed him and fired at him but he escaped by taking shelter of the wall of that shop. He stated that by the time the dacoits reached PW-1's house, PW-1 had already retreated to his house; other witnesses were also trying to hide themselves in PW-1's house. He stated that the dacoits looted his house for about half an hour and, thereafter, they went to the settlement of Jatavs to loot and thereafter, the dacoits vanished.

20 (id) In paragraph 15 of his statement, during the course of cross-examination, he stated that in the night itself Daroga (Station House Officer of the police station concerned) had come to the village and had taken the injured persons with him and along with him he had also gone to the police station. He stated that Daroga had enquired from the villagers about the incident in the village and had also queried them at the police station. Next day, again, Daroga had come to visit the shop and the house and had prepared site plan. In paragraph 16 of his statement, PW-2 stated that the accused had not covered their faces with Dhata (cloth). He stated that he had mentioned in his report that accused Bhagwan Singh (appellant no.5) had also fired but if that was not written he does not know the reason for the same. He denied the suggestion that the accused have been implicated on account of enmity. He also denied the suggestion that he could not recognise the real accused and that the dacoity was committed post midnight.

20 (ii) PW-2- Dhan Singh. He also stated about the occurrence of dacoity by 10-12 persons. He stated that amongst the dacoits, he could recognise Bhagwan Singh, Rajendra, Prem, Mohar Singh, Ramesh, Banwari, Rajpal and Gajram. He reiterated that Ram Singh was shot by Gajram and someone, from amongst the dacoits, struck Ranbir (PW-4) with a Ballam. He stated that dacoits looted not only the house of the informant and his brothers but also of other fellow villagers, namely, Baburam, Ram Prasad, Kallu and Hari Ram and, in that process, they took away the mare of Hari Ram. He stated that in the incident, Ranbir, Kallu and his wife Champa had received injuries whereas, as a result of the injury which Ram Singh sustained, Ram Singh died 24 days later. In paragraph 4 of his statement, he stated ''मेरी भाभी ने सरकटे के पूलों में आग लगा दी इसकी काफी रोशनी हुयी। यह डकैती भगवान सिंह ने पुरानी रंजिश की वजह से डलवाई।''

20 (iia) In his cross-examination, he stated that by the time they could reach the shop, Ram Singh had already been shot and, thereafter, when the accused had aimed at the informant party, they hid behind the wall and ran to the safety of their homes. He stated that when the accused tried to enter their houses, stones were pelted at them. He reiterated that the accused were armed with Tamancha, Ballam, Pistol, Gun. In paragraph 8, he stated that after the dacoits had left, the villagers collected to lodge a report of dacoity. Then, at the police station, his brother lodged the report, whereas, PW-2 took his other relative to the hospital. He stated that from the village they went to the police station on a bullock-cart. His brother Saudan had reached the police station before him and he had brought the Daroga with him, whereafter, the Daroga took them to the hospital. He denied the suggestion

that on the date of the incident, he was not in the village and that he has made a false statement on account of enmity. He claimed that he has no knowledge whether Kalyan and others had lodged a separate report of the incident.

20 (iii) PW-3-Kallu. He confirmed the occurrence of dacoity and stated that the dacoits, after committing dacoity at the house of PW-1, came to his house as well, and they looted for about half an hour. He stated that there was no fire lit at that time though light of torches was there. He stated that he cannot give a count of the dacoits; and that he did not see face of any dacoit. He stated that he was asked to open the door and when he opened the door, four shots were fired, out of which two hit him, as a result of which he fell unconscious. At this stage, he was declared hostile by the prosecution and was cross-examined by the prosecution. On a suggestion made by the prosecution, he denied that his statement was recorded by the Tehsildar.

20 (iv) PW-4-Ranbir Singh. He is the person who received injuries in the incident. He stated that the incident occurred at about 9 pm; there were 12 dacoits; at the time of the incident, he was sitting near the shop of his father (the deceased) where a lantern was lit; the dacoits had arrived there through a Gali; and Gajram fired a shot at his father. Because of that shot, his father died at Sadar Hospital, Bareilly. Dacoits also beat him with lathi and Ballam. Dacoits had looted a mare of Hari Ram and they looted the house of Babu as well as Ganga Sahai. He stated that his aunt (बड़ी माँ) had lit haystack, in the light of which he could notice Bhagwan Singh, Rajendra, Prem, Mohar Singh, Banwari, Rajpal and Ramesh. The rest of the dacoits, he could not recognise. He stated that all the named accused except Rajpal are residents of his village whereas Rajpal is the Behnoi (sister's husband) of Bhagwan Singh.

20 (iva) In his cross-examination, he stated that he arrived at the shop an hour before the incident and except him and his father there was nobody in the shop. His father was sitting on a cot whereas he was inside the shop. The dacoits on arrival, first, shot his father and when PW-4 came out, he was assaulted with Ballam and lathi. On being assaulted, he fell, but was conscious. His father, on being hit by gun shot, fell on the cot. The dacoits after leaving him and his father, went to loot other houses and when all the dacoits left, his family and villagers arrived and collected at the spot. In paragraph 4 of his statement, he stated that in the night, the police had arrived and they took him and his father to the police station. He stated that he is not aware as to who had called the police. He stated that the investigating officer had interrogated him on the third day. He stated that he is not aware as to how many shots had hit his father. He admitted that the dacoits also looted other houses. He denied the suggestion that he could not recognise the dacoits and because of enmity, he had named the accused-appellants.

20 (v) PW-5 - Hari Ram. He reiterated the incident of dacoity and stated that his mare was looted by the dacoits. He stated that amongst the dacoits, he could recognise Bhagwan Singh, Rajendra, Ramesh, Banwari, Prem, Mohar Singh, Rajpal and Gajram in the light of torches and there were four others, whom he could not recognise. He stated that the dacoity lasted for about 1 and ½ to 2 hours. He stated that the dacoits were armed and were in Khakhi dress: ''(डाकूओं पर हथियार थे और खाकी बाने में थे)''

20 (va) In his cross-examination, he stated that his house is about 50-60 paces

from the shop of the deceased (Ram Singh). He stated that his mare was taken by breaking open the door of his house. In paragraph 3, he stated that when the incident occurred, he understood that dacoits have come to the village and, therefore, his wife ran to another house and he went to the roof-top of his house. The dacoits pushed and broke open the door of his house and when the dacoits went away, he came out. He stated that the investigating officer interrogated him, next day morning. He stated that along with mare, dacoits also took utensils, clothes, etc. He admitted that in the murder of Happu and Bhure, he and his sons were accused but denied the suggestion that because of old enmity, he is making a false statement. He denied the suggestion that he could not recognise any of the dacoits.

20 (vi) P.W.-6 - P. P. Mishra. The investigating officer, who submitted charge-sheet. PW-6 stated that he was posted at the police station concerned in the month of June-July, 1980. He took over investigation of the case from R.D. Yadav. He proved the signature of Head Constable Dinesh Singh on the Chik FIR (Exb. Ka-1) as well as the GD entry thereof (Exb. Ka-7). He proved the signatures of R.D. Yadav on Exb. Ka-2, Exb. Ka-3 and Exb.Ka-8 to Exb. Ka-15. He stated that he read the case diary of the case and from a perusal of the case diary, he could gather that R.D. Yadav had inspected the spot on 17.05.1980 but the site plan was missing. He stated that all the named accused have been charge-sheeted by him. He proved the charge-sheet which was marked as Exb. Ka-16. He stated that all the accused had surrendered. He also stated that the accused Gajram was absconding and has been killed in a police encounter.

ANALYSIS

21. Having noticed the rival submissions and the entire prosecution evidence led during the course of trial, the key features that stand out in the prosecution evidence are as follows:-

(a) The factum of dacoity is not challenged as would be clear from the suggestions put to the prosecution witnesses. Though, its time has been challenged by putting a suggestion to one of the witnesses;

(b) There are three sets of accused. One (i.e. Gajram) is named but not related to any of the other named accused including the present set of appellants; the other set, comprising seven persons including the appellants, are related to each other and all of them, except Rajpal, reside in the same village where dacoity was committed; and, the third set of accused are unknown persons. In respect of Gajram, in paragraph 10 of the statement of PW-1, during the course of cross-examination, it has come that Gajram had been absconding since after another incident and that though he (Gajram) was earlier a resident of the village but was no longer residing in the village. PW-1, however, denied the suggestion that Gajram was of PW-1's party. PW-1, in paragraph 8 of his statement, during the course of cross-examination, admitted that 8-10 years ago, in a case of burglary in the house of Happu (the father of Bhagwan Singh and Rajendra), a case was instituted against PW-1's brother-Ram Singh (the deceased), Gajram (co-accused of this case), Malkhan and others in which they were acquitted;

(c) The role of causing gun shot injury to the deceased is attributed to Gajram. No specific role of causing any specific injury is attributed to any of the other accused. Further, as to what article was looted by whom and as to who (excepting Gajram)

caused which injury is not disclosed in the prosecution evidence;

(d) The prosecution led no evidence of recovery of any incriminating material from any of the accused persons even though, according to the allegations, the dacoit lifted clothes, utensils and other articles which could have been identified and correlated with dacoity, if there had been a recovery; and

(e) The enmity between the named accused (the appellants of this case) and the informant as well as three of the four witnesses of fact is proved as follows:- Father of Bhagwan Singh and Rajendra, namely, Happu, and his brother - Bhure were killed about a year before the incident in which Ganga Sahai (informant-PW-1), Ganga Sahai's brothers, namely, Dhan Singh (PW-2), Ram Singh (the deceased), Ganga Sahai's nephew (i.e. Ranbir - the injured - PW-4), Hari Ram (PW-5) were accused;

(f) The dacoits, according to the prosecution story and the evidence led during the course of trial, looted not only those with whom they had enmity but other residents of the village also. One of the villagers whose house was looted by the dacoits, namely, Kallu (PW-3), though supported the allegation of dacoity but resiled from the prosecution case on two important counts:-

(a) That he did not count the number of dacoits and could not recognise/notice their faces;

(b) That though there were light of torches but there was no fire lit;

(g) The other victims, except Kallu (PW-3), who did not bear enmity with the named set of accused, have not been examined during the course of trial;

(h) The investigating officer of the case, who prepared the seizure memos as well as the police personnel who were posted at the police station at the time of lodging the FIR and who may have prepared Chitthi Majroobi have not been examined and the investigating officer, who did not conduct the earlier stages of investigation, though submitted charge-sheet on the basis of previous record, was examined only to prove the signature on various documents prepared during the course of investigation by the earlier I.O.

22. After examining the key features in the prosecution evidence, we find that the defence has not seriously challenged the occurrence of dacoity in the village on that fateful night though there appears a dispute with regard to its time. In view whereof, the trial court was justified in recording a finding that the commission of dacoity in the village on that fateful night has been duly proved. Thus, the only question that falls for our consideration is whether or not the accused- appellants were part of that gang of dacoits that committed dacoity in the village, or the informant and his relatives, who are highly inimical to the accused, have taken the incident of dacoity as an opportunity to falsely implicate his enemies i.e. the appellants, as being part of the gang of dacoits.

23. To demonstrate that it is a case of false implication of the appellants, the learned counsel for the appellants has highlighted the following circumstances:-

(i) That there were three sets of accused, one, known (i.e Gajram) but not related to the second set; second, known, seven in number including the appellants, who were related to each other but not related to Gajram; and the third, four unknown persons, who have not been sent to trial. Notably, the second set of accused, which includes the appellant, had strong

enmity with the informant and his family including the prosecution witnesses of fact except PW-3, who did not support the prosecution case against the appellants.

(ii) The dacoity was committed not only at the house /shop of the informant party but also at other places in the village with whom the named accused-appellants had no enmity. In the circumstances, the accused-appellants who were residents of the same village would have had tried to mask their faces. The circumstance that they did not cover their faces while committing dacoity is relevant because it does not fit in the scheme of the prosecution case.

(iii) There is no corroboration to the prosecution case either by recovery of any incriminating material from the accused - appellants or by independent/ non-inimical witnesses.

24. The trial court has discarded the plea of false implication on the following grounds:-

(a) That the FIR has been promptly lodged therefore the possibility of the prosecution case being coloured with enmity is ruled out;

(b) There is an injured witness, who has supported the prosecution case; and

(c) Whether the accused would commit dacoity in his own village, without covering their faces, is not an acid test for the prosecution to pass, as it depends on the psychology of the accused, as has been observed by this Court in **Chandrabhan v. State :1981 CrLJ 196** as also by the Apex Court in **Siyaram Rai v. State of Bihar; 1973 (3) SCC 241.**

25. Before we proceed to analyse the submissions, it would be useful to notice a decision of the Supreme Court in somewhat similar situation where the accused had allegedly participated in the commission of dacoity at his neighbour's house and the factum of dacoity was duly proved and the eye-witnesses, apparently, were congruous and consistent in their deposition yet, upon finding the possibility of false implication very high, the apex court allowed the appeal of the convicted accused and acquitted him of the charge upon finding that intrinsic circumstances of the prosecution case raised considerable amount of suspicion regarding the complicity of the appellant in the dacoity. The relevant observations of the Supreme Court in that case i.e. **Lakshman Prasad v. State of Bihar : 1981 (Supp) SCC 22**, contained in paragraph 3 of the judgment, are extracted below:-

"3. The central evidence against the appellant consisted of the testimony of PWs 1 and 2 who were the servants of complainant PW 4 Baijnath Prasad. It appears from the evidence that Baijnath Prasad was a rich business man of the locality and the accused-appellant Lakshman Prasad was his next door neighbour having a double storey house. Both the courts below have accepted the prosecution case that a dacoity took place in the house of Baijnath Prasad in the course of which cash and other articles were stolen away. In the instant case, counsel for the appellant has not challenged this finding of the courts below. We are also satisfied that a dacoity undoubtedly took place in the house of Baijnath Prasad. The only question that falls for consideration is whether or not the appellant participated in the crime. PWs 1, 2 and 4 have supported the prosecution case that the appellant clearly participated in the dacoity and was, in fact, the leader of the dacoits. After going through their

evidence, we do find that there is some amount of consistency in their evidence but mere congruity or consistency are not the sole test of truth. Sometimes even falsehood is given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface. This appears to be one of these cases. There are many inherent improbabilities in the prosecution case so far as the participation of appellant is concerned. In the first place, admittedly the appellant was a respectable man in the sense that he was possessed of sufficient means and was a well-known homeopath doctor and also the neighbour of the complainant. In this view of the matter, it is difficult to believe that he would commit dacoity in the house of his own neighbour and that too in the early hours of the evening, so that he may be caught any moment and take the risk of a conviction under Section 395 Indian Penal Code. Secondly, the evidence of the complainant PW 4 clearly shows that the dacoits had no doubt concealed their identify but they did it in such a way that their faces were visible. Indeed, if the appellant had participated in the dacoity and took the precaution of concealing his identity, then he would have seen to it that his face was fully covered so that identification by the complainant or the witnesses would become impossible. If he was a dare-devil, then he would not have concealed his identity at all. Thirdly, FIR having been lodged the same evening the police visited the house of the appellant next morning and found him there. If the appellant had really participated in the dacoity, he would have at least made himself scarce. The house of the accused was also searched and nothing incriminating was at all found. Finally, there was the important circumstance that in view of a dispute between complainant Baijnath Prasad and the appellant, there was a clear possibility of the appellant having been falsely implicated due to enmity. The complainant himself admits that there is a boundary wall around the house of the appellant and there is a road which runs to the east of his house and the mill of the complainant is situated to the west of the house. There is evidence of DW 2 that there has been some dispute between Baijnath Prasad and accused Lakshman Prasad two or three years before the occurrence of dacoity in respect of a passage near the house of accused Lakshman Prasad through which he used to go to his mill. The evidence of DW 2 does support what the complainant has himself admitted. The gravest provocation which the complainant must have felt was the fact that Lakshman Prasad bought a piece of land near his house from Kishori Lall, the nephew of Baijnath Prasad. This is proved by Ex. Kha and the evidence of DW 4. The High Court also observed that the sale-deed executed by the nephew of the complainant in favour of the appellant was executed only a month before this occurrence. This therefore furnishes an immediate motive for the false implication of the appellant. Another important circumstance which seems to have been overlooked by the courts below is that PW 4 has clearly admitted in his evidence at page 44 of the paper-book that immediately after the occurrence, a number of people near the mosque assembled, of whom he recognized Suba Raut and Moti Raut, but they never came to his help. The witness also says that when he came from the west, he saw 40 to 50 persons at a little distance, including Ganesh Raut, Achhelal, Mathura Ram and Rameshwar. Obviously, if an occurrence of dacoity had taken place in the early hours of the evening, the near neighbours must have assembled and yet none of these neighbour have been

examined to support the complainant's version that the appellant has participated in the occurrence. It seems to us that the reason why these persons did not choose to support the complainant was that perhaps the appellant had been falsely implicated and hence the persons who had assembled may not have relished the idea of supporting the complainant if he had gone to the extent of falsely implicating the appellant in the dacoity. These intrinsic circumstances speak volumes against the prosecution case and raise considerable amount of suspicion in our minds regarding the complicity of the appellant in the dacoity. It is well settled that while witnesses may lie, circumstances do not.

(Emphasis supplied)"

26. From the observations of the apex court, extracted above, what becomes clear is that mere consistency or congruity in the testimony of the prosecution witnesses is not the sole test of truth as even falsehood can be given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface. Therefore, what the court has to look at, and assess, is whether the prosecution evidence coupled with the surrounding circumstances has a ring of truth about it or there arises a strong suspicion and high probability of false implication of the accused put on trial. Bearing this in mind, when we embark upon the exercise to assess the prosecution evidence, we find that, no doubt, on record, the prosecution case is instituted on a prompt first information report and is supported by testimony of a person injured but, interestingly, no one disputes the factum of dacoity in the village on that fateful night. What is disputed is the accused-appellants being part of the gang of dacoits. When we see the evidence in this light, we find that the prosecution evidence is completely silent as to what the accused-appellants did at the time of dacoity. Except in the statement of one witness (i.e. PW-1) that Bhagwan Singh was carrying a gun and he fired a shot, there is no disclosure about the role of any of the accused appellants save that, that they were noticed. In fact, PW-1 who deposed about that, in the FIR, which was lodged by him and with which he was confronted, made no such disclosure. Even in respect of gunshot alleged to have been fired by Bhagwan Singh, it is not disclosed as to whom it was aimed at and who sustained what injury from it. Importantly, two persons were reported to have been examined for their injuries, one is PW-4 and the other is Champa Devi. Champa Devi has not been examined as a witness and PW-4 has sustained incised wounds, the author of which has not been disclosed by him. Interestingly, the only witness (i.e. PW-3) with whom the accused-appellants had no enmity and whose house was also looted, does not support the prosecution case either with respect to the number of dacoits who participated in the dacoity or in respect of their identity. Further, we find that there is no recovery of any incriminating material from any of the accused-appellants to lend credence to the accusation against them. Another important feature that we notice from the testimony of the prosecution witnesses is that various houses in the village were looted and after the dacoits had left, the villagers had collected at one place. This suggests that there were independent witnesses also who were affected by the dacoity but the prosecution deliberately chose not to examine them. When we see all of this, coupled with the fact that the accused-appellants are residents of the same village where the dacoity had been committed yet, they chose not to cover their faces and

nothing incriminating has been recovered from them, as also that all the accused do not appear to be of the same family or of the same village, it gives us a feeling that the dacoity in the village has been taken as an opportunity to falsely implicate the accused with whom the informant and the prosecution witnesses of fact except PW-3, who was declared hostile, had strong enmity.

27. At this stage, we may observe that the trial court has laid great emphasis on the first information report being promptly lodged. In this case we have noticed from the original record of the trial court that various recovery/ custody memos, namely, Exb. Ka-2, Exb. Ka-3, Exb. Ka-8, Exb. Ka-9, and Exb. Ka-11, all dated 17.05.1980, bear no details of the case i.e. crime number, in respect of which those memos were prepared. No doubt, there are other memos also, namely, Exb. Ka-12, Exb. Ka-13, Exb. Ka-14 and Exb. Ka-15 that bear the details of the case but those appear to be in a different handwriting than the other exhibits, noticed above. Importantly, the Chitthi Majroobi (Exb. Ka-5 and Exb. Ka-6), under which the injured got themselves examined at the PHC, bear no case details. We may also notice that though the genuineness of the Chitthi Majroobi (Exb. Ka-5 and Exb. Ka-6) has been admitted by the defence but admission of its genuineness would not amount to accepting it as having been prepared after registration of the case. Interestingly, the medical examination of Champa Devi is of 2 pm on 17.5.1980 against a Chitthi Majroobi dated 16.05.1980 which bears no details of the case. Importantly, the first investigating officer of the case and the constable clerk, who prepared the Chik FIR, allegedly on oral dictation of the informant, have not been examined therefore, in our view, merely because the defence did not question the police witness (PW-6) on the issue whether the first information report was ante-timed or not, it would not absolve the prosecution of its responsibility to prove its case beyond reasonable doubt.

28. On the analysis above, though we agree with the finding of the trial court in respect of commission of dacoity in the village on that fateful night but we are of the considered view that the prosecution has failed to establish beyond reasonable doubt that the accused - appellants were part of the gang of dacoits that committed dacoity in the village. Rather, we have a strong suspicion, based on the facts of the case, the informant has taken the commission of dacoity in the village as an opportunity to falsely implicate persons with whom he had enmity i.e. the appellants along with other unknown dacoits including one Gajram who has been ascribed causing of gunshot injury to the deceased. The above suspicion could have been dispelled if the prosecution had produced independent witnesses i.e. non-inimical victims of the dacoity to disclose the involvement of the applicants or had proved their involvement by recovery of looted articles or other incriminating material connecting the appellants with the crime. Admittedly, there is no recovery of any incriminating material from the accused- appellants and the only independent witness of fact, namely, PW-3, did not depose with regard to the involvement of the accused-appellants. Even the other prosecution witnesses of fact have not been able to demonstrate beyond reasonable doubt that as part of the gang of dacoits, the accused-appellants participated in the dacoity, either, by lifting or looting articles or, by causing injury to any of the victims. No doubt, we are

conscious of the legal position that being part of a gang of dacoits, while the act of dacoity is on, is sufficient to make a member of that bunch of dacoits, present there, liable for conviction, but, here, the issue is whether, the appellants were a part of that bunch of dacoits or not, therefore, to test whether they were a part or not, we have taken notice of the aspects discussed above. Further, the investigating officer of the case has not been examined to explain non mentioning of the case details in the Chhitthi Majroobi as well as various memos prepared during investigation so as to enable us to be completely satisfied in respect of prompt lodging of the FIR. Further, the police clerk who registered the FIR was not produced as a witness.

29. For all the reasons above, we are of the considered view that the appellants are entitled to the benefit of doubt. Consequently, the appeal deserves to be allowed and is consequently **allowed qua the surviving appellants i.e. appellant no.2 (Mohar Singh son of Nathu); appellant no.5 (Bhagwan Singh son of Happu); appellant no.6 (Rajendra son of Happu); and appellant no.7 (Rajpal son of Khannu**). The judgment and order of the trial court qua the surviving appellants (supra) is hereby set aside. All the surviving appellants (supra) are acquitted of the charges for which they have been tried. They are reported to be on bail, they need not surrender and their bail bonds are discharged, subject to compliance of the provisions of Section 437A Cr.P.C. to the satisfaction of the court below.

30. Let a copy of this order be sent to the trial court for information and compliance.

(2022)04ILR A1109

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.04.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 35 of 2006
Connected with
Criminal Appeal No. 64 of 2006

Banchcha Pandey ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Prabhakar Singh, Sri Bhuvan Raj (A.C.), Sri Manish Pandey, Sri Radhey Krishna Pandey, Sri Shri Prakash Dwivedi (A.C.)

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Indian Penal Code,1860 - Sections 302 & 34 - Non examination of scribe is not fatal to the prosecution and no adverse inference can be drawn against the prosecution since the scribe is not an eye witness and the Informant had proved the F.I.R. by examining himself

B. Where ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence a finding of guilt can be safely recorded even if the motive for the commission of crime has not been proved.

C. Judicial approach has to be cautious in dealing with the evidence of partition or interested witnesses but the plea that such evidence should be rejected because it is partisan cannot be accepted.

D. Contradictions in the statements of the witnesses must be material contradictions. If they are minor in nature, their testimony cannot be discarded.

E. A public servant employed in the Police cannot be said to be untrustworthy unless he has any reason to implicate the accused falsely.

F. Quality of evidence should be weighed over quantity of evidence.

G. Mere fact that it is not established that the recovered weapon was used in the commission of offence, in itself cannot be made the base for discarding the testimony of reliable eye witnesses.

H. Where the appellants came together and demanded money, on refusal threatened to kill and went away, came back armed with lathi and tamancha and on exhortation of one, other fired upon the deceased then this conduct of the appellants shows their common intention to commit murder in furtherance of their pre arranged plan and as such be liable for the criminal act done by one of them with the aid of Section 34 I.P.C. Appeal dismissed.

Appeal dismissed. (E-11)

List of Cases cited:-

1. Moti Lal Vs St. of U.P. 2009(7) Supreme 632

2. Anil Kumar Vs St. of U.P. (2003)3 SCC 569

3. St.of H.P. Vs Jeet Singh 1999(38) ACC 550(SC)

4. Nathuni Yadav & ors. Vs St. of Bihar & ors. 1997 (34) ACC 576

5. Thaman Kumar Vs St. of Union Territory of Chandigarh 2003 (47) ACC 7

6. Baitulla & anr. Vs St. of U.P. AIR 1997 SC 3946

7. Rameshwar & ors. Vs State 2003 (46) ACC 581

8. State of Haryana Vs Sher Singh & ors. 1981 Cr. Ruling 317 SC

9. Brahm Swaroop & anr. Vs St. of U.P. (2011) 6 SCC 288

10. Masalti Vs St. of U.P. (A.I.R.) 1965 SC 202

11. Krishna Mochi Vs St. of Bihar (2002) 6 SE81

12. Asha Vs St. of Raj., AIR 1997 SCC 2828

13. Kashmiri Lal Vs St. of Har. (2001)1 SCC 652

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

1. These criminal appeals emanate from the judgment and order dated 21.12.2005 passed by the learned IInd Additional Sessions Judge, Court No. 1, Mirzapur in Session Trial No. 52 of 2004 (State Vs. Shiv Kumar @ Pinku and another) arising out of Case Crime No. 12 of 2004, under Section 302 read with Section 34 IPC, Police Station Kotwali City, District Mirzapur, whereby appellants Shiv Kumar @ Pinku and Bachcha Pandey @ Subhas have been convicted and sentenced under Section 302/34 IPC with life imprisonment and fine of Rs.5,000/- each. In default of payment of fine, the appellants have to undergo additional imprisonment for a period of six months.

2. The prosecution case in brief is that on 15.01.2004, at about 9.05 p.m., an F.I.R. was lodged at the police Station Kotwali City, District Mirzapur by informant Om Prakash s/o Harishankar r/o *Meer Sahab Ki Gali, Kotwali City, Mirzapur* by filing a written report stating therein that while his brother Sunil Kumar was sitting with his wife in the room located at the back side of his house, at about 8.30 p.m, Shiv Kumar @ Pinku s/o Lakshman and Bachcha Pandey @ Subhas s/o Vishwambhar Pandey r/o *Muhalla Imamganj Babhaiya, Mirzapur* came there and demanded money. On refusal, they threatened to kill him and went away. In the meantime, hearing noise, his father Harishankar came

into the room. Further, at about 8.45 p.m., Shiv Kumar @ Pinku and Bachcha Pandey again came to the house with countrymade pistol and on exhortation of Bachcha Pandey, Shiv Kumar @ Pinku shot fire at his brother Sunil Kumar who had died on the spot. Both the accused fled away on their making hue and cry. There was electric light inside and outside of the house. Dead body of his brother was lying on the spot. Tahreer was scribed by Moolchand s/o Nanhakuram *r/o Kotwali City, District Mirzapur*.

3. S.S.I. R.D. Kaithal was handed-over the investigation of the case who along with other officials went to the place of occurrence where he conducted the inquest of the body of deceased Sunil Kumar and got the inquest report prepared by S.I. Jitendra Pratap Singh at his own instance and also got prepared other papers required for the purposes of post-mortem. Dead body was sealed and handed over to constable Kedar Rai and home guard Subedar who brought it to the mortuary, District Hospital, Mirzapur.

4. The post-mortem was conducted on 16.01.2004 at about 1.30 p.m. It is mentioned in the post-mortem report that body brought by constable C.P. Kedar Rai and home guard Subedar was received in sealed cloth which tallied with the sample seal. The external condition of the body as described therein is as under:

Average built body. Rigor mortis present.

Antemortem Injury:(1) Fire arm wound of entry of 2.5 c.m. X 1.5 c.m. Oval on shape margins are charred and inverted present over right perieto temporal region of skull, .5 c.m. above from right tragus. (2) Fracture of right occipitoparietal bone with bone loss present. (3) Cross fracture of right occipital bone present. (4) one bullet recovered from the brain matters. (5) Clotted blood with ruptured brain matter found after opening skull.

Cause of death was shock and hemorrhage as result of ante-mortem injuries.

5. During the investigation, accused-appellant Shiv Kumar @ Pinku was arrested by the police from Janhavi Tiraha at about 12.30 o'clock on 19.01.2004. On interrogation, appellant Shiv Kumar @ Pinku disclosed that he had hidden countrymade pistol at a place in Pakki Sarai at the time of running away from the place of occurrence which he could recover. At his instance, a countrymade pistol was recovered from the southwest corner near the Indra Ghandi Park located at Pakki Sarai at about 13.40 O'clock. Country-made pistol was taken into custody by the police and recovery memo was prepared on the spot by S.S.I. Jitendra Kumar in the presence of the witnesses.

6. The investigating Officer visited the place of occurrence and prepared site plan Ext. Ka-14 relating to the place where incident took place and also the site plan relating to the place from where countrymade pistol was recovered at the instance of appellant Shiv Kumar @ Pinku as Ext. Ka-15. He recorded the statements of witnesses conversant to the facts of the case. Thereafter, the investigation was handed-over to Inspector Mahendra Pratap Shukla who took over the investigation on 30.01.2004 and collected report from F.S.L. Ext. Ka-13 & 16, and concluded the investigation, found the case prima facie made out under Section 302 IPC and after preparing the charge sheet submitted it to the court concerned.

7. Learned Chief Judicial Magistrate took cognizance of the offences and provided copies of prosecution papers in compliance of Section 207 Cr.P.C. to appellants and committed the case to the court of session for trial.

8. The trial court after taking into consideration the material on record, framed the charges against appellants under Section 302 read with Section 34 IPC. The charges were read-over and explained to the appellants, they pleaded not guilty and denied the charges and claimed for trial. Consequently, the case was fixed for prosecution evidence.

9. In support of its case, the prosecution examined P.W.1 Om Prakash, the first informant and brother of deceased; P.W.2 Hari Shankar eye witness of the incident and father of deceased; P.W.3 S.I. Virendra Pratap Singh who prepared inquest report and other relevant papers; P.W.4 Dr. Ramesh Singh Thakur who conducted post-mortem of the body; P.W.5 constable Gajendra Pratap Singh who prepared chik F.I.R. and entered the detail in G.D; P.W. 6 S.I. Mahendra Pratap Shukla the investigating officer who submitted the charge sheet and P.W. 7 S.I. R.D. Kaithal the 1st Investigating Officer of the case who had arrested the appellant Shiv Kumar @ Pinku and made recovery of pistol at his instance.

10. On conclusion of prosecution evidence, statements of accused persons were recorded under Section 313 Cr.P.C. wherein appellant Shiv Kumar @ Pinku asserted the incident and statements of witnesses relating thereto to be false. He further stated that there was a dispute with informant Om Prakash relating to partition on account of which he was implicated falsely. Likewise appellant Bachcha Pandey @ Subhas also asserted the incident and statements of prosecution witnesses to be false and he having been implicated falsely by the informant.

11. In defence, no evidence was adduced on the part of appellants.

12. After hearing the arguments of the team of appellants as well as the State, learned trial court passed the order dated 21.12.2005 convicting the appellants as aforesaid. Hence this appeal.

13. Heard Shri Prakash Dwivedi, learned Advocate for appellant Shiv Kumar @ Pinku and as Amicus Curiae for appellant Bachcha Pandey @ Subhas in the connected appeals and Shri Rupak Chaubey, learned A.G.A. for State and perused the record.

14. Learned counsel for the appellants submits that the impugned judgment and order of conviction is bad in law being against the evidence available on record. Learned trial court has erred in convicting the appellants without proper appreciating the evidence. The prosecution could not prove its case with cogent and reliable evidence and the learned trial court has decided this case wrongfully. The appellants are innocent. They have not committed any offence as alleged against them. There are material contradictions in the statements of witnesses. Informant is the brother of the deceased and P.W. 2 being father is also an interested witness. Time between the occurrence and F.I.R. is too short which makes the prosecution story highly doubtful. The scribe of F.I.R. Moolchand had not been examined. No blood was collected from the place of occurrence by the Investigating Officer

which makes the place of occurrence doubtful. No motive to commit the murder of the deceased has been assigned. The wife of the deceased who was also said to be present in the room where murder took place had not been examined. There is no independent witness account. It is submitted that the recovery of countrymade pistol though has been shown but there was no public witness to prove the recovery. In this way the prosecution could not prove its case beyond reasonable doubt. The appellants, therefore, are entitled to acquittal.

15. Learned A.G.A. opposed the contentions raised by the learned counsel for the appellants and submitted that in this case, the informant as well as P.W. 2 both were present on the spot and they have narrated the whole prosecution story. They are eye-witnesses and, therefore, motive looses its importance. Further it is not necessary to adduce a number of witnesses. Even on the testimony of sole witness conviction can be sustained. The contradictions in the testimony of witnesses are minor in nature, and hence are immaterial. During the post-mortem, a bullet was recovered from the body of deceased Sunil Kumar. It was sent for the forensic examination. As per the report, it is established that the countrymade pistol which was recovered at the instance of accused-appellant Pinku, was used in the commission of murder of the deceased. In this way, the prosecution had proved its case beyond reasonable doubt against the appellants. Learned trial court has passed the judgment and order on the basis of evidence on record. There is no error of fact or law. These appeals being devoid of merit are liable to be dismissed.

16. From the submissions and perusal of record, the following questions emerge for consideration of this Court as to whether motive is absent. The witnesses being relatives and no independent witnesses having been examined would have adverse effect on the prosecution case. Whether the alleged material contradictions in the testimony of witnesses make it unreliable. Further, whether the appellants have been implicated due to enmity with the first informant and police.

17. Before we deal with the contentions raised by the learned counsel for the appellants, it would be convenient to take note of the evidence adduced by the prosecution.

18. P.W. 1 Om Prakash is the informant and brother of the deceased, who deposed that on the day of the incident, i.e. 15.01.2004 at about 8.30 p.m., his brother Sunil Kumar was sitting in the room located at the back, western side of the house. Appellants Shiv Kumar @ Pinku and Bachcha Pandey @ Subhas came there from behind and demanded money from the deceased. When refused they became angry, threatened him to kill and went away. At that time the wife of the deceased and his father were also present. Again at about 8.45 p.m., appellants came at the same place. At that time, appellant Pinku was equipped with countrymade pistol and Bachcha Pandey with danda. Bachcha Pandey exhorted to fire at the deceased. On hearing this, Shiv Kumar @ Pinku opened fire at Sunil which stroke at his head and he died on the spot. Appellants went away in the lane with the countrymade pistol. It is stated by P.W. 1 that at the time of the incident, there was light of electric bulb inside and outside the room in which he had identified the appellants, who were residents of adjacent *muhalla* and that he knew them from before. He got *tahreer*

written by Moolchand and made his signature on it after hearing its' contents which he proved as Ext. Ka-1.

This witness was subjected to gruel cross-examination by the learned counsel for appellants wherein this witness had not disclosed any such fact which weakens his testimony. He has affirmed the fact of firing made by appellant Shiv Kumar @ Pinku on the exhortation of Bachcha Pandey.

19. P.W. 2 Harishankar, father of the deceased had deposed that the incident occurred on 15.01.2004 at about 8.30 p.m. His son was sitting on the board (takath) on the back side of the room in the house where his wife Vinita and another son Om Prakash were also sitting, appellants Shiv Kumar @ Pinku and Bachcha Pandey came there and demanded money from his son while standing outside the window. When refused, they went away while threatening to kill. Again at about 8.45 p.m. both of the accused came there and Bachcha Pandey exhorted to shot fire at deceased at which appellant Shiv Kumar @ Pinku shot fire which stroke his son Sunil Kumar who died in the room. Appellants bolted the room from outside on account of which they could not chase them. There was light of electric bulb inside and outside the room in which he identified the appellants.

This witness has also been subjected to gruel cross-examination by the learned counsel for the appellants and during cross-examination he has again affirmed the account of the incident, the offence committed by the appellants. No such statement has been made by him so as to demolish his presence at the place of occurrence or that he could not identify the appellants.

20. Both these witnesses remained intact during the cross-examination. No such contradictions are visible in their statements which can make their testimony unreliable or unnatural. Minor contradictions are of cosmetic nature and not likely to affect the credibility of their testimony.

21. In the instant case, there is no enmity between the parties. They belong to adjacent locality. There cannot be any dispute about identification of the appellants. Though, the appellants have stated in their statements recorded under Section 313 Cr.P.C. that they had been implicated falsely on account of enmity but there is no suggestion of enmity during the cross-examination of the witnesses which might have adversely affected their reliability and become an excuse for implicating them falsely while absolving real culprits.

22. There is not an iota of evidence on record which may even remotely suggest that PW-1 & PW-2 had any grudge against the appellants or any cause to implicate them falsely.

23. Injuries on the person of deceased Sunil Kumar were caused by the firearm as stated by P.Ws. 1 & 2. Ext. Ka-9 is the post-mortem report wherein firearm wound was reported on the right parital temporal region of skull.

24. P.W. 4 Dr. Ramesh Singh Thakur has proved the injury and told that the injury was caused by firearm and opined that this injury was possible with a single fire. As per the estimation of the doctor, all the injuries were caused at about 8.45 p.m. in the night on 15.01.2004. He also opined that the cause of death was shock and hemorrhage due to antemortem injury. During the post-mortem, a bullet was recovered from the wound which was

sealed by the doctor and was sent to F.S.L. by the Investigating Officer for forensic examination.

25. In this way, injuries found on the person of deceased Sunil Kumar were proved to have been caused with firearm at about 8.45 p.m. in the night on 15.1.2004 and this evidence corroborates the statements of P.Ws. 1 & 2 with regard to the manner of causing the injuries resulting into death. The eye-witnesses account, thus, finds corroboration from the medical evidence on record.

26. Countrymade pistol alleged to have been used in committing the offfence was recovered by the Investigating Officer S.S.I. R.D. Kaithal and recovery memo was prepared by S.I. Virendra Pratap Singh who had proved it during his examination as Material Exhibit-1. This countrymade pistol was also sent to F.S.L. with bullet, recovered from the person of deceased for ballistic examination regarding which ballistic reports from F.S.L. were obtained and proved as Ext. Ka-13 & 16 wherein it has been mentioned that during examination, it was found that on the piece of metal which was mentioned as bullet blood stains were seen and on micro chemical examination, fouling matters with remnants of firing lead and nitrate were found present and also in the barrel of countrymade pistol, the remnants of firing lead and nitrate were found.

27. There is no delay much less inordinate delay in lodging the F.I.R. The occurrence took place on 15.01.2004 at about 8.45 p.m. in the night and the F.I.R. was lodged on the same day at 21.05 hours (hrs), after 20 minutes at the police station concerned which was one furlong from the home of the informant. It cannot be said to be delayed. A question raised by the learned counsel for appellants that the time in lodging the F.I.R. after occurrence was too short to be sustained in view of distance between the house of the informant and the police station concerned, i.e. one furlong only.

28. P.W. 5 constable Nagendra Pratap Singh has proved the chik F.I.R. on the basis of *Tahreer* Ext. Ka-1. He stated that on 15.01.2004 he was posted at the police station concerned as constable *muharrir*. On the basis of *tahreer* given by the informant, he prepared the Chik F.I.R. in his handwriting and signature and also made entry of it in the G.D. which he proved as Ext. Ka-10 & 11. P.W. 5 further stated that the special report was also sent on the same day on 15.01.2004 at about 22.15 hrs through G.D. No. 43.

29. At this point, the learned counsel for appellants highlighted that scribe of the tehreer, Moolchand had not been examined, therefore, the F.I.R. cannot be said to have been proved. In this regard, it is to note that non-examination of scribe is not fatal to the case of the prosecution and no adverse inference can be drawn against the prosecution, since the scribe was not an eye witness to the incident and the complainant/informant had proved the execution of the F.I.R. by examining himself as P.W.1.

30. In the case of ***Moti Lal Vs. State of U.P. 2009(7) Supreme 632***, the Apex Court has ruled that the non-examination of scribe of the F.I.R. is not fatal to the prosecution case. Likewise in the case of ***Anil Kumar Vs. State of U.P. (2003)3 SCC 569*** where scribe of the F.I.R. who was not an eye-witness, was not examined, the Apex Court observed that there was no

necessity to examine him. He could have thrown no light on the prosecution case, therefore, no prejudice can be said to have been caused to the appellants. Thus, this submission of the learned counsel is not acceptable to us.

31. P.W. 7 S.S.I. R.D. Kaithal proved the stages of the investigation. He had arrested the appellant Shiv Kumar @ Pinku from *Janhavi Tiraha near Sulabh Complex* on 19.01.2004 at about 12.30 p.m. On query the accused disclosed about the place where he concealed the countrymade pistol and it was recovered from southern-west corner at *Pakki Sarai* at his pointing out. P.W.7 prepared the recovery memo which he proved as Ext. Ka-8 and also the site plan as Ext. Ka-15.

32. P.W.6 S.I. Mahendra Pratap Shukla took over the investigation from S.S.I. R.D. Kaithal on 30.1.2004 who proved the F.S.L. report as Ext. Ka-13 & 16, concluded the investigation and submitted the charge sheet.

33. P.W.3 S.I. Virendra Pratap Singh who followed S.S.I./I.O. R.D. Kaithal on 15.01.2004 and went on the spot, prepared inquest on the dictation of S.S.I. R.D. Kaithal along with other essential papers which he proved as Ext. Ka-2 to 7. Ext. Ka-2, the inquest report disclosed that the dead body of deceased was found on the floor in front of the house of the informant. P.W. 3 has also stated during cross-examination that the dead body of deceased was lying on the floor in front of the house of the informant where he had prepared the inquest report. In this regard, P.W. 2 has stated during the examination-in-chief and even in the cross-examination that the appellants shot fire at the deceased while he was sitting on the board (takhat) inside the room located at the backside of the house. After the incident, he took Sunil Kumar to the hospital where doctor declared him brought dead. In this way, it cannot be said that the deceased was not shot by the appellants in the room located at the backside of the house. It is natural that the family members of the victim would try their best to save his life and in that effort so they took the injured to the hospital in the hope of life. In such a situation, it cannot be said that the incident did not take place in the room where it has been said to have taken place and as shown in Ext. Ka-14. The place where dead body was lying at the time of inquest was also the floor in front of the house, it, therefore, cannot be said that the place of occurrence was not situated at the house of the deceased as asserted by the prosecution witnesses namely P.W. 1 & P.W. 2.

34. Learned counsel has also drawn attention of this Court towards the fact that no blood stained and plain soil was collected from the place of occurrence by the Investigating Officer at the time of inquest which makes the place of occurrence doubtful. In this regard, it can be said that firearm injury was found on the head of the deceased. Blood oozed out of the wound and it was soaked in the clothes worn by the deceased. The clothes were taken into custody and sent to F.S.L. for examination. As per F.S.L. report, as Ext. Ka-13, all the clothes namely shirt, baniyan, underwear, pant and kalawa etc. worn by the deceased were found blood stained. In the situation, where the deceased was taken to the hospital by his inmates after the incident and brought back from the hospital to his home and he was laid on the floor outside the house, presence of blood on the said floor does not seen to be possible. On the basis of this fact

that no blood stained and plain soil was collected from the place of occurrence by the Investigating Officer during investigation, the testimony regarding the place of occurrence as deposed by P.W. 1 & P.W. 2 cannot be falsified. In this regard, the contention of the learned counsel for the appellants is not acceptable.

35. Further the attention of this Court has also been drawn towards the absence of motive to commit murder. He urged that the prosecution had failed to prove motive on the part of the appellants to commit the crime.

36. It is true that there is no mention of motive in the F.I.R. about the commission of murder of deceased Sunil Kumar. Even PW-1 and PW-2 have also not disclosed anything that became the root cause of committing murder by the appellants except the demand of money by the appellants from the deceased and refusal on his part but there is no such principle or rule of law that where the prosecution fails to prove motive for commission of the crime, it must necessarily result in acquittal of the accused. Where occular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of crime has not been proved.

37. In ***State of Himachal Pradesh Vs. Jeet Singh 1999 (38) ACC 550 SC***, it was held that no doubt it is a sound principle to remember that every criminal act was done with a motive but it's corollary is not that no offence was committed if the prosecution failed to prove the precise motive of the accused to commit it as it is almost an impossibility for the prosecution to unravel full dimension of the mental deposition of an offender towards the person whom he offended.

38. In ***Nathuni Yadav and others vs. State of Bihar and others 1997 (34) ACC 576,*** it was held that motive for committing a criminal act, is generally a difficult area for prosecution as one cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act and such impelling cause unnecessarily need not be proportionately grave to grave crimes. It was further held that many murders have been committed without any known or prominent motive and it is quite possible that the aforesaid impelling factor would remain undiscoverable.

39. In the case of ***Thaman Kumar vs. State of Union Territory of Chandigarh 2003 (47) ACC 7*** the Hon'ble Apex Court has reiterated the same view after taking into consideration the aforementioned cases.

40. In the case of ***Baitulla and another Vs. State of U.P. AIR 1997 SC 3946*** where occurrence took place in broad day light and spoken to by the eye-witness and the same was supported by Medical Report, it will not be necessary to investigate the motive behind such commission of offence.

41. This Court has also made such observations in the case of ***Rameshwar and others vs. State 2003 (46) ACC 581*** that when there is direct evidence, the motive was not important. Likewise in the case of ***State of Haryana vs. Sher Singh and others 1981 Cr. Ruling 317 SC*** it has been held that the prosecution is not bound to

prove the motive, more so, when crime is proved by direct evidence.

42. In our opinion, in the facts and circumstances of the present case, the absence of an evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which certainly establishes the guilt of the accused.

43. The next limb of argument of the learned counsel for the appellants is that the prosecution had examined highly interested and related witnesses and it had not produced any independent witness in support of its case. No doubt the witnesses of fact examined in the case are real brother and father of the deceased but Relationship itself is not a ground to reject the testimony of the witnesses, rather the law is that a relative would be the last person to leave the real culprit and falsely implicate any other person.

44. In the case of ***Brahm Swaroop and another vs. State of U.P. (2011) 6 SCC 288*** the Hon'ble Apex Court in Para No.21 has observed as under:-

"merely because the witnesses were related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that affects the credibility of a witness, more so, a relation would not conceal the real culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. However, in such cases the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence."

45. The Court also referred cases of ***Dalip and others vs. State of Punjab A.I.R. (1953) SC 364; Masalti vs. State of U.P. (A.I.R.) 1965 SC 202***.

46. In ***Masalti vs. State of U.P. (A.I.R.) 1965 SC 202***, the Hon'ble Apex Court observed in Para No.14

"but it would, we think, be unreasonably to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on sole ground that it's partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it's partisan cannot be accepted as correct.

47. It is common knowledge that village (mohalla) life is faction ridden and involvement of one or the other in the incidents is not unusual. One has also to be cautious about the fact that wholly independent witnesses are seldom available or are otherwise not inclined to come forward, lest they may invite trouble for themselves for future. Therefore, relationship of eye-witnesses inter se, cannot be a ground to discard their testimony. There is no reason to presume the false implication of the appellants at the instance of the eye-witnesses. It would also be illogical to think that the witnesses would screen the real culprits and substitute the appellants for them.

48. Normally, independent persons do not intervene in the matters of others due to

fear or a number of circumstances and relatives and family members only make courage to depose regarding the occurrence because they are the worse sufferers. In the case of **Krishna Mochi Vs. State of Bihar (2002) 6 SE81**, the following observation has been made by the Hon'ble Apex Court.

It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power.

49. Further argument that P.W.1 and P.W. 2 have stated that the wife of deceased was also present in the room where the incident took place but she had not been examined by the prosecution. In this regard, it is to note that it is the discretion of the prosecution to adduce the evidence which it thinks proper in the circumstances of the case. Section 134 of Indian Evidence Act does not require the specific number of witnesses to be adduced to prove the case but even the testimony of single witness if found to be trustworthy and reliable, conviction can be based. In other words, for conviction quality of evidence is required and not the quantity. In the instant case, the incident took place in the presence of P.W.1 and P.W.2 in the same room. They were produced by the prosecution before the Court and have proved the case, so it is not the requirement of law that all the witnesses be produced. In this way, non-production of the wife of deceased in the witness box, does not affect the credibility of testimony of P.W.1 and P.W. 2 and no adverse inference can be drawn in this regard.

50. So far as the submissions of the learned counsel regarding contradictions in the testimony of the prosecution witnesses, it is to note that contradictions in the statements of witnesses must be material contradictions. If they are minor in nature, the testimony of witnesses cannot be discarded.

51. In the case of **Asha Vs. State of Rajasthan, AIR 1997 SCC 2828** where some minor contradictions in the statements of witnesses were found, it was observed that some trivial contradictions in nature are to be ignored.

52. In the present case, P.W. 2 had stated that deceased Sunil Kumar was taken to the hospital after the incident where he was declared dead by the doctor and P.W. 1 stated that the incident took place in the room and deceased died on the spot and his dead body was lying there. These statements of the eye-witnesses are self contradictory. It is evident from the testimony of P.Ws. 1 and 2 that after the incident took place, P.W. 1 went to the police station to lodge the F.I.R. just after the incident and P.W. 2 remained in the house with other inmantes who took the deceased to the hospital. As at that time, P.W. 1 was not present, it cannot be expected from him to know about the fact that whether deceased Sunil Kumar was taken to the hospital by P.W. 2 and other inmates. This contradiction in the statements of both the witnesses is natural

and do not strike at the very root of their statements about the fact of incident rather this makes the witnesses more truthful and trustworthy.

53. Learned counsel for the appellants has also argued that except police personnel no other public witness was brought at the time of recovery of country-made pistol at the instance of appellant Shiv Kumar @ Pinku, which makes the recovery doubtful. In this regard, the statement of the Investigating Officer/P.W.7 S.S.I. R.D. Kaithal is relevant where he stated that he tried to trace public witness at the time of recovery but no one was ready to come forward. It is natural that no person wants to become a witness against criminals in the society. On the other hand, a public servant employed in the police cannot be said to be untrustworthy unless he has any reason to implicate the accused falsely.

54. In the case **Kashmiri Lal Vs. State of Haryana (2001)1 SCC652** the Hon'ble Apex Court has laid down that thus apart, there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trustworthy, the court can definitely act upon the same. If in the course of scrutinising the evidence, the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle of quality of the evidence weighed over the quantity of evidence.

55. In this case, there was no suggestion of any enmity with the Investigating Officer on account of which it could be said that he made false recovery and implicated the accused falsely. It is noteworthy that the countrymade pistol recovered at the instance of appellant Shiv Kumar @ Pinku and the bullet found in the body of the deceased at the time of the post-mortem were sent to F.S.L. for the ballistic examination wherein firing remnanats of lead and nitrate were found to be present yet this does not affirm the use of the countrymade pistol recovered at the instance of appellants in commission of the murder of the deceased Sunil Kumar, but absence of public witness at the time of recovery does not make the recovery false and fabricated. Here it is noteworthy that there was single entry wound on the head of the deceased and a bullet was also recovered by the doctor from the brain matter of the deceased but the country-made pistol recovered at the instance of appellant Shiv Kumar @ Pinku was 12 bore wherein ordinarily cartridge is used. In the usual way, the use of bullet cannot be said to be possible in the *tamancha* (countrymade pistol) of 12 bore. No opinion, in this regard has been given by the ballistic expert also. Thus, it cannot be said to be established that the recovered weapon was used in the commission of the crime. Mere fact that it is not established that the recovered countrymade pistol was used in causing the murder, in itself cannot be made the base for discarding the reliable testimony of the eye witnesses, of those who had seen the incident and identified the appellants while making fire on the deceased.

56. The appellant Shiv Kumar @ Pinku in his Section 313 Cr.P.C. stated, asserted that the police had implicated him in several cases so he had also been implicated by the police on account of enmity as also Om Prakash, the first informant. He further stated that the deceased was conducting business of selling *ganja* due to which he had enmity with other ganja sellers. Amongst them, one was Vijay Kasera resident of the *Mohalla* who poured acid on the deceased in which case he was also convicted and hence was trying to kill him. Likewise, Bachcha Pandey has stated that the informant had implicated him falsely. Though, the appellants stated that they had been implicated falsely on account of enmity but no instance of enmity with the informant or the deceased had been disclosed by them. Even, during the cross-examination of P.W. 1 and P.W. 2 no such fact has been brought on the part of the appellants by way of suggestion to discern any enmity. The contentions of the appellants regarding enmity, thus, do not get support from any material on record. Further, when there was no enmity with the family of the deceased it is not understandable as to why would they implicate the accused falsely while absolving the real culprits. Furthermore, in case, the statements of appellant Shiv Kumar @ Pinku about enmity with one Vijay Kasera is accepted, then there was no question with the informant to implicate the accused falsely while absolving the real assailant namely, Vijay Kasera. The statements made by the appellants in this regard do not go in their favour and do not prove to be a good defence.

57. The testimony of P.W.1 and P.W.2, the eye-witnesses of the incident who had identified the appellants in the electric light and also knew them from before being resident of the adjacent Muhalla, is found to be unshakable. They are natural witnesses of the incident which took place in their house at about 8.30 & 8.45 p.m. where presence of other persons was not possible.

58. So far as the liability of appellant Bachcha Pandey is concerned, he is said to have exhorted to shoot the deceased. Both the appellants came together at the house of deceased and made a demand for money from him. On refusal, they threatened to kill him and went away at about 8.30 P.M. They both came again there at 8.45 P.M. with lathi and *tamancha*. On the exhortation of appellant Bachcha Pandey, appellant Shiv Kumar @ Pinku made fire pointing at the head of deceased, they both then went away together through the backside lane. This conduct of the appellants shows their common intention to commit murder of deceased Sunil Kumar in furtherance of their prearranged plan. They are, therefore, liable for the criminal act done by one of them with the aid of Section 34 I.P.C.

59. Having given our due considerations to the submissions advanced by the learned counsel for the parties, we are of the firm opinion that the prosecution has succeeded in establishing its case against the appellants beyond any shadow of doubt and the view taken by the learned Sessions Judge does not suffer from any infirmity.

60. In the result, the appeals lack merit and are hereby **dismissed.**

61. Since, appellant Shiv Kumar @ Pinku is in jail, he will serve out the remaining period of sentence and appellant

Bachcha Pandey @ Subhas is on bail, he shall taken into custody and sent to jail to serve the sentence.

62. The copy of this judgment alongwith the original record of the Court below be transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. The office is directed to keep the compliance report on record.

(2022)04ILR A1122
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.03.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 1104 of 2009
Connected with
Criminal Appeal No. 1105 of 2009

Kamlesh @ Ghora ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
I.B. Singh, Krishna Kumar Singh, Nisar Ahmad

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law - Indian Penal Code,1860 - Sections 302 & 34 - The appeal against conviction can be disposed of on merits only after hearing the appellants or his counsel and when there is no representation for the appellant, it is the duty of the appellate court to appoint another counsel as Amicus Curiae to defend the accused-appellant.

B. Criminal Law – Evidence Act, 1872 - Section 118 - Evidence of the child witness and his credibility depends upon the facts and circumstances of each case. There is no rule of practice, but as a prudence, the court always finds it desirable to seek corroboration to evidence of a child witness. The only precaution which the court has to bear in mind while assessing such evidence is that witness must be a reliable one.

C. It is unreasonable to expect from a witness to give picture perfect report of the incident and minor discrepancies in their statements have to be ignored.

D. In case of direct evidence and the ocular testimony of the eye witness being found to be trustworthy, reliable and cogent it will not be necessary for the prosecution to prove the motive for the crime.

Appeal dismissed. (E-11)

List of Cases cited:-

1. Mangat Singh Vs St. of Punj. : 2005 (11) SCC 185

2. Md. Sukur Ali Vs St. of Assam : (2011) 4 SCC 729

3. Shankar Vs St. of Mah. (Criminal Appeal No. 1106 of 2019 decided on 23.07.2019)

4. Alagupandi alias Alagupandian Vs St. of T.N.: (2012) 10 SCC 451

(Delivered by Hon'ble Ramesh Sinha, J.
&
Hon'ble Mrs. Saroj Yadav, J.)

1. At the outset, Shri Ishan Baghel holding brief of Shri I.B. Singh, Senior Advocate, for the appellants stated that short term applications have been filed on behalf of the appellants in both the appeals which are pending and the same may be disposed of by this Court. He submits that both the appellants, who are sons of co-accused Mool Chandra, are in jail for the last 17 years, hence he prays that they may be released on parole/short term bail on the ground that their father, Mool Chandra (co-

accused) has died on 07.01.2022 and there is no one to take care of their family members.

2. Taking into consideration the fact that paper book is ready; matter is ripe for hearing; the above-captioned appeals are listed for final hearing today; the convicts/appellants are in jail for the last 17 years, we gave an option to Shri Ishan Baghel, holding brief of Shri I.B. Singh, learned Senior Advocate, to argue the appeals finally, Shri Ishan Baghel, learned Counsel showed reluctance and prays for adjournment with a plea that he has no power in the instant appeal.

3. It transpires from the order-sheet of the case that the first application for bail filed by the appellants was rejected by a Co-ordinate Bench of this Court comprising Hon'ble Shiva Kirti Singh, Chief Justice and Hon'ble Devendra Kumar Arora, J. (as they then were) vide order dated 15.04.2013. After that, the aforesaid appeals were listed on several dates but adjourned either on the request of learned Counsel for the appellants or on his out of station slip.

4. It also transpires that on 13.01.2022, when the above-captioned appeals were listed for final hearing, this Court gave an option to Ms. Reena Rajesh, learned Counsel who was holding brief of Sri I.B. Singh, Senior Advocate, to argue the appeal finally, she showed reluctance and stated that her Senior Counsel, Shri I.B. Singh, who was out of station, would argue the appeal and prayed that the matter be listed in the next week for final hearing. Appreciating the request of Ms. Reena Rajesh, learned Counsel, this Court posted the matter for final hearing on 20.01.2022. On 20.01.2022, on the request of learned Ms. Reena Rajesh, learned Counsel, the case was again adjourned and the matter was posted for 22.02.2022. On 22.02.2022, Shri Ishan Baghel, learned Counsel holding brief of Shri I.B. Singh had appeared and prayed for adjournment in order to enable him to prepare the case for final hearing. Appreciating this request of Shri Ishan Baghel, learned Counsel appearing on behalf of the appellants, the matter was posted for final hearing in the week commencing 07.03.2022. After that, the case has been listed for today i.e. on 07.03.2022.

5. Today, when the case was called out, Shri Ishan Baghel, learned Counsel has put in appearance on behalf of the appellants and instead of arguing the appeal finally, presses the short term bail/parole and so far as arguing the appeal finally is concerned, he states that he has no power on behalf of the appellants to argue the appeals finally.

6. It is noteworthy to mention here that Ms. Reena Rajesh holding brief of Mr. I.B. Singh, Senior Advocate, who is also present with Mr. Ishan Baghel today, had also appeared in the appeal on previous occasion i.e. on 13.01.2022 and pressed the short term/parole application on behalf of the appellants and further sought adjournment with a plea that the matter would be argued by Sri I.B. Singh, Senior Advocate, who was abroad at the time.

7. Considering the aforesaid, this Court finds the conduct of Mr. Ishan Baghel and Ms. Reena Rajesh, learned Counsel appearing on behalf of the appellants on different dates cannot be appreciated by the Court as all the attempt is being made to get the appellants somehow short term bail/parole even

though the earlier bail applications of the appellants have been rejected by the Co-ordinate Bench and final hearing of the appeals has been avoided even knowing the fact that the above-captioned appeals have been listed today for final hearing.

8. At this juncture, it would be apt to mention that the Apex Court in **Mangat Singh Vs. State of Punjab** : 2005 (11) SCC 185 has observed as under :-

"2. It is unfortunate that the counsel had not appeared in the High Court in a case of appeal of conviction under Section 302 IPC. The question of accountability of the advocate looms large in a case of this nature. However, the High Court could have appointed an amicus curiae to assist the Court rather than relying on the assistance of the learned counsel for the State."

9. The Apex Court in **Md. Sukur Ali vs. State of Assam** : (2011) 4 SCC 729 has observed in para-7 as follows : -

"We are of the opinion that **even assuming that the counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the Court should not decide a criminal case against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the Court should appoint another counsel as *amicus curiae* to defend the accused.** This is because liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is the most important fundamental right of the fundamental rights guaranteed by the Constitution. Article 21 can be said to be the 'heart and soul' of the fundamental rights."

(emphasis supplied)

10. The Apex Court in the case of **Shanker Vs. State of Maharashtra** *(Criminal Appeal No. 1106 of 2019 arising out of Special Leave Petition (Crl.) No. 7230 of 2018, decided on 23.07.2019)* has also reiterated the ratio laid down in **Mangat Singh Vs. State of Punjab (supra)** and has observed as under :-

"5. When the accused has preferred the appeal against the conviction, the appeal can be disposed of on merits only after hearing the appellant or his counsel. When there was no representation for the appellant, in our considered view, the High Court ought not to have disposed of the case on merits. It was held in 2005 (11) SCC 185 titled *Mangat Singh vs. State of Punjab* that where the advocate for the appellant is absent on the date of hearing, the Court shall either appoint an *amicus curiae* and then decide the appeal. **Once the appeal against the conviction is admitted, it is the duty of the Appellate Court either to appoint an advocate as *amicus curiae* or to nominate a counsel through Legal Services Authority and hear the matter on merits and then dispose of the appeal. "**

(emphasis supplied)

11. Keeping in mind the aforesaid ratio laid down by the Apex Court and also considering the aforesaid facts, **while declining to grant short term bail/parole to the appellants (C.M. Application No. 6 of 2022 in re: Criminal Appeal No. 1105 of 2009 and C.M. Application No. 8 of 2022 in re: Criminal Appeal No. 8 of 2022)**, the Court proceeds to hear the above-captioned appeals filed on behalf of

the appellants finally by appointing Shri Ishan Baghel as *Amicus Curiae* to argue the above-captioned appeals on behalf of the appellants finally because as stated hereinabove, he is well acquainted and also prepared with the case. Furthermore, Shri Ishan Baghel does not state that he is not well acquainted and also not prepared the case to argue it finally but his objection was only to the effect that he has no power in the above-captioned appeals to finally argue the matter. In these backgrounds especially considering the fact that the appellants are in jail for the last 17 years, in the ends of justice, this Court proceed to hear the appeals finally with the assistance of Shri Ishan Baghel (*Amicus Curiae*) and Shri Vishwas Shukla, learned Additional Government Advocate for the State.

12. Three accused persons, **Kamlesh *alias* Ghora, Rajesh and Mool Chandra,** were tried in Sessions Trial No.765 of 2005 (State Vs. Kamlesh @ Ghoda & others), arising out of Case Crime No.76 of 2005, under Section 302 I.P.C., Police Station Itaunja, District Lucknow, whereas accused **Kamlesh @ Ghora** was also tried in Sessions Trial No.766 of 2005 (State Vs. Kamlesh @ Ghora), arising out of Case Crime No.85 of 2005, under Section 3/25 of Arms Act, Police Station - Itaunja, District Lucknow, by the Additional District & Sessions Judge, Court No.15, Lucknow.

13. Both the aforesaid two Sessions Trials were related to each other, hence the learned Additional District & Sessions Judge, Lucknow heard and decided the aforesaid two Sessions Trials together and vide common judgment and order dated 06.04.2009/09.04.2009, the learned Additional District & Sessions Judge, Lucknow, convicted and sentenced the accused/appellants **Kamlesh *alias* Ghora, Rajesh** and **Mool Chandra** in the manner as stated hereinbelow :-

"Accused/appellants Kamlesh *alias* Ghora, Rajesh and Mool Chandra :-

Under section 302 read with Section 34 of the Indian Penal Code to undergo life imprisonment and a fine of Rs.10,000/-. In default of fine, to undergo six months additional rigorous imprisonment.

Accused/appellant Kamlesh *alias* Ghora :-

Under Section 25 of Arms Act to undergo three years rigorous imprisonment and a fine of Rs.2000/-. In default of fine, to undergo one month additional imprisonment.

All the sentences were directed to run concurrently."

14. Feeling aggrieved by the impugned judgment and order dated 06.04.2009/09.04.2009, convict/appellant Kamlesh *alias* Ghora has preferred Criminal Appeal No. 1104 of 2009, whereas convict/appellant Rajesh has preferred Criminal Appeal No. 1105 of 2009 and convict Mool Chandra has preferred Criminal Appeal No. 1077 of 2009.

15. It is pertinent to mention here that during pendency of the aforesaid appeals, convict/co-accused Mool Chandra died, hence his Criminal Appeal No. 1077 of 2009 filed before this Court stood abated vide order dated 22.02.2022.

16. Since the above-captioned appeals arise out of a common factual matrix and impugned judgment, we are disposing them of by a common judgment.

17. Shorn off unnecessary details the facts of the case are as under :-

The informant-Radha Devi d/o Hira Lal (P.W.1) lodged a written report (Ext. Ka.1) dated 20.06.2005 at police station Itaunja, Lucknow, alleging therein that she is the resident of Village Dugauli, Police Station Madhiyao, District Lucknow, current address Village Gohona Khurd, Police Station Itaunja, District Lucknow. After the death of her mother about a year back, her father Hira Lal married to another woman, who was the daughter of Mool Chandra s/o Jhole, resident of Pipari, Police Station Itaunja. After marriage, they were residing at Village Gohana Khurd, Police Station Itaunja.

On 17.06.2005, her father had beaten her second mother, upon which her second mother had gone to her parental village Pipri. On account of the said enmity, on 17.06.2005, at 4.00 p.m., when her father along with her (P.W.1) and her brother Rajneesh (P.W.2) had come to village Pipri, which is adjacent to her village, to take her second mother, an altercation took place between Mool Chandra (accused/convict) and her father on the issue of leaving the house of her second mother, on which her father got angry and left for home. In the meanwhile, Kamlesh, Rajesh s/o Mool Chandra (convicts/appellants) and Mool Chandra (accused/convict) surrounded her father and Kamlesh (convict/appellant) fired two shots upon her father by his gun and when her father fell down, Mool Chandra (accused/convict) and Rajesh (convict/appellant) assaulted her father with *banka*, due to which her father died on spot. The incident was witnessed by her (P.W.1), her brother- Rajneesh (P.W.2), Babu Lal s/o Molhe Ram (P.W.4) resident of Village Mohana Khurd and other persons.

18. Thereafter, informant-Radha Devi (P.W.1) got the FIR scribed by Mohd. Bilal, who after scribing it read it over to her. She, thereafter, affixed her signature on it. She then proceeded to Police Station Itaunja and lodged it.

19. The evidence of P.W.5- Molhey Ram shows that on 20.06.2005, he was posted as Head Constable at Police Station Itaunja, Lucknow. On the said date, informant Radha Devi (P.W.1) came along with a written report at police station. On the basis of the written report, he registered an F.I.R. on the same date at 06:40 p.m. as chik no. 59 of 2005, case crime no. 73 of 2005, under Section 302 I.P.C., Police Station Itaunja, District Lucknow. He proved the chik F.I.R. (Ext. Ka. 6). He also proved the GD (Ext. Ka.7).

It appears that the trial Court has provided opportunity to cross-examine P.W.5-Molhey Ram but he was not cross-examined by the defense.

20. A perusal of the chik FIR shows that the distance between the place of incident and Police Station Itaunja was 6 kilometers. It is significant to mention that a perusal of the chik FIR also shows that a case under Section 302 I.P.C. was registered against appellants, Kamlesh, Rajesh and Mool Chandra.

21. The investigation of the case was conducted by P.W.7-S.I. Panna Lal Saroj, who, in his examination-in-chief, had deposed that on 20.06.2005, he was posted as Sub-Inspector in police station Itaunja. On the same day, on the basis of written report lodged by informant-Radha Devi (P.W.1), FIR was lodged as Case Crime No.76 of 2005, under Section 302 I.P.C. and he himself started the investigation. On the same day, firstly he filled the form and mentioned the hindi copy of FIR in G.D.

On pointing out of the informant Radha Devi (P.W.1), the place of occurrence was investigated by him. Site plan (Ext.Ka-9) was prepared by him, which is in his handwriting and signature. Secondly, on 21.06.2005, he recorded the statement of the witnesses of Panchayatnama and memo (fard) - Dr. Ajay Kumar, Dharmveer, Ramesh, Kallu and others. After that he recorded the statement of witness Babu Lal (P.W.4) and Rajneesh (P.W.2). During the inspection of place of occurrence, he recovered blood stained *banka* (Ext. Ka.3) and empty cartridge (Ext. Ka.5), collected plain soil and blood stained soil (Ext. Ka. 4) under memo (fard) dated 20.06.2005. On the same day, in his presence and on his instruction, panchayatnama (Ext.Ka-2) was prepared by S.I. Ayodhya Prasad Pathak on which he made his signature. The challan lash (Ext.Ka-10), photo lash (Ext. Ka-11) and specimen seal (Ext.Ka-12) was prepared by S.I. Ayodhya Prasad Pathak, who accompanied him and the same was signed by him. Letter to the C.M.O. (Ext.Ka-13) was prepared and was signed by him. On 23.06.2005, he prepared paper (parcha) no.3 and also made search for accused persons.

On 25.06.2005 the accused persons surrendered before the court concerned and sent to jail and the details of the same was mentioned in paper no.4. On 29.06.2005, statements of accused persons were recorded in District Jail, after taking permission from the court concerned, which is mentioned in paper no.5. On 05.09.2005, paper no.6 was prepared in which it was mentioned that accused Kamlesh @ Ghora was taken on police custody/remand with the permission of court concerned and on his pointing out, pistol used in commission of crime and cartridge were recovered. On the place of recovery, one pistol 12 bore, one live cartridge were recovered and its memo (Ext.Ka-14) was prepared, which was written and signed by him. Thereafter, on 07.07.2005 paper no.7 was prepared in which it was mentioned that docket of one box each of blood stained soil and plain soil and one bundle containing clothes of the deceased was prepared and the same was sent to Forensic Science Laboratory. On 08.07.2005 paper no.8 was prepared in which it was mentioned that copy of panchayatnama and copy of post-mortem report was made. On 20.07.2005, paper no.9 was prepared which stated that statement of scriber of FIR Moharrir Mohley Ram (P.W.5) was recorded.

On 31.07.2005, paper no.10 was prepared which stated that on receiving the docket, copy of the pistol 12 bore and empty cartridge, which were sent to the Forensic Science Laboratory, Lucknow for testing, the evidence was found, on the basis of which charge sheet No.77 of 2005 (Ext.Ka-15), which is in his handwriting and signature, was sent to court concerned. On 23.10.2005, in S.C.D. -II, the details of the report of Forensic Science Laboratory was mentioned and the report, which was received, was also annexed. The seal-covered goods (Ext.1), which were in the cloth of "markeen', were opened before the court and seeing one pistol and three empty cartridges and one live cartridge that came out from inside, the witness said that it was the same gun (Ext.2), a live cartridge (Ext.3) and three empty cartridges (Ext.4, 5 & 6) which were recovered from accused Kamlesh. Before the court, a sealed packet was opened, on cloth Ext.7 was marked and Ext.8 was marked on a carton received from inside. A *banka* (in sealed condition) (Ext.10) was also received from inside and after seeing this, the witness said that it was the same weapon, used in the commission

of crime, and recovered from the place of occurrence. The containers of blood stained soil and plain soil were found sealed separately, on the clothes of which Ext.11 and Ext.12 were marked; on two containers Ext.13 and Ext.14 were marked; and Ext.15 and Ext.16 were marked on plain soil and blood stained soil respectively; Ext.17 was marked on sealed bundle containing clothes of the deceased; and Ext.18 was marked on clothes.

In his cross-examination, he deposed that to take accused persons in police custody, he went along with S.I. Ayodhya Prasad Pathak, Constable Phool Singh Yadav and Constable Om Prakash from police station. He firstly said that he did not remember the time of departure from police station, but soon after he stated that at 8.30 p.m. they left for jail from police station. He did not remember the exact time when the accused were taken into custody. The fact that on which time the accused Kamlesh was taken into custody from jail was not mentioned in the case diary. At that time, he was not aware from where the gun used in the commission of crime, was to be recovered. After taking the custody, he went to village Pipri via Itaunja on asking of accused Kamlesh. He mentioned the said fact in the case diary. The time of reaching at Village Pipri was not mentioned in the case diary. The population of village Pipri was about 500-600. He did not remember under which Sub Inspector's area Pipri village falls. He tried himself to take witnesses but due to fear and ill-will no-one was ready. None of the witness disclosed name and address and left. In the case diary he did not mention the name of the witnesses but he wrote that no-one was ready to give evidence because of ill-will. Sealed bundle which contained country made pistol did not bear any signature and on it "Crime No.85/2005 and Crime No.76/2005" was written in his handwriting, which was the crime number punishable under Section 3/25 of Arms Act in the case of State Vs. Kamlesh. The word "and" was written between both the crime numbers by him. Under the aforesaid expression, the details of Crime No.85/2005 and Crime No.76/2005 were written by him. The aforesaid were written by him at the place of recovery. He did not put any handwritten slip on the country made pistol. Likewise he did not put any handwritten slip over the cartridges. He further deposed that when recovered articles, recovered weapons, recovery memo are sent to police station and the case is registered, only then crime number of case of recovered weapon is determined. After the recovery made in this case, he reached police station at 17:15 hour and thereafter the case was registered and crime number was determined. The accused persons were lodged in police station. He finished the paper work of that day after reaching the police station, but did not mention any time. He denied the suggestion that on pointing out of accused, no country made pistol was recovered. The expression written with blue pen on the bundle containing *banka* is in his handwriting. He denied the suggestion that *banka* was not sealed at the place of occurrence. It is wrong to say that forged paper work was done at the police station.

In his cross-examination, he deposed that in front of his police station, a concrete road goes towards Amaniganj. The scriber of the present FIR is Mohd. Bilal r/o Amaniganj. Amaniganj comes under Police Station Itaunja. He did not mention the name of Mohd. Bilal in the list of witnesses in charge sheet. He did not record the statement of Mohd. Bilal and he did not write the reason in case diary that Mohd. Bilal was not examined during

investigation. The fact that Mohd. Bilal was searched and he could not be found was also not mentioned in the case diary. Where the incident was allegedly occurred, there is an orchard of mango trees. Kalmi mango trees were also in the garden and who was looking after orchard, it is not mentioned in the case diary. He did not write timing of his reaching at the place of occurrence in the case diary and the fact of tracing those people is not even written in the case diary, but he mentioned the timing of recording the statement of informant in case diary. He did not mention the timing of recording the statement of witness Rajneesh in the case diary. He did not mention his duration of time at the place of occurrence in the case diary. He did not mention in how much time he completed the first paper in the case diary. Likewise, he did not mention about the timing of completion of any paper in case diary. The date is also not there under the endorsement made by the C.O. on the first paper. Likewise, there is no date on any of the papers below the order of the C.O. He further deposed that during investigation it did not come to his knowledge that the deceased had done many marriages and with regard to said fact, during investigation, he did not record any statement or got any information. On the day of incident, he did not go to police station and he remained in the area in search of accused persons. He did not point out any particular place where he made search. It is wrong to say that he did not recover any weapon of assault on the pointing out of accused Kamlesh and on return, he made a forged recovery. Informant Radha Devi did not inform him about the fact that she along with his father and brother left from their house. It is wrong to say that he did all the investigation of the case, sitting at the police station.

22. P.W.8-Guru Sahai Bhargav, Constable, in his deposition, stated that on 05.07.2005 he was posted as Constable Clerk at Police Station Itaunja. He proved the FIR of case under Section 3/25 of Arms Act as Ext.Ka-16.

In his cross-examination he stated that it is wrong to say that no recovery was made from the accused nor any specimen seal was prepared and the same has been prepared in a forged manner while sitting at Police Station.

23. P.W.9 Head Constable Ajay Pratap Singh, Police Station Manpur, District Sitapur, in his deposition, stated that on 05.07.2005, he was posted as Head Moharrir at Police Station Itaunja, District Lucknow. At 17.15 hour. S.H.O. Panna Lal Saroj (P.W.7) along with other police force brought accused Kamlesh @ Ghora s/o Mool Chandra r/o Pipri, Police Station Itaunja Lucknow along with recovered articles used in the commission of crime, i.e., one country made pistol 12 bore and a cartridge in a seal covered state and submitted at Police Station. An entry was made in Rojnamcha as Case Crime No.85 of 2005, under Section 3/25 of Arms Act at Rapat No.37. G.D. entry of the same was made by him being Head Moharrir. The carbon copy of the entry G.D. was prepared in the same process alongwith the original, which is paper no.1/14. That was written in his handwriting over which Ext.Ka-17 was marked.

In his cross-examination, he stated that he did not go to jail. He only made entry in G.D. He did not bring the G.D. in original. The recovery was not made before him. The recovery was made by S.O. and he only made entry of the same. He also made entry of one pistol 12

bore and a live cartridge. Empty cartridge was not recovered before him. He did not remember that before this G.D. entry, which and at what time G.D. entry was made and he also did not remember at what time and which G.D. entry was made subsequent to the G.D. entry of this case. It is wrong to say that the FIR is anti-timed.

24. P.W. 10 - Shri Ram, S.H.O. Fakharpur, District Bahraich, in his deposition, stated that on 05.07.2005 he was posted as Sub-Inspector, Police Station Itaunja, District Lucknow. He was entrusted with the investigation of Case Crime No.85 of 2005, under Section 3/25 of Arms Act. On 03.09.2005 after obtaining the necessary permission from District Magistrate and finding the offence established, he dispatched the Charge Sheet No.89 of 2005.

In his cross-examination he deposed that there is no witness of recovery. No time was mentioned in the case diary with regard to taking the statement of witnesses - Panna Lal Saroj (P.W.7), Om Prakah Pathak & others. The time of inspection of the place of occurrence has also not been mentioned in the C.D. It is wrong to say that investigation has been carried out in the Police Station.

25. The postmortem of the body of deceased Heera Lal was conducted on 21.06.2005 at 10:50 a.m. at Ram Manohar Lohiya Hospital, Lucknow by Dr. Anil Kumar Srivastava, Senior Cardiologist (P.W.6), who, found the following ante-mortem injuries on his person :-

"(i) Multiple incised wound in area 12 cm x 10 cm, present over front and both side of face. Size ranging from 2 cm x 2.5 cm x muscle deep to 3 cm x 1 cm x bone deep.

(ii) Incised wound - 3 cm x 1 cm x bone deep present on right side of forehead just above right eye brow, underlying frontal bone cut.

(iii) I W - 1.5 cm x 1 cm x bone deep present over chin underlying bone mandible cut.

(iv) I W- 12 cm x 6 cm x vertebrae deep present on front and both side neck just above the thyroid cartilage underlying soft tissue minor and margin vessles layering pharynx and larynx found cut underneath the injury 2nd and 3rd centre vertebrae found cut above outer spinal chord.

On opening eechymosis present underneath all the injuries mentioned above. Margins of all above injuries are sharp and clean cut and well defined tailing present (IW).

(v) FIRE ARM WOUND OF ENTRY- 2 cm x 3 cm abdominal cavity deep present outer aspect of Right side of abdomen 18 cm above right illiac crest. MARGINS- INVERTED AND IRREGULAR BLACKENING, TATOOING, BURNING, CHARRING present around the wound in area 6 cm x 5 cm."

As per the opinion of Dr. Anil Kumar Srivastava (P.W.6), the casuse of death was shock and haemorrhage as a result of ante-mortem injuries.

26. It is significant to mention here that Dr. Anil Kumar Srivastava (P.W.6), in his examination-in-chief, had reiterated the aforesaid cause of death of the deceased and deposed that on 21.06.2005, he was posted at Ram Manohar Lohiya Hospital, Gomti Nagar, Lucknow and on that day, his duty was in post-mortem room. He conducted the post-mortem examination of deceased -Hira Lal aged about 35 years,

who was brought by Constable 1725 Ram Kumar Tiwari, Police Station Itaunja whose post mortem number was 1682 of 2005. At the time of post mortem, rigor mortis was present in the whole body; the deceased was of average height; and both eyes were closed. In his opinion, all the injuries could have been possibly caused on 20.06.2005 at 4.00 p.m. The postmortem report (Ext. Ka-8) is in his handwriting and signature. In the opinion of the doctor, the reason of death was shock and hemorrhage due to ante mortem injuries, which was caused by fire arm injuries and the injuries were caused by sharp edged weapon.

In his cross-examination, he stated that there is only one injury of fire arm. 29 pellets were found from the body. By observing the rigor mortis, it is deduced how much time has passed since death. There may be a difference of 12 hours on either side in the time of death. It is not possible to tell the exact time. The death could have happened even before 36 hours. He further deposed that 90 ml. liquid substance was found in the stomach of the deceased. After two and half hours of having a meal, the food goes beyond the stomach. The deceased must have had food about two and half hours ago ahead of death. He could not tell, from how far does the blackening, charring and tattooing in a fire arm injury would occur. Ballistic expert can tell. There was no contusion or abrasion on the body of deceased.

27. The case was committed to the Court of Sessions by Chief Judicial Magistrate, Lucknow on 24.11.2005. The trial Court had framed charges against the convict/appellants, namely, Kamlesh @ Ghora, Rajesh and accused/convict Mool Chandra for the offences punishable under Sections 302 I.P.C.; the trial court has also framed charges against convict/appellant Kamlesh @ Ghora for offence under Section 3/25 of Arms Act. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

28. During trial, the prosecution examined ten witnesses in all, namely, P.W.1-Radha Devi, who is the informant and daughter of deceased-Hira Lal, P.W.2 Rajneesh, who is son of deceased-Hira Lal, P.W.3-Dharmveer, who is the witness of Panchayatnama, P.W.4 Babu Lal, who is the independent witness,P.W.5-Mohley Ram, who is the scribe of FIR, P.W.6 Dr. Anil Kumar Srivastava, who conducted the post-mortem of deceased, P.W.7 S.I. Panna Lal Saroj, who is the Investigating Officer of the case, P.W.8 - Guru Sahai Bhargav, who proved the FIR, P.W.9 -H.C. Ajay Pratap Singh, and P.W.10 Shriram, who conducted the investigation of the case lodged against appellant/convict Kamlesh *alias* Ghora for the offence under Section 25 of the Arms Act.

29. It is pertinent to mention that excepting Radha Devi (P.W. 1) and Rajneesh (P.W.2), the other two witnesses, namely, P.W.3-Dharamveer and P.W.4-Babu Lal have turned hostile and when confronted with those portions of their statements under Section 161 Cr. P.C. they had denied any such statement made by them. The informant Radha Devi (P.W.1) and his brother Rajneesh (P.W.2), however, stood firm as a rock of Gibraltar.

30. The informant-Smt. Radha Devi, who is the daughter of deceased, was examined as P.W.1. She, in her examination-in-chief, deposed that the incident took place on 20.06.2005 at 4.00 p.m. She stated that after a year of death of her first mother, her father got married

again to one Seema d/o Mool Chandra (convict/accused) r/o Village Pipri. She has a brother; her father lived along with her second mother; and brother in a house constructed in Gohna Khurd. Two-three days before the incident, a scuffle took place between her father and her second mother and her father slapped her mother. Being annoyed of that, her second mother had gone to her parents' place at Pipri. She further deposed that she along with her father (deceased) and brother Rajneesh (P.W.2) had gone to Pipri to bring her second mother back. On the day of incident, a quarrel took place amongst her father, Mool Chandra (convict/ accused), Kamlesh and Rajesh (convict/appellants), on which her father became angry and took the informant (P.W.1) and her brother (P.W.2) and left their house. There is mango orchard of Munna Maurya near Mool Chandra's house. When they were going, Kamlesh, Rajesh (convicts/appellants) and Mool Chandra (convict/accused) surrounded her father (deceased).

P.W.1 had further deposed that Kamlesh (convict/appellant) fired two shots upon her father Hira Lal. Having sustained injuries, her father fell down on the ground. The injury was of gunshot. He sustained the bullet near his waist and blood was oozing out. Thereafter, Mool Chandra (convict/accused) caught hold her father and Rajesh (convict/appellant) slit his throat with *banka*. At that time, she (informant P.W.1) and her brother Rajneesh (P.W.2) and one other person Babu Lal (P.W.4) were present at the place of incident. She (P.W.1) and her brother (P.W.2) ran towards Police station, but before reaching police station, they met a person and they narrated the incident to him, who wrote a report on a paper. The said person read over the report on which the witness made her signatures and took the paper to police station and submitted there. This witness has proved the report and recognized her signatures on that. She further deposed that her father died on spot and Inspector inquired from her about the incident. He took her to the place of occurrence where the body of her father was lying. She identified the accused persons before the court and stated that they were the accused who committed murder of her father. She identified the convict/appellant Kamlesh and stated that he was the person who shot at her father with country made pistol. On seeing accused Mool Chandra in witness box, she stated that this accused was holding her father at the time of incident. On seeing accused/appellant Rajesh in witness box, she stated that it was the person who slit the throat of her father.

In her cross-examination, P.W.1 stated that village Gohna Khurd is surrounded by forest on the southern side which is 1/2 km away from residential area and her house is there in forest under the trees. Her house is made of mud walls and thatch and its width is 2x4 hands wide and length 7x8 hands. Other rooms of some other persons are also there, but she does not know the exact number of rooms. About one month ahead of the date of incident her father was living there. Other people were living in other rooms. She is familiar with their faces but she does not know their names. The thatched house was built by her father. Her father was not having any land there. She was not aware about the occupation of her father. Earlier her father was residing in a pakka house at Dudholi, which has one room and a verandah, with her mother. About two years ago, she used to live with her mother. After the death of her mother she started living

with her father. She was not residing with her grand-father (nana) at Sidhauli. Her grand-father (nana) and maternal uncle (mama) are alive. She went to her grand-father's (nana) place. She did not live in Dudoli with her father, after the death of her mother.

P.W.1 further deposed that she never went inside the village Gohna Khurd, however, she knew one or two persons of Gohna Khurd. She does not remember their names but can identify by their faces. She does not know Babu Singh r/o- Village Gohna. She does not know village Pradhan Lala of village Gohna. She knows village Pipari but she is not aware about the distance between her house and village Pipari. She went to village Pipari about one month ago. She went to village Pipari one month ahead of the incident, also she went to village and on the day of incident. On the day of incident, she went to village Pipari from her house via the way which goes through fields of village Gohna. Her father along with her brother (Rajneesh) went to vilage Pipari. At that time no body was left her house. She went to village Pipari at about 10-11 a.m. and directly reached there within half an hour. On the way she saw many persons working in their fields but she could not tell their names. Nobody asked her father where he was going. They went directly to the house of Mool Chandra. The daughter of Mool Chandra is her new mother and her name is Seema and they met her at the house. She could not tell how many houses are there at village Pipari. She could not tell about the house of Mool Chandra whether it was a Katcha house or Pakka house but a thatch was there on the front.

She further stated that her mother died at Dudoli and after that she lived with her father continuously till he died. It is wrong to say that her father got his third marriage performed at village Mosaud. It is wrong to say that her second mother r/o-village Mosaud is alive and her father got his third marriage performed at village Jutti and her third mother is alive. It is wrong to say that her father got his fourth marriage performed at village Parsau. She is not aware that her father got his marriage performed with Seema in writing or not. It is wrong to say that his father got the aforesaid marriages registered at Registrar Office. It is wrong that her father was involved in a quarrel with the persons of village Parsau regarding jewellery. It is wrong to say that about 15 days ahead of the day of incident miscreants attacked at their house situated in Gohna. She further deposed that her second mother, Seema, was having good relationship with her and her brother Rajnish and they were loved by her and she also provided them food etc. when she was residing with them. She and her brother never had any quarrel with their second mother. Both the children loved their second mother. She (Radha) and Rajnish went to the house of her grand-father (nana) Mool Chandra at Gohna and sat near her second mother Seema and her father stopped in front of the doors and altercations started there. When she reached there, her father was sitting in front of the door. Thereafter the altercation started and it went on for about 10-05 minutes, thereafter, her father left the place, annoyingly. She does not remember how many steps her father walked from the front door when fire was shot upon him. When her father was leaving, within 2-4 minutes firing was made at him and due to which her father fell down. She along with her brother (Rajneesh) did not run as they were near their father. When her father started to leave due to anger, she along with her brother also accompanied their father and they were just behind 2-4 steps of their

father. She does not remember how far and how many steps away they were from the house of Mool Chandra when her father fell down and at that time Babu Lal was in-front of them. She does not remember how many steps away was Babu Lal from her father. This fact is not in her knowledge that before starting living in Gohna village, her father lived at Kishunpur, Shahpur, Asnaha and Chandanapur, and he has left these places due to disputes and is living at Gohna. She went to the place of occurrence with the Inspector after a short interval. She went to the place of occurrence with the Inspector after two-three hours of incident. She had shown those spots to the Inspector where she, Rajnish and Babu Lal were present. She did not know Munna Maurya, but her father used to tell that the grove of Munna Maurya was there. She had got mentioned the name of Munna Maurya in the report regarding the grove. If it has not been mentioned in the report, she could not tell the reason. She had not got mentioned this fact in her report that "her father had received gunshot near waist, and it was bleeding." She did not state this fact even in her statement made before the Inspector. It is correct that she had stated this fact for the first time in the Court only. It is wrong to say that she have stated this fact for the first time before the Court on being tutored. She had got mentioned this fact in her report that " Mool Chandra had caught hold of her father." She had got mentioned the aforesaid fact in her report. If it is not mentioned, she could not tell the reason. She had got mentioned this fact in her report that *"When they were going, then Kamlesh, Rajesh and Mool Chandra came and surrounded her father."* She had got mentioned this fact in her report. If it is not mentioned then she would not be able to tell any reason. She had told the aforesaid fact to the Inspector in her statement. If it is not mentioned, she could not tell any reason. It is wrong to say that she is telling the aforesaid facts for the first time before the Court on being tutored. Two gunshots had been fired upon her father. She had seen that both the fires had been shot, but she did not see whether both the gunshots had hit her father or not. She is conversant with right, left and back. One fire was shot on her father from back, and another fire was shot on her father from front. After both the shots had been fired, her father fell down. The gunshot fired from back was fired on her father from a distance of two-three paces. The gunshot fired from front was also fired upon her father from a distance of two-three paces. There are quite big trees in the grove. The grove is very dense. When they started from home, she, Rajnish and her father Hira Lal had eaten pulses, rice and *chapati* before proceeding. When they reached the place of Mool Chandra, they had not eaten anything. When her father fell down, she and her brother Rajneesh began to cry. Both of them hugged their father. She was clad in *salwar, kurta* and orange coloured stoll. The blood of her father had stained in her hands and apparels. Rajneesh (P.W.2) was wearing blue shirt and green pant. The blood did not stain in the hands of Rajneesh rather it got stained in his clothes. Her father had not died by that time. She could not tell for how much time they remained hugged with their father. When gunshot had hit, Babu Lal had come. None else had come there till the time, they remained there, and Babu Lal had left the place. Babu Lal came, witnessed and went away. She did not remember that after how many minutes, Babu Lal had left. There is bricked way through the grove that connects metalled road. This metalled road is Ayaniganj Itaunja Road. This bricked way passes through the grove and after two

furlong, it merges into the metalled road. From the place of occurrence, she had gone to Itaunja from the place of occurrence through the way of her village via the ridge of fields. After the incident, she returned from the place of occurrence following the same path that she followed while going to the house of Mool Chandra with her father. While returning, she had gone to Itaunja following the path beside Gohna village. She had seen earlier where Police Station Itaunja is situated. While going to Itaunja from her village, she passed through the place where Ayaniganj Road meets the road to Gohna village. A betel-nut shop is there. When she reached the betel-nut shop from the place of occurrence, she found several known persons. People were asking, but she did not tell anything. She did not call anyone from village to accompany her to the police station. She did not remember how much time she took in walking from the place of occurrence to the turning of betel-nut shop. Her brother Rajneesh was with her. She did not leave her at the place of occurrence. She was distressed, but she did not stop. Ayaniganj Road is commonly used road. Tempos are easily available on it. Even from the betel-nut shop, they went to Itaunja on walk. They did not go by Tempo or any other passenger vehicle. Mahona town falls on the way while going from betel-nut shop turning to Police Station Itaunja. A market assembles at Mahona town. There are many shops at both sides of the road.

P.W.1, in cross-examination, had further deposed that he had got mentioned this fact in her report that *"her father got annoyed and left her home along with her and her brother."* She could not tell any reason why this fact is not mentioned in her report. She had told the aforesaid fact to the Inspector in her statement but she could not tell any reason if this fact is not mentioned in her report. She did not use any passenger conveyance from the police station even from Mahona. She did not find any known person between Mahona and Itaunja. When she reached the police station, she found the Inspector. It was the same Inspector who had recorded her statement. She did not know whether the Inspector had seen her blood stained hands and the blood stained clothes of her and her brother or not. She had not shown the clothes of her and her brother and her blood stained hands to the Inspector. The Inspector had asked her about the incident. She remained at the police station for about half an hour. Thereafter, she and his brother had gone to the spot with the Inspector by a jeep. She had studied up to Class 4 and knew to read and write. Her signature was obtained on whatever she had stated at the police station and whatever statement she had made. The spot where the dead body of her father was lying is not visible from the door of Mool Chandra. She could not tell whether there is a room to the south of spot where the dead body of her father was lying. When the *banka* was blown at her father, her father had fallen flat. Her father was not moving. She could not tell how much paces away are the houses of village to the eastwards of the spot where her father had fell down. She could not tell even by guess whether the distance was ten paces or 100 paces. When she had gone to the spot with the Inspector, any person from Gohna village was not present there, and none was there even from Pipari village. When she went there for second time, the dead body of her father was lying there and any person was not there. She could not tell how many police officials were there on the jeep when she had gone to the spot with the Inspector. She could not tell whether police officials were there itself when she reached the spot with the Inspector. She could not tell

whether the police officials were there throughout when she was present at the spot near the dead body of her father. She did not remember for how much time she had stayed near the dead body. The Inspector had inspected the dead body and blood etc. at the spot. She is not able to recollect after how much time the dead body had been sent from the spot. The dead body had been sent from the spot by a tempo. She did not remember how many persons had gone on the tempo with the dead body. Meanwhile, none of her acquaintance or relative came to the spot. Thereafter, she had gone to her house. Her grand-father or anyone else did not come to her house in the night. Her grand-father Chhote Lal came to the house at morning 9-10 o'clock. Thereafter, she came to Dudauli on the next day. It is wrong to say that she and her brother Rajnish had not gone to the house of Mool Chandra at village Pipari with her father on the day of incident. It is wrong to say that the accused persons have not committed any incident or brawl with her father, nor she witnessed any incident. It is wrong to say that the report of this incident has been got prepared later on after consultation, and the signature was obtained at the police station in due course. As per her knowledge, any case was not proceeding against her father. It is wrong to say that her father had solemnized several marriages and there was some dispute with their family members regarding jewellry etc. It is wrong to say that some other people have killed her father due to enmity and none has witnessed the incident. It is wrong to say that on being tutored, she has stated the fact of catching hold by Mool Chandra. She further deposed that she did not know how many groves are their in Pipari village. There is a grove at some distance from where they lived at Gohna village. She did not know to whom this grove belongs to. There were mangoes in the grove of Pipari village. The grove of Pipari is big one. She could not tell in how many bighas it would have spread. The family members of Mool Chandra were guarding that grove. While going from the place of occurrence to the police station, no person of Gohna village accompanied her. She knew Chhote Lal and Dulare of Gohna village. She is acquainted with their names. Dulare did not visit her village Dudauli. She is not aware of the fact that the in-law's house of Dulare is at Dudauli village. She could not tell whether he is alive or dead now. After reaching the police station, she had described the entire incident to the Inspector. She had dictated the report which she had got written. She had got written the application at a place which was at some distance from the police station. She is not aware of name of scribe, but that person knew her father. That very person had brought the papers etc. by whom she got written the application. She had got written the report by giving dictation. Her brother Rajnish was with her. She knew Babu Lal. None had told her the name of Babu Lal's father rather she remembered that. The name of Babu Lal's father was Bhole. She had got it written in the report. He further deposed that she knew her maternal grandfather from Pipari since her father solemnized marriage in her family. She did not know in which month her father had solemnized that marriage. She did not attend the marriage procession of her father nor any marriage procession of her father assembled. Her father told her that he had married to her, and she is her mother. Seema was already married somewhere. She did not know where she had been married. Seema was already having two kids. She is not aware of Makkaganj, Lucknow. She is not aware of the fact that the marriage of Seema was

solemnized with Guddu of Makkaganj. She is not aware of the fact that Seema has two children from Guddu. It is wrong to say that at the time of incident, Seema was living at her in-law's house with her husband Guddu. It is wrong to say that Seema never visited her house at Gohna. It is also wrong to say that Seema had never lived with her father. She did not remember that her father would have conducted any documentation regarding marriage with her father. After this incident, the Inspector did not ever call Seema to face her, nor conducted any enquiry. She did not remember from where Babu Lal reached the spot. Even she did not know after how much time he went away. Even she did not remember for how much time he stopped at the spot, since they were weeping.

P.W.1 had further deposed that her maternal grand-father has come with her for her deposition. She resided with her maternal grand-father. She is residing with maternal grand-father from beginning. None has tutored her for deposition. Her second mother has two issues. These two children never resided with her father. She never saw these children at her home. How old these children are she did not know. From where the second marriage of her father was solemnized, it is not known to her. The accused persons present in the court used to visit her home daily. Before the incident, any altercation never occurred between them and her family. She never stayed at the house of accused persons at night. There are houses of other persons near her house. There are trees & plants. There are houses of Mohan, Vikky and others but names of others are not in her memory . There are open land and bushes nearby her house and due to which distant places are not visible. She further deposed that her father had sold some land of Dudauli where she was residing earlier at Lucknow and some land is left. Her father wanted to transfer this remaining land in favour of her second mother. It is not known to her. At the place of occurrence, accused persons neither caught her nor beat her nor abused her. There is a mango grove near the place of occurrence and there remains some darkness due to it. At the time of incident, Babu Lal (P.W.4) was appeared coming on the path situated near the grove. At how much distance he was from her, she did not remember. It is wrong to say that she did not remember any thing and she had forgotten the whole incident, therefore, she is unable to tell the distance of Babu Lal. It is wrong to say that she did not see the incident with her eyes. It is also wrong to say that she is giving false deposition at the behest of her maternal grand-father. It is wrong to say that some other persons have killed her father elsewhere and at the behest of her maternal grand-father and family members, he is giving false deposition against the accused persons.

31. P.W.2-Rajneesh, aged about 8 years, who is the brother of the informant P.W.1 and son of the deceased, had deposed before the trial Court that the incident took place on 20.06.2005, at 4 o'clock, in the evening. On that day, he had gone to take his mother along with father. His sister Radha was also with them. His mother was at the place of maternal grandfather. The mother had gone there two days ago and she was his second mother. An altercation took place with father as his mother had left the house. At the place of maternal grand father, his father had a conversation with his maternal grand-father Mool Chand, maternal uncle Rajesh and Kamlesh regarding *bidai* of his mother. The conversation turned into altercation. Mool Chand, Rajesh and Kamlesh had beaten his

father. Kamlesh shot his father by katta (country-made pistol). His father fell down, then, Mool Chand caught him. Rajesh assaulted at the neck of his father by *banka* (a sharp edged weapon). Kamlesh fired two shots by katta. One shot hit his father above waist and the other shot on the chest. His father died there itself. They started crying. Many villagers had come there. The Inspector enquired with him about the incident and whatever he saw he told him.

In cross-examination, P.W.2-Rajneesh had deposed that he did not know, where his mother died. Prior to the incident his father was residing at Dudauli. His house is built there at Dudauli. The house is pakka (cemented). There is only one room in that house. He was not residing in that house at the time of incident. This house was locked at the time of incident. One year ahead of the incident, they were residing at Gohna with father. The house at Gohna is kachcha (non-cemented) and it contains two kothari (small- rooms). There is thatch over the courtyard. This house is situated at a short distance from village. There are forest and bushes near this house. His father used to take him along whenever he used to go anywhere. His father had neither cycle nor any other vehicle. He used to go with him on foot. He could walk a pretty long. He could not tell that at how much distance the paternal house of second mother is situated from village. A grove was there in the way. There was no canal in the way. His elder sister (P.W.1) used to cook meal at Gohna. On the day of incident, he had started after eating meal at his home. His sister (P.W.1) had also taken meal with him. It is not known to him that prior to the incident, some goons had come to their home, damaged T.V. etc. and taken some goods with them. His father had not taken meal before leaving from home on the day of incident. During the period when incident took place, he did not use to go for studies. Now he goes for studies. His sister does not study in his school. Prior to the incident, sometimes his father used to come in intoxicated condition. On the day of incident, they had gone to the house of second mother from their house at about 10-11 o'clock in the day. It is not known to him that when the marriage of father was solemnized with second mother. His father had told that she was his second mother. How many days ahead he told, it is not known. The second mother had stayed at their home. He deposed that for how many days she had stayed there, it is not known. How many days ago, she would have stayed prior to the incident, it is not known. His second mother has no issue. Prior to the incident, who had come to take his second mother from his home to her parental home, it is not known.

In cross-examination, P.W.2 had further deposed that on the day of incident, he and his sister met his second mother inside the house. His father did not go inside. His father had stayed at the door itself. On the day of incident, they had stayed at the house of second mother for about 1-1½ hour. He, his father and his sister left for return from the house of second mother. His father was walking ahead followed by him and then he followed by his sister. He was at a distance of about 20-30 steps from his father. He took refreshment at the place of second mother. What he had eaten, he did not remember. His sister was 2-3 steps behind him. When they reached the house of second mother, Mool Chandra, Rajesh and Kamlesh were present there. Any other person was not present there at home. All these three persons were outside the home. He had no conversation with all these three persons. They had travelled 30-40 steps

from the house of second mother, then, the incident took place. At that spot houses are not situated. The accused persons did not catch him and his sister. After the incident, they ran towards police station. He knew the police station prior to the incident. He had visited police station twice before the incident. Both times his sister was with him. He had also visited police station with his father. Why he had gone to police station, he did not know.

32. P.W.3-Dharmveer, in his examination-in-chief, had deposed that this incident took place on 20th. He did not remember the month, however, it was near to May. He knew Hira Lal (deceased) and his dead-body was lying in the grove of mango. The "panchayatnama' of the dead-body was prepared by the Inspector before him. He put signature on the "panchayatnama' (Ext. Ka.2). The Inspector had recovered weapon of assault a "*banka*' from the place of occurrence. The Inspector had collected plain soil and blood stained soil in separate containers from the place of occurrence and prepared the recovery memo (Ext. Ka.4).

In cross-examination, P.W.3-Dharmveer had deposed that there are his agricultural fields in Gohna Khurd. He knew Hira Lal (deceased) since 3-4 years. The marriage of Hira Lal with the daughter of Mool Chandra (accused/convict) was fifth one. He deposed that Hira Lal used to beat his fourth wife and he left her and a dispute was also going on with the family members of fourth wife. The panchayat was held in respect of jewellery of the fourth wife. Hira Lal told that he would not give jewellery on any count whatsoever. The other wives of Hira Lal are alive. At the time of the incident, his mother Rameshwari was the Pradhan of Gohana Khurd. The dead-body was found in the grove of mango in Pipari village. His village is situated at a distance of one kilometer from Pipari village. He deposed that when noise occurred in his village that Hira Lal was murdered, then, he and his mother were in front of his door. He further deposed that Radha (P.W.1) and Rajneesh (P.W.2) had come to his mother, then, he, his mother and Radha (P.W.1) went to the orchard in Pipri village where the deadbody was lying. When they reached near the dead-body, the Inspector and police personnel of police station Itaunja had reached there. The Inspector brought him, Radha (P.W.1), Rajnish (P.W.2), the dead-body and containers etc. from the place of occurrence to police station. The dead-body was brought on a tempo. On seeing Ext. Ka.3, Ka.2, Ka.4 and Ka.5, he stated that the Inspector had taken his signatures thereon at police station. The signatures of Ajay, Ramesh and Babulal were taken on Ext. Ka.2 at police station before him. He knew Amaniganj village and Mohd. Bilal is the resident of Amaniganj village. Mohd. Bilal was also present at police station. Radha and Rajneesh were crying a lot at police station. The written report was written at police station on the dictation of the Inspector, upon which signature of Radha (P.W.1) was affixed. He further deposed that Ext.Ka.1 is the same document, which was written by Bilal on the dictation of Inspector.

33. P.W.4-Babu Lal, in his examination-in-chief, had deposed before the trial Court that the incident took place on 20th about two years ago at 04:00 p.m. He was returning from the work place and when he reached near the forest of the village of Hira Lal, then, he listened the noise of crying, then, he reached there. He further deposed that he reached near the

house of Hira Lal, where no one had assaulted anyone. Hira Lal was not there. After that, he went to his house. He went along with others to the place where Hira Lal was murdered. He did not see who murdered him. The "panchayatnama' of the dead body was conducted by the Inspector at the place of occurrence. He was also made panch and his signature was also taken thereon. He identified his signature on Ext. Ka.2. The Inspector had recorded his statement.

In cross-examination, P.W.4 had denied that he gave any statement to the Inspector. He did not tell the Inspector that Kamlesh fired with gun; Mool Chandra caught and Rajesh assaulted with *Banka*. He denied the suggestion that he falsely deposed in connivance with accused. He further deposed that "panchayatnama' of the dead-body was conducted before him and he put signature thereon and he did not see any incident.

P.W.4-Babu Lal had further deposed that he saw in the house of Hira Lal at 04:00 p.m. that the children of Hira Lal were crying, then, on asking, he was told that Hira Lal was murdered. He did not go the house of Hira Lal. The house of Hira Lal is at his village. After that he went to his house. In the evening at about 04:45 p.m., he went along with Pradhan and children of the deceased to the place of occurrence. The marriage of Hira Lal was fourth one. The first wife of Hira Lal was Chirauti, who was murdered. The place of the occurrence is about one kilometer from his house. When he reached at the place of occurrence, then, some of the villagers were already present there. While on way, no talk was made who murdered the deceased and why he was murdered.

34. The learned trial Judge believed the evidence of Radha (P.W. 1) and Rajneesh (P.W. 2) and the recoveries effected at the place of the incident on the pointing out of the convicts/appellants, and convicted and sentenced the appellants, Kamlesh *alias* Ghora, Rajesh and convict Mool Chandra in the manner stated hereinabove.

35. As mentioned earlier, aggrieved by their convictions and sentences convict/appellant Kamlesh *alias* Ghora preferred Criminal Appeal No. 1104 of 2009 before this court and convict/appellant Rajesh also preferred another appeal i.e. Criminal Appeal No. 1105 of 2009 and since these appeals arise out of a common factual matrix and impugned judgment, we are disposing them of by one judgment.

36. Heard Shri Ishan Baghel, learned *Amicus Curiae* for the appellants and Shri Vishwas Shukla, learned Additional Government Advocate for the State and perused the impugned judgment as well as material brought on record.

37. Shri Ishan Baghel, learned *Amicus Curiae* appearing on behalf of the appellants submits that as per the prosecution case, incident had taken at a spur of moment between the parties on account of which, convict/appellant Kamlesh armed with country made pistol, whereas convict/appellant Rajesh armed with *banka* assaulted the deceased with their respective weapons and convict/accused Mool Chandra caught hold the deceased. He contended that even if the case is taken at its face value, the present case would not travel beyond Section 304 I.P,C.

38. The next argument of Shri Baghel, learned *Amicus Curiae* is that two eye-witnesses, i.e. P.W.1 and P.W.2, who are daughter and son of the deceased, respectively, were minor aged about 15 and 8 years, respectively and their presence at the place of occurrence is doubtful and they appear to be a tutored witnesses. He further argued that P.W.4-Babu Lal had turned hostile and did not support the prosecution case. He argued that the dispute arose between the parties with respect to *bidai* of Smt. Seema, who is the second wife of deceased Hira Lal, as she had left the house of her husband (deceased), and had come to the house of appellants. The prosecution has not examined Smt. Seema to establish the motive attributed to the appellants for committing the murder of the deceased. It is further argued that P.W.1 and P.W.2 are the residents of Village Guhana Khurd which is situated at a distance of 4 kms. away from the village of the appellants.

39. Shri Baghel has further argued that the human blood could not be ascertained in blood stained soil collected by the Investigating Officer from the spot, in the serological examination report, hence the prosecution has failed to prove the place of occurrence.

40. It has been argued by the learned *Amicus Curiae* for the appellants that there are major contradictions in the statement of P.W.1 and P.W.2 vis-a-vis the first information report and the statement recorded under Section 161 Cr.P.C. regarding the place and manner of occurrence, as such the prosecution story is unworthy to be believed.

41. It has been lastly argued that the trial court committed grave error of law in believing the testimony of P.W.1 and P.W.2, who are minor children of the deceased, before testing the veracity of the testimony of P.W.1 and P.W.2, hence the impugned judgment and order passed by the trial court is liable to be set aside and the appellants be acquitted.

42. Learned A.G.A., on the other hand, has vehemently opposed the submissions advanced by learned Counsel for the appellants and has submitted that the incident took place in the house of the appellants and their sister Smt. Seema was the second wife of the deceased. There was some matrimonial dispute between the two on account of which she has left the house of the deceased and started living with her parents and brothers, i.e. the appellants. The deceased on the day of incident 20.06.2005 had gone to the house of the appellants for *bidai* of his second wife, namely, Smt. Seema and two children of the deceased, i.e. P.W.1 and P.W.2 were also with him at the house of the appellants. A quarrel took place between the deceased and co-convict Mool Chandra, on account of which deceased became angry and left to go back to his house. After that, the appellants Kamlesh, Ramesh and Mool Chandra surrounded the deceased and Kamlesh fired on the deceased with country made pistol whereas co-convict Mool Chandra caught hold the deceased and appellant Rajesh assaulted him with *banka*, on account of which the deceased succumbed to his injuries. The incident was witnessed by P.W.1 Radha Devi and P.W.2 Rajneesh and also by one Babu Lal and other persons of the village. The FIR of the incident was lodged by P.W.1 at the concerned police station on 20.06.2005 at 18.40 hours against the convict/ appellants and co-convict Mool Chandra. Hence the trial Court has rightly convicted and sentenced the appellants by means of the impugned judgment.

43. We have examined the submissions advanced by the learned Counsel for the parties and gone through depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statements of the appellants recorded under Section 313 Cr.P.C. We have also perused the impugned judgment along with the lower Court record.

44. It would become manifest from the above that the learned trial Judge has based the conviction of the appellants on the testimonies of Radha Devi (P.W. 1) coupled with the evidence of Rajneesh (P.W. 2).

45. We would first like to deal with the evidence of Radha Devi (P.W. 1). Since in paragraph-17 we have set out the prosecution story primarily on the basis of the recitals contained in his examination-in-chief, we do not want to burden our judgment by reiterating the details. In short, her evidence shows :-

2-3 days' before the incident, a scuffle took place between her father Hira Lal (deceased) and her second mother Seema and her father slapped her second mother Seema. On account of this scuffle, her second mother Seema left the house and went to her parental house at Pipri village.

On the date of the incident i.e. on 20.06.2005, her father Hira Lal (deceased) took her and her brother Rajneesh (P.W.2) along and went to Pipri village for taking her second mother back, wherein a quarrel took place between father of her second wife, namely, Mool Chandra (co-convict), brothers of her second wife, namely, Kamlesh and Rajesh (convict/appellants) and her father Hira Lal (deceased), upon which her father Hira Lal (deceased) became angry and took her (P.W.1) and her brother (P.W.2-Rajneesh) and left towards Munna Maurya's orchard when appellants Kamlesh and Rajesh and their father Mool Chandra (co-accused/convict) surrounded her father Hira Lal (deceased). After that, convict/appellant Kamlesh fired two shots upon her father Hira Lal (deceased), as a consequence of which, her father sustained injuries and fell on the ground. P.W.1 had also stated that her father sustained bullet near his waist and blood was oozing out. After that, Mool Chandra (convict/appellant) caught hold of her father Hira Lal and convict/appellant Rajesh slit the throat of her father with *banka*. At that time, she, her brother Rajneesh (P.W.2) and Babu Lal (P.W.4) were present at the place of the incident and saw the incident. Immediately thereafter, she and her brother Rajneesh (P.W.2) ran towards police station but before reaching police station, they met a person (Mohd. Bilal) and narrated incident to him, whereupon that person prepared a report on a paper and thereafter that person read the report on which the witness made her signature thereon and proceeded along with it to police station and submitted there.

46. We have gone through the statement of P.W.1-Radha Devi and in our view it would be extremely safe to accept it as P.W.1 has stated in her deposition before the trial Court that convict/ appellant fired two shots upon her father Hira Lal as a consequence thereof her father sustained injury of bullet near his waist and blood was oozing out and fell down on the ground. After that Mool Chandra (co-convict) caught hold the deceased Hira Lal and convict/appellant Rajesh slit the throat of her father Hira Lal with *Banka*. This is

corroborated by the nature of the ante-mortem injuries found on the person of Hira Lal by the autopsy surgeon Dr. Anil Kumar Srivastava (P.W. 6) which we have reproduced in entirety in paragraph-25. The perusal of ante-mortem injuries would show that Hira Lal sustained four clean cut incised wounds and one fire arm injury.

47. The statement of Radha Devi P.W.1 further shows that the FIR was lodged by her at 4 p.m. on the date of the incident i.e. on 20.06.2005, which is corroborated by the evidence of P.W.4-Molhe Ram, who registered the case on the basis of the FIR and that of the Investigating Officer S.I. Panna Lal Saroj (P.W. 9).

48. P.W.2-Rajneesh has fully supported the testimony of P.W.1-Radha Devi.

49. Learned Counsel for the appellants argued that P.W.1 and P.W.2 were aged about 15 years and 8 years, respectively, at the time of occurrence and their presence at the place of occurrence is improbable and their evidence being child evidence cannot be said to be trustworthy as they are tutored witnesses.

50. It transpires that the case of the prosecution is mainly dependent on the testimony of Radha Devi and Rajneesh, the child witnesses, who were examined as PW-1 and P.W.2, respectively.

51. Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that in every case the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that witness must be a reliable one.

52. The Apex Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a rule of practical wisdom than law. [See **Panchhi and others v. State of U.P,** (1998) 7 SCC 177, **State of U.P. v. Ashok Dixit and another,** (2000) 3 SCC 70, and **State of Rajasthan v. Om Prakash,** (2002) 5 SCC 745].

53. In **Alagupandi alias Alagupandian v. State of Tamil Nadu** : (2012) 10 SCC 451, the Apex Court has emphasized the need to accept the testimony of a child with caution after substantial corroboration before acting upon it. It was held that :

"36. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case.

The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her

demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable."

54. It is clear from the testimony of PW-1 and P.W.2 that they are the eye-witnesses of the incident. They were aged about 15 years and 8 years, respectively, at the time of the incident. Both the witnesses have categorically stated that on the date of the incident, their father Hira Lal (deceased) had brought them to take back their second mother from the house of maternal grandfather, wherein quarrel took place between their father Hira Lal (deceased) and father of their second mother, namely, Mood Chandra (convict/accused) and brothers of the second mother, namely, Rajesh and Kamlesh (convicts/appellants). After that, their father became annoyed and took them and left for home. When they reached the orchard of Munna Maurya, convicts/appellants Kamlesh and Rajesh and their father Mool Chandra surrounded their father. After that, Kamlesh (convict/appellant) fired two shots upon her father Hira Lal on account of which their father sustained injuries of bullet near his waist and blood was oozing out and after that Mool Chandra (convicts/appellants) caught hold their father and Rajesh (convicts/appellants) slit the throat of their father with *banka*. P.W.1, in cross-examination, had specifically deposed that two gun shots had been fired upon her father; she saw that both the fires had been shot, but she did not see whether both the gunshots had hit her father or not; she is conversant with right, left and back; one fire was shot on her father from back; another fire was shot on her father from front; after both the shots had been fired, her father fell down on the ground; the gunshot fired from back was fired on her father from a distance of two-three paces; the gunshot fired from front was also fired upon her father from a distance of two-three paces. This statement of P.W.1 has been supported by P.W.2. Both the witnesses right from the beginning had supported the prosecution case and stood as a rock of Gibraltar. The post-mortem report of the deceased Hira Lal has also corroborated the evidence of P.W.1 and P.W.2 as it transpires from the post-mortem report that apart from four incised wounds, deceased Hira Lal sustained one fire arm injury. The evidence of Dr. Anil Kumar Srivastava (P.W.6), who conducted the post-mortem of the deceased Hira Lal, shows that the reason of death of the deceased was shock and haemorrhage due to ante-mortem injuries, which was caused by fire arm injuries and the injuries caused by sharp edged weapon. P.W.6 had also stated that there was no contusion or abrasion on the body of the deceased.

55. P.W.1-Radha Devi, in her deposition, had clearly stated before the trial Court that her relation with the second mother Seema was good when she resided with her; her second mother Seema had loved a lot to her and her brother Rajneesh (P.W.2); food etc. was given to her and her brother; the second mother did not quarrel to her and her brother Rajneesh; both she and her brother Rajneesh had loved a lot to their second mother Seema and they did not

make quarrel. When they reached to the house of Mool Chandra, they sat with their mother Seema and their father sat outside of the door and after that scuffle took place for about 10-5 minutes; and after that, their father became annoyed and left with both of them. This itself shows that there were good terms between P.W.1, P.W.2 and their second mother Seema. Even otherwise, there is sufficient corroboration, on record to rule out the possibility of PW 1 and P.W.2 being tutored or used for ulterior purposes by some alleged interested persons. In the absence of any inherent defect we do not find any substance in the plea to reject the testimony of child witnesses i.e. P.W.1 and P.W.2. The factum of the deceased having received fire-arm wound and incised wound with *banka* are proved by the medical evidence.

56. The recovery of the blood stained *banka* and empty cartridge at the place of the occurrence and further pistol on the pointing out of convict/appellant Kamlesh leaves no doubt to disbelieve the presence of P.W.1 and P.W.2 at the place of occurrence. The place of occurrence being near the house of the appellants has not been disputed. The report received from FSL as per Exhibit 21 and 22 shows that blood stained soil and plain soil (item 1), *banka* (item 2), which was used in the commission of crime, and pants (item 3), belt (item 4), shirt (item 5), baniyan (item 6) and underwear (item 7) of the deceased and the knife (MO 1) were found to be stained with blood. Dr. Anil Kumar Srivastava (PW 6) has opined that the injuries found on the dead body of the deceased could be caused with a sharp edged weapon and fire arm. The FSL report (Ext. Ka. 21) further shows that catridge (EC-1) recovered from the place of the occurrence, was fired from the country made pistol in question (1/2005). These all evidences shows that the testimonies of P.W.1 and P.W.2 are trustworthy and reliable. Hence, the plea of the counsel for the appellants in this regard is hereby rejected.

57. So far as the submission of the learned Counsel for the appellant that there is a major contradiction in the statement of P.W.1 and P.W.2 vis-a-vis the First Information Report and and statement under Section 161 Cr.P.C. regarding place and manner of the occurrence, therefore, the prosecution story is unworthy of credit, it is pertinent to mention that the present is a case where incident took place on adjoining way of the residential house of the appellants in the evening at about 4.00 pm. The presence of P.W.1, P.W.2, the deceased Hira Lal and appellants and co-convict Mool Chandra at the place of occurrence was natural. The post-mortem of the deceased Hira Lal was conducted by Dr. Anil Kumar Srivastava, who had appeared, as PW.6 and proved the injuries. The eye- witnesses P.W.1 and P.W.2 have corroborated the incident and have proved the role of convicts/appellants in causing injuries to Hira Lal. PW.1 and P.W.2 have proved the incident and the role of the different convict/appellants in their eye-witnesses account. The mere fact that there are certain inconsistencies with regard to the manner of causing injuries to Hira Lal by the witnesses as noted in the F.I.R. and as noted in the statement under Section 161 Cr.P.C., can in no manner shake the entire evidence or make the statement of witnesses unreliable.

58. The above argument of the learned Counsel for the appellants is not at all acceptable for the reason that before the Police also the role of convicts/appellants

was mentioned by eye-witnesses. In their statements under Section 161 Cr.P.C. and before the Court also eye-witnesses proved the role of the appellants and presence of the appellants. Hence, the eye-witness account of witnesses proves the presence of the appellants and commission of murder by them. They have been rightly convicted under Section 302 IPC.

59. It is relevant to add here that each person being a member of unlawful assembly is guilty of offence being committed in prosecution of common object, has been held both by Apex court and High Court. The Apex Court in **Chandrappa and Others versus State of Karnataka** : (2008) 11 SCC 328 has laid down that it is unreasonable to expect from a witness to give a picture perfect report of the incident and minor discrepancies in their statement have to be ignored. Para 17 and 18 of the judgment is extracted as below:-

"17. It has been contended by the learned Counsel for the appellants that the discrepancies between the statements of the eyewitnesses inter se would go to show that they had not seen the incident and no reliance could thus be placed on their testimony. It has been pointed out that their statements were discrepant as to the actual manner of assault and as to the injuries caused by each of the accused to the deceased and to PW3, the injured eyewitness. We are of the opinion that in such matters it would be unreasonable to expect a witness to give a picture perfect report of the injuries caused by each accused to the deceased or the injured more particularly where it has been proved on record that the injuries had been caused by several accused armed with different kinds of weapons.

18. We also find that with the passage of time the memory of an eyewitness tends to dim and it is perhaps difficult for a witness to recall events with precision. We have gone through the record and find that the evidence had been recorded more than five years after the incident and if the memory had partly failed the eye witnesses and if they had not been able to give an exact description of the injuries, it would not detract from the substratum of their evidence.

It is however very significant that PW 2 is the sister of the four appellants, the deceased and PW 3 Devendrappa and in the dispute between the brothers she had continued to reside with her father Navilapa who was residing with the appellants, but she has nevertheless still supported the prosecution. We are of the opinion that in normal circumstances she would not have given evidence against the appellants but she has come forth as an eyewitness and supported the prosecution in all material particulars."

60. We have gone through the oral evidence recorded before the trial court and are of the view that finding of guilt recorded by trial court is based on correct appreciation of evidence. Minor contradictions and inconsistencies as pointed out by the learned *Amicus Curiae* for the appellants rightly have been ignored by the trial Court as we find from the evidence on record that the intention/object of the unlawful assembly was to assault and teach the victim a lesson and for that purpose they came armed with weapons immediately when the deceased along with P.W.1 and P.W.2 left from the house of the appellants, and committed the crime.

61. No doubt, in case of direct evidence and the ocular testimony of the eye-witness

being found to be trustworthy, reliable and cogent, it will not be necessary for the prosecution to prove the motive for the crime. In the present case, we have already held hereinabove, that the testimony of the eye-witnesses is wholly reliable and trustworthy. Even otherwise, as per the prosecution version, the main motive behind the crime was with regard to the dispute over *bidai* of the second wife of the deceased Hira Lal and appellants in the instant appeal are the brothers of the second wife and at the time of the incident, the second wife of the deceased was residing at the house of the appellants. When the deceased along with P.W.1 and P.W.2 went to take back his second wife Seema, scuffle took place between appellants and their father and the deceased Hira Lal. After that deceased Hira Lal became annoyed and in an annoyed stage, the deceased Hira Lal left along with P.W.1 and P.W.2 towards his house and in the way, the appellants surrounded and committed the crime. These all establishes the immediate motive of the appellants to commit the murder of the deceased Hira Lal.

62. Considering the aforesaid, we are of the view that the prosecution has proved his case beyond reasonable doubt against appellants **Kamlesh alias Ghora** and **Rajesh** and their conviction and sentence for the murder of deceased by the impugned judgment is fully justified.

63. In view of the foregoing discussions, the conviction and sentence of the appellants **Kamlesh alias Ghora** and **Rajesh** for the murder of deceased Hira Lal by means of the impugned order dated 06.04.2009/09.04.2009 does not call for any interference by this Court.

Appellants **Kamlesh alias Ghora and Rajesh** are in jail and they shall serve out the sentence as ordered by the trial Court.

64. Both the above-captioned appeals stand **dismissed.**

65. Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.

(2022)04ILR A1147
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.04.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Capital Case No. 1 of 2019
connected with
Jail Appeal No. 2322 of 2019

State of U.P. ...Appellant
Versus
Santosh Kumar Nat & Anr. ...Respondents

Counsel for the Appellant:
Govt. Advocate

Counsel for the Respondents:

A. Criminal Law - Indian Penal Code,1860 - Sections 302 & 201 - Circumstantial Evidence.--The last seen evidence is very important evidence and if proved and found trustworthy it can singularly lead to the inference of guilt.

B. In case of circumstantial evidence there should not be any snap in the chain of circumstances. If there is any snap in the chain, the accused is entitled to benefit of doubt. If some of the circumstances in the chain can be explained by any other reasonable hypothesis, then also the accused is entitled to benefit of doubt.

C. Evidence of "last seen together" do not by themselves lead to the inference that the accused committed the crime unless and until there is something more establishing connectivity between the accused and the crime.

D. Section 106 of Evidence Act.--- In case it is established that the accused was last seen together with the deceased prosecution is exempted to prove exact happening of the incident and burden of proof shifts on the accused to prove the same.

E. Time gap between last seen alive and recovery of dead body must be so small that the possibility of any person other than the accused being the author of the crime becomes impossible.

F. It is the nature and gravity of the crime and the manner in which it is committed which are germane for consideration of appropriate punishment in a criminal trial.

Capital Case is dismissed. Jail Appeal is partly allowed. (E-11)

List of Cases cited:-

1. St. of Raj. Vs Kheraj Ram : (2003) 8 SCC 224

2. Vilas Pandurang Patil Vs St. of Mah.: (2004) 6 SCC 158

3. Arun Bhanudas Pawar Vs St. of Mah.: 2008 (61) ACC 32(SC)

4. Vithal Eknath Adlinge Vs St. of Mah. : AIR 2009 SC 2067

5. Vijay Kumar Vs St. of Raj. : (2014) 3 SCC 412

6. Bhimsingh Vs St. of Uttarakhand : (2015) 4 SCC 281

7. Rohtas Kumar Vs St. of Har.: 2013 (82) ACC 401 (SC)

8. Prithipal Singh Vs St. of Pun., (2012) 1 SCC 10

9. Ashok Vs St. of Mah. : (2015) 4 SCC 393

10. St.of Goa Vs Pandurang Mohite : AIR 2009 SC 1066

11. St.of UP Vs Satish : 2005 (3) SCC 114

12. Sardar Khan Vs St. of Karn. : (2004) 2 SCC 442

13. Ravi Vs St. of Karn. : AIR 2018 SC 2744

14. Mohibur Rahman Vs St.of Assam : (2002) 6 SCC 715

15. Malleshappa Vs St. of Karn. : (2007) 13 SCC 399

16. Machi Singh Vs St. of Pun. (1983) 3 SCC 470

17. Ravji Vs St. of Raj. : (1996) 2 SCC 175

18. Swamy Shraddananda (2) Vs St. of Karn.: (2008) 13 SCC 767

19. Raj Kumar Vs St. of M.P., (2014) 5 SCC 353

20. Selvam Vs State : (2014) 12 SCC 274

21. Tattu Lodhi Vs St. of MP, (2016) 9 SCC 675

22. Sachin Kumar Singhraha Vs St. of MP : (2019) 8 SCC 371

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

(A) INTRODUCTION

(1) Two accused persons, namely, **Santosh Kumar Nat and Mamman alias Sonu alias Tejpal**, were tried by the Additional District & Sessions Judge/ Special Judge (POCSO Act), Faizabad in Special Sessions Trial No 84 of 2014 (C.N.R. No. UPFZ01-001666-2014, Registration No. 466 of 2014) : *State Vs. Santosh Kumar Nat and another,* arising out of Case Crime No. 357 of 2014, under Sections 302, 376A, 376D, 377 and 201 of the Indian Penal Code, 1860 (in short, referred hereinafter as **"I.P.C.'**) and Section 3/4 of the Protection of Children from

Sexual Offences Act, 2012 (in short, referred hereinafter as **''POCSO Act'**), Police Station Kotwali Bikapur, District Faizabad.

(2) Vide judgment and order dated 16.11.2019, the Additional District & Sessions Judge/Special Judge (POCSO Act), Faizabad, convicted and sentenced accused persons, **Santosh Kumar Nat** and **Mamman alias Sonu alias Tejpal**, in the manner as stated hereinbelow :-

i. Under Section 302 I.P.C. to be hanged to death till they are dead and fine of Rs.50,000/-. In default of fine, two years additional rigorous imprisonment;

ii. Under Section 376A I.P.C. to undergo life imprisonment;

iii. Under Section 376D I.P.C. to undergo rigorous imprisonment for life along with fine of Rs.25,000/-. In default of fine, one year additional rigorous imprisonment;

iv. Under Section 377 I.P.C. to undergo rigorous imprisonment for life along with fine of Rs.25,000/-. In default of fine, one year additional rigorous imprisonment; and

v. Under Section 201 I.P.C. to undergo seven years R.I. and fine of Rs.10,000/-. In default of fine, six years additional rigorous imprisonment.

All the sentences were directed to run concurrently.

(3) Aggrieved by the aforesaid judgment and order dated 16.11.2019, convicts/appellants, **Santosh Kumar Nat and Mamman alias Sonu alias Tejpal**, preferred Jail Appeal No. 2322 of 2019 : *Santosh Kumar Nat and another Vs. State of U.P.*

(4) Capital Case No. 1 of 2019 arises out of the Reference made by the learned trial Court under Section 366 (1) of the Code of Criminal Procedure, 1973 to this Court for confirmation of the death sentence of convicts **Santosh Kumar Nat** and **Mamman alias Sonu alias Tejpal**.

(5) Since the above-captioned capital sentence reference and jail appeal arise out of a common factual matrix and impugned judgment dated 16.11.2019, we are disposing of these matters, by this common judgment.

(6) In view of the judgments of the Apex Court in **Bhupinder Sharma Vs. State of H.P. :** (2003) 8 SCC 551 and **Nipun Saxena and another Vs. Union of India and others :** 2018 SCC OnLine 2772, the name of the victim is not being mentioned and describe her as "victim X" in the judgment hereinafter.

(B) FACTS

(7) The informant Sri Prem Chandra (P.W.1) had filed written report (Ext. Ka.1), alleging therein that on 11.09.2014, at about 06:00 p.m., his daughter, the "victim X', aged about 06 years, had gone from house on the outer side of village for call of nature, after informing to her mother Usha (P.W.3) but she ("victim X') did not return home, then, they searched a lot but could not trace her. His daughter's appearance is dark colour; small hair on the head; short height 2¾ feet; average built; barefoot; and wore pink colour frock, tight pink-colour paijama, pink colour underwear, silver ear rings in the ears; and simple nose pin on the nose. His daughter is frequent in conversation and is aware of her name and address. It has further been stated that he did not have any enmity with anyone nor has any land dispute.

(8) On the basis of the aforesaid written report (Ext. Ka.1), an F.I.R. (Ext.

Ka.9), bearing Case Crime No. 357 of 2014, was registered under Section 363 I.P.C., Police Station Kotwali Bikapur, District Faizabad, against unknown person.

(9) The evidence of P.W.6-Constable Rakesh Kumar shows that on 12.09.2014, he was posted as Constable at Police Station Bikapur, District Faizabad. On the said date, on the basis of the written report (Ext. Ka.1) submitted by the informant Prem Chandra (P.W.1), an F.I.R. (Ext. Ka.9) bearing Case Crime No. 357 of 2014, under Section 363 I.P.C. was registered by him against unknown person at 12:30 a.m. in chik no. 191 of 2014.

In cross-examination, P.W.6-Constable Rakesh Kumar had deposed that this case is five years old and it was not registered in the presence of S.O. but it was registered in the presence of the officer present in night. The informant Prem Chandra (P.W.1) had come to his office with a written report for lodging F.I.R. He further deposed that he could not tell whether informant Prem Chandra (P.W.1) was literate or not. When the informant (P.W.1) came for lodging the report, then, he came with written report with signature affixed thereon. He saw the written report. On seeing the written report, it appeared that it was written by some other person and the signature only thereon was of the informant (P.W.1). When the informant (P.W.1) came with written report, he immediately started writing the case. He did not remember how long he (P.W.1) stayed at police station. He further deposed that the mobile number, which was written in the report, was not verified by him. When the informant (P.W.1) had come to lodge the case, it was 12:30 in the night. He did not remember who was the staff present in the police station at that time apart of him. The investigation of the case was handed over to SI Munendra Pal Singh (P.W.9), In-charge of Chaure Bazar outpost. The information in this regard was given to SI Munendra Pal Singh (P.W.9) by post on the instruction of S.H.O. He was posted at police station Bikapur from 2012 to 2014. He did not know when the name of the accused in this case came to light.

(10) A perusal of the chik F.I.R. (Ext. Ka. 9) reveals that the distance between the place of the incident and police station Bikapur is 12 Kms. It is significant to mention that a perusal of the chik FIR also shows that on the basis of written report (Ext. Ka.1), Case Crime No. 357 of 2014, under Section 363 I.P.C. was registered against unknown person.

(11) The evidence of P.W.4-Awadhesh Kumar shows that on 12.09.2014, he was posted as Naib Tehsildar, Bikapur, Faizabad. On the said date, *"panchayatnama'* of the deceased "victim X' daughter of Prem Chandra Kori, resident of Chaure Chandauli (Bhaujai-Ka-Purwa), Police Station Kotwali Bikapur, was conducted on spot between 10:30 a.m.-01:00 p.m. In the presence of "panchan' Prem Chandra Kori, Phool Chandra, Bhagelu, Dipak and Surjeet, *"panchayatnama'* (Ext. Ka.2) was written before him by SI and got it prepared with his signature. He got prepared letter to Reserve Inspector (Ext. K.3), letter to the Chief Medical Officer (Ext. Ka.4), photo lash (Ext. Ka 5), Form-13 (Ext. Ka.6) and specimen seal (Ext. Ka.7), under his handwriting and signature on the spot.

In cross-examination, P.W.4-Awadhesh Kumar had deposed that he had got the *"panchayatnama'* prepared of this case. He had appointed witnesses of

inquest, out of whom two persons were of the family of the deceased and rest from outside. Out of two persons in the family of the deceased, one person was the father of the deceased, namely, Prem Chandra (P.W.1) and names of others were not remembered. He took the opinion of witnesses of inquest collectively as well as separately. All of them told that death of the deceased seems to be on account of drowning in water.

(12) The investigation of the case was conducted by P.W.9-S.I Munendra Pal Singh, who, in his examination-in-chief, had deposed that when he was posted as Chowki In-charge, Chaure Bazar, Police Station Bikapur, District Faizabad, investigation of Case Crime No. 357 of 2014, under Section 363 I.P.C. was handed over to him against unknown persons. The copy of the chik report was supplied to him during the investigation at the place of incident through Home Guard. He started to conduct the investigation of the case from 12.09.2014. He recorded the statement of the informant (P.W.1), his wife Smt. Usha (P.W.3) and his mother Smt. Bachauna (P.W.2) and during the investigation, he recovered the dead body of the missing girl "victim X' from "Gadayee' (small pond). On the direction of Naib Tehsildar, *''panchayatnama'* was prepared and after preparing it, the dead body was sent for post-mortem. He, thereafter, inspected the place of recovery of the dead body and recorded the statement of witness of the incident and witness of inquest Sri Surjeet Bhagelu. He also inspected the place of the incident. He prepared the site plan of the place of the incident (Ext. Ka.11) and also site plan of the recovery of the deadbody (Ext. Ka.12). He proved the sealed articles under recovery memo (Ext. Ka. 13), which were recovered from the place of the incident and kept in six different containers. He further deposed that during investigation on the basis of evidence of the witnesses, he found the involvement of Santosh Kumar Nat and Mamman alias Tej Pal alias Sonu Nat (appellants) in the incident. He deposed that after receipt of the second copy of post-mortem report in the office, after its perusal and on confirmation of committing rape and unnatural sex with the "victim X', deleted Section 363 I.P.C., added Sections 376 (1), 377, 302, 201 I.P.C. and Section 3/4 of POCSO Act and entry of which was made in the G.D. The further investigation of the case was done by S.H.O. Sripal Singh, who had died. He had seen him reading and writing. He further deposed that S.H.O. Sripal Singh, on perusal of the post-mortem report, found that the cause of death was due to respiratory obstruction and ante-mortem injuries and recorded in CD II. He recorded the statement of Sagar Nat, Santosh Kumar Nat, Suraj Kumar Singh, Indra Bahadur Yadav. In CD III, the search and address clues of the accused have been observed. In CD No. 4, 5 and 6, endorsement in respect of clues of address was made. In GD No. 7, endorsement of the arrest and recording of statements of accused Santosh Nat and Mamman Nat was made and during investigation, Sections 376A and 376D I.P.C. were added.

In cross-examination, P.W.-9 Munendra Pal Singh had deposed that recovered articles were sent to laboratory for medical examination, which were not received so far. He did not record the statement of accused Indra Bahadur Yadav nor he met him. He was the first Investigating Officer in this case. He conducted the investigation of the case till 12.09.2014. He got the investigation of this case after midnight on 12.09.2014 but did not

remember the time, however, it was almost 1:30 a.m. in the night. He conducted the investigation till 12.09.2014 at 21:20 hours. He conducted the investigation for less than 24 hours. The case was not registered in his presence. On 12.09.2014, the In-charge of the police station was Inspector Sripal Singh. He further deposed that during his investigation, he recorded the statement of the informant Prem Chandra (P.W.1), his wife (P.W.3) and his mother Smt. Bachauna (P.W.2). After receiving material of case, he had perused the chik F.I.R. In the written report, word "author' is not mentioned. He deposed that he did not see at the moment who wrote Ext. Ka. 1. He denied the suggestion that written report of the said case was written by him.

P.W.9 Munendra Pal Singh, in his cross-examination, had further deposed that the case was lodged on 12.09.2014. He was not at the police station when the case was lodged as he was patrolling in the area. On the information of villagers, he went to the village. Home Guard Ashok Pandey had brought the copy of the FIR on the spot. He deposed that if any information/Tahrir has been sent by the informant (P.W.1) to the police station through post, then, he is not aware of it. He reached the spot at around 1:00 am in the night. He went alone to the village. The police force had arrived after 10-12 minutes when he reached the spot. He did not remember, who came at that time. Inspector in-Charge Sripal Singh had come to the spot and other people also came. The Inspector In-Charge had arrived only after 10-12 minutes by the government-vehicle. Sub-Inspector Rajesh Yadav, Sriprakash Singh and other police personnel were there. He saw the Chick F.I.R. on the spot and started the investigation. On the spot, informant Prem Chandra (P.W.1) and his wife Usha Devi (P.W.3) and his mother Bachauna Devi (P.W.2) were present. Other people of the village had also gathered. They started to search the missing girl. The search for the girl continued till her body was not found. The body of the girl was found in a "Gadayee' (small pond) at 10:00 am. The informant of the case was also along with him. He did not write the written report. The Investigating Officer was changed on 12.09.14. Being a case of 302 IPC, the investigation was handed over to SHO Sripal Singh. The Investigating Officer was changed after recovery of dead-body. His transfer from Bikapur Police Station took place after 10-15 days. He did not know who became I.O. after Sripal. He did not know that the body of the girl was recovered in the presence of accused Santosh Kumar s/o Kamala Prasad and Indra Bahadur Son of Vindeshwari. He is not aware that accused Santosh Kumar s/o Kamla Prasad was the driver of a local MLA Abhay Singh. It is wrong to say that after arresting the accused Santosh and Indra Bahadur from the spot, they were released from the police station under the pressure of Abhay Singh. The pond from where the corpse was recovered, was filled with water. Immediately after the body was found, it was sent for post-mortem after "panchnama' in the same condition. The body was not washed with water. He is not aware of the fact that on the complaint of the informant, his wife and villagers, the Investigating Officer was changed. Later on, the Investigating Officer Sripal Singh had passed away. He did not arrest the accused. He did not know who had arrested them. He is not aware that the villagers had given a complaint to the Governor. He is also not aware who had sent the sample for DNA test. He denied the suggestion that he has not done the investigation fairly and had implicated the innocent and saved the accused persons.

(13) The evidence of P.W.8 Manoj Kumar shows that on 20.09.2014, he was posted as SSI at police station Bikapur,

district Faizabad. On the said date, the investigation of Case Crime No. 357 of 2014, under Sections 376 (1), 376A, 376 D, 377, 302, 201 I.P.C. and 3/4 of the POCSO Act was conducted by his erstwhile Investigating Officer Sripal Singh and after his transfer, the investigation of the case was entrusted to him. After taking over the investigation of the case and on perusal of the post-mortem report of deceased "victim X' as well as original *''panchayatnama'*, he made endorsement of the same in the case diary and also enclosed the same with case diary. During investigation, on 21.09.2014, he recorded the statement of witness of *''panchayatnama'* Phoolchand s/o Ramraj resident of Bhujai Ka Purwa, Chaure Chandauli, witness Dipak Kumar s/o Rajaram, Prem Chandra s/o Ram Raj (informant P.W.1). During interrogation, the aforesaid witnesses confirmed to him the murder of the deceased "victim X' by accused Santosh Kumar and Mamman. After that, Sub-Inspector Uday Raj Yadav took over the investigation of the case being Station In-charge.

In cross-examination, P.W.8-Manoj Kumar had deposed that on 20.09.2014, the investigation of the case was entrusted to him. Prior to him, the investigation of this case was conducted by the then Inspector-in-charge Sripal Singh. On account of the transfer of the then Inspector-in-Charge Sripal Singh to non-district, the investigation of the case was entrusted to him. From 13.9.14 to 18.9.14, the investigation was conducted by the former Investigating Officer Sripal Singh and during that time, his posting was in Bikapur police station. He was with him (Sripal Singh) occasionally during the investigation. It has been mentioned by the earlier Investigating Officer that the accused Santosh Kumar Nat and Mamman could run away to Mumbai. Accused Santosh Kumar Nat was not arrested from Mumbai. He stated that it is true that in the statement given in the Court by informant Prem Chandra (P.W.1) on oath, it is mentioned that Santosh (accused) was arrested by the police from Mumbai. He had no knowledge whether the informant or villagers had given any application against the Investigating Officer. He further stated that it is true that the arrest of accused Santosh Kumar Nat was made on 18.9.14 i.e. a week after the incident. He denied the suggestion that he also went to Mumbai to arrest the accused Santosh Kumar Nat.

P.W.8 further deposed that investigation of the case remained with him for two days. After that, the newly appointed SHO SI Shri Uday Raj Yadav (P.W.7) took over the investigation. In these two days, he was able to take the statement of witness of "panchan' only. He was not present at the time of the recovery of the dead body. He was at the police station at that time. He could not tell in whose presence the body was recovered. He denied the suggestion that the investigation was withdrawn from him on account of some complaint. He further deposed that he could not tell when the DNA of the accused was sent for the report. During his investigation, he did not take action for DNA report. He did not remember that when the incident took place and Abhai Singh was the local MLA or not. He denied the suggestion that he is deliberately expressing ignorance about Abhay Singh was the MLA. He further deposed that he had no knowledge whether Santosh Kumar son of Kamala Prasad was the driver of MLA Abhay Singh or not. He further stated that he went to the house of the accused in the past before the investigation came to him but how long back, he did not remember. He stated that it is true that after

the incident took place, he had gone to the house of the accused. After the investigation was taken over from him by the other Investigating Officer, he went a couple of times along with the second Investigating Officer. He did not remember at this time for how long he remained posted in Thana Bikapur. Accused Mamman was not arrested from the truck. He was arrested from Kudemar intersection. He was in the arrest team. He could not tell the distance of the place of arrest from the house of the accused Mamman. He denied the suggestion that during those two days' of investigation, he conducted the investigation improperly. He also denied the suggestion that for implicating the accused, he dropped the accused Santosh Kumar S/o Kamala Prasad under the pressure of MLA.

(14) Further investigation of the case was conducted by P.W.7-Uday Raj Yadav. He, in his examination-in-chief, had deposed that the in-charge of Police Station Bikapur is called Kotwal. In other words, it is Inspector. At the time of taking over the investigation of the case, he was Station Officer, Bikapur. Among the former Investigating Officers, Sripal Singh was the Inspector and other two Investigating Officers, SSI Manoj Kumar (P.W.8) and Munendra Pal Singh (P.W.9), were of SI rank police officers. Both these police officers were of his rank and were equivalent in rank to him. Till the time he remained posted at the police station, the DNA test report of this case was not received from the Forensic Science Laboratory. The DNA test report has not yet been received from the Forensic Science Laboratory on the record. Letter No. TSF 27/2013 dated 14.2.2014, sent by the Forensic Science Laboratory, came to his notice and after redressing the defects, the letter was sent again but the DNA report has not been received yet. If it is received, it should have been attached with the record. He stated that the local MLA was Abhay Singh at the time of the incident and there was a Samajwadi Party Government. The former Investigating Officer had called Santosh son of Kamala Prasad for interrogation and subsequently released him on finding no evidence against him. This fact was in his knowledge. Indra Bahadur Yadav was also interrogated but he was not arrested. The body of the deceased was recovered on the next day after the incident from a "Gadayee' (small pond) located behind the house of accused Santosh. He did not know whether Santosh son Kamala Prasad was the driver of MLA Abhay Singh or not. Abhay Singh was the MLA of Samajwadi Party. He was a member of Samajwadi Party. He stated that he could not say anything about the statement of the informant (P.W.1) wherein he had stated that under the pressure of the police, the names of Santosh S/o Kamla Prasad and Indra Bahadur Yadav were dropped from this case but he did not find any evidence against them. He conducted the investigation of the case on the basis of circumstantial evidence. He did not interrogate Santosh son of Kamala Prasad and Indra Bahadur. On the basis of the case diary compiled by the former Investigating Officer, he found no evidence in the case diary against the above two persons. He further stated that he had no knowledge that Indra Bahadur Yadav was a dominant person of that village. He stated that in this case, earlier the missing report of the deceased was filed. After that, her dead body was recovered. He further deposed that according to his knowledge, the missing report was registered before the body was found. He had no knowledge

after how many days copy of the FIR was given to the informant (P.W.1). He recorded the statement of the informant of this case Prem Chandra (P.W.1), the mother of the informant, namely, Mrs. Bachauna (P.W.2) and the wife of the informant, namely, Usha (P.W.3). He denied the suggestion that he had arbitrarily written the statements of Prem Chandra (P.W.1), the mother of the informant, namely, Mrs. Bachauna (P.W.2) and the wife of the informant, namely, Usha (P.W.3). He was appointed as Investigating Officer of the case after a week of the incident but did not remember the date. He further denied the suggestion that former three Investigating Officers were removed from this case under the public pressure. He stated that due to the change of offences/sections in the present case, the investigation of the case was taken over from the previous Investigating Officers according to the rules. He further stated that they were not removed by any order.

P.W.7 had denied the suggestion that on the basis of the complaint of the informant and villagers, the former Investigating Officers were removed. He himself had recorded the statement of the informant, his mother and his wife. Accused Mamman had told in his statement under Section 161 Cr.P.C. that he is doing job of a Cleaner in a truck. Both the accused were arrested by the earlier Investigating Officer. The accused in this case were in jail during the period when he did investigation. Their names came to light on the basis of evidences collected by the earlier Investigating Officers. The accused were arrested by the Investigating Officer Sripal Singh and his team. He did not remember the date on which the arrest of accused Santosh Kumar Nat was made. It was mentioned in the case diary. He did not know from where the arrest was made. He did not know about the date of arrest of accused Santosh Kumar Nat. He had not met the accused before forwarding the charge sheet. He did not talk to the accused about the incident as he had many other evidences. He denied the suggestion that there was any demonstration at the police station due to the proceedings in the investigation of this case. He had no knowledge whether the demand for a CBI inquiry was raised in relation to this incident or not. He denied the suggestion that he forwarded the charge-sheet against the accused to the Court without any evidence.

(15) Going backward, the autopsy on the dead-body of "victim X' was conducted on 12.09.2014 at 03:50 p.m. by Dr. Devendra Kishor Sarraf (P.W. 5), who found on her person ante-mortem injuries, enumerated hereinafter :--

"Ante-mortem injuries of deceased ''victim X'

(1) Contused swelling over Rt. eye size 3 x 2.5 cm.

(2) Lacerated wound over Rt. upper lid size 0.5 x 0.5 cm muscle deep.

(3) Abrasion over Lt. upper lid 3 cm x 2.5 cm.

(4) Contusion present over both upper & lower lip Ċ lower 1/3rd of nose.

(5) Wall of labia majora is tear at "6' and "10' O'clock position.

(6) Contusion present around post and lateral part of anus & 0.5 cm around anal opening.

(7) Anal wall Ċ skin tear at 6 O'clock.

(8) Goose skin over hand & feet present."

The cause of death spelt out in the autopsy report of the deceased "victim

X' was asphyxia as a result of ante-mortem smothering.

(16) It is significant to mention that in his deposition in the trial Court, Dr. Devendra Kishor Sarraf (P.W. 5) has reiterated the said cause of death and also stated therein that on 12.09.2014, he was posted as Ophthalmologist in Sriram Hospital, Ayodhya, Faizabad. On that day, his duty was with his colleagues Dr. AK Singh and Dr. BM Maurya in P.M. House, Faizabad. On the same day, the body of deceased "victim X' daughter of Prem Chandra Kori resident of Bhulai-Ka-Purwa, PS Bikapur, Faizabad, was brought by C.O. Rajat Singh and C.P. Mahendra Verma of Kotwali Bikapur, Faizabad at 03:45 p.m. The dead body was identified by the father of the deceased Prem Chandra (P.W.1). He started to conduct the post-mortem of the dead body of the deceased at 03:50 p.m. and completed it at 05:00 p.m. Ten forms were sent with the body. He further deposed that the age of the deceased was about 6 years; her height was 112 cms; her physique was of medium average stature; stiffness was present in the upper and lower limbs of the body; eyes and mouth were half-open; teeth were 12/12; the inner part of the mouth and the nails had become oily; and the eye membranes were congested.

Dr. Devendra Kishor Sarraf (P.W. 5), in his examination-in-chief, had further deposed that on internal examination, he found that skull was normal; brain membrane was congested; the brain was congested; the teeth were 12/12, larynx and vocal cords were normal, trachea & hyoid bone were normal; ribs in chest, breathing tube were normal; both lungs were congested; the membrane around the heart was congested; the right corner of the heart was full and the left was empty; the large blood vessel was normal; abdominal hair was normal; 150 ml pasty material was present in the stomach; pasty material and gases were present in the small intestine; faecal matter and gas were present in the large intestine; liver was congested and gallbladder was empty; pancreas was congested; both kidneys were congested; and the bladder was empty. He had deposed that the expected time of death was approximately one day and the cause of death was suffocation due to smothering.

In cross-examination, P.W.5 Dr. Devendra Kishor Sarraf had deposed that he had no knowledge with regard to test results sent in envelops 1 to 6 at the time of post-mortem. He opined that there can be a difference of 3 to 6 hours pertaining to the time of the death of the deceased. After the autopsy, he handed over the body to the police. He denied the suggestion that he had made any carelessness during the course of post-mortem.

(17) At this juncture, it would be relevant to mention here that the recovered items, samples of the deceased as well as blood samples of the accused were sent for DNA Test to the Forensic Science Laboratory, Mahanagar, Lucknow. Vide report dated 21.08.2019, Forensic Science Laboratory, Mahanagar, Lucknow has reported as under :-

डी.एन.ए. रिपोर्ट में अभियुक्तगणो के रक्त नमुनो को :–

प्रदर्श–1 (अभियुक्त संतोष कुमार का)

प्रदर्श–2 (अभियुक्त मम्मन उर्फ तेजपाल नट का)

के रूप दर्शाया गया है।

पीडिता/मृतका से प्राप्त वस्तुओ एव स्वॉब को निम्न प्रकार से दर्शाया गया है:–

प्रदर्श–3 दीवार की खुरची मिट्टी।

प्रदर्श–4 खुली जगह की मिट्टी।

प्रदर्श–5 कमरे के अन्दर की मिट्टी।

प्रदर्श–6 बाल
प्रदर्श–7 टुकडा कपडा।
प्रदर्श–8 फ्राक।
प्रदर्श–9 पैजामी।
प्रदर्श–10 कच्छी।
प्रदर्श–11 वैजाइनल स्लाइड सवॉब।
प्रदर्श–12 यूरेथ्रल स्लाइड स्वॉब।
प्रदर्श–13 पेरिनियल स्लााइड स्वॉब।
प्रदर्श–14 बक्कल स्लाइड स्वॉब।
प्रदर्श–15 नेल कटिंग।
प्रदर्श–16 एनल स्लााइड स्वॉब।

" परीक्षण परीणाम

प्राप्त प्रदर्शी ¼1½ से ¼16½ का डी-एन- ए- परीक्षण किया गया ।

स्रोत प्रदर्श ¼12½] ¼13½ व ¼16½ ¼मृतका से½ पर उपस्थित

बायोलोजिकल द्रव्य के स्रोत व स्रोत प्रदर्श ¼1½ ¼संतोष कुमार से½ में समानता पायी गयी परन्तु स्रोत प्रदर्श ¼2½ ¼eEeu उर्फ तेजपाल से½ नही पायी गयी। (HID & Y-STR KIT)

स्रोत प्रदर्श ¼11½ ¼मृतका से½ में पुरुष विशिष्ट एलील की उपस्थिति

पायी गयी परन्तु आंशिक डी-एन-ए- प्रोफाइल जेनरेट हुआ।

प्रदर्श ¼3½ से ¼6½ से डी-एन-ए- निष्कर्षण न हो सका।

प्रदर्श ¼7½ से ¼10½] व ¼15½ में आंशिक डी- एन- ए- प्रोफाइल जेनरेट हुआA

स्रोत प्रदर्श ¼14½ ¼मृतका से½ स्त्री मूल का पाया गया ।

डी-एन-ए- परीक्षण में जेनेटिक एनालाइजर व जीन मेपर सॉफ्टवेयर का प्रयोग किया गया।

उक्त परिक्षण में मानक विधियों प्रयोग में लायी गयी।"

(18) The medical examination of convicts/appellants Santosh Kumar and Mamman alias Tejpal were conducted on 18.09.2014 at 12:15 p.m. and 12:05 p.m., respectively, at Community Health Centre, Bikapur, Faizabad by Dr. Satish Chandra, who found the following injuries on their person :-

"Injury of Santosh Kumar, s/o Ram Kumar

A black mole over right side of face about 2.5 c.m. below from the lower lid."

Injury of Mamman alias Tejpal, s/o Late Hari Ram

A black mole over right side of face about 5.5 cm below from the lateral of the Rt. eye."

(19) It is pertinent to mention that Dr. Satish Chandra was not examined. However, he stated in the injury report that there is no injury.

(20) The case was committed to the Court of Sessions in usual manner where the convicts/appellants were charged for the offence punishable under Sections 376A, 376D, 377, 302, 201 I.P.C. and Section 3/4 of the Protection of Children from Sexual Offences Act, 2012. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(21) During the trial, in all, the prosecution examined 9 witnesses viz. P.W.1-Prem Chandra, who is the father of the deceased and informant of this case, P.W.2-Smt. Bachauna, who is the grand-mother of the deceased, P.W.3-Smt. Usha, who is the mother of the deceased, P.W.4-Sri Awadhesh Kumar, in whose presence *"panchayatnama'* was conducted, P.W.5-Dr. Devendra Kishor Sarraf, who conducted the post-mortem of the deceased, P.W.6-CP Sri Rajesh Kumar Pal, who had lodged the chik F.I.R. on the basis of written report of informant P.W.1-Prem Chandra and P.W.7-

Uday Raj Yadav, P.W.8-Sri Manoj Kumar and P.W.9-Sri Munendra Pal Singh, who were the Investigating Officers of the case. From the side of appellants/convicts, Sri Saeed Husain was examined as D.W.1.

(22) P.W.1-Prem Chandra, in his examination-in-chief, had deposed that he had one daughter and three sons, out of whom his daughter had died in the incident. The incident is of 11.09.14. His daughter "victim X', aged about 6 years, went from home at 6 o'clock in the evening for urinal after informing his wife Usha (P.W.3) but his daughter did not return. He searched his daughter in the village but could not find her. On the same day, he went to the police station Bikapur for giving information to the police about the incident. After getting scribed the report (5A) of the incident from a man in the village itself and putting his signature thereon, he gave that to the police station. He proved the written report (Ext. Ka.1). He further stated that on the next day of the incident, his mother and wife told him that on the day of the incident, his mother was sitting in front of Raja Pradhan's house and saw that "X' (deceased) was going to Santosh's house with some items. The name of Santosh's father is Ram Kumar Nat. In the house of Santosh (appellant no.1), Indra Kumar Yadav, Mamman alias Sonu (appellant no.2) and Santosh Kumar (appellant no.1) were sitting and drinking alcohol. On the second day, around 9-10 a.m., the dead body of "X' was found in the "Gadayee' (small pond) next to the house of Santosh Nat (appellant no.1). He had full belief that Santosh Nat (appellant no.1), Mamman alias Sonu (appellant no.2) and Indra Bahadur Yadav sexually assaulted his daughter "victim X' under intoxication, thereafter, killed her and thrown her body in a "gadayee' (small pond). The Inspector came to the spot.

P.W.1-Prem Chandra, in his cross-examination, had deposed that he did not go to work on the day of the incident. He worked in brick slurry. He also go outside the village to work. He goes to work for a distance of 10-15 kms. On the day of the incident, he was at home. He went to the farm for about two hours. He went to the farm at around 2.30 p.m. and came back in about two hours. He came to know about the missing of his girl around 6:30 p.m. His wife and his mother told him. On getting information, first he searched around the village along with family members. He searched whole night in the village but no trace was found. Even outside the village, about 10 km distance trace was made with the help of family members. She was found around 9:30 a.m. and till then they were still searching. For lodging the report of the incident, he had gone to the Village Pradhan's house at around 8.30 a.m., where the Village Pradhan had telephoned the police station. Then, around 09:00 p.m., the police had come to village. The policemen were also co-operating in the search in the night. He further deposed that he did not go to the police station to lodge the report. The report was written in the village itself by the Inspector, whose name is not known. The report was written in front of the house of Santosh Kumar.

P.W.1 Prem Chandra was shown the said report (Ext. Ka.1), then, he stated that this report was not written in front of the house of Santosh. However, his signature was on Exhibit Ka-1. He did not remember when and where he signed it. He himself wrote Exhibit Ka-2. He wrote this application in the evening but could not tell its time. When the report was written, no

one else was present there except him and it was written at his house. Before writing the report, he had inquired from family members and the villagers. Exhibit Ka-1 was sent by post to Inspector-in-Charge Kotwali Bikapur and he posted it from Chaure Bazar Post Office. He sent the same on the next day of the incident. It was sent by pasting ticket on the envelope. He had pasted ticket of Rs.100/-. He went to the police station around 17th. The Village Pradhan, his wife, his mother and 10-12 people from his village went along with him to the police station. At the police station, no paper was signed by him. His report at the police station was registered three to four days after the incident. He signed Exhibit Ka-1 after three to four days of the incident. Apart from Exhibit A-1, he had not signed on any other paper. The memo paper number 9A was written on the date of recovery of the body of his girl in the evening itself, on which his wife and he had signed. No one else had put signature thereon before him. He did not know what was written in the memo. The paper of memo was not blank but when he signed, signature of any villager was not there on the memo. He did not know Dilip Kumar Choubey. He did not even know Sangeeta Devi and Pooja Rani Patel and Sunita Devi. The memo was not written before him. He did not know who wrote that. The signature was done in the village itself. He did not read memo and was not read over to him. He did not read the Chik FIR nor was read over to him. He further deposed that the action of the police about the incident was not satisfactory.

P.W.1 had further deposed that accused Santosh and Mamman are residents of his village. The house of Santosh is about 500 meters away from his house. The house of Mamman is about 100 meters away from his house. There are 20-25 houses in his village. He met the accused in the morning of the incident. Accused Mamman used to work as a helper on the truck from one week prior to the incident. Accused Santosh Kumar did not do any work, rather he used to drink alcohol and roam here and there. His family consisted of Santosh and his sister who lived in Mumbai. Since she belonged to the village, he knew Santosh's sister. He did not know whether Santosh knew or did the work of television and electricals. There is electricity in Santosh's house. There is no electricity in his (P.W.1) house. There is no electricity in 10-12 houses in the village. The rest of the houses have electricity. Santosh was caught by the police from Mumbai. Santosh had fled away to Mumbai after the incident. The accused Santosh was caught by the police a week after the incident. The information about the arrest was received from the police. The whole village came to know that Santosh had been arrested by police from Mumbai. Santosh has three rooms in his house. A thatch was laid on the front. The accused Mamman was caught by the police after the incident from a truck. This fact was also known to the whole village. In the house of Mamman, his brother, sister-in-law and three children of his brother were there. He has no sister. Mamman's brother worked as a labourer. They also went to the house of the accused in search of the girl. The policemen had gone too. He further deposed that there were two locks put on, in Santosh Kumar's house. Neither they nor the villagers saw Santosh Kumar locking his house. Santosh had left his house in the evening on the day of the incident. In the evening, Santosh was seen by the villagers and the people of the market before prevailing darkness. It was mild cold at the time of the incident. The girl's body was found before lodging the report. Everything

was written correctly in the report. It is rightly written in the report that when she did not return home, they searched a lot but no trace could be found. Apart from these accused, Santosh Kumar son Kamala and Indra Bahadur son Vindeshwari Yadav were also involved in the incident. Indra Bahadur Yadav belonged to his village. He already knew him. Indra Bahadur was an influential and powerful man in the village. He lodged the report against him and the policemen had also caught him but later on released him. His daughter did not use to go to the house of the accused. She knew all the four accused. The police did not challan Santosh son of Kamla and Indra Bahadur in this case. Santosh son of Kamla is the driver of local MLA Abhay Singh. Abhay Singh is the MLA of Samajwadi Party. He admitted the suggestion that the police did not challan Santosh son of Kamla and Indra Bahadur Yadav under the pressure of MLA. He had complained about this to the higher police officers but no action was taken. He got the copy of Chik FIR, about 10 days after the incident. Kotwal had given it, he did not remember his name. He also denied the suggestion that the police did not challan the real accused and he has given a false statement under pressure of the police.

(23) P.W.2-Bachauna, in her examination-in-chief, had deposed that the incident happened about 8 months ago at about 5:00 p.m. She was on the roadside at Raja Pradhan's door. Her grand-daughter "victim X', aged about 6 years, was returning from the shop with "namkeen' and "toffey' in her hand. She called and asked "where "victim X' was going', then she said that Santosh uncle had asked to bring "Namkeen' and she was going there to give it. Santosh gave Rs.10/-. She saw Santosh and Mamman alias Sonu and Bahadur at the door of Santosh. Santosh son of Kamala was also there. The name of the father of Santosh present in Court is Ram Kumar. She saw her grand-daughter "victim X' going in the house of Santosh Nat along with Mamman. The electricity was in at the house of Santosh and T.V. was on play. When she did not come back, Santosh and Mamman took "victim X' in the room. On the next day, the body of "victim X' was found in a "Gadyee' (small pond) behind the house of Santosh. Her son (P.W.1) had lodged the report of the incident. She had told all these things to the Inspector. The Inspector had come to the spot and had conducted *"panchayatnama'* of the dead-body.

In cross-examination, P.W.2-Bachauna had stated that there are two persons named Santosh in her village. The name of the father of one Santosh (accused) is Ram Kumar and the name of the father of another Santosh Kumar is Kamla. In connection with this incident, the police had also caught another Santosh Kumar son of Kamla, but left him after taking bribery. In connection therewith, he had also complained to the higher officials that the police had released Santosh Kumar son of Kamla after taking bribe. It was his son who had lodged an FIR in this incident and he also complained that the police had released Santosh Kumar son of Kamla after taking bribe. Santosh son of Kamla is the driver of MLA Abhay Singh, under his pressure, the police released Santosh Kumar son of Kamla. Santosh son of Kamla was involved in this incident. Indra Bahadur Yadav son of Vindeshwari Yadav was also involved in this incident, whose name was dropped by the police after taking bribe. She had no enmity with Santosh and Mamman. On the day of the incident, she saw Santosh and Mamman at the door of Pradhan. The distance of the

Pradhan's house from his house is 1-1½ bigha. The house of Santosh son of Ram Kumar falls between her house and the Pradhan's house. They are not her "*pattidar*'. She is Kori by caste. No one used to come and go from her house to the house of Santosh and Mamman or vice-varsa. The deceased "victim X' was coming from near the primary school with snacks. The primary school is at a distance of about 4 bighas from her home. She saw the deceased, "victim X', bringing snacks from there. She was sitting at the door of Pradhan when she saw Santosh Kumar son of Kamla and Indra Bahadur Yadav at the door of the Pradhan. "victim X' was not there when Santosh s/o Kamla and Indra Bahadur Yadav were at the door of the Santosh. She had three sons. The report of this incident was lodged by her son Prem Chand (P.W.1). She had told everything to Prem Chandra (P.W.1). Her son Prem Chandra had reported the incident on the day of the incident. The report of this incident was not written by the Inspector because Inspector had taken bribe. Her son had lodged an FIR against Santosh S/o Kamla and Indra Bahadur but the Inspector did not take any action against them by taking bribe. Santosh and Mamman were caught by the police after 8-9 days and detained in this incident. In the report, which was written by his son, Santosh and Mamman were not named rather the police had implicated these persons by excluding Santosh son of Kamla and Indra Bahadur Yadav.

(24) P.W.3-Smt. Usha, in her examination-in-chief, had deposed that she had three sons and one daughter, whose name was "victim X' aged about 6 years at the time of the incident. She did not remember the date of the incident. The day was Thursday. The incident happened almost a year ago. It was 6 o'clock in the evening. Her daughter had gone out for call of nature. She saw from her door that Santosh Nat and Mamman (accused/appellants) and Indra Bahadur and Santosh son of Kamla were drinking alcohol at their door. She had not seen "victim X' at their door. Her mother-in-law, Bachauna (P.W.2), told that Santosh Nat (convict/appellant no.1) asked her (deceased "victim X') to bring "namkeen' and as such her daughter (deceased " victim X') went to his house for giving it. Her daughter didn't come back from call of nature till 8 o'clock in the night, then, she (P.W.3) and her husband (P.W.1) went out to search her and saw that the lock was hanging on the door of Santosh (convict/appellant no.1) and all of them had run away. At 10:00 am, the body of her daughter "victim X' (deceased) was found from a "Gadyee' (small pond) behind the house of Santosh Nat (convict/appellant no.1). After that, her husband (P.W.1) had lodged the report of the incident. Inspector had come on spot and recorded her statement. She was confident that Santosh Nat, Santosh son of Kamla (convicts/appellants) and Indra Bahadur Yadav were involved in the murder of her daughter (deceased "victim X').

In cross-examination, P.W.3-Usha Devi had deposed that her husband (P.W.1) works as a labourer. The father of accused Santosh is called Kamla, thereafter, she stated that she did not know the name of Santosh's father and his name might be known to his husband (P.W.1). The houses of both the persons named Santosh are at a short distance. There is no enmity between her family and accused Santosh and Mamman. Santosh is a TB patient, whose treatment is going on at Bombay, who also had a lung operation. On the seventh day of

the incident, the policemen had brought Santosh from Bombay. On the third day of the incident, the policemen had arrested Mamman. There was no one in Santosh's house and one of his sister used to live at Mumbai. After the arrest of Santosh (convict/appellant no.1), his sister went to Mumbai with all the belongings of his house. Santosh and Mamman never had any dispute with her family.

P.W.3 had further deposed that Santosh (appellant no.1) had his lung operated 3-4 months before the incident. The incident was reported by her husband (P.W.1) on the day of the incident itself. The police had arrived at 9 o'clock in the night. When the police reached her village, Santosh (accused/ appellant no.1), Indra Bahadur Yadav and Santosh son of Kamla were not found. The body was found on the next day after the incident. When the body was found, Santosh son of Kamla was there and on his pointing out, the body was recovered. At that time, the police did not arrest them. Indra Bahadur and Santosh son Kamla were caught by the police and took them to the police station Bikapur. She did not know how long the policemen kept them at the police station. She further deposed that Santosh son Kamla drives the vehicle of Abhay Singh MLA and the influence of Abhay Singh is on the police station and under his influence Abhay Singh saved Santosh son of Kamla and Indra Bahadur. However, these persons were also involved in the incident. She further deposed that she was at home when her girl left the home. She had left the house on the pretext to attend the call of nature. Her mother-in-law Bachauna (P.W.2) told her that Santosh Nat had asked her daughter "victim X' (deceased) to bring "namkeen'. When she (P.W.3) went to the house of Santosh Nat (appellant no.1), it was locked. She went to the house of Santosh Nat at 6:30 p.m. She did not tell the Inspector that her daughter had gone to the house of Santosh Nat. Santosh son of Kamla and Indra Bahadur Yadav are people of bad character. When the policemen released Santosh son of Kamla and Indra Bahadur Yadav, then, they made demonstration against the police personnel. She deposed that main accused Santosh son of Kamla and Indra Bahadur were released under the pressure of Abhay Singh after taking bribe. Mamman and Santosh (accused/appellants) are poor men. She denied the suggestion that these people have falsely been implicated because they are poor.

(25) D.W.1-Syed Hussain, in his examination-in-chief, had deposed that he knew accused Mamman S/o Hariram R/o Chaurai Chandauli police station Bikapur Faizabad from 2-3 years ahead of the alleged incident. He used to work as a cleaner on his truck and used to stay with him on the truck. When he and Mamman (accused) were on the way to Badlapur near Jaunpur by his truck, then, police of Bikapur police station had stopped his truck, arrested Mamman at Bikapur and took him. At that time, he was going after loading sugar from Jarwal Mill, Bahraich to Badlapur Panjiri factory. Later on he came to know that the police had implicated him (convict/appellant no.2-Mamman) in some case.

D.W.1 had identified Mamman in the Court and in cross-examination had deposed that Mamman is also called Sonu and some people also called him as Tejpal Nat. He did not know up to what standard he had studied. Prior to 10 days of the incident, Mamman had gone with him on his truck. Mamman used to go home occasionally and came back after taking a

bath. He is close to, and has helping attitude towards Mamman. He denied the suggestion that being close to Mamman and in order to save him, he had falsely deposed.

(26) In the statement recorded under Section 313 Cr.P.C., the convicts/appellants had denied the allegations levelled against them and had stated that the Investigating Officer had falsely implicated them in the case in order to save the real culprits under the influence of local MLA.

(27) The learned trial Court believed the evidence of P.W.1-Prem Chandra, P.W.2-Smt. Bachauna, Smt. Usha (P.W.3) and perused the recovery memos as well as the D.N.A. test report and convicted and sentenced the accused/appellants **Santosh Kumar Nat and Mamman alias Sonu alias Tejpal** in the manner stated in paragraph-2, hereinabove.

(28) Hence the instant reference and appeal.

(C) CONVICTS/APPELLANTS ARGUMENTS

(29) Shri Amar Singh, learned *Amicus Curiae* appearing on behalf of convict/appellant no.1-Santosh Kumar Nat has argued :-

I. that the whole case of the prosecution is based on circumstantial evidence. There is no motive to convict/appellant to commit murder of deceased "victim X'. Complete chain of evidence is missing so as to indicate that convict/appellant is the only person who has committed the crime.

II. that the First Information Report was lodged by P.W.1-Sri Prem Chandra, who is the father of the deceased/victim "X', against unknown persons but the police had falsely implicated the convict/appellant in the case saving the real culprits.

III. that medical evidence is not compatible with oral evidence.

IV. that the Investigating Officer Sripal Singh was not examined and the investigation conducted by other Investigating Officers of the case, namely, P.W.7-Sri Uday Raj Yadav, P.W.8-Manoj Kumar and P.W.9-S.I. Munendra Pal Singh is defective one.

V. that the age of the deceased "victim X' at the time of incident was 6 years. The medical evidence shows that the deceased "victim X' died due to asphyxia as a result of smothering and definite opinion with regards to commission of rape has not been given by P.W.5-Dr. Devendra Kishor Sarraf who conducted the postmortem.

VI. that none of the witnesses of fact viz. P.W.1-Sri Prem Chandra, P.W.2-Smt. Bachauna and P.W.3-Smt. Usha had seen the incident. They have not been able to say that the convict/appellant caused the death of deceased or he committed rape.

VII. that P.W.1-Sri Prem Chandra, P.W.2-Smt. Bachauna and P.W.3-Smt. Usha are interested and partisan witnesses as P.W.1-Sri Prem Chandra and P.W.3-Smt. Usha are the father and mother, respectively, of the deceased "X', whereas P.W.2-Smt. Bachauna is the grand-mother of the deceased "X'. Hence, their testimony cannot be relied upon nor conviction can be based on their testimony.

VIII. that there are major contradictions in the statements of P.W.1-Sri Prem Chandra, P.W.2-Smt. Bachauna and P.W.3-Smt. Usha, hence the conviction and sentence of the convict/appellant on the basis of their testimonies cannot be sustainable.

IX. that the learned trial court has committed error in concluding that the case of the convict/appellant is covered under the "rarest of rare cases' and, therefore, the death sentence awarded is not legally justified.

Shri Sanjay Kumar Yadav, learned counsel appearing on behalf of convict/appellant no.2- Mamman alias Sonu alias Tejpal has adopted the arguments of learned Counsel for the convict/ appellant no.1 and in addition, he only argued that D.N.A. collected from the blood of convict/appellant no.2 was also sent for DNA test but the D.N.A. collected from the blood of convict/appellant no.2 was not matched with the sample collected from the deceased "victim X' as is evident from the FSL report, hence it cannot be said that convict/appellant no.2 was involved in committing rape, carnal intercourse against the order of nature (unnatural offence) and murdered the deceased "victim x'. Thus, the instant appeal filed on behalf of the convict/appellant no.2 is liable to be allowed.

(D) STATE ARGUMENTS

(30) Shri Vimal Srivastava, learned Government Advocate assisted by Shri Pankaj Tiwari, learned Additional Government Advocate for the State has argued that there was sufficient evidence to prove the charge against the convicts/appellants. The learned trial Court finding the evidence adduced by the prosecution reliable and trustworthy held the convicts/appellants guilty of committing rape and murder of six years old daughter of the informant P.W.1 Sri Prem Chandra and awarded the death sentence. The death sentence awarded by the learned trial Court is absolutely justified. He further argued that DNA test report has completely supported the prosecution case.

(E) FINDINGS/OBSERVATIONS

(31) We have examined the submissions advanced by Shri Amar Singh, learned *Amicus Curiae* for the convict/appellant no.1-Santosh Kumar Nat, Shri Sanjay Kumar Yadav, learned counsel for the convict/appellant no.2- Mamman alias Sonu alias Tejpal and Shri Vimal Srivastava, learned Government Advocate assisted by Shri Pankaj Tiwari, learned A.G.A. for the State. We have also perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statement of the appellants recorded under Section 313, Cr. P.C.; statement of D.W.1, defense witness; and the impugned judgment.

(32) It would become manifest from the above that the learned trial Court has based the conviction of the appellants on the testimonies of P.W.1-Prem Chandra, P.W.2-Smt. Bachauna, and P.W.3-Smt. Usha as well as the report of DNA test.

(33) We would first like to deal with the testimony of P.W.1-Prem Chandra. His evidence shows that on the date of the incident i.e. on 11.09.2014, his daughter "victim X' (deceased), aged about six years, went from home at 06:00 O'clock in the evening for attending the call of nature after telling the same to her mother Usha (P.W.3) but as his daughter "victim X' did not return, his wife Usha (P.W.3) and his mother Smt. Bachauna (P.W.2) told him about the disappearance of his daughter "victim X'. He and family members searched his daughter "victim X' but could not trace out. After that, he had gone to the

house of Village Pradhan at around 8:30 p.m. and the Village Pradhan had informed the incident to the police station Bikapur telephonically. On receipt of the message, the police reached the village at around 09:00 p.m. and also searched his daughter but could not trace out. He proved the written report (Ext. Ka.1). On the next day of the incident, his mother Smt. Bachauna (P.W.2) and his wife Smt. Usha (P.W.3) told him that on the day of the incident, his mother Smt. Bachauna (P.W.2) was sitting in front of door of Raja Pradhan and saw that "victim X' (deceased) was going to the house of Santosh (appellant no.1) with some items in her hand and in the house of Santosh (appellant no.1), Indra Kumar Yadav, Mamman alias Sonu (appellant no.2) and Santosh Kumar (appellant no.1) were sitting and drinking liquor. On the second day of the incident, at around 09-10 a.m., the dead body of his daughter "victim X' was found in the "gadyee' (small pond), which was next to the house of Santosh Nat (appellant no.1).

(34) P.W.2-Bachauna, who is the mother of P.W.1-Prem Chandra and grand-mother of deceased "victim X', has supported the testimony of informant P.W.1-Prem Chandra and stated that on the day of the incident, she was on the side of the road in front of Raja Pradhan's door. Her grand-daughter "victim X' aged about six years was returning from shop after bringing *"namkin'* and "toffey'. She called her grand-daughter " victim X' and asked her where she went, then, she ("victim X') replied that Santosh uncle (appellant no.1) had asked to bring *"namkin'*, hence she ("victim X') went to give him (appellant no.1). Santosh (appellant no.1) gave Rs.10/- to her grand-daughter ("victim X') for bringing the aforesaid articles. She further deposed that she saw Santosh (appellant no.1), Mamman alias Sonu (appellant no.2) and Bahadur at the door of Santosh (appellant no.1). She had deposed that she told the whole incident to her son (P.W.1-Prem Chandra).

(35) P.W.3-Smt. Usha, who is the mother of the deceased "victim X', wife of the informant P.W.1-Prem Chandra and daughter-in-law of P.W.2-Bachauna, has also supported the testimonies of P.W.1-Prem Chandra and P.W.2-Bachauna and had stated before the trial Court that on the date of the incident, her daughter "victim X' aged about six years went to attend call of nature outside the village after telling the same to her at 06.00 p.m. She saw from her door that Santosh Nat (appellant no.1), Mamman (appellant no.2), Indra Bahabar and Santosh son of Kamla were drinking liquor at the door of Santosh. Her mother-in-law Bachanua (P.W.2) had told her that appellant no.1-Santosh Nat had asked her daughter to bring "namkeen', due to which, her daughter went to the house of Santosh (appellant no.1) to give the same. She deposed that when her daughter did not return till 08:00 p.m., then, she and her husband went to search, then, she saw that door of Santosh (appellant no.1) was locked and all of them fled away from there.

(36) We have gone through the evidence of P.W.1-Prem Chandra, P.W.2-Bachauna and P.W.3-Usha and have no hesitation in observing that their testimonies are wholly credible and reliable. It is true that there is no evidence of any witness who might have seen the convicts/appellants committing rape and causing death of the daughter of the informant Prem Chandra (P.W.1) and the prosecution case is based on circumstantial evidence of "last seen together" and P.W.2-

Bachauna has been examined to prove this fact. The statement of PW-2-Bachauna is significant as an evidence of the circumstance of last seen. The last seen evidence is very important circumstantial evidence and if proved and found trustworthy, it can singularly lead to the inference of guilt.

(37) In **State of Rajasthan v Kheraj Ram** : (2003) 8 SCC 224, **Vilas Pandurang Patil v State of Maharashtra:** (2004) 6 SCC 158, **Arun Bhanudas Pawar v State of Maharashtra:** 2008 (61) ACC 32 (SC), **Vithal Eknath Adlinge v State of Maharashtra** : AIR 2009 SC 2067 and **Vijay Kumar v State of Rajasthan** : (2014) 3 SCC 412, the Apex Court has laid down that circumstantial evidence, in order to be relied on, must satisfy the following tests :

"1. Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

2. Those circumstances must be of a definite tendency unerringly pointing towards guilt of the accused.

3. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from conclusion that within all human probability the crime was committed by the accused and none else.

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused but should be inconsistent with his innocence in other words, the circumstances should exclude every possible hypothesis except the one to be proved."

(38) In **Bhimsingh v State of Uttarakhand** : (2015) 4 SCC 281, the Apex Court has held that when the conviction is to be based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances. If there is a snap in the chain, the accused in entitled to benefit of doubt. If some of the circumstances in the chain can be explained by any other reasonable hypothesis, then also the accused is entitled to the benefit of doubt. But in assessing the evidence, imaginary possibilities have no place. The court considers ordinary human probabilities.

(39) In **Rohtas Kumar v State of Haryana** : 2013 (82) ACC 401 (SC) and **Prithipal Singh v State of Punjab,** (2012) 1 SCC 10, the Apex Court has held that the doctrine of "last seen together" shifts the burden of proof on the accused requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard would give rise to a very strong presumption against him.

(40) Further, in **Ashok v State of Maharashtra** : (2015) 4 SCC 393, it was explained by the Apex Court that initial burden of proof is on prosecution to adduce sufficient evidence pointing towards guilt of accused. However, in case it is established that accused was last seen together with the deceased, prosecution is exempted to prove exact happening of incident as accused himself would have special knowledge of incident and thus would have burden of proof as per Section 106 of the Evidence Act. But last seen together itself is not conclusive proof but along with other circumstances surrounding the incident like relations between accused and deceased, enmity between them, previous history of hostility, recovery of weapon from accused, etc. non-explanation

of death of deceased, etc. may lead to a presumption of guilt of accused.

(41) In **State of Goa v Pandurang Mohite** : AIR 2009 SC 1066, **State of UP v Satish** : 2005 (3) SCC 114 and **Sardar Khan v State of Karnataka** : (2004) 2 SCC 442, the Apex Court has observed that circumstances of "last seen together" do not by themselves and necessarily lead to the inference that it was accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. The time gap between last seen alive and the recovery of dead body must be so small that the possibility of any person other than the accused being the author of the crime becomes impossible.

(42) In **Ravi v State of Karnataka** : AIR 2018 SC 2744, reversing the conviction based on "last seen together" where there was a time gap of four days between last seen and recovery of dead body and as per postmortem report, the death must have occurred 30 hours ago, the Apex Court held that the time gap was considerably large and no corroboration was forthcoming, and therefore, in absence of any other circumstance which could connect the accused with crime, reasonable doubt as to involvement of accused is created and in such situation, the burden would not shift under section 106 of the Evidence Act. Following the judgments in **Mohibur Rahman vs State of Assam** : (2002) 6 SCC 715 and **Malleshappa vs State of Karnataka :** (2007) 13 SCC 399, the Apex Court held as under:

"Last seen together' is certainly a strong piece of circumstantial evidence against an accused. However, as it has been held in numerous pronouncements of this Court, the time lag between the occurrence of the death and when the accused was last seen in the company of the deceased has to be reasonably close to permit an inference of guilt to be drawn. When the time lag is considerably large,....., it would be safer for the court to look for corroboration."

(43) In the instant case, P.W.2-Bachauna is the grand-mother of the deceased "victim X'. She deposed before the trial Court that when she was at the side of the road in front of Raja Pradhan's door, she saw her grand-daughter "victim X' going towards the house of appellant no.1-Santosh with "namkeen' and "toffey'. Therefore, the presence of P.W.2-Bachauna is very natural at the time of last seen. On the next date of the incident, dead body of the deceased "victim X' was recovered from the "gadyee' (small pond) which situates close to the house of appellant no.1-Santosh and door of appellant No.1-Santosh was locked. It also comes out in the evidence of P.W.1-Prem Chandra that Santosh (appellant no.1) was seen by the villagers and the people of the market before it became dark. Seemingly, there is no delay or time-gap between last seen and the discovery of the dead-body.

(44) It transpires from the record that there was no enmity between the appellants and their family members. There is no reason to even think that P.W.2-Bachauna would give false evidence. Therefore, she has been rightly relied on by the learned trial Court.

(45) The evidence of last seen is further corroborated by medical evidence which shows that after postmortem of the deceased "X', six items i.e. (1) Buccal swab with smear; (2) Urethral swab with smear; (3) Anal swab with smear; (4) vaginal swab with

smear; (5) perineal swab with smear; (6) nails of "victim X', were handed over to concerned constable. The aforesaid items were sent for D.N.A Test. As per the report of D.N.A. test dated 21.08.2019, the D.N.A. collected from the blood of appellant no.1-Santosh Nat was matching with the samples collected from the deceased "victim X' and there was in perfect equality of the D.N.A of appellant no.1-Santosh Nat with the samples collected from the deceased "victim X' and also male special allele were present in vaginal slide swab of the deceased "victim X' but D.N.A. collected from the blood of convict/appellant no.2-Mamman was not matched with the samples collected from the deceased "victim X'. It is also clear from the postmortem that abrasion and contusion were also there on her upper lid and right eye; right upper lid was lacerated; both upper and lower lid and lower 1/3 of nose were contused; wall of lebia majora was teared; around post and lateral part of anus around anal opening was contused; anal wall with skin was teared; and goose skin over hands and feet was present.

(46) It is strange that despite ample evidence of sexual assault and rape, P.W.5-Dr. Devendra Kishore Sarraf had not given specific opinion on rape. The fact that her anal wall with skin was teared at 6 O'clock; around post and lateral part of anus and 0.5 c.m. around anal opening were contused; there was abrasion and other marks of injury on her body, amply goes to show that rape was committed on her. The DNA report also supports this as rightly concluded by the learned trial court. P.W.5-Dr. Devendra Kishor Sarraf had stated that the deceased died out of asphyxia as a result ante-mortem smothering.

(47) The DNA profile of material item-12 Urethral Slide Swab, item-13 perineal slide swab and item-16 Anal Slide Swab were found same of convict/appellant no.1-Santosh Nat. In the DNA profile of material item-11 Vaginal Slide Swab, male special Allele were found. It is true that the samples of appellants were only sent for D.N.A. test. On that basis, the learned trial court has rightly concluded that on comparison of the said items of the victim "X' and appellants, the DNA of the appellant no.1-Santosh was found matched and also human smear was present, which itself establishes the involvement of the convict/appellant no.2 in the crime also. After a close scrutiny of the evidence given by P.W.1, P.W.2 and PW-3 and medical evidence, the learned trial Court has rightly concluded that the appellants committed rape on the victim and caused her death by closing her mouth or by throttling which resulted in asphyxia. It was also noted down by the learned trial court that after the incident, the appellants were not found present in the village.

(48) Once it is established that it was the appellant no.1-Santosh, who asked deceased "victim X' to bring "namkeen' and appellant no.2-Mamman was also present in the house of the appellant no.1-Santosh when the deceased brought "namkeen', it was on the appellants to explain what happened thereafter. In view of Section 106 of the Evidence Act, the burden was on the convicts/ appellants to explain how her private parts were contused and why such injuries were found on her body which could not have been caused except by way of sexual assault and in the course of commission of rape on her. In such cases, the provisions of POCSO Act and the Evidence Act, both require the appellants to show that they were innocent and did not commit rape. The learned trial Court has also rightly concluded that the nature of crime is such that if somebody would have

seen the appellants committing it, such incident could not have taken place. The appellants had alleged that they were falsely implicated, but, there appears to be no reason for their false implication nor there is any reason why the people of that locality would give evidence about their drinking habit and perverted behavior. Had it been so as alleged by appellants, any of the villagers would definitely come to adduce evidence in support of the appellants. We find that there is no force in the argument of the appellants regarding their false implication. If read in conjunction with the statement of last seen given by PW-2 Bachauna, medical evidence and drinking habit of the appellants conclusively indicate the hypothesis that it was they and they only, who committed rape, carnal intercourse against the order of nature and murder of the deceased.

(49) In view of the above discussion, we find that the conclusion of the learned trial court that the prosecution has successfully established that the convicts/appellants committed rape, carnal intercourse against the order of nature (unnatural offence) and murder of the victim is based on unimpeachable evidence of "last seen' supported by medical and FSL report and the conduct of the appellants themselves prior to the incident and soon after the incident. The conviction of convicts/appellants for the offence under Sections 302, 376A, 376D, 377 and 201 IPC is legal and justified.

(50) Now, the question is whether the case is covered under the *"rarest of the rare case"* and the death sentence to the appellants is justified.

(51) In **Machi Singh vs. State of Punjab** (1983) 3 SCC 470, the Apex Court has held that

"1. When the murder is committed in an extremely brutal, grotesque diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (i) when the house of the victim is set aflame with the end in view to roast him alive in the house, (ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death, (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

2. When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland.

3. When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them or, make them with a view to reverse past injustices and in order to restore the social balance.

4. In cases of "bride burning' and what are known as "dowry-deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

5. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the

members of a family or a large number of persons of a particular caste, community, or locality, are committed.

6. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder, (b) a helpless woman or a person rendered helpless by old age or infirmity, (c) a person vis-à-vis whom the murderer is in a position of domination or trust, (d) a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similarly reasons other than personal reasons."

(52) In **Ravji vs. State of Rajasthan** : (1996) 2 SCC 175, where the Apex Court held that it is only characteristics relating to crime, and not to criminal, which are relevant for sentencing. The Apex Court observed as follows :-

"The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the attrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry to justice against the criminal'."

(53) In **Swamy Shraddananda (2) vs. State of Karnataka:** (2008) 13 SCC 767, the Apex Court observed:

"The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court is giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system."

(54) In **Raj Kumar v. State of Madhya Pradesh**, (2014) 5 SCC 353, a case concerning the rape and murder of a 14 years old girl, the Apex Court directed the appellant therein to serve a minimum of 35 years in jail without remission.

(55) In **Selvam v. State** : (2014) 12 SCC 274, the Apex Court imposed a sentence of 30 years in jail without remission in a case concerning the rape of a 9 year old girl.

(56) In **Tattu Lodhi v. State of MP**, (2016) 9 SCC 675, where the accused was found guilty of committing the murder of a minor girl aged 7 years, the Apex Court imposed the sentence of imprisonment for life with a direction not to release the accused from prison till he completes the period of 25 years of imprisonment.

(57) In **Sachin Kumar Singhraha v State of MP** : (2019) 8 SCC 371, where the accused was sentenced capital punishment for the offence of rape and murder of 5 year

girl, the Apex Court converted the sentence into life imprisonment for 25 years without remission and has observed:

"Life imprisonment is the rule to which the death penalty is the exception. The death sentence must be imposed only when life imprisonment appears to be an altogether inappropriate punishment, having regard to the relevant facts and circumstances of the crime."

(58) Recently, the Apex Court in the case of **Mohd. Firoz vs. State of Madhya Pradesh** (Criminal Appeal No. 612 of 2019, decided on 19.04.2022) has commuted the death sentence imposed on man for rape and murder of 4 year old girl to life imprisonment. Para-43 of the aforesaid order dated 19.04.2022 reads as under :-

"43. Considering the above, we, while affirming the view taken by the courts below with regard to the conviction of the appellant for the offences charged against him, deem it proper to commute, and accordingly commute the sentence of death for the sentence of imprisonment for life, for the offence punishable under Section 302 IPC. Since, Section 376A IPC is also applicable to the facts of the case, considering the gravity and seriousness of the offence, the sentence of imprisonment for the remainder of appellant's natural life would have been an appropriate sentence, however, we are reminded of what Oscar Wilde has said - *"The only difference between the saint and the sinner is that every saint has a past and every sinner has a future"*. One of the basic principles of restorative justice as developed by this Court over the years, also is to give an opportunity to the offender to repair the damage caused, and to become a socially useful individual, when he is released from the jail. The maximum punishment prescribed may not always be the determinative factor for repairing the crippled psyche of the offender. Hence, while balancing the scales of retributive justice and restorative justice, we deem it appropriate to impose upon the appellant-accused, the sentence of imprisonment for a period of twenty years instead of imprisonment for the remainder of his natural life for the offence under section 376A, IPC. The conviction and sentence recorded by the courts below for the other offences under IPC and POCSO Act are affirmed. It is needless to say that all the punishments imposed shall run concurrently."

(59) On due consideration, we find that the aggravating circumstances in this case are that the convicts appellants and deceased "victim X' were residing in same village and the deceased "victim X' was only 6 years of age and convicts/appellants committed rape, carnal intercourse against the order of nature (unnatural offence) on her and murdered her. The mitigating factor is that the appellants were in the habit of taking liquor and the whole case is based on circumstantial evidence.

(60) In the facts and circumstances of this case and on the basis of the law discussed above, we are of the view that the learned trial court was not justified in awarding death sentence under Section 302 I.P.C. and the sentence of life imprisonment could have been sufficient in the circumstances of the case. Hence, the conviction under Sections 376A, 376D, 377 and 201 I.P.C. is upheld and award of death sentence under Section 302 I.P.C. is altered to imprisonment for whole life without remission.

(F) CONCLUSION

(A) Capital Case No. 01 of 2019

While affirming the conviction and sentence of the appellants for the offence punishable under Sections 376A, 376D, 377 and 201 of I.P.C., and the conviction of the appellants for the offence punishable under Section 302 IPC, we set-aside the *'sentence of death'* awarded to the convicts/appellants by the trial Court by means of impugned judgment and order dated 16.11.2019 and direct that for the murder committed by the convicts/appellants, **Santosh Kumar Nat and Mamman alias Sonu alias Tejpal**, they are sentenced to life imprisonment for the whole span of their natural life without remission instead of death sentence.

Appellants **Santosh Kumar Nat and Mamman alias Sonu alias Tejpal** are in jail and shall serve out their sentence.

Subject to this alteration in the sentence, Capital Case/ Reference No. 1 of 2019 is dismissed.

(B) Criminal Appeal No. 2322 of 2019 :-

The criminal appeal is partly allowed. Although we maintain the conviction and sentence of appellants, **Santosh Kumar Nat and Mamman alias Sonu alias Tejpal**, for the offence punishable under Sections 376A, 376D, 377 and 201 of I.P.C. and their conviction for the offence punishable under Section 302 I.P.C but we set-aside their sentence of death on the latter count and instead sentence them to imprisonment for life for the whole span of their natural life without remission.

Appellants, **Santosh Kumar Nat** and **Mamman alias Sonu alias Tejpal**, are in jail and shall serve out their sentence.

(61) Before we part with the case, we must candidly express our unreserved and uninhibited appreciation for the distinguished assistance rendered by Shri Amar Singh, *Amicus Curiae* for the appellant no.1-Santosh Kumar Nat in the instant appeal, therefore, we deem it appropriate to direct for payment to Shri Amar Singh, learned *Amicus Curiae* for his valuable assistance as per Rules of the Court.

(62) Let Shri Amar Singh, learned *Amicus Curiae* be paid remuneration as per Rules of the Court within a month.

(63) Office is directed to send a certified copy of this judgment along with lower court record to the court concerned for information and compliance.

(2022)04ILR A1172
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.04.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
HON'BLE MRS. SAMEER JAIN, J.

Criminal Appeal No. 1248 of 2010

Rama Shanker & Anr.
...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Lav Srivastava, Sri Akhilesh Kumar Ojha, Sri Amrendra Pratap Singh, Sri Jitendra Prasad, Sri Mahesh Kumar, Sri Niraj Tiwari, Sri V.P. Srivastava, Sri Vinay Dubey, Sri Kuldee Bajpal, Sri Avnish Kumar Srivastav, Sri Kuldeep Bajpai, Sri B.N. Singh Rathore, Sri Anurag Tiwari

Counsel for the Respondent:
A.G.A., Sri Rajeev Upadhyay

A. In evaluating the evidence of an interested or even a partisan witness, it should first be seen whether it's presence at the scene of the crime at the material time was probable. If yes, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative and the evidence of a witness appears to the court to be almost flawless and free from suspicion it may accept it without seeking corroboration from any other source and form the basis of conviction.

B. Ante timed F.I.R. – The most common test adopted for inferring F.I.R. to be ante timed is to find out from the evidence and material on record whether the existence of case details, such as case crime etc. that arise on registration of F.I.R. are reflected in police papers prepared subsequent to the registration of F.I.R. and also when special report or report u/S 157 Cr.P.C. was forwarded, delayed dispatch of the body for autopsy, if unexplained may create doubt regarding the existence of F.I.R. at the specified time.

C. The lack of details in the F.I.R. are not ordinarily material, but where there is long standing animosity between the parties then lack of such details would suggest that at the time of lodging the report complete information with regard to the manner in which the incident occurred was not available. This possibility gains strength from the circumstance that the site plan also does not contain the complete information though the ocular account may be consistent with the medical evidence as to the site of injuries are concerned which is not a guarantee for it being trustworthy and reliable because oral deposition can always be improved and polished on legal advice after receipt of autopsy report.

D. Civil Law - Arms Act, 1878 - Section 25 - Is not justified when firstly recovery of country made pistol is not evidenced by any member of the public even though it is not a chance recovery but is alleged to be on a disclosure made by accused while in police custody. Secondly when the weapon recovered has not been forensically connected with the bullets recovered from the body of the deceased and thirdly when the alleged recovery is from an open place not under the control or in possession of the accused and, therefore, weapon cannot be said to be in possession of the accused.

Appeal allowed. (E-11)

List of Cases cited:-

1. Hari Obula Reddy Vs St. of A.P., (1981) 3 SCC 675

2. Jalpat Rai Vs St. of Har., (2011) 14 SCC 208

(Delivered by Hon'ble Manoj Misra, J.)

1. This appeal is against judgment and order of conviction and sentence, dated 23.02.2010 and 24.02.2010, respectively, passed by the Additional Sessions Judge, Court No.5, Azamgarh in connected Sessions Trial Nos. 618 of 2002 and 619 of 2002 whereby, both the appellants, namely, Ram Shanker and Rajesh Pandey, have been convicted under Section 302/34 I.P.C. in Sessions Trial No.618 of 2002; and in Sessions Trial No.619 of 2002 the appellant Rajesh Pandey has also been convicted under Section 25 Arms Act. For their conviction under section 302/34 IPC both the appellants have been sentenced to imprisonment for life with fine of Rs. 5,000/- each and a default sentence of six months R.I.; whereas, for his conviction under section 25 Arms Act, the appellant Rajesh Pandey has been sentenced to one year R.I. with fine of Rs.1,000/- and a default sentence of one month. However, in Sessions Trial No. 618 of 2002, both the appellants were acquitted of the charge of

offence punishable under Section 504/34 I.P.C.

INTRODUCTORY FACTS

2. The prosecution story, in brief, as could be elicited from the written report (Exb. Ka-1) lodged by PW-1, is that the deceased - Munnar Mali (informant's father), had a long standing civil litigation with Ramjeet Pandey (the father of accused Rajesh), giving rise to strong enmity between them. Prior to the incident, on 05.08.2002, in the evening, at about 4 pm, while the deceased was working at the door of his house, Ramjeet, his son Rajesh and Onkar, came, abused and tried to assault informant's father, however, informant's father managed to escape and hide himself in the house. Thereafter, on 07.08.2002, at about 7.15 am, when the informant (PW-1) and his father (the deceased) were returning from Budhanpur Bazaar, after purchasing betel leaves, near Amari village, Rama Shankar son of Kamla Prasad (appellant no.1), Onkar son of Rama Shankar (non-appellant), and Rajesh son of Ramjeet (appellant no.2) came on a motorcycle from behind and, by exhorting each other, fired three shots at the deceased, as a result whereof, the deceased fell on the road and died and his blood, stained informant's shirt. In the FIR it is also alleged that the accused had threatened and chased the informant, who escaped to the adjoining village Amari to hide himself, whereas the accused while threatening the witnesses and brandishing their weapons escaped on their motorcycle, via Bhatti Chatti towards Atrait, and were spotted, inter alia, by Sherai (PW-2) and Gulab Seth (not examined), who all had witnessed the incident. It is also alleged that seeing the entire incident, people in the area were terrified and public order was breached. By stating all that has been narrated above and claiming that informant's father's body and cycle is lying at the spot, written report (Exb. Ka-1) was given at P.S. Atrauliya, District Azamgarh, which was registered as Case Crime No. 257 of 2002, on 07.08.2002, at 8.30 hours, of which Chik FIR (Exb. Ka-3) was prepared by PW-4, vide GD entry no. 15 (Exb. Ka-4).

3. Inquest was conducted at the spot on 07.08.2002 at 10.30 hours of which inquest report (Exb. Ka-7) was prepared by S.I. Lallan Mishra (not examined), which was proved by I.O.(PW-6). PW-1 (Rajaram-informant) and PW-2 (Sherai), inter alia, were witnesses of the inquest. The condition in which the body was noticed at the time of inquest is reported as follows:-

"दशा शव – शव मृतक मुन्नर माली बूबूढनपुर – भटहई पक्की सडक पर अमारी गांव के सामने दाहिने करवट औंधी पडी है, दोनो पैर दक्षिण सर उत्तर, चेहरा पश्चिम, दाहिना हाथ दाहिनी तरफ दबी बांया हाथ उपर बायी तरफ दाहनी सीधी, आंख, मुंह अध खुला। सायकिल मृतके के नीचे दबी, जिसमे आगे झोला लटका, पीछे पान की टोकरी बंधी।

कपडा– मृतक के बदन पर कपडा धोती, लंगोट, बंडी, कुर्ता।

चोट – मृतक मुन्नर माली के शव को उलट पलट कर देखा गया तो इसके बदन पर निम्नलिखित चोटे पाई गयी।"

4. Autopsy was conducted on 07.08.2002, at about 4.15 pm., by Dr. Nand Lal Yadav - PW-3, who prepared **autopsy report** (Exb. Ka-2). The **Autopsy report** notices:

External examination:

Average body built, eyes closed, mouth closed, Rigor mortis present in all limbs. No sign of decomposition.

Ante-mortem injury:

(i) Firearm wound of entry 2 cm x 2 cm x brain cavity deep on right side of head 10 cm above right ear. Blackening and tattooing present (sic) singed. On opening, underlying parietal bone fractured into pieces. Membrane and brain matter lacerated. One metallic bullet recovered from wound.

(ii) Firearm wound of entry 2 cm x 2 cm brain cavity deep on back of head, occipital region above root of neck. On opening underlying occipital bone fractured, brain and membrane lacerated. One metallic bullet recovered from wound.

(iii) Firearm wound of entry 2 cm x 2 cm x chest deep on left side of back. Lateral from cavity of back; and 7 cm below left scapula. One metallic bullet recovered along with (sic).

Internal Examination:

Stomach empty, small and large intestine and rectum unloaded. Note: Three metallic bullets were recovered from the body.

Cause of death:

Death due to coma as a result of ante-mortem firearm injury on head.

Estimated Time of Death:

About half a day before.

5. During the course of investigation, the investigating officer (I.O.) recovered blood stained shirt of the informant of which recovery memo (Exb. Ka-2) was prepared. The I.O. also recovered blood stained earth and plain earth of which recovery memo (Exb. Ka-19) was prepared. The bicycle and the basket of betel leaves kept on its carrier, recovered from the spot, was handed over to the informant of which custody memo (Exb. Ka-3) was prepared by the I.O. On 25.08.2002, the I.O. allegedly recovered a country made pistol on the pointing out of Rajesh (appellant no.2) after he was arrested of which a recovery memo (Exb. Ka-15) was prepared and, pursuant thereto, a separate FIR, under Section 25 of the Arms Act, was lodged at P.S. Atrauliya, District Azamgarh, as Case Crime No. 280 of 2002, on 25.08.2002 at 8.35 hours of which Chik FIR (Exb. Ka-5) was prepared by PW-5. Investigation of Case Crime No.257 of 2002 was completed by V.B. Singh (PW-6), but charge sheet (Ex. Ka-20) was submitted by S.I. Chandra Shekhar, whose signatures were proved by PW-8. Charge-sheet (Exb. Ka-20) was submitted against Ram Shanker (appellant no.1); Onkar; and Rajesh (appellant no.2) under section 302/ 504/ 34 IPC; whereas, investigation of Case Crime No. 280 of 2002 was completed by PW-7, who submitted charge-sheet (Ex. Ka-17) against Rajesh Pandey (appellant no.2) under section 25 Arms Act. After taking cognisance on the two charge-sheets, both the cases were committed to the Court of Session and were connected with each other. Arising from Case Crime No. 257 of 2002, Sessions Trial No. 618 of 2002 was instituted against all the three accused, namely, Rama Shankar, Onkar and Rajesh; whereas in respect of Case Crime No. 280 of 2002, Sessions Trial No. 619 of 2002 was instituted.

6. In Sessions Trial No. 618 of 2002, on 02.08.2004, Rama Shankar, Onkar and Rajesh were charged for offences punishable under Sections 302/34 and 504/34 I.P.C. All of them pleaded not guilty and claimed to be tried. In Sessions Trial No. 619 of 2002, the appellant-Rajesh was charged under Section 25 Arms Act. He pleaded not guilty and claimed to be tried. Later, in S.T. No.618 of 2002, co-accused-Onkar was declared a juvenile therefore, his trial was separated. Thus, Sessions Trial No. 618 of 2002 proceeded against Rama

Shanker (appellant no.1) and Rajesh (appellant no.2) only, whereas, Sessions Trial No. 619 of 2002 proceeded against Rajesh (appellant no.2) alone.

7. As both the trials were connected, a common set of evidence was led. During the course of the trials, the trial court examined eight prosecution witnesses: PW-1-**Raja Ram** - the informant and son of the deceased - the eye-witness of the incident; **PW-2 - Sherai Mishra** also an eye-witness of the incident; **PW-3- Dr. Nand Lal Yadav -** autopsy surgeon; **PW-4 - Brijnath Dubey** - the constable who prepared Chik FIR and GD entry of Case Crime No. 257 of 2002; PW-5 - **Ram Bachan Ram** - the constable who prepared Chik Report and GD entry of Case Crime No. 280 of 2002; **PW-6 - Vijay Bahadur Singh** - the investigating officer of Case Crime No. 257 of 2002. He proved the various stages of investigation including collection of blood stained earth, plain earth, blood stained shirt, which the informant was wearing at the time of incident, preparation of inquest report, photo nash, challan nash, site plan etc. He also proved the Supurdaginama (custody memo) of the cycle and the Pan Basket recovered from the spot and handed over to the informant. He also proved the various other steps of investigation including the arrest of the accused and recovery of country made pistol at the instance of accused-Rajesh. He produced the material exhibits such as plain earth, blood stained earth and blood stained shirt etc; **PW-7 - Janardan Yadav -.** the investigating officer of Case Crime No. 280 of 2002 He proved the submission of charge-sheet against Rajesh Pandey in Case Crime No. 280 of 2002 and proved the sanction accorded by the District Administration for prosecution of Rajesh Pandey. The sanction letter dated 04.10.2002 was exhibited as Exb Ka-18; and **PW-8, Head Constable - Mukteshwar Singh** proved the signature of Chandra Shekher Lal on charge-sheet relating to case crime no.257 of 2002, paper no. 3 Ka-1, which was exhibited as Exhibit Ka - 20.

8. The incriminating circumstances appearing in the prosecution evidence were put to Rama Shanker and his statement, under section 313 CrPC, was recorded on 26.08.2009. He stated that he has been falsely implicated; that there is land dispute between the informant and his family; that a false report has been lodged in collusion with the police; that the incident has been incorrectly described; that PW-2 made false statement because he is a friend of the deceased and was a co-accused of the deceased in a trial wherein he was convicted; that the FIR had been ante-timed; that the investigating officer is in collusion with the informant; that the informant on account of land dispute is inimical and has falsely implicated him in collusion with witness Sherai, who is a friend of the informant. Rama Shanker also stated that the deceased had criminal antecedents and that the deceased as well as Sherai were both convicted and sentenced; that the deceased had enmity with various other persons and that he was killed and his body was thrown by unknown persons but, out of enmity, the informant made a false report against him. Identical explanation was offered by Rajesh (appellant no.2) in Sessions Trial No. 618 of 2002. In Sessions Trial No. 619 of 2002, apart from denying other incriminating circumstances, Rajesh (appellant no.2) claimed that the recovery of country made pistol is false and bogus.

9. After their statements under Section 313 Cr.P.C. were recorded, the accused -

appellants examined three defence witnesses, namely, Dilip Kumar Singh (DW-1); Chandra Jeet Verma (DW-2); and Mohd. Irshad Khan (DW-3).

10. **DW-1** is the scribe of the FIR of Case Crime No. 257 of 2002. He stated that while he was going to bazaar he saw a large crowd at the police station and at the gate of the police station he saw a body lying. There he saw the investigating officer and constable. The investigation officer V.B. Singh was known to DW-1 therefore, he called DW-1 to scribe the report. DW-1 stated that the I.O. gave him a paper and a pen and dictated the report to him. He stated that at that time it must have been 11 am or 12 noon. He stated that he wrote the Ex. Ka-1 on the dictation of I.O.

In his cross-examination, DW-1 stated that he did not know Munnar Mali and that he does not know the accused. He stated that he has appeared as a witness on service of summons on him by the police. He stated that his house is about 200 mtrs away from the police station. He stated that he did not see the body as it was wrapped in a cloth. He stated that **Raja Ram** (PW-1) must have met him between 11 and 12 hours though he does not exactly remember the date but it must have been the month of August, 2002. DW-1 denied the suggestion that the I.O. had not dictated the report scribed by him. He also denied that he is telling lies.

11. **DW-2 - Chandra Jeet Verma**. He is the person who had put his signature on the memorandum of recovery of blood stained earth and plain earth. He stated that when he was going to Budhanpur, police personnel stopped him and requested him to sign on certain papers and when he asked them as to what they relate to, they stated that it relates to recovery of blood stained soil and, on their request, he signed those papers and when he signed those papers, at that spot there was no body; and that the blood stained earth was not picked up in his presence. He stated that similarly signature of Jai Ram was obtained. DW-2 upon seeing Exhibit Ka-14 stated that it carries his signature. He also stated that at the time when his signatures were obtained it must have been 11 or 11.30 hours.

In his cross-examination, he described the place where he was requested to sign the papers by stating that towards north there was Chauraha; towards South there was culvert; and east as well as west there were fields. He stated that he is M.A and B.Ed pass; that the paper which he signed had 2-3 lines mentioning certain sections; that, normally, he does not sign without reading the paper. He admitted that the paper Exhibit Ka-19 carries his signature.

12. **DW-3 - Mohd. Irshad Khan.** He is a villager of Amari village. His statement was recorded in the month of September, 2009. He stated that about seven years back when he heard noise in the village, he went to the spot and saw that on the 'Med' of a Paddy field, a body was lying; by the time he reached the spot, the Sun had not come out though there was light and there were several people and within half an hour thereafter, the police arrived in a Jeep and took away the body. There was nobody to recognise the body there. When police took away the body, he left for home.

In his cross-examination, he could not disclose the number of the field in Amari Gaon where body was found; he stated: that when the investigating officer had reached the spot, he was there but the

I.O. did not inquire from him; that he never disclosed anything to the investigating officer; that though the police had arrived at the spot before sunrise but he does not remember the time when the investigation officer had arrived; that he saw blood on the spot though the body was not bleeding. He denied the suggestion that he was not there at the spot and that he is making a false statement under the influence of the accused.

13. The trial court found the prosecution evidence reliable and the defence evidence unreliable, accordingly, it convicted the appellants, as above, against which, the appellants are in appeal.

14. We have heard Sri Niraj Tiwari for the appellants; Sri H.M.B. Sinha, learned A.G.A., for the State; and have perused the record.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE APPELLANTS

15. Sri Niraj Tiwari, learned counsel for the appellants, submitted as follows:-

(a) that PW-1 is not a reliable witness and his presence at the spot is doubtful for the following reasons:-

(i) If the manner in which the incident occurred is to be accepted, keeping in mind that PW-1 was allegedly given a chase by the assailants with a view to kill him, PW-1 would not have escaped injuries, particularly when the assailants were fully armed and had bullets to spare;

(ii) According to the prosecution case, PW-1 and the deceased on separate bicycles had gone to the Bazaar to purchase goods for the Betel shop run by PW-1. If the goods were for the Betel shop either the journey was to get over before the shop had to open which, according to PW-1, use to open at 6 am, or only one of them would have gone. In either case, the story set up by the prosecution that PW-1 accompanied the deceased to the Bazaar and on their way return, the incident occurred at 7 am does not inspire confidence. Further, from the evidence, it appears, the deceased was carrying the Pan Basket on his bicycle. If the deceased were to carry the merchandise, there was no reason for PW-1 to accompany the deceased to the Bazaar on a separate bicycle. More so, when PW-1 had to sit in the betel shop by 6 am. To address this anomaly in the prosecution story, explanation offered was that there were other goods also, which were purchased by PW-1 for his shop and carried by him on his bicycle. But, interestingly, the police neither noticed such articles nor made recovery of the other bicycle. Further, if the goods were to be used in that Betel shop which had to open by 6 am, the possibility of incident occurring in the wee hours of the morning gains strength and is corroborated by **autopsy report** wherein stomach, small intestine and large intestine were all found empty. All of this raises a serious doubt about the truthfulness of the prosecution story as also with regard to the presence of PW-1 at the time of incident.

(iii) DW-1, who scribed the FIR, as per the prosecution case, gave a statement that he scribed the FIR at the police station at about 11 am on the dictation of the I.O.; therefore, it appears to be a case where the body of the deceased was first picked up by the police, brought to the police station, where it was identified by PW-1 and, thereafter, on the basis of enmity, a false FIR was got lodged by getting it ante-timed.

(b) PW-1 is not consistent and makes improvement during his deposition;

whereas, PW-2 is a chance witness whose explanation for his presence there does not at all inspire confidence. Therefore, as both the eye witnesses fall in the category of interested and partisan witnesses, keeping in mind that their testimony does not inspire confidence and no independent witness of the village has been examined to support the prosecution case, benefit of doubt is to be extended to the appellants.

(c) According to the prosecution case, the assailants were armed with country made pistol. Rajesh fired two shots, whereas Rama Shankar fired single shot. If two shots were fired by one person from a country made pistol, the weapon would have to be re-loaded. But, no empty cartridge was found. Absence of an empty cartridge at the spot suggests that the incident occurred in some other manner than alleged by the prosecution;

(d) The presence of blood on the shirt of PW-1, seized by the police, is no guarantee for the presence of PW-1 at the spot because PW-1 stated that blood stain on his shirt appeared at the time when he lifted his father's body. Father's body could have been lifted later also, than at the time of the incident;

(e) The deceased had a criminal record and, therefore, would have had multiple enemies. Thus, merely because there was litigation between the accused (including his family) and the informant party, it was not the accused party alone who held motive for the crime;

(f) The weapon recovered at the pointing out of the appellant Rajesh (appellant no.2) was not sent for ballistic report to connect it with the bullets found in the body of the deceased therefore, the prosecution is guilty of hiding the truth; and

(g) The weapon was recovered from an open place, accessible to all, therefore, it cannot be said that the appellant-Rajesh was in possession of the weapon. Consequently, his conviction under Section 25 Arms Act is not at all justified.

16. In a nutshell, the submission of the appellant is that the case at hand appears to be a case where the incident occurred in the wee hours of the morning, not witnessed by anyone, later, when the body was found and identified, the prosecution story was developed on the basis of past enmity and suspicion.

SUBMISSIONS ON BEHALF OF THE STATE

17. **Per contra,** the learned A.G.A., submitted that the motive for the crime was duly proved; that place of occurrence is proved without doubt as there is no suggestion that the incident occurred at any other place; that the distance between place of residence of PW-1, or the place where PW-1's shop is, and the place of occurrence is about 4 km therefore, if PW-1 had to be called, or to come, from his residence to the spot, the FIR could not have been lodged with that promptitude, as it has been. Hence, there appears no reason to doubt the presence of PW-1 at the spot. Further, the defence had not made suggestion to the investigating officer, or any member of his team, of having any ill motive to falsely implicate the accused therefore, there is no occasion to accept the submission that the FIR has been ante-timed, particularly, when the record and the GD entry proves prompt lodging of the FIR. Further, as there is no specific suggestion to the prosecution witnesses that the incident occurred at some other spot, merely because DW-2 made a statement that he was made to sign papers regarding

recovery of plain earth and blood stained earth by the police whilst there was no body on spot, would not render the place of occurrence doubtful. In respect of presence of PW-1 at the spot, no suggestion has been given to PW-1 that at the time of the incident he was at the betel shop therefore could not have witnessed the incident. Thus, the defence cannot take a plea that because the betel shop opens at 6 am, the presence of PW- 1 is doubtful at the spot. Moreover, PW-1 has given a graphic description of the incident which finds corroboration in the medical evidence as also the position in which the body was noticed at the time of inquest proceeding. It was urged that absence of ballistic report would not make a material difference as this is a case based on ocular account and since the ocular account has a ring of truth about it, absence of ballistic report would not make a material difference. It was urged that conviction under Section 25 of the Arms Act is sustainable because though the place from where weapon was recovered might be accessible to others but it was hidden in a hay-stack *(Sarpat)*, hence, it was under the control of the appellant-Rajesh. The learned A.G.A. accordingly prayed to dismiss the appeal.

PROSECUTION EVIDENCE

20. Before we proceed to weigh the respective submissions, it would be apposite to notice the testimony of prosecution witnesses in some detail. The testimony of prosecution witnesses is as below:

20 (i). **PW-1-Rajaram - Informant - son of the deceased.** He stated that Ram Shanker, Onkar and Rajesh are of his village; informant side had civil litigation with the family of the accused in respect of Abadi land; the litigation had been there for the last 25 years and had generated strong enmity between the two sides. In that background, on 05.08.2002, at about 4 pm, when informant's father Munnar Mali (the deceased) was at the door of his house, Munnar Mali was attacked by Ramjeet Pandey, his son Rajesh (the appellant no.2) and Onkar (the co-accused) as a consequence whereof, his father had to run and hide himself in the house. PW-1 stated that on 07.08.2002, while the deceased and PW-1 were returning from Budhanpur Bazaar after purchasing Pan etc. for PW-1's betel shop, at about 7.15 am, when they crossed Rokha Pul (culvert) near Amari village, the accused, namely, Rama Shanker, Rajesh and Onkar came on Hero Honda motorcycle, driven by Onkar, from behind, crossed the bicycle of his father, stopped their motorcycle in front of the bicycle of his father and, on exhortation of Onkar to finish off the deceased so that all litigation could come to an end, Rajesh (appellant no.2) fired from his country made pistol at the deceased, which hit the deceased on his head, as a result whereof, the deceased fell on the ground. Seeing the deceased falling, PW-1 came running to hold the deceased; whereafter PW-1 pleaded that his father be spared but the accused threatened PW-1 to run away or he too will be killed; immediately thereafter, Rajesh fired a second shot which hit the deceased at the back of his head; following that, Rama Shanker fired a third shot, which hit the deceased on his back. Thereafter, the accused chased PW-1 to finish him off too, but PW-1 ran away towards Amari village to save himself, whereas, the accused, brandishing their weapons, escaped towards north. At that time, PW-2 (Sherai Mishra) and Gulab Seth, amongst others, were there on the road to witness the

incident. PW-1 stated that after the accused had left, he returned back to find his father dead. Thereafter, PW-1 gave his bicycle to a person to give information at home and found one Dilip Kumar (DW-1) at the spot, who wrote the first information report on PW-1's dictation, after which, the written report was lodged as a first information report. PW-1 proved the written report, which was marked as Exb. Ka-1. PW-1 stated that police had arrived at the spot and had taken his statement. PW-1 also stated that when he was lifting his father, his shirt got blood-stained and the police took possession of the shirt of which memorandum was prepared. PW-1 stated that the police had prepared a memorandum in respect of handing over custody of deceased's bicycle and *Pan ki Tokri* (basket of betel leaves). He proved the seizure memo of the shirt, which was marked as Exb. Ka-2, and Supurdaginama (custody memo) of the bicycle, which was marked as Exb. Ka-3. He stated that after punchnama (inquest), the body was taken to Azamgarh for post-mortem. After post-mortem, the body was handed over to him and he cremated the body.

20 (ia). **In his cross-examination**, he was confronted with two cases, namely, (a) Case No. 454 of 1995 (State v. Rajaram and others), in respect of which, PW-1 feigned ignorance; and (b) a judgment dated 13.12.1967 in S.T. No. 229 of 1966 (State v. Shivmurat and others) in which PW-1's father (the deceased) and Sherai Mishra (PW-2) were co-accused, in respect of which, again, PW-2 feigned ignorance and denied the suggestion that he is deliberately feigning ignorance. PW-1 also denied the suggestion that his father was a 'Tantrik' and a man with bad character. PW-1 stated that the deceased used to sell flowers. In respect of the alleged incident dated 05.08.2002, PW-1 stated that he has no knowledge whether it was reported by his father or not. He stated that at the time when that incident occurred, only PW-1 and his father were present. He denied the suggestion that he has framed a false case on account of land dispute with the accused. PW-2, however, admitted that he has a betel shop at a distance of about half a kilometer from his house where he sits from 6 am in the morning, after taking a bath. He stated that Budhanpur Bazaar is about 8-9 kms. away from his shop. There are two rasta to go to Budhanpur. One is a *Kachha* (non-paved) rasta (route) of about 5 kms. and the other is Pakka (paved) rasta of about 9 km. From the place of incident, PS. Atrauliya is about 4-5 kms and from the place of incident Budhanpur is about 1 km. On further examination, he stated that to reach the place of incident from Budhanpur, they took about 5 minutes. PW-1 and his father (the deceased) had left Kasturipur (name of village where they resided) at 4.30 hours to go to Budhanpur for purchasing Betel leaves, etc. By the time, they reached Budhanpur, it was about sun rise time. They stayed at Budhanpur bazaar for about one and a half to two hours and in the meantime purchased Pan, Biscuits, Toffee, Tobacco etc. His father carried the Pan Basket whereas the carton of Biscuit was kept on the cycle of the informant and the toffees were kept in a bag. Neither he nor his father ate anything at the bazaar. Between the bazaar and the spot of the incident, except the accused, nobody else of the village was present. PW-1 added that he and his father were on two separate cycles. Onkar had stopped the motorcycle about two feet in front of his father's cycle. PW-1's cycle was about three feet away from Onkar's motorcycle. He stated that he had shown to the police the spot where the incident had occurred. He reiterated that he

had caught his father when he was hit by gun shot but when he caught his father he himself could not stand and had to sit. PW-1 stated that the accused fired shots at the deceased from separate spots. First shot was fired by Rajesh at the deceased from a distance of two feet; thereafter, the second shot was fired from a distance of two and a half feet; and the third shot was fired by Rama Shanker from a distance of about two feet. He stated that he does not remember whether the police collected the empty cartridge from the spot or not. He stated that except three gunshot injuries, he did not notice any other injury on the body of his father. PW-1 stated that when the accused extended threat, he ran towards west. Accused gave him a chase for some distance. He stated that the rasta which he took to escape was shown by him to the investigating officer. PW-1 stated that the distance of Amari village abadi from the place of incident is about 1 km. He took about 10 to 15 minutes to reach village abadi. PW-1, however, could not tell the name of the person in whose house he hid himself in village Abadi though, he could disclose that the door of that house opened towards North. He stated that he informed the villagers of Amari gaon about his father's murder. He stated that he stayed in the village Amari for about 4-5 minutes and thereafter, about 25-30 persons of the village Amari arrived with him at the spot. He stated that he arrived at the spot from village Amari within 20-25 minutes though he could not remember the name of the villagers of village Amari who accompanied him to the spot. He admitted that statement with regard to arrival of 20-25 persons with him at the spot is being made for the first time in Court. He denied the suggestion that he was not present at the time of the incident and that he had not seen the incident. He denied that his father was a characterless person and that he lodge the report after deliberation on account of enmity.

20 (ib). In his cross-examination on 21.09.2004, he stated that *Pan ki Tokri* (Betel leaves basket) was on the cycle of his father whereas the remaining goods, namely, Biscuits, toffee were on his cycle. He admitted that seizure memo of the blood stained shirt carried signature of one Chunnilal, who is a person of his village, and the other witness is Phool Chand Gaur, who is having a medical consultancy business near his shop at a place owned by him. He denied the suggestion that he was not present at the spot and that he smeared blood on the shirt to develop a false story. He stated that memo of custody of the bicycle and seizure memo of the shirt was prepared at the spot. He stated that he went to the police station alone; that he accompanied the body to the police station and the from there, the body had gone to the hospital. The body was handed over to him at about 4.30 pm in the evening. He admitted that he had not stated in the FIR that he had sent information to his house about the incident. He stated that he had disclosed that Rama Shanker, Rajesh and Onkar had come on Hero Honda motorcycle and had stopped the motorcycle in front of his father's (the deceased) cycle but if the the same was not mentioned in the report, he cannot tell its reason. He also stated that he had mentioned in his report that the accused alighted from their motorcycle, Onkar exhorted to finish off the deceased and Rajesh had fired at the deceased, as a result whereof, the deceased stumbled and fell but if it was not written in the report he does not know the reason for the same. He also stated that he had mentioned in the report that seeing his father falling, he ran to support him and begged the accused to spare him upon

which, the accused threatened him and, soon thereafter, the second shot was fired by Rajesh and the third was fired by Rama Shanker, but if all this has not been written in the report, he does not know the reason for the same. He also stated that he had dictated in his report that while lifting his father, his shirt got blood stained but if that was not written in the report, he does not know the reason for it. He was also confronted by his statement under Section 161 Cr.P.C. in respect of which he stated that he had given statement to the investigating officer that after the second shot was fired, he got scared and ran towards Bhatahi Chatti where he noticed Sherai (PW-2) and Gulab Sheth, who also witnessed the incident. He stated that Bhatahi Chatti is at a distance of about one furlong towards North of the place of incident. He stated that his statement in the Court that he ran towards the West is correct. He denied the suggestion that first information report was not lodged at 8.30 am but later, he also denied the suggestion that the body was found unattended at Sherwa Pul (culvert) and that the police was informed and later the body was got identified. He denied the suggestion that the accused has been falsely implicated on account of enmity. He also denied the suggestion that he lodged the first information report after consultation and deliberation.

20 (ii). **P.W.-2 - Sherai Mishra**. He is a chance witness, who stated that at the time of the incident he was going from his house to Budhanpur Bazaar as on that day there was a Bhandara (feast) arranged by him in connection with which he had to purchase vegetables, etc. According to him, when he was on his way, as he crossed Bhatahi Chauraha, he heard gunshot and screams of Rajaram Mali. Then he saw Munnar Mali (the deceased) on the ground and accused Rajesh and Rama Shanker firing at him from their country made pistols and Onkar was exhorting them, whereas **Raja Ram** (PW-1) was begging to spare his father. PW-2 stated that this incident was witnessed by Gulab and 10 - 20 others. After the incident, the accused, brandishing their weapons, escaped on a motorcycle. He stated that the investigating officer had arrived and had prepared papers and had enquired from him; thereafter, 6-7 days later, he was called by a constable for interrogation.

20 (iia). **In his cross-examination**, he stated that he knew the accused from before. He stated that he signed the inquest report at the police station. Immediately thereafter, he asked as to what an inquest report is. When the inquest report was shown to him and was explained to him, PW-2 stated that he signed the same at around 3.30 pm. He proved his signature on the inquest report. He stated that he did not see Shayamacharan, Kalicharan and Rajaram (PW-1) at the police station and after signing the inquest report he had come back. He stated that he is not aware whether any recovery memo of blood stained clothes was prepared by the police. He admitted that he was a co-accused with Munnar Mali (deceased) in S.T. No. 229 of 1966 but stated that in that case he was later acquitted. He added that except that sessions trial, he was not an accused with the deceased (Munnar) in any other case. PW-2 in respect of the reason for his presence at the spot stated that whenever he is in need to purchase goods, he goes to Budhanpur, which is about 7 kms from his house. In respect of the route adopted to reach Budhanpur, he stated that while going to Budhanpur, first Padumpur bazaar and, thereafter, Atrait bazaar would come and near that, there is Bhatahi Chauraha. He

stated that Rajesultanpur bazaar, which may be big or small, is on the other side of his house, at a distance of about 3 km from his house. PW-2 admitted that the son of the deceased was present in the court room behind him, but stated that he had come to the Court on his own and that the son of the deceased had not paid for his conveyance. He stated that he had also come on last four occasions to give his statement but his statement was not recorded.

20 (iib). **In his cross-examination** on 30.11.2004, he denied being an accused in a dacoity case. He stated that Balai Mishra is not his relative though, being a fellow villager, he refers to him as his uncle. He stated that he heard about the murder of Balai Mishra but is not aware whether Ram Shabd is an accused in his murder. PW-2 denied having knowledge about Ram Shabd's wife being real sister of accused Rajesh's wife. He denied the suggestion that he is trying to hide his relationship and also denied that in the murder of Balai, on behalf of Ram Shabd, Rajesh (appellant no.2) and his family were doing pairvi. He denied the suggestion that because of this animosity, he is telling lies. He also denied the suggestion that his father was convicted in a theft case. He stated that the investigating officer had himself inspected the spot and that he had not shown him the spot, though, the I.O. had called him 6-7 days later for interrogation, but had not brought him to the place of occurrence. He stated that the house of witness Gulab is about 200 Katta (one Katta equals to 7-8 feet) away from his house. He stated that though he had gone to the police but Gulab did not come. He waited at the police station for about 30-45 minutes. The I.O. had asked him few things and thereafter had released him. He stated that he had told the investigating officer that on the date of the incident he was going to Budhanpur to purchase vegetables etc. but if that was not written he cannot give its reason. He also stated that he had informed the I.O. that Rajaram had pleaded the accused to spare his father but if the I.O. had not written that, he cannot tell the reason for it. He stated that when he first heard the noise, he was 50 Katta South of Bhatahi Chatti. He was on a bicycle and so was Gulab with him. Their cycles were separated from each other by five paces. He was ahead whereas Gulab was following him. He stated that on a turn towards West from Bhatahi Chatti, there is a bazaar having shops. People from Bhatahi Chatti had not arrived at the time of the incident. PW-2 stated that 10-20 persons had seen the occurrence but, he cannot tell their names, except that of Gulab. PW-2 stated that Rajaram (PW-1) was 5-7 Kattha away towards north of the spot where the body of the deceased fell. Rajaram (PW-1) had left his cycle to run towards the deceased and had pleaded the accused to spare the deceased. When PW-1 (Rajaram) pleaded with folded hands, PW-1 was about five paces North of the deceased. PW-2 stated that the spot where Rajaram left his cycle was at a distance of 4-5 Katta towards North of the location of PW-2. PW-2 stated that the motorcycle was 3-4 hands away towards west of the body. Onkar kept sitting on the motorcycle. Motorcycle was going towards North. The first shot was fired from a close range immediately upon arrival on the motorcycle and, thereafter, each of the two accused, fired a shot each from a close range. After firing at the deceased, the accused escaped towards North. PW-2 stated that he stayed at the spot for about half an hour and thereafter came to Budhanpur bazaar but he did not go to the hospital with the body. PW-2 stated that he had neither noticed the motorcycle number nor could notice its

colour. He stated that towards north of Bhatahi Chatti, there is Atrait Bazaar but he does not know which village falls towards North of it. PW-2 stated that he did not say anything to the accused at the spot. He could not tell as to how long Rajaram (PW-1) stayed at the spot but Rajaram was there till PW-2 was there at the spot. He denied the suggestions: that he did not witness the incident; that some unknown persons had killed Munnar at some unknown place and unknown time; that because of being a friend of the deceased and having enmity with the accused, he is telling lies; that the son of the deceased had brought him to give statement. Rather, PW-2 claimed that he had paid Rs. 56/- for travelling and on earlier occasions also he had paid for the conveyance. He stated that when he was there at the spot, 2-3 constables had arrived but the investigating officer had not arrived.

20 (iii). **PW-3 - Dr. Nand Lal Yadav.** He conducted the autopsy and proved the **autopsy report** (Exb. Ka-2), the details of which have already been noticed above. PW-3 accepted the possibility of death having occurred at or about 7:15 am on 07.08.2002.

20 (iii a). **In his cross-examination**, he accepted the possibility of death having occurred in the wee hours of the morning say at 4 or 4.30 am. He also accepted the possibility of the three injuries found on the body being caused from different distances. He stated that injury no.1 could have been caused from a distance of 2 - 3 feet whereas injury no. 2 -3 could also be from a distance of 2-3 feet and then clarified that injuries no. 2 and 3 could be from a distance of 10 to 12 feet. He stated that the accused must have had attended nature's call in the morning as the Rectum was found unloaded. He stated that injuries 2 and 3 were on the back side of the body and it is possible that these injuries might have been caused from back. He stated that police papers for autopsy were received by him at 4 pm.

20 (iv) **PW-4 - Brij Nath Dubey**, the Head Moharir, at P.S. Atrauli, who made GD entry of Case Crime No. 257 of 2002 on 07.08.2002 vide GD report no. 15 at 8.30 hours. He proved the GD entry of the written report as well as Chik FIR. They were marked as Exhibit Ka-3 and Ka-4.

20 (iv a) **In his cross-examination**, he stated that on 07.08.2002, the instant case was the first cognizable case to be registered that day and there was no other cognizable case registered. He stated that the Chik FIR was prepared on the basis of the written report submitted by the informant. He denied the suggestion that the informant had signed the report at the police station. He also denied the suggestion that the Chik FIR was not registered at 8.30 hours but later. He stated that Chik FIR was sent to C.O. on 08.08.2002 but he is not aware of the day as to when it was sent to the Magistrate's court. He further stated that vide GD Report No. 21 at 19:15 hours on 07.06.2002, section 7 Criminal Law Amendment Act was added in the case. He denied the suggestion that the FIR was ante-timed.

20 (v) **PW-5 - Constable Ram Bachan Ram.** The constable clerk at PS. Atrauli, who registered Case Crime No. 280 of 2002 on 25.08.2004. He proved the registration of the case, the making of the Chik FIR as well as the GD entry in respect thereof.

20 (v a) **In his cross-examination**, he admitted that he served under the I.O. V.B. Singh and that the accused was taken from locker for Baramadgi. He denied the suggestion that under pressure he registered a false case.

20 (vi) **PW-6 - V.B. Singh (Investigation Officer)**. He stated that on

07.08.2002, he was posted at P.S. Atrauli as Station Officer. On that day, Case Crime No. 257 of 2002 was registered. After obtaining copy of Chik FIR and making entry in the case diary, he recorded the statement of Rajaram Mali (PW-1), and went to the spot with S.I. Lallan Mishra and other police personnel. First he examined the body of the deceased and directed for inquest. He recorded the statement of the informant, inspected the spot and prepared the site plan (Exb. Ka-6). The inquest report was prepared by S.I. Lallan Mishra. He proved Lallan Mishra's signature on the inquest report. He proved the letter written to the C.M.O., photo nash, challan nash, etc - they were marked Exhibit 7 to 13. He stated that the body was sealed and handed over to constable Ram Pujan Yadav and Arvind Yadav for post-mortem at Sadar, Hospital. He proved lifting of blood stained earth and plain earth from the spot. He also proved taking custody of blood stained shirt from the informant. The custody memo was exhibited. He also stated that the bicycle of the deceased with a Pan Basket in its carrier was found at the spot; the custody of the cycle and Pan Basket was given to the informant of which custody memo (Exb. Ka-3) was prepared. He stated that he recorded the statement of other witnesses including Rajaram (PW-1) and thereafter went in search of the accused but the accused could not be found on that day. Again, on 08.08.2002, he searched for the accused but they were not found. On 10.08.2002, he arrested the accused Onkar and produced him before the Magistrate. On 12.08.2002, he took steps to initiate proceedings under Sections 82-83 Cr.P.C. against the accused but the accused surrendered in Court. On 16.08.2002, he applied for police custody remand and, on 24.08.2002, he obtained the order for police custody of accused Rajesh. On 24.08.2002, he got custody of Rajesh, who was in District Jail, and kept him in the police lock up; thereafter, on 25.08.2002, he took Rajesh from the police lock-up and got him to the spot. There, on the indication given by the accused-Rajesh, recovery of country made pistol from a haystack was made. He proved the recovery memo, which was marked as Exhibit Ka-15. He produced blood stained earth and plain earth seized by him during investigation and same were marked as material exhibit -1 and material exhibit-2. He also produced the blood stained shirt, seized from the informant and the same was marked as material Exhibit-3. He also produced the country made pistol recovered at the instance of Rajesh which was marked as material Exhibit Ka-4. He stated that during the course of investigation, he was transferred.

20 (vi a) **In his cross-examination**, he stated that as he had been transferred, he could not send the recovered country made pistol for ballistic report. He admitted that in exhibit Ka-14, only section 302 I.P.C. is mentioned and other sections 504 and 506 I.P.C. are not mentioned. He denied the suggestion that papers were prepared before registration of the FIR. He stated that the blood stained earth and plain earth were not sent to the Serologist by him as he was transferred on 25.08.2002. He stated that he collected blood stained shirt from the informant at the spot and had also sealed the same. He admitted that the witnesses of shirt seizure, namely, Phool Chand and Chunni Lal, were residents of Rajasultanpur, District Ambedkar Nagar, which is at the border of Thana. PW-6, however, clarified that they had arrived at the spot on getting information. He admitted that these two witnesses reside 3.50 to 4 kms away from the place of occurrence. He stated that as those

witnesses were available at the spot, they were made witnesses.

20 (vi b) On further cross-examination, he stated that the weapon of assault was recovered from a haystack, which was in a jungle type of a place having no abadi; and that place must have been about a furlong away from the place of occurrence. He added that though at the time of recovery of weapon, there were few bystanders but, despite request, they did not volunteer to be a witness. When PW-6 was asked about their names, he could not disclose their names. He stated that the place from where the weapon of assault was recovered must have been 50 paces away from *Kharanja* (road paved out of bricks laid vertically). He denied the suggestion that the weapon of assault was shown recovered not because there was a disclosure statement of the accused but to lend credence to an otherwise false prosecution case. He denied the suggestion that, at the spot, neither the informant was present nor he gave a blood stained shirt and that such seizure was to add colour to the prosecution case. He admitted that from the spot no empty cartridge was recovered. He stated that informant had come on his own cycle and he wanted his father's cycle to be given in his custody therefore, he did not make a seizure memo but prepared a custody memo of that cycle and the cycle was given in PW-1's custody along with the Pan Basket. He stated that the cycle must have been given to PW-1 by or about evening time.

20 (vi c) On 27.02.2007, he was again cross-examined. He stated that from the spot he had recovered only one cycle, which was of the deceased. He had not noted its number, colour or the brand name of that cycle; and that the place from where he recovered the cycle was not shown in the site plan due to inadvertence. He stated that he had not noticed any carton of biscuits on the cycle. He stated that he had not noticed any blood on the cycle. When confronted with the recital in the inquest report that the cycle, having a bag on its handle, was lying beneath the body of the deceased, with a pan basket on its carrier, PW-6 stated that he did notice the pan basket on its carrier. He denied the suggestion that at the spot there was neither cycle nor pan basket. He also denied the suggestion that the incident did not occur in the manner stated. He denied the suggestion that the custody memo of the cycle was bogus and fictitious. On being confronted with the difference in the distance mentioned in the Chik report with that mentioned in the inquest report, he stated that the difference can only be explained by the person who has written the same. PW-6 stated that the informant had not shown him the place where the accused had parked their motorcycle; rather, he stated that the shot was fired while the motorcycle was moving.

20 (vi d) On further cross-examination, on 13.09.2007, PW-6 stated that he had not mentioned the spot from where the witnesses had seen the incident. This must be an inadvertent mistake. He denied the suggestion that there was no witness at the spot and therefore the location of the witnesses was not shown in the site plan. He further added that the informant had not given him the description of the Hero Honda motorcycle. He, therefore, did not take any step to determine the owner of that Hero Honda motorcycle. He denied the suggestion that he did not properly investigate the matter. On being confronted with the entry in the challan nash regarding the time of death as four hours before, he stated that the explanation for that can only be given by S.I. Lallan Mishra, who prepared the

challan-nash. He stated that the statement of Sherai Mishra (PW-2) could be recorded only on 16.08.2002 as he was not available though he was witness of the inquest report. He denied the suggestion that the FIR was lodged after the inquest. He stated that the body is sent first to the police line and thereafter it is sent for post-mortem. He denied the suggestion that the body is sent for post-mortem straightaway and papers are prepared later to show that the body has been sent to police line. He stated that the body is sent for post-mortem against the number provided at the police line and this number is mentioned in the post-mortem report. When confronted that at the police line the number assigned was 521 / 2002 whereas in post-mortem report it is 522/ 2002, he stated that only the doctor can tell about the same. He however denied that this entry was made on imagination. He also denied the suggestion that all of this discloses that the first information report is ante-timed.

20 (vii) **PW-7-Janardan Yadav.** He is the investigating officer of Case Crime No. 280 of 2002. He stated that investigation of the case was given to him on 25.08.2002. He proved the various stages of the investigation of that case such as recording the statement relating to recovery and preparation of site plan of the place from where the recovery of country made pistol was made. He also proved submission of the charge-sheet as well as sanction accorded by the District Administration for prosecution under Section 25 Arms Act.

20 (vii a) **In his cross-examination**, he stated that country made pistol recovered was not sent for forensic examination; that the place from where the country made pistol was recovered was an open place near a Khadanja rasta. He denied the suggestion that he submitted a false charge-sheet under pressure of the Inspector in-charge.

20 (viii) **PW-8 - Head Constable - Mukteshwar Singh.** He proved submission of the charge-sheet by the subsequent investigating officer of Case Crime No. 257 of 2002.

20 (viii a) **In his cross-examination**, he admitted that he has no knowledge with regard to the mode and the manner in which the investigation of that case was conducted.

ANALYSIS

21. Having noticed the entire prosecution evidence and the submissions made before us, we find that there is no issue with regard to long standing animosity between the informant and the accused side. Admittedly, the family of the accused and the family of the deceased had been in a long standing civil litigation for last more than two decades. However, what needs to be examined is whether there existed any precipitating factor for the crime, because the civil litigation was there for the past two decades. In this regard, the prosecution set up an incident that allegedly occurred on 5.8.2002, 2 days prior to the incident. As per the allegations, in this incident, the deceased was attacked by the accused party comprising Rajesh (appellant no.2), Ramjeet Pandey and Onkar; the deceased could, however, escape that attack by hiding himself in his house. But the alleged incident dated 5.8.2002 was neither reported nor there is record of any injury sustained by the deceased in that incident; and, there is no independent witness of any such incident. Thus, though, long standing enmity is proven, but existence of a precipitating factor for the crime could not be proved beyond reasonable doubt. But, as motive is not of much importance when there is

ocular account of the incident, we do not propose to dwell more on this aspect though, we would have to bear in mind that this long standing animosity between the parties render the eye witnesses interested in the implication and conviction of the accused therefore, we will have to weigh and scrutinise the prosecution evidence carefully.

22. As to how the testimony of an interested witness is to be appreciated and weighed, the law has been settled by a three-judge Bench decision of the Supreme Court in ***Hari Obula Reddy v. State of A.P., (1981) 3 SCC 675*** where, in paragraph 13 of the judgment, it was observed as follows:

"..... it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any other source. Since perfection in this imperfect world is seldom to be found, and the evidence of a witness, more so of an interested witness, is generally fringed with embellishment and exaggerations, however true in the main, the court may look for some assurance, the nature and extent of which will vary according to the circumstances of the particular case, from independent evidence, circumstantial or direct, before finding the accused guilty on the basis of his interested testimony. We may again emphasise that these are only broad guidelines which may often be useful in assessing interested testimony, and are not iron-cased rules uniformly applicable in all situations."

Emphasis Supplied

Similarly, in **Jalpat Rai v. State of Haryana, (2011) 14 SCC 208,** after reiterating the general principles as noticed above, in paragraph 41 of the judgment, the apex court in the context of interested witnesses testimony observed: *"to find out the intrinsic worth of these witnesses, it is appropriate to test their trustworthiness and credibility in light of the collateral and surrounding circumstances as well as the probabilities and in conjunction with all other facts brought out on record."* The apex court also observed: "*it is a reality of life, albeit unfortunate and sad, that human failing tends to exaggerate, over implicate*

and distort the true version against the person(s) with whom there is rivalry, hostility and enmity. Cases are not unknown where an entire family is roped in due to enmity and simmering feelings although one or only few members of that family may be involved in the crime." The law is thus settled that the testimony of an interested witness is not necessarily unreliable and there is no invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. What is required is that testimony of such a witness should be subjected to careful scrutiny. If, on such scrutiny, the testimony is found to be intrinsically reliable or inherently probable, it may, in the facts and circumstances of a case, form the basis of conviction. Though, no hard and fast rule can be laid down for appreciation of evidence but, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful, as a first step, to determine whether the presence of the witness at the scene of crime at the material time was probable. If so, whether the substratum of the story narrated by him is consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case and is such that it would appear convincing to a prudent person. If the answer to these questions can be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any source.

23. Bearing in mind the legal principles relating to evaluation of testimony of an interested witness, we shall now proceed to evaluate the evidence and analyse it in the context of the rival submissions. But, before that, it would be useful to summarise the defence submissions. In a nutshell, the submissions of the learned counsel for the appellants is that the FIR is ante-timed; that it was not lodged at 8.30 hours on 07.08.2002; rather, it was lodged after 11 am as is proved from the testimony of DW-1; that there are various other circumstances also to suggest that the FIR is ante-timed; that presence of both PW-1 and PW-2 is doubtful at the spot; that their testimony does not inspire confidence; that it appears to be a case where the incident occurred in the wee hours of the morning when the deceased was alone, returning from the bazaar, while his son PW-1 was at his shop; that nobody witnessed the incident; and, subsequently, the prosecution story was developed on guess-work and suspicion, which is apparent from the various improvements made later in the prosecution case. Per contra, on behalf of the State, the submission is that the FIR is not ante-timed; that being a prompt FIR, there is no scope to treat the prosecution story contrived; that the presence of PW-1 with the deceased is natural; that the ocular account is corroborated by medical evidence and, therefore, there is no good reason to disbelieve the prosecution story.

24. First, we shall proceed to test whether the FIR is ante-timed. According to the appellant's counsel, there are various circumstances which suggest that the FIR is ante-timed. These circumstances include delayed post-mortem; discrepancy in the the entries made in inquest report, challan nash, etc with the Chik report and, above all, the statement of DW-1, the scribe of the FIR. We shall notice the submissions in detail on these aspects, one by one, below. In respect of the delay in autopsy,

according to appellant's counsel, the autopsy of the body was conducted late at around 4 pm. According to appellant's counsel, there was no occasion for that kind of a delay if the inquest had been over by 10.30 and the body was sealed and papers were prepared for autopsy. This delay, according to him, suggests that the police papers were not ready by noon. In addition to that, DW-1, scribe of the FIR, stated that he wrote the FIR at the police station on the dictation of the I.O. at 11 am, which, according to appellant's counsel, means that the FIR was not lodged at 8.30 am as alleged. Appellant's counsel also pointed out that the post mortem number mentioned in the register maintained at the district police head quarters is different from that mentioned in the post mortem report suggesting that the body reached for autopsy before the papers could. It was pointed out that as per the testimony of PW-6, post mortem number is assigned at the police lines (district police head quarters) and the post-mortem report must reflect that number. But, in the instant case, the post-mortem report mentions number 522 of 2002 when, in the register maintained at police lines, the number is 521 of 2002, which suggests that the body was sent directly to the hospital for autopsy and the papers relating to autopsy were filled later. It was also argued that testimony of DW-1 that he scribed the FIR at 11 am was unjustifiably discarded by observing that if the FIR had been written at 11 am, the body could not have reached police lines by 2.10 pm as that place was 48 km away from the police station. It has been argued that this reasoning is perverse because to cover a distance of 48 km in a vehicle one would, at the maximum, take one hour and thirty minutes. Therefore, even if the body is dispatched from the police station at 12.30 hrs it can easily reach police lines by 2.10 pm or 14.10 hrs. Another aspect highlighted to demonstrate that the first information report is ante-timed and prepared after the inquest report is, that, though, as per record, inquest is stated to have been completed at the spot by 10.30 am, but, PW-2, who is a witness of the inquest and is a signatory to the report, stated that his signature was obtained on the report at the police station at about 3.30 pm (15.30 hrs.). It was also pointed out that, in the inquest report, the distance of the place of occurrence from the police station is 8 km, whereas in the Chik FIR the same is mentioned as 6 km and, similarly, in the papers relating to autopsy i.e. challan nash, etc except section 302 IPC, the other charging section i.e. 506 IPC, which finds mention in the Chik FIR, is not there; therefore, it is clear that at the time when the inquest report was prepared, the Chik FIR was not with the person who prepared the inquest report or papers for autopsy.

25. Having noticed the submissions of the learned counsel for the appellant on the issue whether the FIR is ante-timed, we may, at the out set, observe that there are no cut and dried formulae or tests to determine whether an FIR is ante-timed or not. An inference with regard to the FIR being ante-timed is to be drawn only after careful scrutiny of the evidence and material on record. The most common test adopted for the purpose is to find out from the evidence and material on record whether the existence of case details, such as case crime number, etc, that arise on registration of FIR, are reflected in police papers prepared subsequent to the registration of the FIR as also as to when special report or report under section 157 CrPC was forwarded. Delayed dispatch of the body for autopsy, where autopsy is required, is also a

circumstance, in the facts of a case, if unexplained, and it may create a doubt with regard to the existence of the FIR at the time specified. In the instant case, two aspects highlighted by the appellant's counsel that raise a doubt about the existence of the FIR at the specified time need be noticed. One is the statement of the scribe (DW-1) that he scribed the FIR at the police station at 11 am; and the other is the statement of inquest witness (PW-2), who states that he signed the inquest report at the police station at 3.30 am. Upon a careful perusal of the record, we find in the statement of PW-2, who is an inquest witness, that his signature on the inquest report was obtained at the police station at 3.30 pm (15.30 hrs). Whereas, the inquest report states that inquest was over at the spot by 10.30 hrs. We also find that the distance of the place of occurrence from the police station mentioned in the Chik FIR is different from that mentioned in the inquest report. We also find that in the challan nash (Exb. Ka-13), amongst charging sections, other than section 302 IPC, section 506 IPC is not mentioned and, as per the entry in the challan-nash, the body was received at police lines, Azamgarh at 14.10 hours to which, post mortem number 521 of 2002 was assigned whereas, the post-mortem number reflected in the **autopsy report** is 522 of 2002. But the challan-nash as well as the inquest report discloses the case crime number of the case (i.e. 527 of 2002). The challan-nash also discloses the time of dispatch of the body to the Police Head Quarters (i.e. Police Lines) for autopsy, as 10.30 hours. Ordinarily, when inquest and post-mortem related papers are filled after the FIR has come into existence, entries in those subsequent papers are expected to be in sync with the entries in the Chik FIR inasmuch as the I.O. or the police team is expected to carry a carbon copy or copy of the report for reference. But there is no such rule that where the entries are at variance with the Chik FIR, it would be presumed that the FIR was not in existence, particularly, when the entries reflect the case details i.e. the case crime number. No doubt, the post-mortem report recites post mortem number 522 of 2002 instead of 521 of 2002, but this entry is made by the doctor, or the staff subordinate to the doctor, to whom no question has been put with regard to the discrepancy. Under these circumstances, PW-6's explanation that if there is any such discrepancy it is for the doctor to explain, is acceptable. But since no question was put to the doctor with regard to the said discrepancy, it would not be appropriate on our part to accept the suggestion that the body was sent directly to the hospital for post-mortem and the papers were prepared thereafter. Similarly, the discrepancy in the distance mentioned in the inquest report with that mentioned in the Chik FIR, could best be explained by S.I. Lallan Mishra who, according to PW-6, prepared the inquest report. But, importantly, he has not been examined therefore, the defence cannot be blamed for not putting questions to him. In so far as non-filling of all the charging sections are concerned, that, by itself, in our view, is not sufficient to raise a presumption with regard to non-existence of the FIR at the time specified, particularly, when there is a recital of the case crime number in those papers relating to autopsy. However, there is another aspect of the matter, which is, that filling up of case details in subsequent papers is not conclusive of the FIR having come into existence because, it is possible that, upon noticing a crime or an incident, the police may reserve a number for that case, particularly, if, on that day, there is no other cognizable case reported and the records of the police station, being not

digitised/ computerised, admit of filling data, later. Notably, in this case, the Constable Clerk at the police station, namely, PW-4, was questioned in this regard, upon which, he stated that no other cognizable report, except the case at hand, was reported at that police station on that date. But, as we find that no suggestion has been put either to the investigating officer, or the Head Moharir, who made GD entry of the written report, with regard to they bearing any ill motive as against the accused or being under any kind of influence of the complainant party to manipulate the records, the above mentioned circumstances, by itself, are not sufficient to enable us to record a finding that the FIR is ante-timed. But, the deposition of DW-1 that the FIR was scribed by him at 11.00 am at the police station is a very important circumstance which we will have to address to rule out the possibility of the FIR being ante-timed. In this context, we would like to notice the discrepancy in between the statement of PW-1 and DW-1 as to the place where the FIR was scribed. PW-1 states that the FIR was scribed by DW-1 at the spot i.e. the place of occurrence. DW-1 says that he scribed the FIR at the police station at about 11 am. What is important is that DW-1 is not a resident of the village where the spot i.e. place of occurrence is located. From DW-1's statement it appears he resides at a distance of about 200 meters from the police station where the report was lodged. This circumstance lends credence to the testimony of DW-1 that the FIR was scribed at the police station. Once, that is the position, the possibility of the FIR being scribed at the police station and at the time suggested by the defence increases manifold, particularly, when nothing could be elicited from DW-1 as to him being in cahoots with the accused. To discard the testimony of DW-1, the trial court took the view that since, for autopsy, the body reached the district police head quarters, 48 km away, by 14.10 hrs, if the FIR had been lodged at 11.00 am that would not have been possible. We disagree with the above reasoning of the trial court because, in times of vehicular transport, covering a distance of 48 km is very much possible within an hour and thirty minutes. Therefore, in our view, even if the FIR or papers related to autopsy were prepared by noon or so, the body could have easily reached the district police head quarters by 14.10 hrs.

26. The upshot of the above discussion is that although the defence might not have been able to establish with certitude that the FIR is ante-timed but has succeeded in creating a serious doubt as to it being ante-timed. Once that is the position, the ocular account of the incident would have to be tested thoroughly on all material particulars before acceptance.

27. In this backdrop, we would have to carefully scrutinise the prosecution evidence, bearing in mind the well settled legal principle that the burden is on the prosecution to prove its case by leading evidence, reliable and trustworthy. There are two eye witnesses, namely, PW-1 and PW-2. PW-1 is the son of the informant and there is no dispute with regard to long standing animosity between the family PW-1 and the accused on account of decades old civil litigation pending inter se. In so far as PW-2 is concerned, the defence could demonstrate that the deceased and PW-2 were co-accused in a sessions trial. Further, the defence could also demonstrate that PW-2 is related to one Balai Mishra who was murdered, and in whose murder, Ram Shabd was an accused, who is husband of

Rajesh's (appellant no.2's) wife's real sister, and for whom the appellant no.2 was doing pairvi. Not only that, the defence has sought to discredit PW-2 by terming him a chance witness as his presence otherwise, was not natural at the spot. Notably, to explain his presence at the spot, PW-2 stated that on the date of the incident there was a feast (Bhandara) arranged by him and to purchase vegetables, etc. for that feast, he had left early morning to go to Budhanpur when, on way, he witnessed the incident. The defence has cross-examined him in detail to elucidate that from PW-2's place of residence, much before Budhanpur bazaar, there are several big markets from where he could have made those purchases, if it was so required, therefore, there was no good reason for him to go to Budhanpur bazaar. Thus, according to the defence, the explanation offered by PW-2 for his presence at the spot is flimsy and is a ruse to create a witness when otherwise there was none. In the above context, we are of the view that PW-2 is not only a chance witness but is also an interested witness as he has an interest in the conviction of at least one of the accused persons, namely, Rajesh (appellant no.2).

28. We shall now proceed to evaluate the testimony of PW-1. To enable a deeper analysis of PW-1's account, we propose to extract relevant portions of his testimony in respect of various aspects such as:

(i) In respect of the time, place and the manner in which the accused arrived at the scene of the crime - PW-1 stated as follows:-

'' दि0 07.8.2002 को सुबह सवा सात बजे मैं व मेरे पिता मुन्नर ब

'' गाडी से उतर कर ओंकार ने ललकारा कि मार डालो साले को मुकदमा खत्म हो जाए। तब तक राजेश ने अपने हाथ में लिए हुए कट्टे से मेरे पिता पर जान मारने की नीयत से फायर कर दिया गोली मेरे पिता जी के सर में लगी और मेरे पिता जी वहीं पर लड़खड़ा कर गिर पड़े मैं अपने पिता को गिरते देख कर दौड़कर उन्हें पकड़ लिया और मुल्जिमान से हाथ पैर जोड़ने लगा कि मेरे बाप को मत मारिए तब मुल्जिमान कहे कि साले भाग जाओ नहीं तो तुम्हारा भी जान मार डालेंगे। पुनः राजेश ने दूसरा फायर मेरे पिता जी के ऊपर कर दिया जो मेरे पिता के सर के पीछे लगी। फिर रामाशंकर ने मेरे पिता के ऊपर तीसरा फायर किया जिसकी चोट उनकी पीठ में लगी। तब मुल्जिमान मुझे भी मारने के लिए दौड़ा लिए। मै अमारी गांव में भाग कर अपनी जान को बचाया और मुल्जिमान कट्टा लहराते हुए उत्तर भाग गए। इस घटना को गवाहान शेरई मिश्र, गुलाब सेठ तथा सडक पर तमाम आते जाते लोगो ने देखा।''

(iii) In respect of post incident conduct of PW-1 - PW-1 stated as under:-

'' जब मुल्जिमान चले गए तो मैं अपने पिता जी के पास आया तो देखा कि मेरे पिता जी मर गए हैं। तब मैंने एक व्यक्ति को साईकिल दिया कि मेरे घर खबर कर दीजिए और वहीं पर मैं दिलीप कुमार से घटना के बाबत बोलकर दरखास्त लिखाया और दरखास्त ले जाकर थाने पर दिया।''

(iv) In respect of blood stains on his shirt - PW-1 stated as under:-

'' घटना के समय जब मैं पिता जी को उठा रहा था तो उनका खून मेरी शर्ट पर लग गया था।''

(v) In respect of custody of his father's cycle and Pan Basket - PW-1 stated as follows:

'' जिस साईकिल से मेरे पिता जी जा रहे थे उस साइकिल के कैरियर पर पान की टोकरी जिसमें पान के पत्ते थे बंधी थी साईकिल को मेरी सुपुर्दगी में दिए थे व पान की टोकरी को भी दरोगा जी ने सुपुर्दगीनामा लिखवाया था। कागज नं0 8क/2 पर प्रदर्श क – 2 डाला गया।''

(vi) In respect of the place where PW-1's betel shop was located and the timing of its opening - PW-1 stated as follows:-

" मेरे घर से मेरी पान की दूकान करीब आधा किमी दूर है। सुबह मै नहा धोकर छः बजे अपनी दूकान पर पहुंचे कर दुकान खोल लेता हूं। बू"बू

29. After stating as above, PW-1 stated that Onkar stopped his motorcycle about two feet in front of his father's bicycle; at that time, PW-1's bicycle was a foot behind. PW-1 stated that he had shown to the I.O. the spot where the motorcycle of Onkar had stopped. He also stated that he had pointed out to the I.O. the spot from where Rajesh had fired at the deceased and had also pointed out the place from where Onkar exhorted and Rama Shanker fired at the deceased. But, when we see the site plan (Exb. Ka-6) prepared by the I.O. (P W-6), there are just arrows disclosing the direction in which the deceased and the accused were moving including the place where the deceased was killed. The place where the motorcycle stopped, the place from where the accused Rajesh and Rama Shanker fired at the deceased and the place from where the witnesses witnessed the incident have not been disclosed in the site plan (Ex. Ka-6). Interestingly, when PW-6 (I.O.) was cross-examined on this aspect, on 27.07.2007, he stated as follows:-

'वादी मुकदमा ने मुझे स्थान नही दिखाया था। मोटर साइकिल खडी करने का कोई स्थान ;पबद्ध में नही बताया है बल्कि गाड़ी चलते हालत में गोली मारना बताया है।"

29. The above statement of the I.O. suggests that at the time when the site plan was prepared the information about the incident was not complete. But that, by itself, is not sufficient to discard the ocular account of PW-1 though it puts us on guard to carefully scrutinise the evidence on all material aspects so as to rule out the possibility of prosecution story being contrived on account of enmity. The first step in that regard would be to test whether at the time of the incident PW-1 was present with his father or he arrived later, on receipt of information about the incident. For a better evaluation of PW-1's deposition, we propose to divide it into parts, along with brief comment, to enable a proper analysis. These parts are as follows:-

(a) At 4.30 am the deceased and PW-1, on separate bicycles, left their home to go to Budhanpur bazaar, which is 8 to 9 km away, for purchase of Betel leaves, etc for the shop of PW-1;

(b) Before leaving they ate nothing *(Note: empty stomach, empty small and large intestine corroborate this part);*

(c) At Budhanpur bazaar, they stayed for one hour and thirty minutes, made purchases of various other articles such as biscuits, toffee, tobacco pouches, etc, apart from betel leaves *(Note: no shop keeper of Budhanpur Bazaar was interrogated/ examined to test whether both father (deceased) and son (PW-1) had visited Budhanpur bazaar on that fateful day. Further, according to the statement of PW-1, basket of Betel leaves was on the bicycle of the deceased, whereas carton of biscuits etc were on the bicycle of PW-1 but neither PW-1's bicycle nor carton of biscuit etc was noticed nor seized or custody memo prepared during investigation);*

(c) On their way return from Budhanpur bazaar, at about 7.15 am, by the time they could cover 1 km distance, which they did in about 5 minutes, the accused (three in number including the appellants) arrived on a Hero Honda motorcycle *(Note: number and colour, or description, of the motorcycle is not disclosed);*

(d) The accused Onkar (declared juvenile), who was driving the motorcycle,

stopped the motor cycle in front of the bicycle of the deceased and exhorted other accused persons (the appellants) to finish off the deceased (Note: *driving of motorcycle by Onkar and stopping his motor cycle, followed by exhortation is not disclosed in the FIR. Further, PW-1 states that Onkar and all alighted from the motorcycle whereas PW-2 stated that Onkar kept sitting);*

(e) After that, Rajesh (appellant no.2) fired one shot on the side of the head of the deceased from a close range, as a result, the deceased fell; seeing the deceased falling, PW-1 left his bicycle rushed towards the deceased to hold him; thereafter, he pleaded the accused to spare the deceased (PW-1's father) *(Note: all of this is not disclosed in the FIR);*

(f) The accused threatened PW-1 and asked him to leave, or he would meet the same fate, and, immediately thereafter, Rajesh (appellant no.2) fired a second shot from close range, which hit the deceased on the back of his head, thereafter, a third shot was fired by Rama Shanker (appellant no.1), which hit the deceased on his back *(Note: all of this not disclosed in the FIR);*

(g) After witnessing all that, PW-1, to save himself, ran towards the abadi of village Amari (1 km away from the spot); and was given a chase by the accused for some distance;

(h) At village Amari, PW-1 hid himself for about 5 minutes *(note: details of the place where he hid himself not disclosed)* and, thereafter, with 25-30 villagers *(note: names not disclosed)* he returned back to the spot within 20-25 minutes. There, at the spot, PW-1 met Dilip (DW-1) *(Note: DW-1 states that he resides 200 mt from the police station and that he scribed the report at 11 am at the police station itself)* who wrote the FIR at PW-1's dictation and thereafter left to lodge the report. *(Note: It was lodged at 8.30 hrs at a police station which is 6 km away from the spot).* In the meantime, he gave his bicycle to a villager *(note: name not disclosed)* to inform his family about the incident.

(i) Thereafter, the police arrived at the spot and took various steps to carry the investigation forward and also prepared Supurdaginama (custody memo) of Pan Basket /cycle as well as the inquest report .

At this stage, it would be useful to notice that according to PW-1 he had also purchased biscuits, toffee, tobacco pouches, etc. therefore, it took them time at Budhanpur bazaar. **In his cross-examination**, PW-1 stated that the basket kept on the carrier of the bicycle of the deceased carried betel leaves whereas, in the Gatta (carton) there were biscuits; and toffee, etc were in a bag. **In his cross-examination**, on 21.09.2004, PW-1 stated:-

" पान की टोकरी मेरे पिता ने अपनी साइकिल पर रखी थी। बाकी सामान बिस्कूट व टाफी आदि मेरी साइकिल पर था।"

But interestingly the cycle and the goods which PW-1 was carrying were neither noticed by the I.O. nor a custody memo in respect thereof was prepared. Non-preparation of custody memo may not be too relevant because, according to PW-1, he had given his bicycle to a villager to inform persons of his village. But, what is relevant is that a bag, in which there could be toffees, at the time of inquest, was noticed hanging on the bicycle of the deceased lying below the body of the deceased. As to what was there in that bag the prosecution has not come out with it. The defence case is that this bag contained toffees etc which, to show his presence, PW-1 claims to be carrying on his bicycle. The relevant portion of the inquest report has already been extracted by us above. Importantly, on this count, the I.O., PW-6 was specifically cross-examined by the

defence counsel. In response to which, PW-6 stated as follows:-

''यह पंचायतनामा लल्लन मिश्रा द्वारा भरा गया है इस पर मेरा भी हस्ताक्षर है। लेकिन उन्होने यह बात कि ''साईकिल मृतक के नीचे दबी जिसमें ;पबद्ध झोला लटका पीछे पान की पेड की पत्ती'' पंचायतनामा के पेज 2 ;पबद्ध के अन्तिम लाईन मे सही लिखा है अथवा गलत लिखा है मै नही बता सकता साइकिल की सुपुर्दगी वादी को दिनांक 7.8.2002 को दिया है।''

It be noted that prior to the above extracted statement, PW-6 had stated that when he had recovered the bicycle he had not seen the bag and he had also not seen the carton or biscuits; and that whatever he had seen, he prepared a seizure memo of that. In that context, to contradict PW-6, that portion of the inquest report was put to him. All of this would suggest that the prosecution deliberately tried to hide the presence of bag on the bicycle of the deceased so as to provide a reason for the presence of PW-1 with the deceased i.e. to carry other articles for the betel shop. But if the bag hanging on deceased's bicycle contained toffees etc there was no reason for PW-1 to accompany the deceased.

30. In that backdrop, the question that now crops up is whether the deceased had gone alone to purchase goods for the betel shop or he went with PW-1. Notably, according to PW-1, his shop, on a daily basis, use to open at 6 am. It is a matter of common knowledge that Betel (Pan) leaves are perishable and, therefore, its purchase for commercial use would be an every day affair. Therefore, in normal course of events if the shop had to open by 6 am why would PW-1, who used to sit in that shop, be away to the Bazaar to purchase goods for the shop when those goods can be purchased by his father (the deceased). The other aspect of it is, that if PW-1 had to accompany his father, there would be an effort to return before 6 am i.e. the usual time of opening the shop. In these circumstances, apart from the story set up by the prosecution, two other possibilities arise: (i) that the incident occurred much earlier than put by the prosecution but to explain the delay in contriving the story, the time of the incident was delayed, or (ii) that, at the time of the incident, PW-1 was not accompanying the deceased but was at his shop which had to open by 6 am. In this context, we may notice a decision of the Supreme Court in the case of **State of UP V. Madan Mohan and others, (1989) 3 SCC 390,** where there were chance witnesses set up by the prosecution. One of the chance witness, namely, PW-1, had a shop. To prove his presence at the spot, the chance witness (PW-1 of that case) disclosed that he had shut his shop a bit early on the date of the incident. In that contextual matrix, while disbelieving the witness, the high court opined that he was an interested witness being the brother of deceased and his claim that he closed his shop early and was, therefore, at the scene of occurrence when the incident occurred was difficult to accept. Affirming the judgment of the high court, the apex court observed: *"the story of PW-1 that he closed the shop earlier than usual is difficult to believe because he does not assign reason for so doing"*. Reverting to the facts of the instant case, here also, PW-1 had a shop, the opening time of which, as per own statement of PW-1, was 6 am where, after taking a bath, PW-1 used to sit from 6 am onwards. In these circumstances, the presence of PW-1 with deceased at the scene of occurrence, which was several kilometres away from his shop, needed a believable explanation. The explanation offered was that PW-1 had accompanied the deceased to the Bazaar to purchase merchandise. There is no difficulty with

that explanation per se, provided they were to return by the opening time of the shop. But, here, they were at a far away place well past the opening time of the shop. In that background, in absence of a cogent explanation there arises a serious doubt with regard to the presence of PW-1 with the deceased at the time of occurrence. This doubt gets amplified when we find that in the FIR, PW-1 does not disclose in detail the manner in which the incident unfolded. The FIR only discloses that the assailants (all the three accused) came on a motorcycle and by exhorting each other fired three shots at the deceased, as a result the deceased fell dead on the road and his blood splattered on the shirt of the informant, which was witnessed by the informant, Sherai and Gulab. The FIR does not specifically disclose that two shots were fired by Rajesh and one was fired by Rama Shanker. It is also does not disclose that when the first shot was fired at the deceased, the deceased fell and the informant came to hold the deceased and beg for his life. Further, though the informant disclosed that his shirt got blood stained but he did not disclose that his shirt got blood stained while lifting the body of the deceased. We are conscious of the law that a first information report need not be an encyclopaedia and therefore absence of all the details with regard to the manner in which the incident occurred is not fatal to the prosecution but, some aspects of which, particularly, how many shots were fired and by whom, and who exhorted, could have been disclosed, if there had been awareness about it. Therefore, taking the testimony of PW-1 as an improvement from the report, the informant (PW-1) was confronted with the report which was bereft of all the details deposed during trial. However, what is most important in the FIR as well in the testimony of PW-1 is that the accused also chased PW-1 with an intention to kill him but he could some how manage to escape.

31. The defence counsel urged that if the ocular account as rendered by PW-1 is to be believed then before his father could fall on the ground, PW-1 held his father yet, at the spot, as per the recital in the inquest report, of which PW-1 is a witness, his father (the deceased) was noticed lying on the cycle at the spot. Meaning thereby, that PW-1 was not there to hold his father when he was first shot. The defence argument also is that the first information report is deliberately silent in respect of the manner in which the incident occurred. Perhaps, because, PW-1, on advise, wanted to fill in the details after receipt of the autopsy report so that his ocular account is consistent with the medical evidence. Notably, there were three shots fired at the deceased. One on the head, from the side; the other on the back of the head; and the third, on the back. When the first short must have been fired, the deceased must have fallen; the second and third shot must have been fired when he had already fallen but even then such sequence was not disclosed in the FIR because the incident was not at all witnessed.

32. When we notice the position in which the body was lying over the cycle, as noticed at the time of the inquest, it appears to us that the deceased must have fallen after the first shot. However, in our view, the statement of PW-1 need not be understood as saying that PW-1 actually prevented the deceased from falling after he was hit. PW-1's statement is to be understood as saying that he tried to stop his father from falling when he was hit by the first shot. But, whether in such a scenario there was any scope for PW-1 to beg for the life of his father and, thereafter,

escape injuries, despite assailants desiring to finish him off too, with bullets to spare, is an issue that needs to be examined to find out whether there is a ring of truth about PW-1's deposition.

33. In our view, the testimony of PW-1 that he begged for the life of his father and, thereafter, could manage to escape from the scene of crime, without any injury, does not inspire our confidence. When the assailants had come well prepared, fully armed and had the capacity to fire three shots at the deceased, from two weapon, all at vital parts, and each of the three shots was sufficient in itself to kill, if the assailants had a desire to finish off PW-1, as is the deposition of PW-1, with whom the assailants had very strong enmity, why would the assailants let off such a soft target, as was PW-1. This raises a serious doubt regarding the presence of PW-1 at the spot, which the prosecution needed to dispel by production of an independent witness such as a resident of the village Amari where, according to PW-1, PW-1 escaped to hide himself from the wrath of the assailants. But here, neither such a witness was produced nor his identity disclosed. Importantly, PW-1 was questioned during cross-examination as to where he hid himself in the village. To which, PW-1 replied by saying that he does not know. Thereafter, he tried to give an evasive answer by saying that that house had a door opening towards north. Interestingly, PW-1 stated that he returned to the spot from the village with several persons of that village yet, the I.O. did not verify this position during the course of investigation. In that background, when we notice that the betel shop of PW-1, son of the deceased, had to open on a daily basis by 6 am, as is the statement of PW-1, the possibility of the occurrence in the wee hours of the morning becomes probable. This possibility is fortified by the fact that the deceased was empty stomach, empty intestine and empty rectum at the time of the autopsy. It suggests that the deceased, who had left early morning at 4.30 am to purchase Pan (betel leaves) for the shop of PW-1 had to return back to provide Pan to PW-1 for his betel shop which had to open by 6 am. In that context, staying at Budhanpur bazaar for an hour and a half and having nothing to eat, not even tea or biscuit, appears a bit improbable, if not impossible. This doubt could have been cleared if any person from Budhanpur bazaar had been examined to demonstrate that the deceased was accompanied by PW-1 for purchase of Pan, etc. This doubt could also have been cleared if the bicycle of PW-1 with carton and bag in respect of other goods allegedly purchased from Budhanpur Bazaar had been noticed by the investigating officer. But, here, a bag was noticed hanging on the cycle of the deceased, as is clear from the inquest report of which PW-1 is a witness. This creates a doubt whether, PW-1 to show his presence with the deceased has cooked up a story of his going with the deceased to Budhanpur Bazaar to purchase goods for the betel shop. When we take into account all these circumstances as a whole in conjunction with the manner in which the incident is stated to have occurred, while keeping in mind that PW-1 has not suffered a single injury, we find that the presence of PW-1 at the spot at the time of occurrence appears extremely doubtful.

34. The above doubt gets amplified when we notice the FIR bereft of all details with regard to the manner in which the shots were fired at the deceased and by whom. No doubt, a first information report need not be an encyclopaedia of all the

facts but in the FIR lodged by PW-1 there is not even a statement that the accused fired after stopping the motorcycle. There is also no statement in the first information report that after the accused had stopped the motorcycle, Onkar alighted from the motorcycle and on his exhortation two shots were fired by Rajesh and one by Rama Shanker. Further, in the first information report there is no averment that when the first shot was fired at the deceased, PW-1 had jumped off his bicycle to hold the deceased and beg for his life. The narration in the FIR is reflective of an incident that occurred in a split second, where shots were fired from a moving motor cycle and the blood splattered on the shirt of the informant, who, crying for help and to save his life, ran towards Bhatahi Chatti where he saw Sherai Mishra (PW-2) and Gulab coming from Atrait side. But, interestingly, in the statement made during the course of trial, the blood stains on the shirt were explained as to be on account of smearing of blood while lifting the body of the deceased. The lack of details in the first information report, in ordinary circumstances, would not have been material. But, here, the informant comes from a litigious family, which is in litigation for two decades with the accused side. In that context, lack of details would suggest that at the time of lodging the report, complete information with regard to the manner in which the incident occurred was not available. This possibility gains support from another circumstance, which is, that the site plan prepared by the I.O. does not disclose as to - where the motorcycle stopped; from where the assailants fired at the deceased; from where the witnesses witnessed the incident and as to in which direction PW-1 ran. No doubt, during his deposition in court, PW-1 gives a graphic description of the incident but this could be developed on advise, particularly, when a person comes from a litigious family.

35. There are few other aspects in the ocular account of PW-1, which make it highly improbable. First, if the informant had to effect escape from the spot why, at the first place, he would go and come in the firing range of the accused to plead for the life of the deceased after he was already shot in the head. Second, what was the occasion for the assailants, who were well armed and well prepared, not to kill the informant at the spot rather than waste a bullet on his father who had already been hit twice on the head. In these circumstances, lack of injury on the body of the informant makes the prosecution story, as narrated during trial, improbable and unnatural. Had it been a case where the informant straight away effected his escape seeing the assailants, informant's story might have been acceptable and believable. But PW-1's deposition is that he begged the assailants to spare his father, when his father was already shot in the head. Not only that, according to PW-1, the assailants, thereafter, shot twice at his father and then turned towards him, whereafter, he ran to escape. All of this renders the story highly unnatural. Interestingly, the site plan does not disclose the direction in which PW-1 ran to save his life and it also does not disclose the spot from where gun shots were fired and by whom. In such a scenario, the presence of PW-1 at the spot at the time of the incident becomes highly doubtful. No doubt, the ocular account may be consistent with medical evidence in so far as injuries found on the body of the deceased is concerned but we must not lose sight of the fact that the FIR is completely bereft of how, by whom, and on which part of the body, the deceased was shot. In that

context, merely because the ocular account is corroborated by medical evidence, as to the site of the injuries are concerned, it is not a guarantee for it being trustworthy and reliable because oral deposition can always be improved and polished on legal advise after receipt of **autopsy report**.

36. In so far as PW-2 is concerned, he is a chance witness and is a relative of Balai Mishra in whose murder, Ram Shabd (the husband of appellant no.2's wife's sister) is an accused and for whom, Rajesh (appellant no.2) was doing pairvi. Therefore, PW-2, too, is a witness having an interest in the conviction of the accused. Further, PW-2's explanation for his presence at the spot is flimsy. He, as already noticed above, states that he was going to Budhanpur bazaar, which is 7 km away from his residence, to buy vegetables for a feast arranged by him. This explanation for his presence does not inspire our confidence because it was admitted by him **in his cross-examination** that there were multiple bazaars closer to his residence than the one he proposed to visit for the merchandise. Moreover, this explanation was not there in his statement under section 161 CrPC. That apart, in his deposition he has not disclosed that PW-1 escaped from the spot. Thus, in our view he is not a reliable witness.

37. The summary of our analysis is that the deceased had gone to the Bazaar early morning to buy betel leaves for the shop of PW-1; the shop of PW-1 use to open on a daily basis at 6 am; therefore, it is most likely that either the incident occurred earlier than the time put by the prosecution, which possibility is not ruled out by medical evidence, or PW-1 was at his shop and not with the deceased at the time of the incident; further, if PW-1 had been present at the time of the incident, and the same had occurred in the manner alleged, he would not have been spared. Thus, the presence of PW-1 at the spot at the time of occurrence is highly doubtful. Further, the testimony of PW-1 does not inspire our confidence as he makes a huge improvement in his deposition in court than what he stated in the FIR with regard to the mode and manner in which the incident occurred and by whom injuries were caused to the deceased. That PW-2 is a chance witness whose explanation with regard to his presence at the spot is flimsy and not confidence inspiring and he is also interested in the conviction of Rajesh (appellant no.2) for reasons disclosed above, therefore, his testimony does not inspire our confidence; more so, because he states that he signed the inquest report at the police station at 3.30 pm. Further PW-2's deposition is at variance with PW-1 in so far as he does not disclose about PW-1 escaping from the spot towards village Amari. That, except PW-1 and PW-2, who are highly interested witnesses, no independent witness has been examined; and no effort has been made to connect the weapon recovered at the instance of the appellant no.2 with the bullet recovered from the body of the deceased. Last but not the least, from the statement of DW-1 i.e. the scribe of the FIR as well as other circumstances noticed above including the statement of PW-2 that he signed inquest report at 3.30 pm, there arises a strong possibility of the FIR being ante-timed. The sum and total of our analysis is that the prosecution evidence is not trustworthy and fails to inspire our confidence to sustain the conviction of the appellants. Consequently, the benefit of doubt would have to be extended to the accused appellants.

38. In so far as conviction of the appellant-Rajesh under Section 25 Arms Act is concerned, we notice that, firstly,

recovery of the country made pistol is not evidenced by any member of the public even though it is not a chance recovery but is alleged to be on a disclosure made by accused while in police custody; secondly, the weapon recovered has not been forensically connected with the bullets recovered from the body of the deceased; and, thirdly, the alleged recovery is from an open place not under the control or in possession of the appellant no.2 therefore, weapon cannot be said to be in possession of the appellant-Rajesh so as to justify his conviction under Section 25 of the Arms Act. Consequently, the conviction of the appellant-Rajesh under Section 25 Arms Act is also liable to be set aside.

39. For all the foregoing reasons, the appeal succeeds and is, accordingly, **allowed.** The impugned judgment and order of the trial court in the two connected trials is hereby set aside. The appellants are acquitted of the charge for which they have been tried and convicted by the court below. The appellants, if in jail, shall be set at liberty forthwith, unless wanted in any other case, subject to compliance of section 437 A Cr.P.C. to the satisfaction of the court below.

40. Let a copy of this order and the lower court record be sent to the trial court for information and compliance.

(2022)04ILR A1202
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.04.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 2117 of 2008

Prakash Pasi ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Jaikaran

Counsel for the Respondent:
Ms. Smiti Sahai, learned Additional Government Advocate

A. Recovery not made at the pointing out of the accused. Rather had been made on the basis of the statement given by the accused to the I.O. while he was confined in jail. Has no values in the eyes of law.

B. Child witness- it is a rule of practical wisdom than law that the testimony of a child witness be appreciated with caution and must be relied upon when it is corroborated by other evidence because a child can easily be swayed or tutored by others. Conviction can be based on the sole evidence of hostile witness provided it is trustworthy and inspires confidence of the court after considering all the facts and circumstances of the case.

C. The circumstantial evidence brought on record must be strong enough to point out towards the culpability of the accused and accused alone in committing the offence.

Appeal is allowed. (E-11)

List of Cases cited:-

1. Shivaji Chintappa Patil Vs St. of Mah. reported in (2021) 5 SCC 626

2. Yogesh Singh Vs Mahabeer Singh (2017) 11 SCC 195

3. Ranjeet Kumar Ram @Ranjeet Kumar Das Vs St. of Bihar 2015 SCC Online SC 500

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This criminal appeal has been preferred by the sole appellant/convict Prakash Pasi against the judgment and

order dated 14.08.2008 passed by Additional Sessions Judge, Court No. 6, Raebareli in Sessions Trial No. 276 of 2006, Crime No. 78 of 2006, under Section 302 of the Indian Penal Code 1860 (in short "I.P.C."), Police Station Badokhar, District Raebareli, convicting the appellant with life imprisonment coupled with a fine of Rs.2000/-.

2. The facts necessary for disposal of this appeal in short are:-

An F.I.R. was registered at case crime no. 78 of 2006, under Section 302 IPC, Police Station Badokhar, District Raebareli on the basis of written report presented by Km. Khushboo. It was described in the written report that the father of the complainant had gone to Etawah for doing work as labourer on brick-kiln. She was in the house along with her mother and younger brother Mukesh. On 22.05.2006 at about 11 A.M. her mother was chopping vegetables sitting on a Cot in the Court-yard under the thatch. Her neighbour Prakash Pasi, who left the village along with his family since the festival of Holi, came there and started chatting with her mother sitting on the same cot. Her mother asked her to bring the chilies and her younger brother went to play in the field. When she came back after taking chilies from the shop of Ravi, she found that her mother was lying soaked in blood by the side of the cot and Prakash was not there. She raised cry, then some people of the neighbourhood came there and found her mother dead. Her throat was slit. Prakash had killed her mother due to old enmity.

3. After investigation charge sheet was submitted in the Court against the appellant/convict under Section 302 IPC. The concerned Magistrate after taking cognizance on the charge sheet committed the case to the Court of Sessions, for trial.

4. The Sessions Court framed charge under Section 302 IPC. The accused denied the crime and claimed to be tried. The prosecution examined six witnesses in toto to prove its story and also proved the relevant documents Exhibits Ka-1 to Ka-14. The witnesses produced include:-

(a) P.W. 1- Km. Khushboo, the complainant and daughter of the deceased;

(b) P.W.2- Dinesh Singh, a witness of extra judicial confession made by the appellant/convict;

(c) P.W. 3- Kunjan, the husband of the deceased;

(d) P.W. 4- Dr. Sayyad Altaf Hussain, who conducted post-mortem on the cadaver of the deceased;

(e) P.W. 5-Constable Amar Pal, who prove the registration of FIR and;

(f) P.W. 6- Anirudh Kumar Singh, S.H.O, who investigated the crime.

The Exhibits include:-

(I) Ext. Ka-1- written report;

(II) Ext. Ka-2- post-morten report;

(III) Ext. Ka-3- Chik FIR;

(IV) Ext. Ka-4- concerned G.D.;

(V) Ext. Ka-5- Site-plan;

(VI) Ext. Ka-6- memo of collection of blood stained and plain soil from the spot of crime;

(VII) Ext. Ka-7- inquest-report;

(VIII) Ext. Ka-8- report of Investigating Officer for conducting post-mortem,

(IX) Ext. Ka-9- Photo "Nash';

(X) Ext. Ka-10- Police Form No. 13;

(XI) Ext. ka-11- letter to Chief-Medical-Officer for post-mortem;

(XII) Ext. Ka-12- recovery memo of weapon of offence;

(XIII) Ext. Ka-13- charge-sheet;

(XIV) Ext. Ka-14- site-plan of the place from where the weapon of offence was recovered.

5. After completion of prosecution evidence, the statement of the appellant/convict under Section 313 of the Code of Criminal Procedure (in short Cr.P.C.) was recorded, wherein he denied the crime and stated that witnesses have deposed falsely. He had also stated that he was implicated in the crime falsely at the behest of one Shiv Sagar, the resident of the same village, who has terror in the village and his brother was I.G. in police. Shiv Sagar had murdered his (convicts) brother, thereafter the appellant/convict along with his family members left the village. The complainant and his family implicated him in the crime at the behest of Shiv Sagar. He examined Vinod Kumar, as defence witness, who is also scribed the written report.

6. After completion of evidence, hearing the arguments of both the sides and analyzing the evidence learned Trial Court reached at conclusion that on the day of incident the appellant/convict Prakash Pasi reached the house of the deceased. Before incident, they both (appellant and deceased) were chatting sitting on the same cot in the Court-yard of the deceased, where she was chopping vegetables. The daughter of the deceased has proved this fact that when Prakash was in the house, her mother sent her to bring chilies and when she came back after taking chilies she found, her mother was lying dead soaked in the blood. The time-gap between the incident and presence of Prakash at the spot was so short that to presume that somebody else might have committed the crime, is not possible. Km. Khushboo proved that when she left the house for purchasing chilies, both the deceased and Prakash were alive and present in her house and when she came after half an hour, she found her mother dead and Prakash was not there. Hence, the circumstances are indicating that in all probabilities the crime was committed by the appellant/convict.

7. Learned Trial Court held the appellant guilty under Section 302 IPC and punished accordingly with life imprisonment coupled with a fine of Rs.2000/-. Being aggrieved of this conviction, the present appeal has been preferred by the appellant.

8. Heard Sri Jaikaran, learned counsel for the appellant/convict, Ms. Smiti Sahai, learned Additional Government Advocate appearing on behalf of the State respondent and perused the material brought on record.

9. Learned counsel for the appellant/convict argued that there is no direct evidence of the crime and the case is based on circumstantial evidence. P.W.1-Km. Khushboo (the complainant and daughter of the deceased) was a child of only nine years at the time of incident and she did not even witness the crime. She has stated only that she saw Prakash Pasi (appellant/convict) in the house along with her mother and she went to purchase chilies upon asking of her mother and when she came back, she found her mother lying besides the cot soaked in the blood and her throat was slit and Prakash (appellant/convict) was absent. He further argued that no other witness has corroborated the presence of Prakash in the house of the deceased before the incident. The recovery of weapon was not made at

the pointing out of the appellant/convict rather it has been made on the basis of the statement given by the appellant to the Investigating Officer while he was confined in jail. The appellant/convict has stated in his statement that he has been implicated in the crime at the behest of Shiv Sagar, who is a strong man of the village and has terror in the minds of people of village. The appellant/convict has already left the village along with his entire family due to his fear after the murder of his brother by Shiv Sagar. He further argued that the appellant/convict has no concern with the crime, as such, he should be acquitted.

10. On the other hand learned A.G.A. submitted that the presence of the appellant/convict in the house of the deceased, just half an hour before the incident has been proved by P.W. 1- Km. Khshboo, the daughter of the deceased. The time gap between when P.W. 1 went to purchase chilies leaving the appellant Prakash in her house and came back from there and found her mother dead, was very short, so there was no possibility of being committed the murder by someone else, except the appellant/convict. Learned A.G.A. further submitted that knife used in the crime was recovered by the Investigating-Officer on the basis of the statement of appellant/convict from a pond and that knife was recognized by the son of the deceased as the knife used for chopping the vegetables in his house. It has been further submitted that circumstantial evidence is strong enough to hold the appellant guilty of the crime and convict accordingly, as such, the appeal should be dismissed.

11. Considered the rival submissions and perused the original record as well as the impugned judgment and order passed by the Trial Court.

12. The case is based on circumstantial evidence as there is no direct evidence of the crime. The principles governing the appreciation of evidence in such cases have been summarized by the Hon'ble Apex Court in catena of decisions.

13. The Hon'ble Apex Court in this regard in the case of ***Shivaji Chintappa Patil Vs. State of Maharashtra reported in (2021) 5 SCC 626,*** has laid down as under (para 12):-

"12. The law with regard to conviction on the basis of circumstantial evidence has been very well crystalised in the judgment of this Court in Sharad Birdhichand Sarda v. State of Maharashtra :-(SCC p.185, paras 153-54)

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC p. 807 : para 19, SCC (Cri) p. 1047]

"19. .....Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions."

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

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

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

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

14. In the present matter, FIR was lodged by nine years old daughter of the deceased, Km. Khushboo, wherein she has mentioned that Prakash (appellant/convict) came to her house on the day of incident at about 11 A.M. Her mother was chopping vegetables. Prakash and her mother were sitting on the same cot and started chatting. Her mother asked her to bring chilies from the market. When she came back her mother was found lying dead and her throat was slit and Prakash (appellant/convict) was absent. She has also mentioned that Prakash killed her mother due to old enmity. Km. Khusbhoo has been examined as P.W. 1 in the Trial Court on 11.01.2007 i.e. about eight months after the incident. She has stated in the Court that Prakash (appellant/convict) came to her house, her mother and Prakash were sitting on the same cot and chatting. Her mother asked about the well-being of her father as the father of Km. Khushboo and Prakash used to work together at brick-kiln in Etawah as a labourer. Thereafter, her mother asked her to bring chilies from the market and when she came back, found her mother dead, her throat was slit and Prakash (appellant/convict) was not there. She has further stated in the Trial Court that she did not see Prakash cutting the throat of her mother, hence it is very clear that she is not an eye witness of the crime. She is witness only of the fact that Prakash (appellant/convict) was there with her mother in the house just half an hour before the incident. She has also stated that her father was not on talking terms with Prakash. P.W. 2-Dinesh Singh before whom the appellant allegedly made an extra judicial confession about killing of the deceased by him has turned hostile and he has not supported the story of prosecution.

15. Now comes another important witness Kunjan (husband of the deceased), who has been examined as P.W. 3. He has stated before the Trial Court that he received an information about the incident telephonically. When he came to the village, her daughter told about the incident. He has stated in his cross-examination that he received information of the incident on the next-day of incident and he came to the village next-day. He has further stated that his statement was not recorded by the Investigating Officer in the Police Station when he reached there, upon information received. He was called by the Investigating Officer after 10-12 days of the incident and upon being asked by the Investigating Officer he told to the Investigating officer the reason of murder of her wife but he nowhere has stated that Prakash killed her wife due to enmity, though in his examination-in-chief he has stated that Prakash (appellant/convict) had

killed his wife because Prakash deemed that one Shiv Sagar killed his (appellant's) brother upon his (P.W. 3) behest. In cross-examination P.W. 3 has further stated that Prakash was friendly with him when they were working at brick-klin in Etawah. At the time of incident he or his family members had no enmity with Prakash. He has clearly stated that Shiv Sagar was annoyed with Prakash.

16. Alleged recovery of weapon of crime i.e. knife was admittedly not made at the pointing out of the accused rather had been made on the basis of the statement given by the appellant/convict to the Investigating Officer while he was confined in jail. The statement of appellant/convict was recorded by the Investigating Officer after taking permission of the Magistrate concerned, as is evident from the statement of the Investigating Officer recorded as P.W. 6. The alleged recovery was made about two months after the incident and that too on the basis of statement of the Investigating Officer while the appellant was confined in jail. This recovery has no value in the eyes of law and rightly been disbelieved by the trial Court.

17. The appellant/convict has stated in his statement recorded under Section 313 Cr.P.C. that he was falsely implicated in the crime at the behest of Shiv Sagar, whose brother was I.G. in police and Shiv Sagar has terror in the village. Shiv Sagar earlier killed his brother, so due to his fear he left the village along with his entire family. This fact, that Shiv Sagar is the person who had terror in the village has been proved even by P.W. 3 Kunjan (husband of the deceased). He has stated in his cross-examination that village people fear very much to Shiv Sagar. Whatever is asked by Shiv Sagar to any person that person has to comply that. He has also stated that three other families of the village belonging to scheduled castes community had left the village due to terror of Shiv Sagar. Prakash (appellant/convict) and his family also had left the village due to fear of Shiv Sagar. He has further stated that he had friendly terms with Prakash (appellant/convict). In such circumstances, the possibility can not be ruled out that Prakash (appellant/convict) was implicated falsely in the crime. No motive has been established, though it is not always necessary that motive should be proved but in the case of circumstantial evidence the motive gives strength to the case of prosecution to connect the links of the chain of circumstantial evidence.

18. The complainant was nine years old child at the time of incident. On the day of incident, when her mother was killed, she lodged the FIR, her father was in Etawah where he was working as a labourer in brick-kiln. About the acceptability and appreciation of evidence Hon'ble Apex Court has held in catena of decisions that the evidence of a child witness should be appreciated with caution because a child is easily be swayed or tutored. Though the conviction can be based on the sole evidence of a child witness but the evidence of such child witness should be trustworthy and able to inspire the confidence of the Court.

19. In ***Yogesh Singh Versus Mahabeer Singh (2017) 11 SCC 195***, the Hon'ble Apex Court has held as under:-

"It is well-settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See

Prakash Vs. State of M.P., (1992) 4 SCC 225; Baby Kandayanathi Vs. State of Kerala,1993 Supp (3) SCC 667; Raja Ram Yadav Vs. State of Bihar, (1996) 9 SCC 287; Dattu Ramrao Sakhare Vs. State of Maharashtra, (1997) 5 SCC 341; State of U.P. Vs. Ashok Dixit & Anr., (2000) 3 SCC 70; Suryanarayana Vs. State Of Karnataka, (2001) 9 SCC 129.

However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is a found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. [Vide Panchhi Vs. State of U.P., (1998) 7 SCC 177]."

20. In ***Ranjeet Kumar Ram @Ranjeet Kumar Das Versus State of Bihar 2015 SCC Online SC500,*** it has been held as under:-

"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the Court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one."

21. Thus, it is discernible from the above cited case laws that though a conviction can be based on the sole testimony of a child witness, if the Court finds it trustworthy and that inspires the confidence of the Court yet, It is a rule of practical wisdom than law that testimony of a child witness must be relied upon when it is corroborated by other evidence because the child can easily be swayed or tutored by others, keeping in view all the facts and circumstacnes of the case. In the present matter, Km. Khushboo is a witness of fact that she saw her mother alive lastly in the company of Prakash (appellant/convict). No other person has been examined to corroborate the fact that Prakash (appellant/convict) was present there on the day of incident. In her written report, she stated that Prakash (appellant/convict) killed her mother due to enmity. Her father (husband of the deceased) has stated as P.W. 3 that he and Prakash Pasi was on friendly terms while working in Etawah as a labourer and he has no enmity with him, while Km. Khushboo-P.W. 1 has stated that her father was not on friendly terms with Prakash (appellant/convict(. Further more, P.W. 3 has corroborated the fact what has been stated by Prakash (appellant/convict) in his statement recorded under Section 313 Cr.P.C. that Shiv Sagar was annoyed with the appellant.

22. After analyzing the evidence on record in the circumstances described above, a strong possibility was there to get the appellant/convict implicated falsely in the crime. No other witness except P.W. 1-Km. Khushboo has stated that Prakash (appellant/convict) was seen with the deceased or around or near the place of the incident or in the village before or after the incident, on the day of incident. It has come in the evidence of P.W. 1-Km Khushboo that Prakash (appellant/convict) has already left the village and he was not residing in the village since the festival of Holi. The factum of presence of appellant on the day of incident in the house of the deceased has not been corroborated by any other evidence.

23. Thus, in such situation, the conviction of the appellant is not sustainable on the basis of evidence available on record. The circumstantial

evidence brought on record is not strong enough to point out towards the culpability of the appellant and appellant alone, in committing the murder of the deceased, hence he deserves acquittal. ***Accordingly the appeal is allowed.*** The judgment and order dated 14.08.2008 passed by Additional Sessions Judge, Court No. 6, Raebareli in Sessions Trial No. 276 of 2006, Crime No. 78 of 2006, under Section 302 IPC, Police Station Badokhar, District Raebareli, is hereby set aside.

24. Let the appellant-Prakash Pasi convicted and sentenced in Sessions Trial No.276 of 2006, Crime No. 78 of 2006, under Section 302 IPC, Police Station Badokhar, District Raebareli, be released from the concerned jail, if not required in any other case.

25. Appellant Prakash Pasi is directed to file personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

26. Let a copy of this order alongwith original record be transmitted to the trial court concerned forthwith for necessary information and follow up action.

(2022)04ILR A1209
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.04.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No. 2170 of 1983
with
Criminal Appeal No. 2169 of 1983

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

Counsel for the Appellants:
Sri R.B. Sahai, Sri Ankit Saran, Sri Om Prakash Yadav, Sri Pankaj Malviya (A.C.), Sri Pavan Kumar, Sri Yashwant Pratap Singh

Counsel for the Respondent:
D.G.A.

A. Evidence of closely related witnesses is required to be closely scrutinized and appreciated before any conclusion is made to rest upon to convict the accused in a given case. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy it can and certainly be relied upon.

B. Minor contradiction or inconsistency are immaterial and irrelevant details which do not in any way corrode the credibility of witness cannot be labeled as omission or contradictions as the mental capabilities of human being cannot be expected to be attuned to absorb all the details, thus, minor discrepancies are bound to occur in the statements of the witnesses.

C. Convincing evidence is required to discredit an injured witness.

D. Indian Penal Code,1860 - Sections 141 & 149 .- Common object does not necessarily require proof of prior meeting of minds or pre-consult. The vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common objects 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. It is not necessary that all the persons forming an unlawful assembly must do some overt act.

E. Requisition sent to Doctor to conduct post mortem not containing all the particulars found in inquest report and complaint, like particulars of case, weapon used and names of accused persons etc. would not lead to the conclusion that F.I.R. was ante timed. Further, if time of

receipt of special report sent to Jurisdictional Magistrate is not noted and delivery of the special report consistently proved by the credible evidences, mere non-noting of the time would not lead to the conclusion that F.I.R. was ante timed.

F. Code of Criminal Procedure, 1973 - Section 174 - The object of the proceedings u/S 174 Cr.P.C. is merely to ascertain whether person died of suspicious circumstances or met with an unnatural death and if so what was it's apparent cause. The question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings i.e. inquest report is not the statement of any person wherein all the names of the persons must be mentioned. Basic purpose of holding an inquest is to report regarding the apparent cause of death namely, whether it is suicidal, homicidal, accidental or by some machinery etc.

G. Delay in sending the special report to the jurisdictional Magistrate is not fatal particularly when the defence did not put any question in this regard to the Investigating Officer.

Appeals are dismissed. (E-11)

List of Cases cited:-

1. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. (1983)3 SCC 217

2. Shivaji Sahab Rao Bobade Vs St. of Mah. (1973)2 SCC 793(801)

3. Vijendra Singh Vs St. of U.P. with Mahendra Singh Vs St. of U.P. (2017)11 SCC 129

4. Sucha Singh & anr. Vs St. of Pun. (2003)7 SCC 643

5. Brahm Swaroop & anr. Vs St. of U.P. (2011)6 SCC 288

6. Shyam Babu Vs St. of U.P. (201208 SCC 651

7. Maqsoodan & ors. Vs St. of U.P. (1983)1 SCC 218

8. Thaman Kumar Vs State (UT of Chandigarh) (2003)7 SCC 380

9. Mrinal Das & ors. Vs St. of Tripura (2011)9 SCC 479

10. Anil Rai Vs St. of Bihar with Subhash Chand Rai & anr. Vs St. of Bihar with Awani Rai Vs St. of Bihar (2001)7 SCC 318

11. Dev Karan Vs St. of Har.(2019)8 SCC 596

12. Jai Shree Yadav Vs St. Of U.P. (2005)9 SCC 788

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

1. The instant two criminal appeals have arisen from the judgment and order of conviction and sentence dated 14.09.1983 passed by the learned Additional Sessions Judge, Deoria in Sessions Trial No.92 of 1982, under Sections 147, 148, 302/149, 324/149 of the Indian Penal Code, 1860.

2. It would be relevant and pertinent to mention, at the very outset, that initially in the written complaint and the first information report registered thereon by the police against five accused persons namely (1) Prahlad, S/o Ram Hit Yadav, R/o Village Bhimpur, (2) Ram Oudh, S/o Ram Hit Yadav, R/o Village Bhimpur (3) Prahlad S/o Bhirgun, R/o Village Moora Dih, (4) Sudama of Village Chali Chaur, Police Station Rudrapur and (5) Brijraj S/o Mahipat Yadav, R/o Village Khairaich, Police Station Rampur Karkhana, District Deoria, the case was committed to the sessions for trial against the Prahlad, S/o Ram Hit Yadav, R/o Village Bhimpur, Ram Oudh, S/o Ram Hit Yadav, R/o Village Bhimpur, Prahlad S/o Bhirgun, R/o Village Moora Dih and Brijraj S/o Mahipat Yadav, R/o Village Khairaich, Police Station Rampur Karkhana, District Deoria for the

reason that the accused Sudama died before the committal of the case in a police encounter.

3. After completion of the trial, learned Additional District and Sessions Judge, Deoria recorded conviction of accused persons as under:-

(I) Ram Oudh - convicted under Sections 147, 302 read with Section 149, 324/149 of the Indian Penal Code, 1860 and is sentenced life imprisonment for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code and to undergo R.I. for a period of four months for the offence punishable under Section 147 of the Indian Penal Code, 1860 and to undergo R.I. for a period of one year for the offence punishable under Section 324 read with Section 149 of the Indian Penal Code, 1860.

(II) Prahlad S/o Bhirgun - convicted under Sections 147, 302 read with Section 149, 324/149 of the Indian Penal Code, 1860 and is sentenced life imprisonment for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code and to undergo R.I. for a period of four months for the offence punishable under Section 147 of the Indian Penal Code, 1860 and to undergo R.I. for a period of one year for the offence punishable under Section 324 read with Section 149 of the Indian Penal Code, 1860.

(III) Prahlad S/o Ram Hit Yadav - convicted under Sections 148, 302/149, 324/149 of the Indian Penal Code, 1860 and is sentenced life imprisonment for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code and to undergo R.I. for a period of six months for the offence punishable under Section 148 of the Indian Penal Code, 1860 and one year R.I. for the offence punishable under Section 324 read with Section 149 of the Indian Penal Code, 1860.

(IV) Brijraj - convicted under Sections 148, 302/149, 324/149 of the Indian Penal Code, 1860 and is sentenced life imprisonment for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code and to undergo R.I. for a period of six months for the offence punishable under Section 148 of the Indian Penal Code, 1860 and one year R.I. for the offence punishable under Section 324 read with Section 149 of the Indian Penal Code, 1860.

4. Criminal Appeal No.2170 of 1983 has been preferred by the appellants (1) Prahlad, S/o Ram Hit Yadav, (2) Brijraj S/o Mahipat Yadav and (3) Ram Oudh, S/o Ram Hit Yadav. Learned counsel Sri Yashwant Pratap Singh put forth the arguments on behalf of the only surviving appellant Brijraj in this appeal.

5. Criminal Appeal No.2169 of 1983 has been preferred on behalf of the sole appellant Prahlad, S/o Bhirgun separately against the same judgment of conviction and order of sentence described here in above. Learned senior counsel Sri Brijesh Sahai assisted by Sri Himanshu Srivastav, learned Advocate has argued the case on behalf of the said appellant.

6. The record reveals that during the pendency, in Criminal Appeal No.2170 of 1983, Prahlad, S/o Ram Hit Yadav and Ram Oudh, S/o Ram Hit Yadav had died and consequent thereto the appeal to the extent of the aforesaid deceased appellants Prahlad and Ram Oudh were abated vide order dated 23.11.2015, and as such, in Criminal Appeal No.2170 of 1983, the only surviving appellant is Brijraj.

7. The record further shows that accused "Prahlad" (of Village Moora Dih) is on bail granted by this court whereas appellant "Brijraj" in Criminal Appeal No.2170 of 1983 is in jail.

8. To abdicate the confrontation with probable chaos by reason of sameness in the name of two accused in the factual matrix, in our discussions we shall address hereinafter, wherever needed, the accused-appellant Prahlad in Criminal Appeal No.2170/1983 as Prahlad (of Village Bhimpur) and the accused-appellant Prahlad in Criminal Appeal No.2169/1983 as Prahlad (of Village Moora Dih).

(I) Factual Matrix

9. The first informant (P.W.-1) Ishwar S/o Deu, R/o Village Moora Dih, Police Station Kotwali, District Deoria gave a written information in the Police Station Kotwali, District Deoria on 12.04.1979 at about 09:30 P.M., under his thumb impression, about the killing of his nephew namely "Ramashre Yadav" at about 08:30 P.M. to 08:45 P.M. in the incident of bombing by accused persons five in number namely (1) Prahlad (of Village Bhimpur), (2) Ram Oudh, (3) Prahlad (of Village Moora Dih), (4) Sudama and (5) Brijraj on the spot of incident located near the Railway Station, Deoria in front of Octroi Outpost (Chungi ghar) where he was running his pavement shop of lassi and squash. The informant at the relevant time of the incident complained of was on his shop neighbouring to that of his nephew "Ramashre", talking with his relative "Bahadur Yadav" (P.W.-2). His nephew "Ramashre" was making lassi on his shop. At about 08:30 P.M. to 08:45 P.M., the above named accused persons came together pouncing from the side of the railway station towards the shop of Ramashre. Prahlad (of Village Moora Dih) shouted exhortingly, "this is the man Ramashre, kill him (मारो साले को)", persuant thereto Sudama, Prahlad (of village Bhimpur) and Brijraj made a simultaneous throw of hand grenades over Ramashre. The informant and Bahadur (P.W.-2) raised alarm whereupon Banshi (P.W.-3) of Village Gosai Ka Chakra, Police Station Salepur, Hari Yadav of village Bharwali, Tola Mauwari, Police Station Kotwali, District Deoria, Ram Ji of village Moora Dih and numerous other people rushed to the spot and chased the fleeing assailants but they ran away passing through the railway station towards Mal Godam throwing bombs on the chasing crowd. The informant's nephew died instantly on the spot sustaining blast injuries of bombs. With him one of his customer also got injured (P.W.-5). The spot of the incident was illuminated from the electricity light coming from the neighbouring shops. In the written complaint itself, motive of the accused persons for killing Ramashre is also set forth stating that the deceased "Ramashre Yadav" arraigned and convicted by the Sessions Court in the charge of murder of brother of Prahlad (of village Moora Dih) namely Shyama, was enlarged on bail in appeal by the High Court. This is why, Prahlad (of Village Moora Dih) and his companions hatched enmity with the deceased "Ramashre Yadav" which led them to kill him.

10. The first information report was registered as Case Crime No.132 of 1979, under Sections 147, 148, 149, 302 and 307 of the Indian Penal Code, 1860, at the Police Station Kotwali, District Deoria. The written information dated 12.04.1979 was reduced into writing by one Suneet Kumar

on factual narration of the incident by the first informant "Ishwar". This written information proved by the first informant Ishwar as P.W.-1 is Ex. Ka-1, on the basis of which the first information report was registered and proved by P.W.-6, the Investigating Officer which is Ex. Ka-3.

11. The Investigating Officer Anwarul Aziz, Sub Inspector of Police in Police Station Kotwali, District Deoria (PW-6) recorded the statement of the first informant at the police station after registration of the first information report and then proceeded to the spot where he enquired the dead body in inquest proceeding, prepared it's report and other connected papers. The dead body was dispatched with constable Vikram Singh and Bhagirathi for post mortem. On 30.04.1979 at about 0:05 hours, he recorded the statements of witnesses of inquest and eye witnesses named in the complaint viz. Bahadur and Rajvanshi @ Banshi, prepared the site plan, collected the blood stained soil and simple soil from the earth of the spot of incident and prepared the relevant memos. Prosecution proposed to prove the case before the Court by witnesses and documents given herein below in the table for the purpose of easy reference:-

P.W.-1, the informant, Ishwar and eye witnesses	Proved the written complaint
P.W.-2 Bahadur, the eye witness	
P.W.-3 Rajvanshi, the eye witness	
P.W.-4 Dr. M.Jama	Proved Post mortem report Ex. Ka-2.
P.W.-5 Dwarika Nath Tiwari, injured witness	
P.W.-6 Anwarul Aziz, the Investigating Officer	1. Proved Chik Report Ex. Ka-3. 2. G.D. entries No.46 Ex. Ka-4. 3. Inquest report Ex. Ka-5. 4. Photo of the dead body Ex. ka-6. 5. Letter sent with dead body for post mortem Ex. Ka-7. 6. Sealed sample Ex. Ka-8. 7. Form No. 33 Ex. Ka-9. 8. Chalan Dead Body Ex.Ka-10. ***(as in up to 12.04.1979)*** 9. Site Map Ex. Ka-11. 10. Sealed materials from the spot Ex. Ka-12. 11. Blood stained soil and simple soil from the earth of the spot Ex. Ka-13. 12. The residues of blasted bombs and sealed samples Ex. Ka-14. 13. Charge sheet Ex. Ka-15 and Ex. Ka-16.
P.W.-7 Dr. J.N. Thakur	Proved injury report of the injured

	witness.
Three witnesses in defence	
Mahadeo Mishra as D.W.-1	
Anardan Singh as D.W.-2	
Sacchidanand Mani Tripathi as D.W.-3	

(II) Argument of learned counsels for the appellants

We keeping in mind the present two appeals being one of the oldest pendency since long for a period of 40 years, gave an anxious and lengthy hearing to the learned counsels so as to decide the matter.

12. Learned senior counsel Sri Brijesh Sahai, opened the argument impressing on the fact of the role assigned in the first information report itself to the accused-appellant Prahlad (of Village Moora Dih) of exhorting the other accused. He submitted that this role of exhortation, as usually seen, is ornamental only to falsely implicate the said accused for some otherwise reasons with the other culprits in the commission of the offence. In the present case, the purpose of false implication is nothing but to bring the number of the accused atleast to the strength of five so as to label charge of offence under Section 147, 148 and 149 in aid of other relevant sections of the Indian Penal Code, 1860. This is why the first information report is registered Ante-timed. Eye witnesses are posed to have presence over the spot of incident on relevant date and time falsely in fosterage of their enmity with the accused and relation with the first informant and the deceased. They are heavily interested witnesses whose evidence cannot be accepted for reliance unless scrutinized thoroughly.

It is argued that the identity of the accused allegedly involved in the commission of offence through test identification parade or otherwise is not established.

The doubt in chronological sequence of procedural events in the investigation starting from submitting the information of the incident to the police, inquest proceeding, sending the dead body for the post mortem, the letter sent with dead body referring post mortem, the special report, G.D. entry etc. is also hammered. It is argued that some vital stages of the proceeding even suffers from the lack of the details and description of case crime number, relevant sections of the Indian Penal Code, 1860. Anomalies as to the time and date in the paper under proceedings of the investigation, irregular way of filling blanks in such papers, all amply show that the first information report was registered some time at later stage but shown as entered promptly in the first information report. As such, first information report being ante timed, has lost it's value for credence.

Learned senior counsel argued that no independent eye witness had been examined by the Investigating Officer, the scribe of the written report Suneet Kumar also had not been produced by the prosecution for examination before the trial court. Medical evidence does not support the eye witness account of the incident in question.

13. Learned counsel Sri Yashwant Pratap Singh in Criminal Appeal No.2170 of 1983 while putting forth the argument on behalf of the only surviving appellant "Brijraj" adopted mostly all the arguments

made by the learned senior counsel Sri Brijesh Sahai in Criminal Appeal No.2169 of 1983. In addition, he vehemently impressed on the false implication of the appellant Brijraj in collusion with the local police for the reason of his criminal antecedents. He further argued that the accused-appellant was not actually present on the spot of incident, thus, his alleged involvement in the commission of the offence in question is false. The witness related to the first informant and the deceased being heavily interested in consultation to the police, falsely deposed with regard to the identity and involvement of the accused-appellant as participant with the other co-accused in commission of killing the deceased/victim of the incident.

Learned counsel has lastly argued that even the witnesses cannot be held to have seen the incident and the accused persons at the relevant time of commission of the offence in question for the reason of darkness of the night at about 08:30 P.M. to 08:45 P.M. The Investigating Officer in the site map prepared by him had not shown any source of light on or in the vicinity of the place of incident. The site map prepared by him is proved in the course of examination before the Court which is Ex. Ka-11. He argued that eye witness account of bombing by four accused is also not corroborated with the medical evidence of blast injuries on the dead body which reports only one blast injury.

All the learned counsels, thus, linked the falsity of the allegation of bombing by the accused persons with the lodging of the first information report ante timed unless the police had not chosen and got up the required number of accused persons. Lastly, they set forth the criminal character of the deceased himself as indulged in criminal activities, having enmity with numerous other rivals in connection therewith as the reason that he might have been killed by some anonymous assailants. It is urged that the informant being inimical with the appellants falsely implicated him having deep interest in seeing him behind the Bars.

(III) Arguments of learned Additional Government Advocate

14. Learned A.G.A. in reply to the arguments made by the learned counsels for the appellants submitted that the first information report had been lodged promptly by the first informant whose presence on the spot was quite probable and natural. The sequence of events happened on the spot of incident at the relevant date and time at about 08:30 P.M. to 08:45 P.M. as stated by him (P.W.-1) in the course of examination before the trial judge is quite a natural eye witness account. There is no question of enmity as argued by the learned counsel for the appellant Prahlad (of Village Bhimpur) with the first informant. There is no suggestion to this effect in cross-examination put before the P.W.-1. Time taken in giving information of the incident in writing and submitting the same to the police has been reasonably explained in the evidence of P.W.-1. There is no suggestion to the P.W.-1 and P.W.-6 as to the written information having been changed or altered. Time of giving the written information is duly proved. Lodging of the first information report by the Head Moharir is proved in his absence, by the P.W.-6, the Investigating Officer on the basis of the entries in the General Diary maintained in the police station for the purpose. P.W.-6, the Investigating Officer being acquainted with the hand writing of the constable clerk (Head Moharir), thus,

duly proved the first information report lodged promptly within naturally practicable interval of time from the occurrence of the incident. The argument as to the enmity is of no avail as it may act like a two way sword / double edged weapon. In circumstance of alleged and proved on evidence even it may be held as cause for false implication otherwise, generally it acts as the motive for activating the offence quite naturally and probably.

Learned A.G.A. submitted that the judgment of conviction and order of sentence was correctly passed after due appreciation of evidence on record and the appeal is liable to be dismissed. Judgment of conviction and order of sentence deserves to be affirmed.

15. Before going deep with the merit of the arguments advanced by the contesting counsels, material on record as evidence and the judgment of the trial judge recording the conviction and sentence, it would be pertinent and relevant to state about the charges framed by the learned Additional Sessions Judge, Deoria against the accused persons in the trial.

16. The accused Ram Oudh and Prahlad (of Village Moora Dih) were charged under Section 147, 302/149 and 324/149 of the Indian Penal Code, 1860 vide order dated 21.04.1982 passed by VI Additional Session Judge, Deoria; whereas the accused Prahlad (of Village Bhimpur) and Brijraj were charged under Section 148, 302/149, and 324/149 of the Indian Penal Code, 1860 vide order dated 21.04.1982 passed by VI Additional Sessions Judge, Deoria.

(IV) Discussions

17. The prosecution has proposed four witnesses of fact to prove it's case. The informant Ishwar is P.W.-1, Bahadur is the eye witness of the incident as P.W.-2, another eye witness of the incident is P.W.-3 namely Rajvanshi @ Banshi; Dwarika Nath Tiwari, the injured witness of the incident was examined as P.W.-5. The formal witness in addition to the witness of the fact have also been produced by the prosecution for examination before the trial court: namely, Dr. M. Jama who had done the autopsy on the dead body of the victim of the incident "Ramashre Yadav" to prove post mortem report Ex. Ka-2 as P.W.-4. The doctor who had done the medico legal examination of injured in the incident "Dwarika Nath Tiwari" is Dr. J.N. Thakur as P.W.-7. Anwarul Aziz, the Investigating Officer of the Case Crime No.132 of 1979, under Sections 147, 148, 149, 302 and 307 of the Indian Penal Code, 1860 has been examined as P.W.-6.

18. P.W.-1, P.W.-2, P.W.-3 and P.W.-5 belong to nearby villages of the place of the incident situated near Deoria Railway Station who were alleged to be present at the spot of the incident in connection with their routine business or personal causes. They are rustic villagers. It is also pertinent to mention here that the examination of the aforesaid witnesses before the trial judge was started approximately four years after the date of the incident. None of them is a person of high profile or having good education rather they are uneducated common villagers grown in day to day life in milieu of villages, as it comes out from the statement they deposed before the trial judge in the course of their examination.

19. In the aforesaid context, before proceeding to appreciate their evidences, we think it proper to refer some parameters laid down by the Courts from time to time while dealing with the evidences deposed

by witnesses in general. One of such judgment of the Apex Court is ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat1***. The relevant para "5' from the aforesaid judgment is reproduced hereunder:-

"(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 surprised. 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 takes 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."

20. In the same context, we further think it relevant to refer the judgment of the Apex Court in ***Shivaji Sahab Rao Bobade Vs. State of Maharashtra2*** which deals the incident of murder in rural area where the witnesses to the case were rustic and so their behavioural pattern perceptive and un-perceptive habits have to be judged. The relevant extracts of the aforesaid judgment is reproduced hereunder:-

"8. Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot

militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. The learned Sessions Judge has at some length dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the post-mortem certificate. Certainly, the court which has seen the witnesses depose, has a great advantage over the appellate Judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial Judge of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naivete and clever equivocation, manipulated conformity and ingenious unveracity of persons who swear to the facts before him. Nevertheless, where a Judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence, the court of appeal is in as good a position to assess or arrive at legitimate conclusions as the Court of first instance. Nor can we make a fetish of the trial Judge's psychic insight."

Relations of witnesses with first informant, deceased and the accused persons

21. We think that it not to be out of relevance to state about the mutual relation of witnesses inter-se and also with the deceased as well as the accused persons, as coming out from the deposition before the trial judge.

22. The first informant Ishwar has stated in his cross examination made on behalf of accused-appellant Brijraj and accused Prahlad (of Village Moora Dih) that he had two brothers namely Ram Ji and Chandrika. The deceased in the incident in question namely "Ramashre Yadav" was son of aforesaid brother Chandrika, as such, it is admitted that P.W.-1 Ishwar is in blood relation with the deceased being his real uncle. In the same breath, he further stated about the witness P.W.-2 "Bahadur" that his sister is married with the son of P.W.-2 "Bahadur", which means P.W.-2 "Bahadur" is in relation with P.W.-1 "Ishwar" as father-in-law of his sister. Further, he had denied any relation with P.W.-3 Rajvanshi @ Banshi who has been examined by the prosecution as eye witness of the incident in question. So far as the injured in the incident in question namely Dwarika Nath Tiwari who has been examined as P.W.-5, in his cross examination he has stated that he was a customer, who at the time of the incident was at the shop of "Ramashre Yadav", drinking lassi, when bomb blast occurred and he too got injuries in the same occurrence. Though, P.W.-1 denied knowing P.W.-5 personally by name but asserted to have seen him severally to come at the shop of "Ramashre Yadav" to have tea or lassi.

23. **About the work and profession of the witnesses** - P.W.-1 "Ishwar" stated in the examination-in-chief that he and deceased "Ramashre Yadav" were running their shops of lassi and sharbat separately. The deceased Ramashre Yadav was running his shop at a wooden chowki (cot) towards the South of Octroi office whereas the shop of sharbat (sweet drink / squash) of P.W.-1 was on a trolley near the shop of Ramashre Yadav. In the cross examination, this witness has further clarified that his trolley of sharbat was towards the East side of the

shop of deceased "Ramashre Yadav". He then stated that he used to be with his trolley shop near the chowki of Ramashre Yadav in connection with his day to day business on the spot of incident. Further in the same continuation, he has stated that daily upto 11:00 P.M. in the night, his shop and shop of Ramashre Yadav were used to remain open. Nothing contrary could be extracted to the above said facts from the cross examination of or suggestion to the said prosecution witnesses.

24. P.W.-2 "Bahadur", in his cross examination, has stated that he had received the amount of gratuity from the sugar mill in Deoria which he possessed with him on that day. From his statement it became evident that P.W.-2 was a retired workman of Deoria Sugar Mill. His age as disclosed was 70 years on the date when he was examined before the Court. He was doing agriculture work in his village Fatehpur Laheda, Police Station Rudrapur, District Deoria after his retirement (as comes out from para 2 of the examination-in-chief). His son, Nanhu was working in Deoria Sugar Mill and he used to come Deoria and stay with his son in his quarter. On the date of the incident, he was in Deoria with his son and came about 14 to 15 days back. In the cross examination, P.W.-2 further stated that his son Nanhu was on duty on the date of the incident from 10:00 A.M. to 06:00 P.M. This witness has stated about his sense of assessing time in clock with the siron blown from the factory.

25. Another witness (P.W.-3) Rajvanshi @ Banshi is also an agriculturist, his place of residence as disclosed by him, was in village Chakra Gosai under Police Station Mail, District Deoria. He at the relevant date and time of the incident came with his nephew Shiv Avtar who was studying in Village Barhaj, as his supplementary examination was scheduled to be held in an examination centre in District Deoria. As deposed, during his stay, he used to take his meals at a shop near the spot of the incident, situated infront of Deoria Railway Station alongwith his nephew and after dinner he usually take tea in the nearby tea shop. On the relevant date and time of the incident he was taking his tea as usual. In his cross examination, P.W-3 denied any relation with P.W.-1 "Ishwar" or with anyone else in the village Moora Dih. He even denied any relations in the village Bhimpur to which one of the co-accused Prahlad belongs. In the cross-examination P.W.-3 has admitted his relations with deceased "Ramashre Yadav" as his surety in bail in the criminal case against him. Further, he also admitted that whenever he used to come to Deoria in connection with his case in the Consolidation Court, he took food from the shop of Vindyachal situated infront of the Court. Vindyachal was the father-in-law of the deceased "Ramashre Yadav". P.W.-3 further stated that not only he but his brother Baldeo was also surety for Ramashre Yadav in the aforesaid criminal case and for the reason of his relation with Vindyachal, he agreed to become surety in the case against Ramashre Yadav. He had denied doing pairvi in the criminal case against Ramashre Yadav on his behalf.

26. P.W.-5 "Dwarika Nath Tiwari" to whom the P.W.-1 deposed as a customer stated that whenever he used to be in Deoria, he came to the shop of Ramashre Yadav to have tea or lassi. He had stated that the deceased was not personally known to him. In examination-in-chief, he stated his profession being agriculture at his place of abode in Village Pandeypur, Police

Station Laar, Distict Deoria. He was about 53 years old when produced before the Court. This witness, in his examination-in-chief, had stated that he was not aware with the name of shopkeeper of lassi. Thus, this witness is quite unrelated with other witnesses of the case, the deceased and also the accused persons. He is a witness only because of the injuries he got on the spot of the incident during the occurrence of the incident at the stated time and date.

27. From the examination of witnesses of facts namely P.W.-1, P.W.-2, P.W.-3 and P.W.-5, it comes out not only from the examination-in-chief but also from the cross-examination that they are rustic villagers, uneducated, men of low profile, doing agricultural work. P.W.-2 "Bahadur", a retired workman of the Deoria Sugar Mill is also an agriculturist and uneducated villager of District Deoria. Nothing has been extracted contrary to this status of the witness or suggested to them by the learned defence counsel. Such witnesses cannot be expected to possess the photographic memory and recall details of the incident mathematically.

Relation of witnesses with accused persons

28. P.W.-1, the first informant "Ishwar" has stated in the written complaint itself that his nephew "Ramashre" (deceased) was arraigned with the charge of murder of the brother of accused "Prahlad" (of village Moora Dih) namely Shyama and he was convicted. In appeal before the High Court, he was enlarged on bail continuing on the date of incident in question. This is why, the accused Prahlad and others were hatching enmity with his nephew and, therefore, they killed him.

29. The first informant as (P.W.-1) when produced in the witness box, had reiterated and asserted in the examination-in-chief that deceased "Ramashre" murdered Shyama "the brother of the accused Prahlad (of village Moora Dih)". In the trial of aforesaid murder case he was convicted and sentenced but released on bail and continuing as such at the relevant time of incident. He has further stated that the accused persons, Prahlad (of village Moora Dih) and his other companions were inimical for this reason with deceased "Ramashre". He further stated that Prahlad (of village Bhimpur) and his brother Ram Oudh were residents of village Bhimpur, Sudama and Brijraj were their friends. In the cross-examination, this witness has further clarified that the criminal case in which Ramashre was arraigned as accused, he and his brothers Chandrika and Ram Ji were also made accused. In cross-examination, this witness has further stated that the deceased "Ramashre" had justificably murdered Shyama and was sentenced correctly, the pairvi of the Ramashre accused in the murder case of Shyama was being done by him (P.W.-1). The witness has further stated that the accused persons since much before the date of the incident were looking to kill him whenever he used to go to attend his fields in the nights. Before the incident, the accused tried to kill "Ramashre' near Kuna Nala and a report was lodged in connection therewith against Prahlad (of village Moora Dih) and his father Bhirgun with one Hanuman. They also lodged a report against him.

30. On the complaint of accused Prahlad's father, Bhirgun (of village Moora Dih), the P.W.-1, Mohan, Chandrika (father of the deceased Ramashre and brother of P.W.-1), Poojan, Ramdhan and Nagina were

arraigned in a case in Court which was going on at the time of incident. This witness has admitted in the cross-examination that he and Bhirgun (father of accused Prahlad of Village Moora Dih) were in bitter inimical relations for a long time. He has further asserted in the cross-examination that both the accused persons, Prahlad (of village Moora Dih) and Prahlad (of Village Bhimpur) were hatching enmity against him.

31. On a careful perusal of the statement in chief and cross-examination, it is clear that P.W.-1, his brothers and deceased "Ramashre" on the one side and Bhirgun, his son Prahlad (of village Moora Dih) on the other side were indulged in various disputes with each other for long ago the date of incident. It has also came out from the cross-examination that Bhirgun as well as his son, the accused appellant "Prahlad" (of Village Moora Dih) were carrying a bitter inimical relations with Ramashre (the deceased) for the reason of his release on bail after conviction in appeal in the murder trial in case of murder of Shyama, the brother of the accused appellant "Prahlad" (of village Moora Dih). Thus, inimical relations of P.W.-1 as well as the deceased "Ramashre" with the accused appellant Prahlad (of Village Moora Dih) is established and proved.

32. Prahlad (of Village Bhimpur) was inimical with deceased "Ramashre" by reason of his friendship with Prahlad (of Village Moora Dih). So far as the accused persons Brijraj and Sudama are concerned, witness P.W.-1 has denied any personal acquaintance with them. However, in the cross-examination, P.W.-1 has stated that he came to know the accused Sudama and Brijraj because they used to come in his village Moora Dih. They were well known in the village, and therefore, he also knew about them. He further stated that they (Sudama and Brijraj) severely came in quarrel and disputes against him and that was also the reason to know them. This witness has also stated that all the accused persons were knowing the deceased "Ramashre" since before the incident.

33. P.W.-2 "Bahadur" in his cross-examination has deposed about him knowing the accused "Brijraj". He stated that he did not go to the house of Brijraj nor he had even conversation with him. Deceased "Ramashre" had murdered the brother of the accused Prahlad (of village Moora Dih) for which he was subjected to trial and in connection with that he used to go to Court with Ramashre and, thus, he knew Brijraj also. This witness has further stated that though he did not know any one else in the village of Brijraj but knew some other people in the village of Sudama.

34. P.W.-3 Rajvanshi @ Banshi had also identified the accused persons five in number namely Prahlad (of Village Moora Dih), Prahlad and Ram Oudh of Village Bhimpur, Brijraj and Sudama. The outcome of the statement in the examination-in-chief and cross-examination presents an uncontradicted and consistent version as to the relation of witness P.W.-2 "Bahadur" and P.W.-3 "Rajvanshi" not being inimical with the accused named in the complaint. They are villagers of the nearby villages of the place of incident in District Deoria and stated that for the reason of robustic character and fame of accused Brijraj and Sudama, they came to know about them before the incident.

Appreciation of evidence of P.W.-1 and P.W.-2 being related witnesses.

35. P.W.-1 being real uncle of the deceased "Ramashre" and P.W.-2 also being a near relative of the family, their evidence is required to be carefully scrutinized. It is the settled legal preposition that the evidence of closely related witnesses is required to be carefully scrutinized and appreciated before any conclusion is made to rest upon to convict the accused in a given case. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can and certainly be relied upon.

36. No general assumption can be drawn that the related witnesses must also be an interested witnesses. A relative witness is a natural witness, a close relative like P.W.-1, the real uncle of the deceased "Ramashre" in the present case and Bahadur, a near relative of the family, cannot be dis-regarded as interested witnesses. The term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some anonymous or for some other reason. In the light of this principle we have to consider the argument of the learned counsel for the appellants that all eye witnesses being related to deceased are interested witnesses and their version requires scrutiny with care, caution and circumspection and when their evidence is scanned with said parameters, it does not stand to the said test and the case set forth by the prosecution gets corroded and principle of proof beyond reasonable doubts gets shattered.

37. In ***Vijendra Singh Vs. State of Uttar Pradesh with Mahendra Singh Vs. State of Uttar Pradesh3,*** the Apex Court has held in para 31 as under:-

"31. In this regard reference to a passage from Hari Obula Reddy v. State of A.P. [Hari Obula Reddy v. State of A.P., (1981) 3 SCC 675 : 1981 SCC (Cri) 795] would be fruitful. In the said case, a three-Judge Bench has ruled that : (SCC pp. 683-84, para 13)

"[it cannot] be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

It is worthy to note that there is a distinction between a witness who is related and an interested witness. A relative is a natural witness. The Court in Kartik Malhar v. State of Bihar [Kartik Malhar v. State of Bihar, (1996) 1 SCC 614 : 1996 SCC (Cri) 188] has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason."

38. In the present case, the presence of the witnesses on the spot is proved and established by their evidence without any contradiction or inconsistency, therefore, the credibility of the witnesses cannot be thrashed out for their being relative only as witnesses interested in false implication, in seeing the accused persons behind the bars.

39. In ***Sucha Singh and Another Vs. State of Punjab4,*** it is held that relationship

is not a factor to effect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. Para 13 of the said judgment is quoted under:-

13. We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

The ground that the witness being a close relative consequently being a partisan witness should not be relied upon, has no substance. This impression in mind of any person that relatives were not independent is not correct.

40. The evidence in the present case also show and prove bitter inimical relation of the witness P.W.-1 and his nephew "Ramashre" (deceased) with the accused Prahlad (of Village Moora Dih). In para 14 of the ***Sucha Singh and Another Vs. State of Punjab (Supra)***, Hon'ble the Apex Court has considered it as under:-

"14. In Dalip Singh v. State of Punjab [AIR 1953 SC 364 : 1953 Cri LJ 1465] it has been laid down as under : (AIR p. 366, para 26)

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

41. In the present case, the evidence as to the presence on the spot of the incident at the relevant time and date of the incident not only proved probable and natural but is found to be free from contradictions, exaggeration or embellishment. Some minor contradictions or inconsistency are immaterial, irrelevant details which are not in the capacity in anyway corrode the credibility of witness cannot be labelled as omission or contradictions. This settled legal principle has been reiterated in various decisions of the Apex Court. One of the witnesses to the occurrence as himself been injured in the incident is P.W.-5 "Dwarika Nath Tiwari". This witness though had not seen the accused persons but with all certainty, he had proved the place of incident, the

relevant date and time of the occurrence and the manner of commission of crime by throwing hand grenades on the deceased. His presence on the spot is proved and also corroborated with the evidence of other witnesses of fact namely P.W.-1, P.W.-2 and P.W.-3. His testimony cannot be discarded as his presence on the spot cannot be doubted particularly in view of the fact that immediately after lodging of the first information report, the injured witness (P.W.-5) had been medically examined without any loss of time on the same date. The injured witness had been put through gruelling cross-examination but nothing could be elicited to discredible his testimony. It is held by the Apex Court in ***Brahm Swaroop and Another Vs. State of Uttar Pradesh (Supra)5*** as under :-

"It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the court to reject the evidence in its entirety. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." Difference in some minor details, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and shifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basis version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses."

42. In this regard, para 22 of the judgment of the Apex Court in the case of ***Shyam Babu Vs. State of U.P.6***, is reproduced hereunder:-

"This Court has repeatedly held that the version of an eye-witness cannot be discarded by the Court merely on the ground that such eye-witness happened to be a relative or friend of the deceased. It is also stated that where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the Court to discard the statement of such related or friendly witnesses. To put it clear, there is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend etc. These principles have been reiterated in Mano Dutt and Another vs. State of Uttar Pradesh, (2012) 4 SCC 79 and Dayal Singh and Others vs. State of Uttaranchal, 2012 (7) Scale 165."

Motive

43. The motive for the murder as stated in the first information report and proved by the evidence of P.W.-1, is an undisputed fact. Brother of one of the assailants "Prahlad" (of Village Moora Dih) namely Shyama was murdered much before the incident in question. The assailants were under the belief that the said Shyama was murdered by the deceased "Ramashre" and the trial court had found Ramashre guilty of the murder. It seems that when the assailants knew that despite the conviction and sentence passed by the trial court, he was out of jail on release on bail, naturally the instinct of revenge might have galvanised for an opportune time to avenge the murder of Shyama. Thus, the motive put forward by the prosecution seems to be a very strong circumstance to buttress the prosecution version. This circumstance is relevant and admissible in evidence under Section 8 of the Indian Evidence Act, 1872.

About the presence of injured witness (P.W.-5) on the spot of incident at relevant date and time viz. 12.04.1979 between 08:30 P.M. to 08:45 P.M. in the night.

44. First of all we gone through the statement of P.W.-5, the injured witness of the incident namely Dwarika Nath Tiwari. This 50 years old agriculturist of Village Pandeypur, District Deoria stated in his examination-in-chief recorded on 30.06.1983, after more than four years from the date of incident, that at about 08:30 P.M. to 08:45 P.M. he was sitting on a bench of the shop of lassi facing towards South in front of the railway station near Octroi Outpost and was drinking lassi. The place was illuminated by electric lights. He heard suddenly simultaneous blasts of 2-3 bombs which injured his right arm also. The lassi shop owner wounded from the bomb blasts instantly died. He did not know the name of the deceased shop owner. This injured witness has further stated that he was brought to the hospital for treatment on a ricksaw. The ricksaw puller brought him first to the Police Station Kotwali, District Deoria and from there he was sent to the hospital for medical examination. In the cross-examination P.W.-5 stated that after the occurrence, he stayed on the spot for about half an hour. He further stated that he was interrogated by the police in the hospital at about 09:45 P.M. on the next day.

45. In this connection, we may also refer to the statement of P.W.-6, the Sub Inspector (Investigating Officer) who in his cross examination has stated that the injured came to the police station on a ricksaw. His statement was not recorded by him in the police station because he was sent to the hospital for medical examination. This witness (P.W.-6) further stated that he recorded the statement of injured "Dwarika Nath Tiwari" on 13.04.1979 at about 16:00 P.M. in the hospital while he was admitted for treatment. Further, to test the veracity of the statement of the injured witness as to his presence on spot at the time of incident and sustaining injuries in the same occurrence, we may go through the statement of P.W.-7 "Dr. J.N. Thankur" of Deoria Hospital. According to his testimony, on 12.04.1979, he was present in the hospital when at about 09:50 P.M., Dwarika Nath Tiwari was examined by him medically, who was brought by sepoy "Subhash Chandra" of Police Station Kotwali. P.W.-7 had proved the medical examination report of the injured witness as Ex. Ka.17, reproduced hereunder:-

"Examining Sri Dwarika Nath Tiwari 45 years old S/o Lal Bahadur Tiwari R/o Pandey pur Police Station Laar Deoria on 12/4/79 at 9:50 p.m. ..... C.P. No.141

Subhash Chandra Police Station Laar, Deoria

A/I - Black and lap check.

Injury- 1 Lacerated wound 4x4 bone deep right elbow int... kept into. Adv. X-ray.

blacking tattooing around into wound.

2 Swelling simple burn on his right side chest"

46. The expert witness P.W.-7 has further stated that these injuries might have been caused to the injured in between 08:30 P.M. to 09:00 P.M. in the night of 12.04.1979. We did not find any contradiction or inconsistency in the statement of the injured witness i.e. P.W.-5 "Dwarika Nath Tiwari" with that of the statement of P.W.-6 (the Investigating Officer) and P.W.-7 (the Doctor), who did the medico legal examination as to the injuries of P.W.-5, the injured witness. As such, the presence of P.W.-5 at the spot of the incident in question at the relevant time (between 08:30 P.M. to 08:45 P.M.) in the night of 12.04.1979 corroborated from other prosecution evidence. His presence is further corroborated from the statements of other witnesses P.W.-1, P.W.-2 and P.W.-3.

47. P.W.-1 "the first informant" in his written information also submitted to the police and stated about the injuries were sustained by one customer on the shop of deceased "Ramashre" from the bomb blast. In the statement of P.W.-1 (the first informant) therein is:- "A man who sustained injuries in the incident in question had also seen the incident whose name he did not know". P.W.-1 has further stated in the cross-examination that in the first information report the name of injured witness could not be disclosed because he was lying unconscious on the spot after the incident and conversation with him as such was not possible. Further in para 26, P.W.-1 stated that the customer who was drinking lassi on the shop of deceased "Ramashre", was standing at one step away from the wooden cot of the shop in the North direction. He further stated that the name of customer was not known to him till that date,. He, however, had seen the said customer even prior to the occurrence of incident as he severally and occasionally used to come and drink lassi at the shop of deceased Ramashre.

In similar circumstance, the Apex Court has held that when a witness received injuries in the course of the incident, his presence cannot be doubted at the time and place of the occurrence ***(Maqsoodan and others Vs. State of Uttar Pradesh)7*** .

In para 28 in the case of ***Brahm Swaroop Vs. State of U.P. (Supra)***, the Apex Court has held as under:-

"Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with an in-built guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." (Vide State of U.P. v. Kishan Chand [(2004) 7 SCC 629 : 2004 SCC (Cri) 2021] , Krishan v. State of Haryana [(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214] , Dinesh Kumar v. State of Rajasthan [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472] , Jarnail Singh v. State of Punjab [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] , Vishnu v. State of Rajasthan [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] , Annareddy Sambasiva Reddy v. State of A.P. [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630 : AIR 2009 SC 2661] and Balraje

v. State of Maharashtra [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] .)"

48. We would like to remind ourselves at the cost of repetition that the witnesses are rustic villager, uneducated, struggling for earning of their day to day livelihood. This is quite natural in the quick witted bombing on the spot of incident by the accused persons that the witnesses might have been over taken by the events. None of them could anticipate occurrence which bore element of surprise. Their mental faculties may not be tuned to absorb the details. Moreover, the witness sitting or standing on the spot is not so material to over turn the prosecution, the presence of injured witness from his injuries is established in itself, against which no adverse material could be extracted from cross examination. Further, P.W.-2 "Bahadur" has also stated in his examination-in-chief about the presence of one man near the deceased who had sustained blast injuries and fell on the earth. Further, in his cross-examination this witness asserted that the said customer was drinking lassi standing near the deceased "Ramashre" in the North-Eastern corner of the wooden cot of the shop of the deceased and no one else except that customer was present at that time at the shop of the deceased "Ramashre". This witness also has not stated anything contrary or inconsistent to the fact of presence of customer (P.W.-5) at the time of occurrence.

49. P.W.-3 "Rajvanshi @ Banshi" has also stated in the examination-in-chief that at the time of occurrence, one customer after drinking lassi was standing near the shop who sustained blast injures from the bomb in the incident. Nothing contrary or inconsistent could be extracted by the learned defence counsel in the cross-examination with regard to the presence of customer who got injuries and subsequently identified during investigation as Dwarika Nath Tiwari and examined in the trial as P.W.-5.

50. Despite lengthy and grilling cross-examination, the defence could not extract any material contradiction or inconsistency with regard to the proved facts of presence of injured witness, a customer on the shop of lassi of deceased "Ramashre" at the relevant time and date of incident. The arguments of the learned counsel with regard to the falsity and discrepancy in statement of P.W.-1 whether the said customer, the injured witness was sitting on the bench or standing near the wooden cot of lassi shop when he was drinking lassi at the time of occurrence is of no avail.

Evidence as to the presence of witnesses P.W.-1, P.W.-2 and P.W.-3 at the spot.

51. P.W.-1, the first informant of the case, P.W.-2 his relative "Bahadur" and P.W.-3 "Rajvanshi @ Banshi", all have stated on oath about the cause and occasion of their presence at the spot at the relevant date and time of incident when the accused persons threw bombs over the victim of the incident "Ramashre" and killed him. For the purpose of their evidence in this regard, we have to see flaws if any, of improbability coming out from their statement; contradiction or inconsistency between their statements as to the presence on the spot, before placing our reliance on or discredit to their evidence.

52. Starting our discussions on the aforesaid aspects of the veracity of witness's statement, we perused the written

complaint dated 12.04.1979 submitted by the first informant "Ishwar" who had deposed about his profession as well as the profession of his nephew "Ramashre" of selling sharbat and lassi by installing a pavement shop on the footpath near the Railway Station Deoria in front of Octroi Outpost. In his statement, P.W.-1 has stated that he and Ramashre both were running separate shops of lassi and sharbat. The shop of Ramashre for selling lassi was on a wooden cot whereas the shop of the informant was on trolley for selling sharbat. This witness in the cross-examination had denied the suggestion that he used to sell sharbat wandering here and there on the road but asserted that he always used to sell sharbat on the same spot standing near his trolley. He further asserted that about 15 to 16 days from the date of incident, he was doing this business at the spot of incident and Ramashre was also doing business of preparing and selling lassi there. He further stated that the Investigating Officer had seen the trolley of the first informant on the spot of the incident and wooded chowki of Ramashre where he used to sit for selling lassi. This witness has further stated that in connection with their (P.W.-1 and the deceased) business of selling sharbat and lassi, they used to stay on the spot uptill 11:00 P.M. in night. The statement of P.W.-1 as to his usual presence and the presence of deceased "Ramashre" in connection with their day to day business on the spot of incident finds force from the statement of the Investigating Officer (P.W.-6), when he deposed in the cross-examination that the spot inspection was done by him after the incident on the pointing out of the first informant (P.W.-1).

53. P.W.-6 in his examination-in-chief stated that on 13.04.1979 at about 00:5 A.M. i.e. in the same night of the incident (12.04.1979), he inspected the spot of incident on the pointing out and identification of P.W.-1, prepared the site map (Ex. Ka-11), shown the spot of deceased "Ramashre" and cycle no.9270 with other utensils for preparation of sharbat and lassi and raw materials were seized from the spot by him. The shop of the first informant "Ishwar" is shown with letter "B" and shop of deceased "Ramashre" is shown with letter "A" in the proved document Ex. Ka-11. In this way, from the statement of P.W.-1, and that of the Investigating Officer (P.W.-6) and the site map, the evidence of presence of P.W.-1 on the spot in connection in his shop near the shop of deceased "Ramashre" at the time of incident is believable and probable. Nothing can be elicited and extracted against the said evidence of presence of P.W.-1 on spot at the relevant time and date of the incident.

54. Witness P.W.-3 "Rajvanshi @ Banshi" to whom the learned counsel for the appellants termed as a chance witness or the sponsored witness, has stated in examination-in-chief that he was present at the relevant date and time of the incident on the spot of incident as he and his nephew went to a restaurant situated nearby to take dinner and after dining he stayed and sat on the tea stall to have tea. He was drinking tea when the incident occurred. Learned counsel for the defence could not extract any improbability or falsity in his statement as to his presence in District Deoria in connection with the supplementary examination of his nephew. The presence of this witness at the spot of the incident at the relevant date and time cannot be disbelieved. Moreover, his name in the written complaint (Ex. Ka-1) had been given as witness of the incident. For the above, his presence at the spot of the

incident and coincidently seeing the incident in question cannot be doubted.

Spot of incident and source of Light

55. The time of the incident is night at about 08:30 P.M. to 08:45 P.M. A dispute was raised that the witnesses could not be expected to have seen the incident and the accused persons in the darkness of the night. To force this argument, learned counsel for the appellants drew the attention towards the site map (Ex. Ka-11) prepared by the Investigating Officer wherein he has not shown any source of light. He submits that even the witnesses have not stated that the night of the incident was a full moon night. P.W.-6, the Investigating Officer has stated that on the pointing out of first informant (P.W.-1), eye witness Bahadur (P.W.-2) and Rajvanshi @ Banshi (P.W.-3), he inspected the spot of incident and prepared the site map (Ex. Ka-11). In his cross-examination, this witness assertingly replied that P.W.-1 had told him that at the time of incident, there was illumination of electricity light, however, he had not been told that light was coming from the electric pole. Lastly, this witness has denied the suggestion of the learned counsel for the defence that there was no light on the spot of the incident. In this connection, the written complaint (Ex. Ka-1) is also important to be looked into where the first informant (P.W.-1) had narrated the spot of incident being surrounded from all the four directions by shops which were illuminated from electricity lights.

56. P.W.-1 who is a rustic villager in his examination-in-chief has stated that there was a road running towards East to West lying towards South of the gate of Railway Station. The South side of the road was abutted with footpath and in it's South there was a drain, 10-15 shops are located towards South of the aforesaid drain spreading over East to West directions, there was an electricity pole towards the South of the gate of the Railway Station fitted with the electricity bulb. As such, this witness had firmly and confidently stated that the area in vicinity of the spot of incident was lit up by the electricity bulb and light in the shops as well as the electricity pole installed in the South of the gate of Railway Station.

57. The statement of P.W.-6 (Investigating Officer) and P.W.-1 (first informant) is, therefore, not materially contradicting each other rather there is consistency in evidence to the fact of the spot of the incident being surrounded from all the four directions from the shops in the vicinity. As this position of the spot of incident shown in the site map prepared by P.W.-6 finds corroboration from the statement of P.W.-1 and P.W.-6, and there is no contradiction about the position on the spot of the incident being surrounded with nearby shops and situated in South of the Railway Station abutting to the road running towards East to West and footpath, therefore, argument as to non mentioning of the electricity pole or any source of light in the site map would be only an inadvertent omission. The statement of the prosecution witnesses can not be discarded with regard to the source of light available on the spot of the incident at relevant time and date. This omission on the part of Investigating Officer could not be taken to falsify his statement as to the source of light.

58. P.W.-2 (Bahadur) had also stated in his examination-in-chief that from the spot of the incident where Ramashre was killed at the distance of approximately 5 to

6 steps towards East, Ishwar (P.W.-1) was making fruit juice and he was present there with him. There was enough illumination from electricity lights on the spot when he saw the accused persons pouncing from the western gate of the Railway Station.

59. P.W.-3 "Rajvanshi @ Banshi" has also stated to have seen and identifying the accused persons in the light coming from the electric pole. This witness in cross examination has stated that he was facing towards North while sitting on the shop when he was drinking tea. We think it relevant to go back to the statement of P.W.-1 where he described the topography of Deoria Railway Station that in front of the gate of the Railway Station towards South there was a road running towards East to West, at the Southern side of which, the footpath and the shops including the shops of P.W.-1 and his nephew were located.

60. P.W.-1 has stated that at the gate of the Railway Station, an electric pole was installed from which electric light illuminated the area. The site map (Ex. Ka-11) also helps to appreciate his evidence wherein just in front of the Eastern gate of the Railway Station Deoria towards South on the road lying East to West, an electricity pole is shown. This is important that existence of this electricity pole has not been denied by the P.W.-6 in his cross-examination. Even this witness in his cross-examination has stated that in the night of the incident at about 01:30 A.M., he recorded the statement of witness P.W.-2 in the electricity light. P.W.-6 has further stated in cross-examination that witness P.W.-1 "Ishwar" told about the electricity light.

61. In our view, there is no discrepancy in the statement of prosecution witnesses as to the spot of the incident and source of light. The defence has remained unsuccessful in extracting from the cross-examination any evidence to establish that the area was not electrified or there was no possibility of electricity light coming either from the surrounding shops or from the pole installed at the Southern side of the gate of the Railway Station Deoria shown in the site map.

62. This would also be relevant to say that P.W.-1 present on his shop, in between the other shops, had seen the accused person in the illumination of electric lights coming from the shops. P.W.-2 likewise had also seen the accused persons in such light whereas P.W.-3 (Rajvanshi @ Banshi) who was sitting facing towards North naturally in all probability is expected to see the accused persons coming from the gate of the Railway Station towards the spot of the incident. As such, the P.W.-3 (Rajvanshi @ Banshi) looking in North direction towards the railway station and the accused persons pouncing from the railway station towards the spot of the incident situated in front of the railway station towards South were factually in front of each other.

63. Even P.W.-5, the injured witness has stated that the electricity pole nearest to the spot of incident was fitted with electric bulb from which light was coming, however, he expressed his inability to recollect the direction of electrical pole for the reason of having got injured in the incident badly. He, however, absolutely denied the suggestion put forth by the defence counsel that there was no existence of light.

64. We find no falsity, improbability of the statement with regard to the spot of incident and availability of light at the spot of incident on the relevant date and time and also no contradiction or inconsistency in the statement of prosecution witnesses with this regard. Their evidence of watching the incident in the illumination undoubtedly is believable and acceptable.

Identification of the accused persons.

65. As we have discussed earlier the acquaintance of the witness with the accused persons and found that P.W.-1, the informant of the case by reason of his enmity, P.W.-2 (Bahadur), the relative of P.W.-1 knew the accused persons before the incident in question. Prosecution witness P.W.-3 (Rajvanshi @ Banshi) is neither related with P.W.-1 and P.W.-2 nor with the deceased. In cross-examination, he has stated about acquaintance with deceased "Ramashre" whose father-in-law (Vindyachal) was owner of the food shop situated in front of the Court at District Deoria where he used to take meals on his arrival to Deoria in connection with pairvi of his case pending in the consolidation court. He became surety in the bail of Ramashre in the murder case of "Shyama', the brother of accused Prahlad (of Village Moora Dih). P.W.-3 and his brother Baldeo both were sureties for the deceased "Ramashre" in that case. Since father-in-law of deceased namely Vindyachal was known to him since long ago, therefore, he did not hesitate to give surety for Ramashre on his request. This witness has further stated that he knew the parentage of accused Prahlad (of Village Moora Dih) only and no other accused persons. On a suggestion by the defence to him giving false statement by reason of him being relative of the deceased or the P.W.-1, P.W.-3 absolutely denied the relation and that he had deposed falsely. His statement in the examination-in-chief to the effect that he had identified all the five accused persons whose names were Prahlad and Ram Oudh of Village Moora Dih, Prahlad of Village Bhimpur, Brijraj and Sudama does not built confidence, as he without any ambiguity tries to establish their identity by their name and village but in cross-examination, the learned counsel for the defence has been successful in establishing that he does not have any relation in Village Bhimpur. In para 4 of the cross-examination, P.W.-3 further stated that he knew the accused persons Prahlad and Ram Oudh of Village Bhimpur, Brijraj and Sudama during the proceeding of the case going on in connection with the murder by Ramashre (the deceased in the incident) and this is why he told about them to the Investigating Officer.

66. The injured witness (P.W.-5) had not identified the accused persons but very explicitly replied in the cross-examination that he only heard the blast of the bombs and saw that the deceased instantly died of the blast injuries. He stated the reason why he could not see the assailants as while drinking lassi, he sat on the bench of the shop facing South and accused came from the side of the gate of the Railway Station behind him in the North. Therefore, evidence of P.W.-5 is of no avail as to the identification of accused persons but his evidence amply proves the spot of incident, the relevant date and time of the incident, the killing of the deceased "Ramashre" in the incident and the mode of his killing by throwing bombs on him.

67. The evidence of P.W.-3 though seems shaky only with regard to the

identification of all the accused except Prahlad (of Village Moora Dih) to whom he knew earlier, but rest of his evidence as to the mode and manner of killing deceased "Ramashre" in the incident by throwing hand grenade on him at the spot of incident at the relevant date and time of the incident is acceptable and can not be discarded for the reason that the english legal maxim "Falsus in uno, falsus in omnibus" is not applicable in India.

68. The Apex Court in ***Sucha Singh and Another Vs. State of Punjab (Supra)*** has held in para 18 as under:-

"To the same effect is the decision in State of Punjab v. Jagir Singh (AIR 1973 SC 2407) and Lehna v. State of Haryana (2002 (3) SCC 76). Stress was laid by the accused- appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See Nisar Alli v. The State of Uttar Pradesh (AIR 1957 SC 366). Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See Gurucharan Singh and Anr. v. State of Punjab (AIR 1956 SC 460). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead- stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab s/o Beli Nayata and Anr. v. The State of Madhya Pradesh 1972 3 SCC 751) and Ugar Ahir and Ors. v.

The State of Bihar (AIR 1965 SC 277). An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of Madhya Pradesh (AIR 1954 SC 15) and Balaka Singh and Ors. v. The State of Punjab. (AIR 1975 SC 1962). As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi and Ors. v. State of Bihar etc. (JT 2002 (4) SC 186). Accusations have been clearly established against accused-appellants in the case at hand. The Courts below have categorically indicated the distinguishing features in evidence so far as acquitted and convicted accused are concerned."

In view of the above noted legal position, the evidence of P.W.-3 "Rajvanshi @ Banshi" in the case before us cannot be discarded as a whole. If his evidence as to the identification of rest of the accused persons other than the accused Prahlad (of Village Moora Dih) is excluded, even then the portion of his statement as to the number of accused persons appearing on spot of incident with accused Prahlad (of Village Moora Dih) at relevant date and time of incident and throwing bombs on the deceased "Ramashre", killing him thereby instantly on the spot and, thereafter, fleeing from the spot is trustworthy and believable being free of contradictions, inconsistencies or embellishments.

69. The evidence on record does not suggest that the accused appeared on the spot of incident with muffled faces. P.W.-1, the first informant is the resident of the same Village Moora Dih and accused Prahlad to whom the role of exhortation had been assigned also belongs to the same village. By his evidence, P.W.-1 had proved that accused Prahlad (of Village Moora Dih) had enmity with his family. Occasionally Brijraj and Sudama both used to join adversely in disputes and quarrels between his family and the family of accused Prahlad (of Village Moora Dih), therefore, they were also known to him very well since long before the occurrence in question. He has also stated about Prahlad (of Village Bhimpur) being companion of the accused Prahlad (of Village Moora Dih) aiding and assisting him on various occasion and that they were also known to him. P.W.-2 being near relative of the P.W.-1 was also closely knowing all the accused persons, therefore, identification of the accused persons was not improbable and impossible for them when they appeared on the spot of the incident as assailants. The accused persons, as the evidences on record prove, were very much known to the P.W.-1 and P.W.-2, and were not with muffled face at the spot of incident. They were easily seen and identifiable on the spot of the incident illuminated from electric light coming from

the shop and from electricity pole installed in the nearby vicinity in front of the Western gate of the Railway Station towards it's South. P.W.-3 had also seen the four companions of the accused Prahlad (of Village Moora Dih) on the spot as participants and, thus, became known of their faces. His presence on spot is proved by the evidence of the prosecution and finds corroboration from the fact that his name found place in the written information (Ex. Ka-1) proved to have been promptly lodged after the incidence in question. In the cross-examination, P.W.-3 unmistakably recollect his memory in identifying the accused persons in the trial court when he was in the witness box. In the circumstance of the present case, the identification parade was not required.

The manner and Mode of Commission of offence in question

70. The inquest was conducted on 12.04.1979 after getting information of the incident commencing from 21:30 P.M. continued upto 23:50 P.M. which shows that the incident of killing of the deceased "Ramashre" was actuated causing blast injuries of bomb. The body was lying in a drainage having head towards East and legs towards West, when it was drawn out of drainage, it was found that the entire face above the chin was blasted over, the brain also came out, the skull found falling in the drain. In this connection, we think it relevant to refer the post mortem report proved by doctor (medical witness) P.W.-4 (Dr. M. Jama) proved as Ex. Ka-12 is entered.

"Ante mortem injuries:-

1. Blast injury over whole of the face from chin below upto upper part of the head and on sides from one ear to other ear ..... both nostril both eyes extensively lacerated whole of face extending lacerated under lying facial bone both jaw bone and ..... multiple places into pieces lying structure eximoted lacerated ..... presently signed bleeding talioring over injuries proceeds blood clots present. Brain ..... Six metallic frugs body preserved for underlying injured tissues.

2. Abrasion ½ x ¼ on the right arm upper ..... side.

3. Abrasion 2 x ½ on the right arm upper part internal side.

4. Abrasion 1 ½ x ½ on the right arm just above wrist . .. side

5. Multiple Abrasion over an arm of 3x2 on the part of chest in .....

6. Abrasion 1 ½ x ½ on the left upper shoulder.

7. Abrasion ¾ x ½ on the left side chest. 2 ½ above left nipple.

8. Abrasion 1x ½ on the pst..... side lower 1/3rd of the left arm.

9. Abrasion 1 ½ x ½ on the left fore arm middle finger.

10. Abrasion 1 x ½ on the ..... of right thigh.

11. Abrasion 2 x ½ on the lower 1/3 of the right thigh.

12. Abrasion 1 x ½ on the middle side of the right knee.

13. Abrasion 1 ½ x ½ on the ... side right leg lower 1/3rd.

14. Abrasion 1 ¼ x ½ on the middle of left thigh internal sides.

15. Abrasion 1 ½ x ½ on the just above .....

16. Abrasion multiple over an over of 4 x 2 on the left leg upper 1/3 rd."

71. The injuries reported on the person of the deceased as ante mortem injuries are being reproduced hereunder for easy reference and to appreciate the manner of killing the deceased "Ramashre". Dr. M.

Jama (P.W.-4) who had done autopsy on the dead body stated that he had conducted the autopsy on 13.04.1979 at about 02:45 P.M. The deceased was approximately 30 years in age and his death had occurred approximately one day ago. Describing the ante mortem injures, he stated that the entire face of the deceased from chin to forehead, from right ear to left ear, both the eyes and nose were badly and extremely cut and ruptured. Both the jaws were broken, hairs on the head were burnt and wounds were surrounded with blackening and tattooing, blood was clotted, brain was flown out from the skull and six metallic scraps were found inside the wounds. He stated that the injuries reported by him in the post mortem report as ante mortem injuries sustained by the deceased were sufficient in the ordinary course of nature to cause the death and all of them were caused by bombs. He assessed the proximate time of death on 12.04.1979 at about 08:45 P.M. to 09:00 P.M. and also stated firmly that the deceased might have died instantly of the wounds sustained by him as above.

72. In cross-examination, this witness (P.W.-4) has firmly denied that the injury no.1 could occur from rifle, however, the defence has carved out the possibility of the blast injury having been caused from only one bomb also. This would be relevant that the defence has not succeeded in extracting from the evidence of P.W.-4, which is an expert opinion to be read in according with the provision of Section 45 of the Indian Evidence Act, 1872, that the blast injury could not be caused by more than one bombs.

73. In the aforesaid context emerging out from the inquest report and the post mortem report as well as the evidence of P.W.-4 (Dr. M. Jama), it would be necessary to look into the evidence of eye witnesses particularly P.W.-1, P.W.-2 and P.W.-3. So far as the injured witness P.W.-4 is concerned, his evidence is material with regard to the date, time and place of the incident as he has successfully and sufficiently proved his presence over the spot of the incident, the deceased was attacked by the assailants throwing hand grenade (bombs) on him, wherein he himself sustained blast injuries which was duly examined and his injury report has been proved by doctor who examined him medically as P.W.-7 (Dr. J.N. Thakur). As such the injured witness who stands on a high pedestal of trust worthiness and credibility being injured in the incident and eye witness has proved the spot of the incident being the shop of deceased "Ramashre". P.W.-4 has also reliably proved as to the incident of bombing on the lassi shop owner "Ramashre" resulting in death. Likewise, he has successfully proved the time of incident at about 08:30 P.M. to 08:45 P.M. in the night of 12:04.1979.

74. P.W.-1 in his written complaint very specifically stated that at about 08:30 P.M. to 08:45 P.M. in the night of 12.04.1979 when he alongwith Bahadur (P.W.-2) was at his shop near the shop of Ramashre, he saw the accused persons Ram Oudh (of village Bhimpur) and Prahlad (of Village Moora Dih), Sudama and Brijraj coming towards them. Prahlad (of Village Moora Dih) shouted exhortingly pointing the deceased "Ramashre" to kill him *(मारो साले को)* and saw Sudama, Prahlad (of Village Bhimpur) and Brijraj throwing hand grenades (Bombs) on Ramashre. On the alarm of P.W.-1 and P.W.-2, P.W.-3 (Rajvanshi @ Banshi), Hari Yadav, Ram Ji and several other people rushed towards them to chase the assailants who fled

towards Mal Godam through Railway Station Deoria. The Ramashre died of blast injury instantly on the spot.

75. In his examination-in-chief, P.W.-1 without any deviation, exaggeration, embellishment or improvement has stated the same mode and manner of assailants of attacking with bombs on the deceased "Ramashre" at the relevant date and time of incident at his shop of lassi (the place of incident). In cross-examination, this witness stated that at the time of the incident, deceased "Ramashre" was preparing lassi at his shop, he stated that Sudama, Prahlad (of Village Bhimpur and Brijraj) thrown the bomb simultaneously on Ramashre, the assailants were chased but they had succeeded in fleeing away from the spot as Prahlad (of Village Moora Dih) and Ram Oudh thrown bombs over the chasing crowd, the people chasing the assailants feared of the bombs, stopped there. This witness has further stated in his cross-examination that he sighted the assailants only on the exhortation made by the Prahlad (of Village Moora Dih) and seen the assailants throwing bombs over the deceased "Ramashre" soon the exhortation. The accused who were throwing bombs on Ramashre were at a distance of 4 to 5 steps from the wooden cot of the lassi shop of Ramashre.

76. The first bomb was blasted on the head of Ramashre, second also blasted at the same place and rest of the bombs which were thrown simultaneously also blasted on the head of the deceased "Ramashre" when the bombs were thrown on him, the deceased "Ramashre" was in sitting position on his wooden cot of shop facing towards North. (This would be pertinent to refer that accused came towards Ramashre from the side of station which is at the South of the spot of incident).

77. In his cross-examination, this witness has further replied the query of the defence counsel that he saw the bombs just when the assailant took out them from their bags and they were coming at spot of incident, therefore, he tried to ran away from the spot but since Ramashre (the deceased) was sitting on his wooded cot, preparing lassi, he could not see the assailants and bombs in their hands and hence he could not run away from the spot.

78. This witness and the Investigating Officer (P.W.-7) both have deposed about the destruction of utensils and articles and other raw materials from the blast of bombs. P.W.-7 had prepared memo of seizure of the articles destroyed at the shop of deceased and proved in his examination, which also corroborate the oral statement of P.W.-1 that at the time of the bomb blast on Ramashre, he was sitting on his wooden cot shop preparing lassi. He further stated that the body was thrown on earth from the wooden cot towards it's South. In the topography stated by P.W.-7 and other witnesses of fact and the site map prepared by the Investigating Officer, it has been explicitly established that the wooden cot of the lassi shop of deceased "Ramashre" was lying abutted to the footpath of the road and, thereafter, a drainage was running in the East-West direction. The inquest report also shows that the dead body was lying after the incident, in a drainage. (This also corroborates the statement of P.W.-1 with regard to the attack with bombing over the deceased "Ramashre" by the assailant while he was sitting on his wooden cot of the shop preparing lassi and after sustaining blast injuries, he died instantly).

79. P.W.-2 has also stated about exhortation by Prahlad (of Village Moora Dih), induced thereby the assailants Prahlad (of Village Bhimpur), Sudama and Brijraj thrown bombs on Ramashre over his head. In his cross-examination, this witness without any deviation and contradiction with the statement of P.W.-1 has stated that since he was sitting towards North of his shop facing West direction, therefore, he sighted the assailant coming towards the spot of incident but he could anticipate that they were coming to kill Ramashre. He stated that a total of three bombs were thrown over the deceased "Ramashre" from the distance of 5 to 6 steps away from the shop of Ramashre. Standing on the road, Ramashre having been injured from the bomb blast, thrown on earth from his shop lying East-West direction i.e. head towards the East and legs towards the West.

80. The learned counsel for the defence grilled the witness, which side of his body fell from the shop which this witness could not recollect. This witness has also stated about the fleeing assailants throwing bombs on the chasing people, therefore, they succeeded in fleeing away from the spot.

81. Rajvanshi @ Banshi as P.W.-3 has also without material deviation or any contradiction has stated the same scenario on exhortation of Prahlad (of Village Moora Dih) throwing bomb by Ram Oudh and Prahlad (of Village Bhimpur), Sudama and Brijraj. This witness could not recollect in cross-examination that whether all the three bombs or how many bombs wounded the deceased "Ramashre" but with all certainty, this witness replied in cross-examination that the bomb was thrown on the person of the deceased "Ramashre" who died on the spot. He had also stated that Ram Oudh thrown bomb towards the chasing crowd, therefore, they feared of and stopped.

82. Learned counsel argued over the deviations in statement of witness with regard to the number of bombs thrown by the accused persons or bomb thrown by which all the accused caused the blast injury to the deceased "Ramashre". He had not shown any contradiction or deviation in the statement of witness with regard to the mode and manner of assault which the prosecution witness proved without any material contradiction, embellishment or exaggeration. They have proved their presence on the spot at the relevant date and time of the incident which is a material fact for the purpose of proving the incident. Except to the identification of the accused persons, the injured witness has also proved the date, time and spot of the incident. The mode and manner of attack by throwing bomb on the deceased "Ramashre" and his instant death on the spot in the evidence of witness also found corroboration from the position of dead body, it's condition as observed in the inquest proceeding and proved by the Investigating Officer (P.W.-6), as well as ante mortem injuries coupled with the deposition of the doctor who opined that the cause of death of the deceased "Ramashre" was blast injuries, sufficient to cause his death instantly.

83. In the present case, at least two out of four witnesses of the fact namely P.W.-1 and P.W.-2 have proved without any contradiction and without deviation, major or minor, the involvement of accused persons five in number i.e. (1) Prahlad (of Village Bhimpur), (2) Ram Oudh, S/o Ram Hit Yadav, R/o Village Bhimpur (3) Prahlad (of Village Moora Dih), (4) Sudama of Village Chali Chaur, Police Station

Rudrapur and (5) Brijraj S/o Mahipat Yadav, R/o Village Khairaich, Police Station Rampur Karkhana, District Deoria in the attack, the date, time and place of the incident and the mode and manner of attack. The general principle of appreciating the evidence of eye witness in such a case is that where a large number of offenders are involved, it is necessary for the Court to seek corroboration, at least from two or more witnesses as a major or caution. Likewise, it is the quality and not the quantity of evidence to be the rule for conviction even where the number of eyewitness is less than two.

The prosecution has successfully proved the factum of killing of deceased "Ramashre" on 12.04.1979 at about 08:30 P.M. to 08:45 P.M. by the assailants by throwing bombs over him, thus, causing his death by blast injuries.

Argument as to medical evidence not supporting the ocular witness

84. In ***Shivaji Sahab Rao Bobade Vs. State of Maharashtra (Supra)***, it is held in para 18, which is reproduced hereunder:-

"18. Some attempt was made to show that the many injuries found on the person of the deceased and the manner of their infliction as deposed to by the eyewitnesses do not tally. Three is no doubt that substantially the wounds and the weapons and the manner of causation run congruous. Photographic picturisation of blows and kicks and hits and strikes in an attack cannot be expected from witnesses who are not fabricated and little turns on indifferent incompatibilities. Efforts to harmonise humdrum details betray police tutoring, not rugged truthfulness."

85. The argument of the learned counsel as to the discrepancy in the statement of prosecution witness with regard to the number of bombs thrown over the deceased "Ramashre" and the expert opinion as to the blast injuries might have been caused by one bomb only. This argument is not tenable in view of the distorted condition of the dead body from the blast injuries which show that the brain had flown out of the skull and entire face had been cut and ruptured. One cannot with all certainty speculate about the number of bombs causing blast such injuries fatal to the deceased. In this regard, para "16' of the judgment of Hon'ble the Apex Court in case of ***Thaman Kumar Vs. State (UT of Chandigarh)8*** is reproduced hereunder:-

"The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category t may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightway

be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

86. Considering the above observations of the Apex Court, we are unable to accept the submission with regard to variation in the statement of the witnesses P.W.-1, P.W.-2 and P.W.-3 with regard to the number of bombs thrown over the deceased "Ramashre" and as to who threw the first or about the number of blast injuries, as material to demolish the case of the prosecution.

Common object

87. The reliable and trustworthy eye witnesses have proved the assailants having a motive for killing of the deceased "Ramashre" appearing on the spot together having hand grenades (bombs) knowing very well that if the same was thrown on the deceased, the blast injuries would be sufficient to cause his death in the ordinary course of nature. While the bombs were thrown pursuant to their common object by some of the assailants on the deceased "Ramashre", they remain with each other and after assuring the death of the deceased from blast injuries, they fled from the spot together. This is sufficient to prove that their assembly was unlawful and the commission of the offence was in pursuant to their common object, which is sufficient to implicate them for the offence punishable under Section 149 of the Indian Penal Code, 1860.

88. We would like to refer to Section 35 of the Indian Penal Code, 1860.

"When such an act is criminal by reason of its being done with a criminal knowledge or intention.--Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention."

Section 141 of the Indian Penal Code, 1860 defines the unlawful assembly as below:-

"141. Unlawful assembly.--An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is--

(First) -- To overawe by criminal force, or show of criminal force, 1[the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

(Second) -- To resist the execution of any law, or of any legal process; or

(Third) -- To commit any mischief or criminal trespass, or other offence; or

(Fourth) -- By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

(Fifth) -- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do. Explanation.--An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

89. We would also like to refer here Section 149 of the Indian Penal Code, 1860:-

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

90. The evidence of prosecution in very explicit terms proved that the involvement of the accused persons five in number acting in concert with each other in the fatal attack with bombs and, thus, causing his death by blast injury. The act is criminal, done in concert and synergy each and every accused, throwing bombs by some of the them on the exhortation of one accused namely Prahlad (of Village Moora Dih) is implicit in itself that the object of their coming on the spot of incident with bomb was unlawful and throwing the bombs actuate their object on the exhortation made by the accused Prahlad (of Village Moora Dih) which caused the death of the victim. The common object of unlawful assembly thus fructuated in the crime of killing. The liability will be of those also who despite the knowledge of the object of the unlawful assembly remain throughout thereby as member of that assembly in the course common object of the unlawful assembly was actuated. For common object of killing the deceased "Ramashre" there was a motive, proved by the prosecution witness P.W.-1 and P.W.-2 which also united the accused persons for having common object of killing the the deceased "Ramashre". After the commission of the crime, the accused persons fled from the spot together and when they were chased, one of the accused amongst them namely Ram Oudh thrown bomb over the chasing crowd to facilitate all in running away. The above acts were done together by the accused persons to achieve their common object.

91. In ***Mrinal Das and Others Vs. State of Tripura9,*** it is held that common object does not necessarily required proof of prior meetings of minds or pre consult.

92. In ***Anil Rai Vs. State of Bihar*** with ***Subhash Chand Rai and another Vs. State of Bihar*** with ***Awani Rai Vs. State of Bihar10,*** the Apex court held that sharing of common object and participation in the occurrence by each of the accused members of the unlawful assembly must be positively proved. Para 31 and 32 of the aforesaid judgment is quoted hereunder:-

"31. In Lalji v. State of U.P. [(1989) 1 SCC 437 : 1989 SCC (Cri) 211] this Court held: (SCC pp. 441-42, para 9)

"9. 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. It other words, it created a constructive and 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 objects 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 falls 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."

32. In Shamshul Kanwar v. State of U.P. [(1995) 4 SCC 430 : 1995 SCC (Cri) 753] it was held that to infer common object it is not necessary that each one of the accused should have participated in the attack when the evidence of the eyewitnesses clearly established that each one of those convicted accused was a member of the unlawful assembly whose common object was to commit murder. Where the prosecution fails to prove the existence of sharing of common object by all the members of the unlawful assembly, it is unsafe to convict all the accused persons merely on proof of their presence or some overt act which did not cause the death of the deceased. Both the courts below have not found on facts that all the accused persons including A-3 to A-7 shared the common object with A-1 and A-2 and A-2 and fired the shots. Neither any direct evidence nor any circumstances have been brought on record to hold or infer the existence of such a common object. Learned counsel for the appellants have submitted that there is nothing in the evidence to show that the rest of the accused shared the common object with A-1 and A-2 to cause death of Lal Muni Rai and Chand Muni Rai. Even if the existence of a common object is held proved, it cannot be the common object for any offence other than committing the offence of rioting. I find substance in such a submission in the peculiar facts and circumstances of the case. The proved case of the prosecution is that when Lal Muni Rai along with others was coming back, he was intercepted by the accused persons who were armed with weapons and if the object of the unlawful assembly was to cause his death, there was no cause or occasion for them to only catch hold of the said deceased Lal Muni Rai and beat him. He was shot at by Avinash Chand Rai (A-1) only after he escaped from the clutches of the other accused persons. The other accused persons might not have in their contemplation that if the rioting, intended by them, failed any one of them would shoot at the victim."

93. In the case of ***Dev Karan Vs. State of Haryana11***, the Apex Court has held as under:-

"19. Thereafter, it has been opined that if charges framed against the appellant contain all the necessary ingredients to bring home to each of the members of the unlawful assembly, the offence, with aid of Section 149 IPC, and the prosecution proves the existence of an unlawful assembly with a common object, which is the offence, as also the membership of each appellant, nothing more is necessary. The effect of these observations is that Section 141 IPC only defines what is an unlawful assembly and in what manner the unlawful assembly conducts itself, and in what cases the common object would make the assembly unlawful is specified in the sections thereafter, inviting the consequences of the appropriate punishment in the context of Section 149 IPC.

20. In Kuldip Yadav v. State of Bihar [Kuldip Yadav v. State of Bihar, (2011) 5 SCC 324 : (2011) 2 SCC (Cri) 632] , it has been opined in para 36 that a clear finding regarding the nature of the common object of the assembly must be given and the evidence discussed must show not only the common object, but also that the object was unlawful, before recording a conviction under Section 149 IPC. What is required is that the essential ingredients of Section 141 IPC must be established."

94. All the accused persons were with hand granades. Their conduct before, during and after the occurrence clearly brings out their common object. The assembly was patently unlawful. It is inconceivable that the accused with bombs would surround the victim without any criminal object in mind. Mere fact that only some of them used the bombs does not really rule out application of Section 149 of the Indian Penal Code, 1860. Learned counsel for the accused persons submitted that contrary to the evidence of P.W.s -1, 2 and 3 there was only one injury found by the doctor. P.W.s -1, 2 and 3 have stated about assaults and if five persons were really assaulting, the result would not have been only one injury. The definition of "assault" as given in Section 351 of the Indian Penal Code, 1860 makes the plea unacceptable. The trial Court had rightly and in proper legal perspective convicted the accused-respondents under Section 302 read with Section 149 of the Indian Penal Code, 1860.

The plea as to Ante Timed First Information Report

95. Section 154 (1) of the Criminal Procedure Code, 1973 is quoted hereunder:-

"Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf."

96. According to the language of the aforesaid provision, every information relating to the commission of offence whether given in writing or reduced into writing shall be signed by the persons giving it hence, the person who gives the information and who has to sign the information has to choose which particular information relating to the cognizable

offence is to be given in the first information report. The first information report has to be reported almost immediately after the incident occurs as reasonably as practicably possible or after the knowledge of the incident is made known. Sometimes as convenient to the policemen, the first information report is not lodged immediately. Plea of first information report lodged ante time means that time and date has also been changed by the prosecution to suit their purpose, if there is a clear evidence that the first information report was ante timed then it looses it's value.

97. In the instant appeals, the prosecution case before the trial judge against the accused-appellants was that on the late evening of 12.04.1979 at about 08:30 P.M. to 08:45 P.M., the deceased "Ramashre Yadav", nephew of the first informant when was preparing lassi sitting on a wooden cot of his roadside patri shop, the accused persons came pouncing from the side of railway station towards him, one of them namely Prahlad (of Village Moora Dih) exhorted the other co-accused persons shouting, "this is the man Ramashre, Kill him"(मारो साले को). Rest of them, Sudama, Prahlad (of village Bhimpur) and Brijraj threw hand grenades on Ramashre and caused his dead from blast injuries. The assailants were chased by the first informant, witnesses and others people of the vicinity gathered there but they fled away passing through the railway station towards Mal Godam throwing bombs towards the chasing crowd.

98. P.W.-1 and P.W.-2 both the witnesses have stated in their cross examination that they chased to some extent the assailants who were fleeing away from the spot of incident after commission of the offence passing through the railway station towards the Mal Godam but when the assailants again threw the bombs on them from the distance of eight to ten steps, they being feared stopped chasing and came back to the spot of incident.

99. Learned counsel for the defence has tried to carve out the fact of extra ordinary delay in lodging the first information report from the statement under cross-examination of the witness P.W.-1. To assess whether any delay which has unreasonably been caused in giving information of the incident to the police station and lodging the first information report, we have carefully gone through the cross-examination of first informant (P.W.-1). Before going through the statement in cross examination of P.W.-1, we think it proper and relevant to look back on the first information report Ex. Ka-3 wherein the date and time of the incident entered as 12.04.1979 at about 8:30 PM, the time of lodging the report is given 9:30 PM on the same day i.e. 12.04.1979, the distance of the spot of incident and it's direction given in the first information report is Station Road one km. far away from the police station towards North. Other facts coming out from the written complaint are corroborated from the statements of the prosecution witnesses. This is an established principle of law that the first information report is not an encyclopedia and all numerous details of the incident could not be expected to have find place in it.

100. Learned counsel for the appellant drawing attention towards the distance of police station from the spot of the incident, only one km. connected with a pitch road, tried to impeach the first information report allegedly lodged with extra ordinary delay

which is not explained. We have seen that P.W.-1, P.W.-2, P.W.-3 and even the injured witness P.W.-5 have sufficiently proved the incident of bombing over the deceased "Ramashre" by the assailants (accused persons) in which the deceased succumbed to blast injuries died instantly on the spot of incident.

101. On the query made by learned counsel for the defence as to how he availed paper for writing the complaint, he replied that he purchased the papers from a shop situated at a distance of hundred steps away from the Eastern gate of Police Station Kotwali on the road proceeding towards North, the said shop of stationary was about to shut off when he reached there. The report was written in the light coming from the electric pole installed on the road near Crossing. He did not recollect how much time was consumed in getting the report written and speculated that approximately less than one hour time might have been consumed in getting the report written.

102. In our view when the incident occurred at about 08:30 P.M. to 08:45 P.M., as proved by the witness and the first informant along with other witnesses and people of the locality chased first to apprehend the assailant then came to the spot of incident, the first informant stayed there approximately for 2 to 4 minutes and proceeded towards the Police Station Kotwali which situated at a distance of 1 to 1.5 km from the spot of incident, the police officer in the police station directed the first informant to come with the written report, P.W.-1 came out from the police station, searched the stationery shop and purchased paper and then he narrated the information to be reduced into writing to the scribe Suneet Kumar, these all naturally might have consumed a reasonable time more or less about one hour. The things as proved by the witnesses from their evidence has no contradiction or inconsistency in their statement with regard to the sequence of events after the incident before the submission of written complaint in the police station whereupon the first information report is lodged at about 9:30 P.M. in the night of the date of incident 12.04.1979. Minor discrepancies as to the time of lodging the first information report 9:30 P.M. or 10:00 P.M. or other calculation of time in between two events in the sequence of their happening could not be expected to be narrated mathematically on exact calculation by a rustic villager. Moreover, such discrepancies are not touching the very root of the incident which has otherwise been proved by the prosecution. In our considered opinion, there is no delay in lodging of the first information report.

103. P.W.-6 Anwarul Aziz, the Sub Inspector of Police Station Kotwali, District Deoria at the relevant date has also proved the submission of Ex. Ka-1 and making chik report on 12.04.1979 in the hand writing and under the signature of Ram Pyare Lal, the constable Muharir who was working under him. He has deposed in the examination-in-chief that the said Ram Pyare Lal, constable Moharir had prepared the chik report before him and being acquainted with his hand writing and signature he proved the same in the trial court. Entry of the criminal case in the General Diary at report no.46 at about 21:30 P.M. on 12.04.1979 was made by Ram Pyare Lal at the same time. Carbon copy was also prepared in the same process simultaneously. The carbon copy is proved by P-W-6 as Ex. Ka-4.

104. The Ex. Ka-1 obviously has signature of scriber Suneet Kumar and

thumb impression of the first informant Ishwar S/o Deu, R/o Village Moora Dih dated 12.04.1979. An endorsement to the effect of institution of Case Crime No.132 of 1979, under Sections 147, 148, 149, 302 and 307 of the Indian Penal Code, 1860 is also made under the signature of aforesaid constable Moharir on 12.04.1979 which may be seen on the back page of Ex. ka-1. The Chik report i.e. Ex.Ka-3 was sent to the Magistrate on 13.04.1979 wherein the date of incident is entered as 12.04.1979 at about 08:30 P.M., the case crime number is also entered as Case Crime No.132 of 1979 naming five accused persons described here in above in preceding paras arraigning them under Sections 147, 148, 149, 307 and 302 of the Indian Penal Code, 1860.

105. Learned counsel has argued vehemently about the addition of Section 147, 148, 149 and 307 of the India Penal Code, 1860 subsequently, while initially the case was registered under Section 302 of the Indian Penal Code, 1860. The basis of this argument is only the pattern and order of writing the Sections of the Indian Penal Code, 1860 in the relevant papers. But this argument is not acceptable for the reason the relevant Sections of the Indian Penal Code, 1860 are entered in the ascending order viz. 147, 148, 149, 307 and 302 of the Indian Penal Code, 1860. Nothing is carved out in the cross-examination of P.W.-6 (Investigating Officer) which tend to show the interestedness of the Investigating Officer or the scribe of the relevant papers in manipulation and interpolation in the array of relevant sections of the penal code.

106. In memo (fard supurdginama) i.e. Ex. Ka-12 and Ex. Ka-13 (sealed samples of blood stained soil and simple soil from the earth of the spot), learned counsel impressed the fact of subsequent addition of sections and ante timed registration of first information report and has also drew attention towards the inquest report i.e. Ex. Ka-5 which lacks the mention of case crime number, name of the accused, order in which the relevant sections of the Indian Penal Code, 1860 are written indicating the subsequent addition of the Sections 147, 148, 149 of the Indian Penal Code, 1860 after getting required number of accused, thus, ante timed registration of the first information report.

107. P.W.-6, the Investigating Officer has stated in his examination-in-chief that after registration of the first information report on 12.04.1979 at 21:30 P.M., the statement of first informant was reduced into writing by him then he proceeded to the spot of incident where the dead body of "Ramashre Yadav", the victim was lying on. Inquest proceeding was started and relevant papers were prepared in his hand writing and signature.

108. We perused the Ex. Ka-5, the inquest report prepared on the spot by the P.W.-6, which has clear mention of time of the registration of first information report at 21:30 P.M. dated 12.04.1979. The spot of the incident is also mentioned as station road, the distance of the spot of incident from the police station is given as 1.5 Kms. The completion of the inquest proceeding is as 23:50 P.M. on 12.04.1979.

109. In witness box, P.W.-6 has stated that the proceeding was over on the same date i.e. 12.04.1979, thereafter on 13.04.1979 at 00:5 A.M., he reduced into writing the statement of the inquest witnesses and eye witnesses namely Bahadur and Rajvanshi, etc, inspected the

spot on the pointing out of the first informant, drawn the site map which is proved by him as Ex. Ka-11.

110. In cross examination, the P.W.-6 was asked questions and suggestion about the non mention of case crime number and relevant sections in the letter sent for medico legal examination and post mortem Ex. Ka-7. Assertingly, he answered that by the time of sending the letter for medico legal examination to the concerned doctor and post mortem, the case crime number was already instituted but since the mention of case crime number and sections under which the case was instituted is not mandatorily required as neither there was any such instructions from the department nor the format had any column to fill such entries like the case crime number and relevant sections, therefore, they found no place in those papers. Moreover, there is no formant of Ex. Ka-6 to Ex. Ka-10 wherein case crime number and relevant sections are required to be written. He has further explained the discrepancy in order and pattern of writing the relevant sections with which the accused persons are arraigned in various documents under the investigation proceedings, that the inquest report was prepared on spot in hurry, therefore, the order and pattern of sections entered therein may give an irregular look whereas the charge sheet was prepared in the police station relaxably, therefore, the sections are written therein in a single sequence. However, in both the circumstances the relevant sections are written in the same ascending order of writing.

111. P.W.-6 has absolutely denied the suggestion of addition any sections of the Indian Penal Code, 1860 after getting the required number of accused persons settled or the letter sent for the post mortem was manipulated. Likewise, P.W.-6 has answered to the question as to the "Ex. Ka-1' wherein the earlier writing of parentage and address when checked was found incorrect which was erased and rectified by inserting the correct parentage and address from ink in place thereon. The address is the same as written in the written report given by the first informant. P.W.-6 was confronted with several other questions but it is noteworthy here that no question or suggestion as to the replacing altered report in place of original written report is given, as such, the case of the defence, though tried to extract from the cross examination of the aforesaid P.W.-6, with regard to the ante timed first information report is not found proved.

112. We find support from the judgment in ***Jai Shree Yadav vs State Of U.P12,*** para "15' is reproduced hereunder:-

"It is the case of the prosecution that PW-3 Arif Ali who is a resident of village Nawalpur within the limits of Salempur Police Station came to the said police station on 23.9.1993 at 5.30 p.m. and gave a written report Ext.Ka-2 to PW-8 the Officer-in-Charge of the said police station. According to PW-8, he registered a crime based on the said complaint of PW-3 at 5.50 p.m. on the same day, which has been proved by the production of the general diary of the police station Ex.Ka-8. He also submitted that he sent a special report to the Jurisdiction Magistrate on 23.9.1993 at about 7 p.m. through Constable Dheeraj. He further stated that from the entry in the general diary, it is seen that Constable Dheeraj reported back to the police station at about 8 a.m. on 24.9.1993 . He has denied that the special report was not sent on 23.9.1993. A perusal of the entry made by the Chief Judicial

Magistrate, Deoria in the special report shows that the same was received by him on 24.9.1993 but the actual time of the report is not noted in the said entry, however it is clear that the said report was received by him at his residence. Based on this the learned counsel for the appellants had argued that it is possible that this report might have reached later in the day on 24.9.1993, but this argument is not supported by any material on record. On the contrary from the entry made in the general diary of the police station, it is clear that Constable Dheeraj who was entrusted with the job of delivering the special report to the Magistrate had returned back to duty at Salempur Police Station at 8 O'clock on 24.9.1993. Bearing in mind that the distance between Salempur Police Station and Deoria is about 28 to 29 kms. as seen from the records it is clear that the special report has reached the Jurisdiction Magistrate much earlier than 8 O'clock in the morning of 24.9.1993. Though it would have been more appropriate and less controversial if only the concerned Magistrate had noted the actual time of receipt of the special report, still on facts and circumstances of this case as stated above, we are of the opinion that the special report must have reached the Jurisdictional Magistrate much earlier than 8 a.m. Since by then the constable who carried the report had come back to Salempur on 24.9.1993 which fits in with the prosecution case that the same was sent from the police station in the evening of 23.9.1993 at about 7 p.m. So on this count, it cannot be said that the FIR is anti timed."

113. The Apex Court in the aforesaid case has held considering the points whether or not the first information report is ante timed, requisition sent to doctor to conduct post mortem not containing all the particulars found in inquest report and complaint, like particulars of case, weapon used and names of accused persons, etc. would not lead to the conclusion that first information report was ante timed. Further, it is also held that if time of receipt of special report sent to jurisdictional magistrate is not noted, if delivery of the special report consistently proved by credible evidences mere non noting of the time would not lead to the conclusion that first information report was ante timed.

114. In ***Brahm Swaroop and Another Vs. State of Uttar Pradesh (Supra)*** it is held that the whole purpose of preparing the inquest report under Section 174 of the Criminal Procedure Code, 1973 is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating, as in what manner, or by what weapon or instrument, such wounds appear to have been inflicted. For the purpose of holding the inquest, it is neither necessary nor obligatory, on the part of the investigating officer, to investigate into or ascertain as to who were the persons responsible for the death. The object of the proceedings under Section 174 Cr.P.C. is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. The question regarding the details of how the deceased was assaulted or who assaulted him or under what what circumstances he was assaulted, is foreign to the ambit and scope of such proceedings, i.e. the inquest report is not the statement of any person wherein all the names of the persons accused must be mentioned.

115. Omissions as contended by the learned counsel for the appellants in the inquest report are not sufficient to put the

prosecution out of court. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery, etc. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Evidence of eye witnesses cannot be discarded if their names do not figure in the inquest report prepared at the earliest point of time. The inquest report cannot be treated as substantive evidence but may be utilised for contradicting the witnesses of inquest. Para 8, 9 and 10 of the aforesaid judgment is reproduced hereunder:-

"8. Undoubtedly, there are five blanks in the inquest report. The crime number and names of the accused have not been filled up. The column for filling up the penal provisions under which offences have been committed is blank. The time of incident and time of dispatch of the special report have not been mentioned. Therefore, Shri Tulsi has submitted that the FIR is ante-timed and there is manipulation in the case of the prosecution.

9. The whole purpose of preparing an inquest report under Section 174 of the Code of Criminal Procedure, 1973 (hereinafter referred to as `Cr.P.C') is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating as in what manner, or by what weapon or instrument such wounds appear to have been inflicted. For the purpose of holding the inquest it is neither necessary nor obligatory on the part of the Investigating Officer to investigate into or ascertain who were the persons responsible for the death. The object of the proceedings under Section 174 Cr.PC is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. The question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings i.e. the inquest report is not the statement of any person wherein all the names of the persons accused must be mentioned.

10. Omissions in the inquest report are not sufficient to put the prosecution out of court. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery etc. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Evidence of eyewitnesses can not be discarded if their names do not figure in the inquest report prepared at the earliest point of time. The inquest report cannot be treated as substantive evidence but may be utilised for contradicting the witnesses of inquest. (See Podda Narayana & Ors. v. State of Andhra Pradesh, AIR 1975 SC 1252; Khujji v. State of Madhya Pradesh, AIR 1991 SC 1853; George & Ors. v. State of Kerala & Anr., (1998) 4 SCC 605; Shaikh Ayub v. State of Maharashtra, (1998) 9 SCC 521; Suresh Rai v. State of Bihar, (2000) 4 SCC 84; Amar Singh v. Balwinder Singh & Ors., (2003) 2 SCC 518; Radha Mohan Singh alias Lal Sahab & Ors. v. State of Uttar Pradesh, (2006) 2 SCC 450; and Aqeel Ahmad v. State of Uttar Pradesh, AIR 2009 SC 1271)."

116. In the case of ***Brahm Swaroop and Another Vs. State of Uttar Pradesh (Supra),*** the Apex Court has further held that the delay in sending the special report to the jurisdictional magistrate in every case is not fatal particularly when the

defence did not put any question in this regard to the Investigating Officer. Thus, no explanation was required to be furnished by him on the issue. The plea of the first information report being ante timed was also taken in the aforesaid case but such plea was not accepted in view of the evidences available on record which showed that first information report was lodged promptly after the incident as the police station was only one kilometre away from the place of occurrence and names of all accused had been mentioned in the first information report. The relevant paras 14 to 21 are being reproduced hereunder:-

"14. Undoubtedly, there is delay of 5 days in sending the Special Report. This Court in Badam Singh v. State of M.P., (2003) 12 SCC 792, while considering this issue held that where the investigating officer categorically stated that he was not in a position to give any explanation for the delay in sending the Special Report, it may be fatal to the prosecution's case.

15. However, a larger Bench of three Judges in Balram Singh & Anr. v. State of Punjab, (2003) 11 SCC 286, held as under:

"10.....we notice that in reality there is no delay in preparing the FIR but there was some delay in transmitting the said information to the Jurisdictional Magistrate. Having been satisfied with the fact that the FIR in question was registered in the morning of 6-5- 1990, we do not think that the delay thereafter in communicating it to the Jurisdictional Magistrate on the facts of this case, has really given any room to doubt that the said document (FIR) was created after much deliberations. At any rate, while considering the complaint of the appellants in regard to the delay in the FIR reaching the Jurisdictional Magistrate, we will have to also bear in mind the creditworthiness of the ocular evidence adduced by the prosecution and if we find that such ocular evidence is worthy of acceptance, the element of delay in registering a complaint or sending the same to the Jurisdictional Magistrate by itself would not in any manner weaken the prosecution case."

16. In State of Rajasthan v. Teja Singh & Ors., (2001) 3 SCC 147, this Court held that the receipt of special report by the Magistrate is a question of fact and the prosecution may explain the delay in sending the special report. However, the explanation so furnished by the prosecution must be convincing and acceptable. The same view has been re-iterated in Ramesh Baburao Devaskar & Ors. v. State of Maharashtra, (2007) 13 SCC 501.

17. In Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320, this Court held that delay in forwarding the Special Report to the Magistrate could not raise a suspicion that FIR had been written later and was ante-timed. Suspicion of manipulation of the documents prepared during the initial investigation would not dislodge the documentary and oral evidence on the spontaneity of the lodging of the FIR.

18. In Aqeel Ahmad (supra), this Court held that the forwarding of the report to the Magistrate is indispensable and absolute and it must be sent at the earliest, promptly and without any undue delay as the purpose is to avoid the possibility of improvement in the prosecution's case and the introduction of a distorted version by deliberations and consultation and to enable Magistrate concerned to keep a watch on progress of investigation. However, no rule of universal application can be laid down that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version

becomes unreliable. It would depend upon the facts of each case. If there has been some lapse on the part of the Investigating Officer that would not affect the credibility of the prosecution's witnesses.

19. In State of Kerala v. Anilachandran @ Madhu & Ors., AIR 2009 SC 1866, this Court placed reliance upon its earlier judgments in Pala Singh v. State of Punjab, AIR 1972 SC 2679; and Sarwan Singh v. State of Punjab, AIR 1976 SC 2304 and held that the police should not unnecessarily delay sending the FIR to the Magistrate as the delay affords the opportunity to introduce improvement and embellishment thereby resulting in a distorted version of the occurrence. However, in case the prosecution offers a satisfactory explanation for the delay, the court has to test it. An un-explained delay by itself may not be fatal, but it is certainly a relevant aspect which can be taken note of while considering the role of the accused persons for the offence. A similar view has been re-iterated in Pandurang Chandrakant Mhatre & Ors. v. State of Maharashtra, (2009) 10 SCC 773.

20. In Akbar Sheikh & Ors. v. State of W.B., (2009) 7 SCC 415, this Court held as under:

"44. Submission of Mr Ghosh that the first information report is ante-timed cannot be accepted. It is possible that PW 1 because of lapse of time has made certain statements which go beyond the record viz. holding of inquest before the FIR was recorded. The number of accused persons in the first information report might have also been put by the investigating officer at a later point of time. The fact that the post-mortem examination had been held on 16-5-1982 itself goes a long way to establish the genesis of the occurrence. While saying so, we are not unmindful of the fact that the first information report was sent to the Magistrate after twenty-four hours. But then, in a case of this nature such a delay may not, by itself, be held to be fatal".

21. In the instant case, the defence did not put any question in this regard to the investigating officer Raj Guru (PW.10), thus, no explanation was required to be furnished by him on this issue. Thus, the prosecution had not been asked to explain the delay in sending the special report. More so, the submission made by Shri Tulsi that the FIR was ante-timed cannot be accepted in view of the evidence available on record which goes to show that the FIR had been lodged promptly within 20 minutes of the incident as the Police Station was only 1 k.m. away from the place of occurrence and names of all the accused had been mentioned in the FIR.

117. In the present case, in the context of the chronological sequence of the proceeding noted above, the prompt lodging of the first information report igniting the machinery for investigation, cannot be ruled out.

118. P.W.-6 has been successful in proving the documents of proceeding till sending of the dead body for post mortem examination to the doctor. The dead body was sent vide paper number Ex. Ka-7 for the post mortem where the same was received in the mortuary by the concerned doctor on 13.04.1979, as such, obviously there have been no inordinate delay in lodging of the first information report on the basis of written complaint made by the P.W.-1 in Police Station Kotwali, District Deoria by the P.W.-6, the Investigating Officer. The argument of the first information report being registered ante timed is not acceptable.

Defence taken and opportunity availed by the accused persons in the trial.

119. The accused persons have tried to carve out the defence from the cross-examination of the prosecution witness and then to prove their defence by producing witnesses D.W.-1 (Mahadeo Mishra), D.W.-2 (Anardan Singh) and D.W.-3 (Sacchidanand Mani Tripathi) before the trial judge for examination. From the perusal of entire cross-examination of all the witnesses, it appears that the defence as against the prosecution case was tried to set on the ground of enmity of first informant and his family with the accused Prahlad (of Village Moora Dih). The defence as against the accused "Brijraj" is to the effect that he was falsely implicated in the case by the police in collusion with the other witnesses of fact P.W.-1, P.W.-2 and P.W.-3. Admittedly from the cross-examination, the learned counsel could not carve out enmity of witnesses P.W.-3 with any of the accused. So far as the P.W.-2 is concerned, he too was heavily grilled in cross-examination to carve out any interestedness of him in false implication of the accused-appellant for the reason of his relation with P.W.-1 and his family. Nothing could come out of the gruelling examination of this witness.

120. In the examination of accused persons under section 313 of The Code Of Criminal Procedure, 1973, the appellant "Prahlad" (of village Moora Dih) has mostly expressed ignorance with regard to the evidence as to the topography of the spot of incident, the source of light thereon but admitted the fact of conviction of deceased "Ramashre" in the murder trial of Shyama (his brother) and, thus, factum of enmity was admitted by him. He has further admitted the evidence of P.W.-1 as to the inimical relation with deceased "Ramashre" since before 2 to 3 years from the incident in question though he denied from the role of exhortation assigned to him by the prosecution in the incident in question. The evidence as to the fact of chasing him and his companions after commission of the crime on relevant date and time of the incident and, thus, set forth the defence of witness deposing falsely for the reason of enmity with him as well as being related with the deceased "Ramashre. Prahlad (of Village Moora Dih) and Ram Oudh had also replied the query of the Court confronting them with the evidence of prosecution witnesses on the same line and length under section 313 of the Cr.P.C. Likewise, Brijraj had same answers to the queries about the other evidence but stated the false implication in the case against him and evidence of the prosecution witness in collusion with the police by reason of enmity of police with him.

121. In our view, mere denial from the presence on the spot and involvement in commission of crime as against the proved case of prosecution in this regard is not acceptable. We have perused the statement of defence witnesses. Whether to make any difference as to the acceptability of the defence taken by the accused persons in the case. The D.W.-1 Mahadeo Mishra who was called as the defence witness to produce the dak bahi (Despatch Register) dated 12.04.1979 which he was unable to produce before the Court for the reason dak bahi having been weeded out. No argument could be made about the relevancy of dak bahi in the case as the general diary of the police maintained as per rules for entering the day to day events and the relevant extract of the case diary had been produced before the court. Likewise, D.W.-2, the reader of the Court of the District Magistrate was also examined for the purpose of proving the application of the accused persons addressed to the District

Magistrate but how relevant and admissible that fact would be could not be explained. The evidence of this witness, therefore, is not of any avail against the proved case of prosecution with regard to the identification and involvement of accused persons in the incident dated 12.04.1979 at the relevant time on the spot of the incident in the killing of the deceased "Ramashre".

122. D.W.-3, is also of no avail as the proceedings on record of the trial is very much before this Court of appeal and how and to what extent anything otherwise and beyond the lower court record would be relevant could not be argued by the learned counsel.

123. Against the proved case of prosecution by the above noted evidences, the defence taken by the accused is not established and remains unfounded in the evidence of the defence witnesses.

We find no substance in the submissions of the learned counsels for the appellants in the appeals so as to interfere in the impugned judgment and order of conviction and sentence dated 14.09.1983 passed by learned Additional Sessions Judge, Deoria in Sessions Trial No.92 of 1982, under Sections 147, 148, 302/149, 324/149 of the Indian Penal Code, 1860.

Operative

124. On the discussion made hereinabove, we do not find any force in the criminal appeal of "Brijraj" in Criminal Appeal No.2170 of 1983 and criminal appeal of Prahlad (of Village Moora Dih) in Criminal Appeal No.2169 of 1983 against the judgment of conviction and order of sentence passed by learned Additional Sessions Judge, Deoria in Sessions Trial No.92 of 1982 dated 14.09.1983, under Sections 147, 148, 302/149 and 324/149 of the Indian Penal Code, 1860, therefore, the appeals deserve to be dismissed and hereby both the appeals are ***dismissed.***

125. The judgement of conviction and order of sentence in Sessions Trial No.92 of 1982 dated 14.09.1983, under Sections 147, 148, 302/149 and 324/149 of the Indian Penal Code, 1860 is affirmed. The bail bonds and surety bonds on behalf of accused-appellant "Prahlad" (of Village Moora Dih) are hereby cancelled.

126. The Chief Judicial Magistrate, Deoria is directed to take into custody the accused-appellant "Prahlad" (of Village Moora Dih) and send him to jail in compliance of this judgement.

127. The lower court record be sent back to the trial court for further action. Certify this judgment to the court below for further necessary action and compliance.

(2022)04ILR A1252
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.03.2022

BEFORE

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

Writ B No. 211 of 2022

Dulari & Ors. ...Petitioners
Versus
Board of Revenue U.P. at Allahabad & Anr. ...Respondents

Counsel for the Petitioners:

Sri Deepak Kumar Jaiswal, Sri Anil Kumar Yadav

Counsel for the Respondents:
C.S.C.

A. Civil Law -Uttar Pradesh Zamidari Abolition & Land Revenue Act,1950 - Sections 157-AA, 166 & 167 ------The restrictions contained u/Ss 157-AA and the requirement of the permission of Assistant Collector in a case where transfer is sought to be made by a person belonging to Scheduled Caste having become a bhumidhar with transferable rights u/S 131-B, in favour of a person who also belongs to a Scheduled Caste are mandatory and any transfer made in contravention thereof shall by virtue of the provisions contained u/S 166 be rendered void and the consequences of such void transfer as provided u/S 167 would ensue.

B. Court's function is to construe the words used in an enactment so far as possible in a way which best gives effect to the purpose of an enactment.

Writ Petition is dismissed. (E-11)

List of Cases cited:-

1. Man Singh Vs Commissioner, Bareilly Mandal & ors. 2008(2) AWC 1998(All)

2. Allahabad Bank & anr. Vs All India Allahabad Bank Retired Employees Association (2010)2 SCC 44

3. Bharat Singh Vs Management of New Delhi Tuberculosis Centre, New Delhi & Ors. (1986)2 SCC 14

4. Surajmal Vs St. of U.P. & ors. 2020 (146)RD 560

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

1. Heard Shri Deepak Kumar Jaiswal, learned counsel for the petitioners and Shri Ajeet Kumar Singh, learned Additional Advocate General assisted by Sri Ravesh Kumar Singh and Ms. Shikha Dixit, learned Standing Counsel appearing for the State-respondents.

2. The present petition has been filed by the petitioners seeking a direction to quash the order dated 16.12.2021 passed by the Board of Revenue, U.P., Allahabad whereby the earlier order dated 28.03.2007 passed by the ADM (City)/ Addl. Collector, Agra in exercise of the powers under Section 167 of Uttar Pradesh Zamindari Abolition And Land Reforms Act 19501 has been affirmed.

3. Pleadings in the petition are to the effect that the land in question bearing Arazi No. 665/0.2540 Hec. of Khata No. 214 situate in Village-Digner, Tehsil-Sadar, District- Agra was recorded in the name of one Prem Singh who is stated to have become a *bhumidhar* with transferable rights under Section 131-B of the ZA & LR Act and subsequently, executed a registered sale deed dated 01.10.2005 in favour of the petitioner no. 1. A report dated 02.12.2005 was submitted by the Naib Tehsildar (Kundal), Agra pointing out that the transfer made was in violation of Section 157-AA of the ZA & LR Act as the same was without the required prior approval of the authority concerned and accordingly, a recommendation was made for proceedings to be undertaken as per Section 166-167 of the ZA & LR Act. Upon the aforesaid report Case No. 02 of 2005-06 (State vs. Ramdulari) was instituted and a show cause notice dated 26.12.2005 was issued to the petitioner no. 1 who submitted her objections dated 26.04.2006. The case came to be decided in terms of an order dated 28.03.2007 wherein the Additional Collector upon considering the facts of the case held that no prior approval has been

obtained before making of the transfer and the same being in contravention of Section 157-AA of the ZA & LR Act, he made a recommendation for vesting of the land in the State Government as per the provisions of Section 167 of the ZA & LR Act.

4. Aggrieved by the same the petitioner preferred a revision under Section 333 of the ZA & LR Act which has also been dismissed in terms of an order dated 16.12.2021 affirming the findings and the order passed by the Additional Collector.

5. Learned counsel for the petitioner has sought to assail the aforesaid order and contends that in the present case since the transferor and the transferee both belong to the Scheduled Caste, the restriction under Section 157-AA of the ZA & LR Act was not attracted and no previous approval of the Assistant Collector was required prior to making of the transfer.

6. Submission is that there being no violation of the provisions of Section 157-AA of the ZA & LR Act the consequences enshrined under Section 167 of the ZA & LR Act would not follow and for the said reason the orders are erroneous and are liable to be set aside.

7. Controverting the aforesaid submissions, learned Additional Advocate General appearing for the State-respondents submits that Section 157-AA of the ZA & LR Act provides for certain restrictions on transfer by the members of Scheduled Castes becoming *bhumidhar* under Section 131-B of the ZA & LR Act. He submits that as per the case pleaded in the petition, the transferor is stated to have become a *bhumidhar* by virtue of provisions contained under Section 131-B of the ZA & LR Act. It is pointed out that Section 157-AA of the ZA & LR Act contains an absolute bar on transfer being made by members of Scheduled Castes in favour of any person not belonging to a Scheduled Caste. It is further submitted that even in respect of transfer made by a member of Scheduled Caste to another member of the Scheduled Caste there are certain conditions specified under the section. Reference is made of sub-section (4) of Section 157-AA of the ZA & LR Act which provides that no transfer can be made without previous approval of the Assistant Collector.

8. The question which thus arises in the present case is as to whether in a case where the transferor and the transferee both are members of Scheduled Caste, would the restrictions contained under Section 157-AA of the ZA & LR Act, be attracted.

9. For appreciating the rival contentions, the relevant statutory provisions may be adverted to.

10. Section 131-B, as inserted by U.P. Zamindari Abolition and Land Reforms (Amendment) Act, 19952 with effect from January 14, 1995, was brought in with the main object to confer transferable rights on persons who were *bhumidhar*s with non-transferable rights immediately before commencement of the aforementioned Amendment Act, 1995 and had been such *bhumidhar* for a period of ten years or more. Section 131-B referred to above is being extracted below:-

"131-B. Bhumidhar with non-transferable rights to become *bhumidhar* with transferable rights after ten years.--(1) Every person who was a bhumidhar with non-transferable rights immediately

before the commencement of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 1995 and had been such bhumidhar for a period of ten years or more, shall become a bhumidhar with transferable rights on such commencement.c

(2) Every person who is a bhumidhar with non-transferable rights on the commencement referred to in sub-section (1) or becomes a bhumidhar with non-transferable rights after such commencement, shall become bhumidhar with transferable rights on the expiry of period of ten years from his becoming a bhumidhar with non-transferable rights.

(3) Notwithstanding anything contained in any other provision of this Act, if a person, after becoming a bhumidhar with transferable rights under sub-section (1) or sub-section (2), transfers the land by way of sale, he shall become ineligible for a lease of any land vested in Gaon Sabha or the State Government or of surplus land as defined in the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960."

11. Section 157-A provides for certain restrictions on transfer of land by members of scheduled castes. It provides that a *bhumidhar* or *asami* belonging to a scheduled caste shall have no right to transfer any land by sale, gift, mortgage or lease to a person who does not belong to such a caste except with the previous approval of the Collector. The restrictions imposed on the *bhumidhar* or *asami* belonging to a scheduled caste shall be without prejudice to the restrictions contained in Sections 153 to 157 of the Act.

12. Section 157-AA was inserted in terms of the U.P. Zamindari Abolition and Land Reforms (Amendment) Act, 1997 (U.P. Act No.9 of 1997) with effect from May 23, 1997 providing for restrictions on transfer by members of scheduled castes becoming *bhumidhar* under Section 131-B.

13. Section 157-AA, as inserted by the aforementioned Amending Act, is being reproduced below:-

"157-AA. Restrictions on transfer by member of Scheduled Castes becoming Bhumidhar under Section 131-B.--(1) Notwithstanding anything contained in Section 157-A, and without prejudice to the restrictions contained in Sections 153 to 157, no person belonging to Scheduled Caste having become a *Bhumidhar* with transferable rights under Section 131-B shall have the right to transfer the land by way of sale, gift, mortgage or lease to a person other than a person belonging to a Scheduled Caste and such transfer, if any, shall be in the following order of preference :--

(a) landless agricultural labourer;

(b) marginal farmer;

(c) small farmer; and

(d) a person other than a person referred to in clauses (a), (b) and (c).

(2) A transfer in favour of a person referred to in clause (a) of sub-section (1) shall be made in order of preference given below. If a person referred to in clause (a) is not available then transfer may be made to a person referred to in clause (b) of the said sub-section and if a person referred to in clause (b) is also not available then to a person referred to in clause (c) of the said sub-section and if a person referred to in clause (c) is also not available then to a person referred to in clause (d) of the said sub-section in the same order of preference :--

(a) first, to the resident of the village where the land is situate;

(b) secondly, if no person referred to in clause (a) is available, to the resident of any other village within the Panchayat area comprising the village where the land is situate;

(c) thirdly, if no person referred to in clauses (a) and (b) is available, to the resident of a village adjoining the Panchayat area comprising the village where the land is situate.

(3) If no person referred to in sub-section (1) belonging to a Scheduled Caste is available, the land may be transferred to a person belonging to a Scheduled Tribe in the order of preference given in sub-sections (1) and (2).

(4) No transfer under this sections shall be made except with the previous approval of the Assistant Collector concerned.

(5) A transferee of land under sub-section (1) shall have no right to transfer the land by way of sale, gift, mortgage or lease before the expiry of a period of ten years from the date of transfer in his favour."

14. Section 157-AA provides that no person belonging to scheduled caste having become a *bhumidhar* with transferable rights under Section 131-B shall have the right to transfer the land by way of sale, gift, mortgage or lease to a person other than a person belonging to a scheduled caste and the same shall be in the order of preference as contained sub-section (1) of the said section.

15. The provisions contained under Section 157-A and Section 157-AA both provide for restrictions on transfer of land by members of scheduled castes, but with a clear distinction. In terms of Section 157-A no *bhumidhar* or *asami* belonging to a scheduled caste can transfer the land to a person not belonging to a scheduled caste except with the previous approval of the Collector whereas under Section 157-AA the restriction is to the effect that a person belonging to a scheduled caste having become a *bhumidhar* with transferable rights under Section 131-B shall have no right to transfer the land by sale or otherwise to any person other than a person belonging to a scheduled caste. The transfer under Section 157-AA would be permissible only to persons belonging to scheduled castes in the order of preference as prescribed under sub-section (1). The restriction on a scheduled caste with regard to the transfer of land in favour of a person who does not belong to a scheduled caste under Section 157-AA is thus absolute and such transfer is not permissible in any contingency. The restriction herein is more stringent since the land in question is a lease land and grant of agricultural lease contemplated under the ZA & LR Act is for specified object and purpose.

16. The language of sub-section (1) of Section 157-AA is such that even in case of a member of a scheduled caste acquiring transferable rights of a *bhumidhar* under Section 131-B who is desirous to transfer such land to another person belonging to the scheduled caste by way of sale, gift, mortgage or lease the right to transfer is not absolute and the transfer is permissible only in accordance with the preferences specified therein.

17. Sub-section (4) provides for a restraint whereunder no transfer under Section 157-AA is permissible without the previous approval of the Assistant Collector concerned. The language of sub-section (4) is expressed in wide terms and it covers all transfers which are contemplated under Section 157-AA, including a transfer which

is to be made by a scheduled caste in favour of a scheduled caste also.

18. The restrictions provided for under Section 157-AA were made subject to a further condition with the insertion of sub-section (5), in Section 157-AA of the ZA & LR Act in terms of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 2002 (U.P. Act No.11 of 2002) with effect from June 21, 2002. Sub-section (5), referred to above, is being extracted below:-

"(5) A transferee of land under sub-section (1) shall have no right to transfer the land by way of sale, gift, mortgage or lease before the expiry of a period of ten years from the date of transfer in his favour."

19. In terms of Section 166 of ZA & LR Act, transfers made in contravention of the Act are to be held to be void. The consequences of such void transfers are provided for under Section 167. For ease of reference Sections 166 and 167 are being extracted below:-

"166. Transfer made in contravention of the Act to be void.-- Every transfer made in contravention of the provisions of this Act shall be void.

167. Consequences of void transfers. --(1) The following consequences shall ensue in respect of every transfer which is void by virtue of Section 166, namely--

(a) the subject-matter of transfer shall with effect from the date of transfer, be deemed to have vested in the State Government free from all encumbrances;

(b) the trees, crops and wells existing on the land on the date of transfer shall, with effect from the said date, be deemed to have vested in the State Government free from all encumbrances;

(c) the transferee may remove other moveable property or the materials of any immovable property existing on such land on the date of transfer within such time as may be prescribed.

(2) Where any land or other property has vested in the State Government under sub-section (1), it shall be lawful for the Collector to take over possession over such land or other property and to direct that any person occupying such land or property be evicted therefrom. For the purposes of taking over such possession or evicting such unauthorised occupants, the Collector may use or cause to be used such force as may be necessary."

20. This Court may take notice of the fact that the ZA & LR Act was enacted to provide for abolition of the zamindari system which involved intermediaries between the tiller of the soil and the State and for acquisition of their rights, title and interests and to reform the law relating to land tenure. The enforcement of the ZA & LR Act was with a view to simplify land tenure and bring about other consequent reforms to fulfill the needs of an egalitarian society. The abolition of the system of intermediaries between the State and the cultivators and the simplification of land tenure was aimed at paving way for distribution of land to the weaker sections of society according to the mandate of the Constitution of India3.

21. In a primarily agrarian economy where land continues to be the pivotal to both income and employment around which socio-economic privileges and deprivations revolve land reforms are seen as one of the principal instruments for creation of an egalitarian rural society in

tune with the socialistic spirit, as provided in the Preamble and under Part IV of the Constitution. It has also been included in the Ninth Schedule so as to ensure speedy and unhindered implementation of various legislative measures.

22. The restrictions provided for the transfer of land by scheduled castes under Section 157-AA have been introduced in order to address the difficulties faced by members of scheduled castes and to protect their rights with regard to the use and control of land through land reforms by taking appropriate legislative measures.

23. The restrictions provided under Section 157-AA are founded on a reasonable basis inasmuch as these restrictions are in respect of a person belonging to a scheduled caste who has become a *bhumidhar* with transferable rights in terms of the provisions contained under Section 131-B. It is for the purpose of protecting the rights of members of the scheduled castes that the transfer under Section 157-AA is permissible only to a person belonging to a scheduled caste and that too in the order of preference as prescribed under sub-section (1) thereof whereunder the said transfer is to be in an order of preference being made firstly to a landless agricultural labourer, thereafter to a marginal farmer, a small farmer and only subsequent thereto to others. The aforementioned preferential order of transfer is further subject to the conditions under sub-section (2).

24. Sub-section (4) which is couched in a mandatory form contains an injunction against any transfer without the previous approval of the Assistant Collector. The language of sub-section (4) is in wide terms and it encompasses all transfers under Section 157-AA including a transfer by a member of scheduled caste in favour of another member of scheduled caste also. Sub-section (4) refers to "transfer under this section", and therefore, it clearly embraces in itself all transfers which are contemplated in terms of Section 157-AA.

25. The issue as to whether a transfer made by a leaseholder who belongs to a scheduled caste in favour of a person who also belongs to a scheduled caste would require the permission of the Assistant Collector was taken up in the case of **Man Singh Vs. Commissioner, Bareilly Mandal & Ors.4** and upon considering the provisions contained under Section 157-AA it was stated as follows:-

"5. ...Section 157-AA contains a clear restriction that a person belonging to Scheduled Caste who have become bhumidhar with transferable rights under Section 131-B shall have no right to transfer to any person other than person belonging to Scheduled Caste. The transfer under Section 157-AA is permissible only to a person belonging to Scheduled Castes in the order of preference as prescribed in Sub-section (1). Thus, Scheduled Caste cannot transfer the land in favour of a person not belonging to Scheduled Caste in any contingency. Further, this restriction is on reasonable basis since land which has been contemplated under Section 157-AA is a land which is allotted to a person belonging to Scheduled Caste. The restriction is more stringent in this sub-section since the land is lease land and grant of agricultural lease is contemplated under the Act for the specified object and purpose. Much emphasis has been laid down by learned Counsel for the petitioner that Sub-section (1) of Section 157-AA will not apply when transfer is in favour of

Scheduled Caste. Sub-section (4) of Section 157-AA contains an injunction to the effect that no transfer under this section shall be made except with the previous approval of the Assistant Collector concerned. Sub-section (4) is in a very wide terms when it refers to "transfer under this section". This clearly means that it embraces itself all the transfers which are contemplated in Section 157-AA. Thus, even if the transfer is by a Scheduled Caste in favour of a Scheduled Caste, it is fully covered by the restrictions contained under Sub-section (4) of Section 157-AA. In case, the interpretation as put by learned Counsel for the petitioner to Sub-section (4) of Section 157-AA is accepted, then the restrictions put under this Sub-section will be meaningless and redundant. There is valid reason for requiring previous permission of the Assistant Collector. The reason which is deciphered from the scheme of section is, that even the transfer by a Bhumidhar belonging to Scheduled Caste to a person belonging to Scheduled Caste shall be in accordance with the preference mentioned in Sub-section (1). A Scheduled Caste who is bhumidhar with transferable right under Section 131-B has no free choice of transfer to any Scheduled Caste of his own choice. The order of preference given under Sub-section (1) has its own object and purpose. The object obviously is that if transfer is made, the said transfer shall first go to landless agricultural labourer and thereafter to marginal farmer. The reason obviously is that the land being a lease land, the rights of a lessee have to be regulated in a manner which may advance the object and purpose of the Act. Thus, the prior approval of the Assistant Collector is contemplated which is obviously to consider and decide as to whether permission can be accorded and the transfer which is sought, is in accordance with the Scheme of Sub-section (1) of Section 157-AA. If no permission is required for a land to be transferred by Scheduled Caste to another Scheduled Caste, then there will be no stage of inquiry whether the transfer is in accordance with the preference given in Sub-section (1).

6. In view of the foregoing discussions, I am of the considered view that permission is also required when a transfer is made by a person belonging to Scheduled Caste who has become bhumidhar with transferable right under Section 131-B in favour of a person belonging to Scheduled Caste. In the present case, the transfer was made without any such permission and the courts below have rightly taken the view that transfer is void and consequences under Section 167 of the Act shall follow..."

26. The purpose and object of the provision being to protect and promote the rights of the scheduled castes with regard to the control and use of land by bringing about land reforms through legislative measures, the provisions under Section 157-AA have to be read so as to subserve the intent and purpose of the enactment.

27. It is beyond question the duty of courts, in construing statutes to give effect to the intent of the law making power and to seek for that intent in every way. The object and interpretation of construction of statutes is to ascertain the meaning of the legislature and to ensure that the provisions are interpreted so as to subserve that intent. There is a general presumption that an enactment has to be given a purposive interpretation with a construction that best gives effect to the purpose of the enactment.

28. Reference may be had to the judgment in **R (on the application of Quintavalle) Vs. Secretary of State for**

Health5, for the proposition that in construing an enactment effort should be made to give effect to the legislative purpose. The observations made in the judgment are as follows:-

"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. ... 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."

29. Similar observations were made in **Stock Vs. Frank Jones (Tipton) Ltd.6,** wherein it was held as follows:-

"Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law). The first way says Lord Blackburn, of eliminating legally irrelevant meanings is to look to the statutory objective. This is the well-known canon of construction . . . which goes by the name of "the rule in Heydon's Case" (1584) 3 Co. Rep. 7b. (Nowadays we speak of the "purposive" or "functional" construction of a statute.)"

30. The Court's function, in view of the foregoing discussion, would thus be to construe the words used in an enactment, so far as possible, in a way which best gives effect to the purpose of the enactment.

31. The ZA & LR Act having been enacted with the objective of bringing about reforms in the law relating to land tenure, and the provisions contained under Section 157-AA having been inserted with a view to ensure protection of the rights of the scheduled castes in consonance with creation of an egalitarian rural society which would be in tune with the socialistic spirit of the Constitution the provisions contained therein have to be interpreted in a beneficent way so as to subserve the object of the enactment rather than to negate it.

32. In construing a remedial statute like the one above, courts are required to give the terms of the statute the widest amplitude which its language would permit.

33. The principle of applying a liberal construction to a remedial legislation has been emphasised in the **Construction of Statues** by **Crawford7** in the following terms:-

"...Remedial statutes, that is, those which supply defects, and abridge superfluities, in the former law, should be given a liberal construction, in order to effectuate the purposes of the legislature, or to advance the remedy intended, or to accomplish the object sought, and all matters fairly within the scope of such a statute be included, even though outside the letter, if within its spirit or reason."

34. To a similar effect is the observation made by **Blackstone** in

Construction and Interpretation of Laws8, which is as under:-

"It may also be stated generally that the courts are more disposed to relax the severity of this rule (which is really a rule of strict construction) in the case of statutes obviously remedial in their nature or designed to effect a beneficent purpose."

35. In the context of beneficial construction as a principle of interpretation, it has been observed in **Maxwell on The Interpretation of Statutes9** as follows:-

"...where they are faced with a choice between a wide meaning which caries out what appears to have been the object of the legislature more fully, and a narrow meaning which carries it out less fully or not at all, they will often choose the former. Beneficial construction is a tendency, rather than a rule."

36. The principle of applying a liberal construction to a beneficial legislation having a social welfare purpose was reiterated in the case of **Allahabad Bank & Anr. Vs. All India Allahabad Bank Retired Employees Association10,** and it was observed as follows:-

"16. ...Remedial statutes, in contradistinction 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. It is well settled and needs no restatement at our hands that labour and welfare legislation have to be broadly and liberally construed having due regard to the Directive Principles of State Policy. The Act with which we are concerned for the present is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country."

37. Reference may also be had to the case of **Bharat Singh Vs. Management of New Delhi Tuberculosis Centre, New Delhi & Ors.11**, where purposive interpretation safeguarding the rights of have-nots was preferred to a literal construction in interpreting a welfare legislation, and it was held as follows:-

"11. ...the court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the 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 lead to injustice should always be avoided..."

38. The aforementioned legal position with regard to ambit and scope of the

restrictions on transfer by members of Scheduled Castes becoming *bhumidhar* under Section 131-B is contained under Section 157-AA has been considered in extenso in a recent judgement of this court in **Surajmal vs. State of U.P. and others12.**

39. The restrictions contained under Section 157-AA and the requirement of the permission of the Assistant Collector in a case where transfer is sought to be made by a person belonging to Scheduled Caste having become a *bhumidhar* with transferable rights under Section 131-B, in favour of a person who also belongs to a Scheduled Caste, having been held to be mandatory any transfer made in contravention thereof shall by virtue of the provisions contained under Section 166 be rendered void and the consequences of such a void transfer, as provided under Section 167, would ensue.

40. In the case at hand, the land in question having been transferred by a person who was a member of Scheduled Caste and had become a *bhumidhar* with transferable rights under Section 131-B, to the petitioner no.1 herein, also a person belonging to Scheduled Caste, the restrictions contained under Section 157-AA would be fully attracted as also the provisions contained under sub-section (4) thereof whereunder no transfer under the section is permissible except with the previous approval of the Assistant Collector concerned.

41. Contention of the learned counsel for the petitioner is that the transferor and the transferee both being members of Scheduled Caste, the previous approval of the Assistant Collector was not required for the purpose, is thus without basis and cannot be accepted.

42. The rationale behind requiring the previous approval of the Assistant Collector for any transfer under Section 157-AA is not difficult to decipher since as per the terms of the scheme of the provision, even a transfer by a *bhumidhar* belonging to a scheduled caste to a person also belonging to a scheduled caste is to be in accord with the order of preference under sub-section (1).

43. It therefore follows that a member of a scheduled caste who has obtained the status of a *bhumidhar* with transferable rights under Section 131-B also does not have a free choice to transfer the land to any member of the scheduled caste. The transfer which is permissible is to be as per the preferences prescribed. The order of preference under sub-section (1) and sub-section (2) are clearly to subserve the purpose of the legislative enactment which is for furtherance of the objective of land reforms and to protect the vulnerable section of the society from injustice and exploitation.

44. The prior approval of the Assistant Collector as required under sub-section (4) is thus contemplated so as to ensure that the permission which is sought is in accord with the scheme of the provision under the Section 157-AA and as per the order of preference provided under sub-section (1).

45. The transfer of the land in question having admittedly being made without the previous approval of the Assistant Collector concerned, the same would be hit by provision contained under sub-section (4) of Section 157-AA and such transfer being in contravention of the section, the same was rendered void by virtue of the mandate under Section 166

and the necessary consequences under Section 167 were liable to follow.

46. The recommendation made as per the order dated 28.03.2007 passed by the Additional Collection for vesting of the land in the State Government, is in accord with the provisions contained under sub-clause (a) of sub-section (1) of Section 167, and there is no infirmity in the said order. The subsequent order dated 16.12.2021 passed by the Board of Revenue, U.P., Allahabad rejecting the revision of the petitioners and affirming the order of the Additional Collector also cannot be faulted with for the same reason.

47. The writ petition lacks merit and is accordingly **dismissed.**

(2022)04ILR A1263
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2022

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Writ B No. 9235 of 2012

Mohammed Ali ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Saxena, Sri S.S. Sisodiya, Sri P.N. Saxena (Sr. Advocate), Sri R.K. Saxena

Counsel for the Respondents:
C.S.C., A.S.G.I. (2012/2930), Sri Anand Prakash Srivastava, Sri Dashrath Lal Yadav, Sri K.D. Tripathi, Sri Nitin Raj Singh, Sri Tripathi B.G. Bhai, Ved Mani Tiwari

A. Civil Law - Administration of Evacuee Property Act, 1950-Sections 7 & 8 - Under U.P. Ordinance No.01 of 1949 any property in which an evacuee had any right or interest automatically vested in the custodian and any property which purports to have vested with evacuee property in the custodian continued to be so vested under the subsequent ordinances and by virtue of Sections 8(2) and 8(2-A) of the Act 1950 shall be deemed to have been validly vested with the custodian and shall also be deemed to be evacuee property declared as such within the meaning of 1950. No order declaring the property as evacuee property and no notice as referred in Section 7(1) of the Act, 1950 was required in relation to properties which had vested as evacuee properties with the custodian under U.P. Ordinance No.01 of 1949. Passing an order or issuing a declaration that the property was evacuee property was not a condition precedent for vesting and the mere fact that a person who had any right or interest in the property was a evacuee as defined u/S 2© of the Ordinance No.01 of 1949 resulted in automatic vesting of the property in the custodian and the property is deemed to have been declared as evacuee property for the purposes of Act, 1950. Further, the failure of the custodian to issue a notice u/S 6 of U.P. Ordinance No.01 of 1949 or u/S 7(3) of the Act, 1950 notifying the property as evacuee property by publication either in official gazette or by other means prescribed, has no effect on validity of such vesting.

B. Civil Law - U.P. Ordinance No.01 of 1949 - Administration of Evacuee Property Act, 1950 - Sections 34 & 49 - Provides that all records prepared or maintained under these provisions shall be deemed to be public documents within the meaning of Indian Evidence Act and shall be presumed to be genuine unless contrary is proved.

C. Civil Law - Displaced Persons (Compensation and Rehabilitation) Act, 1954 - Sections 12,14,16,17,20,22 & 23 - The Act defines evacuee property as any property which has been declared or deemed to have been declared under the Act of 1950. Section 12 of the Act 1954 empowers the Central Government to acquire any evacuee property by publishing a Notification to the said effect in the Official Gazette and on such publication of the Notification the right, interest and title of any evacuee in the evacuee property shall stand

extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances. Section 16 of the Act 1954 empowers the Central Government to appoint Managing Officers for custody, management and disposal of the property under Section 12 of the Act, 1954 which is made a part of compensation pool. Section 17 and 20 of the Act empowers the Managing Officer to dispose of such property. Sections 22 and 23 of the Act,1954 provides for appeal to the Settlement Commissioner and the Chief Settlement Commissioner against the order of Managing Officer and Assistant Settlement Commissioner.

Writ Petition is dismissed. (E-11)

List of Cases cited:-

1. M/s. Haji Esmail Noor Mohammad & Co. & ors. Vs Competent Officer, Lucknow & ors., AIR (1967) SC 1244

2. Smt. Roori Devi Vs Assistant Custodian General, AIR (1970) All 583

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. Heard the counsel for the parties and also perused the records of Writ-B No. 5199 of 2012 (Shamim Khan Vs. Deputy Director of Consolidation, Bareilly & Others). The original records produced by the State-respondents in pursuance to the order dated 5.3.2018 were also perused by the Court.

2. The petitioner challenges the order dated 7.2.2011 passed by the Deputy Director of Consolidation, Bareilly (hereinafter referred to as, 'D.D.C.'), the effect of which is to restore in C.H. Form 45, the name of Panna Lal Mishra, the predecessor in interest of respondent Nos. 6 to 10 as tenure holder of the plots in dispute between the petitioner and respondent Nos. 6 to 10. The name of Panna Lal Mishra was recorded in C.H. Form 45 on the basis of a sale-deed said to have been executed by the Managing Officer/Assistant Custodian (Evacuee Property) in his favour. The basic year records of the disputed plots displayed the name of one 'Mohd. Ali Khan, Pakistani under the administration of Custodian.' According to respondents Mohd. Ali Khan was an evacuee as defined in the Administration of Evacuee Property Act, 1950 (hereinafter referred to as, 'Act, 1950') and the plots were transferred in favour Panna Lal Mishra by the Managing Officer aftr the same were acquired under Section 12 of the Displace Persons (Compensation and Rehabilitation) Act, 1954 (hereinafter referred to as, 'Act, 1954'). The contention of the petitioner is that the original tenure holder was not an evacuee as he had not migrated to Pakistan, that the plots in dispute were not evacuee property and the sale-deed pleaded by respondent Nos. 6 to 10 is a forged document.

3. It is the admitted case of the parties that Mohd. Ali Khan Khan, S/o Mohd. Khan was the original tenure holder of the plots before Independence. The agricultural plots of which the aforesaid Mohd. Ali Khan was the tenure holder were Plot Nos. 1076, 1082, 1083/1, 1083/3 and 1084 situated in Village-Karilay, Pargana, Tehsil & District-Bareilly. During the first consolidation operations in the village, fresh chaks were carved in lieu of the aforesaid plots and the said chaks were numbered as Plot Nos. 510, 525, 541, 548, 554 and 555 and were part of Khata No. 269. In C.H. Form 45 prepared during the first consolidation operations in the village 'Mohd. Ali Khan, S/o Mohd. Khan resident of Pakistan under the Administration of Custodian' was recorded against Plot Nos. 510, 525, 541, 548, 554 and 555. C.H. Form 45 has been annexed as Annexure No. 3 of the affidavit filed by the District

Magistrate, Bareilly. A perusal of the annexure shows that the C.H. 45 was prepared in 1366 Fasli, i.e., 1959 A.D. C.H. Form 41 annexed with the affidavit of the District Magistrate, Bareilly as Annexure No. 4 also indicates that the document was prepared in 1366 Fasli. The aforesaid documents indicate that first consolidation operations were held in the village in 1366 Fasli. In the second consolidation operations in the village, fresh chaks were carved out in lieu of the aforesaid plots and the chaks were numbered as Plot Nos. 1050, 1111, 1119, 1121, 1122, 1123, 1129, 1130, 1135 and 1136 (hereinafter referred to as, 'disputed plots') and are part of Khata No. 00035.

4. Plot Nos. 1076, 1082, 1083/1, 1083/3 and 1084 are recorded in Register No. 7676, which is the Basic Record/ Basic Register of Evacuee Properties in District-Bareilly. The Register is kept in the custody of Assistant Custodian, Evacuee Properties, Bareilly. It has been certified by the Assistant Custodian that all Evacuee Properties in Tehsil-Bareilly have been recorded in the said Register. The entries in the Register show that Plot Nos. 1076, 1082, 1083/1, 1083/3 and 1084 were allotted to Ranveer Lal Kapoor and Kulveer Lal Kapoor and there is a recital on the relevant page that in the list at Serial No. 80 and File No. 123, the plots were 'Declared by Ordinance'. In the counter affidavit filed by respondent Nos. 6 to 10 an extract of Demand & Collection Register has been annexed as Annexure No. CA-2 showing that rent for the said plots was due on Ranveer Lal Kapoor and Kulveer Lal Kapoor since 1358 Fasli. The significance of the entry in the Basic Register to the effect 'Declared by Ordinance' shall be considered later on in the judgement. It is sufficient to state here that the records were prepared on the premise that Mohd. Ali Khan had migrated to Pakistan during partition. The case of the petitioner is that Mohd. Ali Khan had not migrated to Pakistan and was not an evacuee and the disputed plots were not evacuee property. It is stated by the petitioner that no orders were passed declaring the disputed plots as evacuee property and there was no publication under Section 7 of the Act, 1950 notifying the disputed plots as evacuee property.

5. It is the case of the respondents that, vide notification dated 26.11.1957, the disputed plots were acquired under Section 12 of the Act, 1954 and vested in the Central Government free from all encumbrances and subsequently through a notification dated 23.3.1977 the Evacuee Properties acquired by the Central Government under Section 12 of the Act, 1954 were transferred to the State of Uttar Pradesh for management, administration and disposal. Subsequently, in pursuance to an order dated 26.2.1970 passed by the Assistant Settlement Commissioner, U.P., Lucknow, a sale-certificate dated 26.11.1981 was issued in favour of the petitioner by the Managing Officer/Assistant Custodian and the sale-deed was registered on 3.4.1982. The sale-deed has been registered at Serial No. 1500 in Book No. 1 Volume 2206 at page Nos. 122 to 124 in the Register maintained in the office of the Registrar. The sale-deed recites that the property had been acquired by the Central Government and has been signed by the Managing Officer/Assistant Custodian Acquired Evacuee Property, U.P., Lucknow on behalf of the President of India and the Government of U.P. Copy of the sale-certificate was forwarded to the Sub-Registrar, Bareilly for registration and also to the Tehsildar for mutation of the

name of the purchaser in the land records after expunging the name of the evacuee. It has been stated in the supplementary counter affidavit filed in the present petition that the sale in pursuance to the order dated 2.3.1970 was delayed because of a stay order dated 4.3.1970 passed by this Court in Writ Petition No. 1752 of 1970. The aforesaid stay order was discharged by order dated 16.11.1981. The order dated 16.11.1981 passed by this Court in Writ Petition No. 1752 of 1970 has been annexed as Annexure No. SA-5 to the Supplementary Affidavit filed by respondent No. 4 in the present writ petition. The case of the petitioner is that the sale-deed is forged and further, the sale-deed is invalid as the transfer in favour of Panna Lal Mishra was made without obtaining the approval of Custodian General as required in Section 2(10)(o) of the Act, 1950.

6. The Village was notified for consolidation by notification issued under Section 4 of the Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred to as, 'Act, 1953'). In the present writ petition, it has been stated that the notification under Section 4 of the Act, 1953 was issued in 1980. However, in Writ-B No. 5199 of 2012 the date of notification under Section 4 of the Act, 1953 has been disclosed as 1.10.1983. The exact date of the notification is not relevant for deciding the issues raised in the petition. This was the second consolidation operation in the village. It appears that the basic year records prepared during the second consolidation also displayed the name of 'Mohd. Ali Khan, Pakistani under the Administration of Custodian.' It is the case of the respondents that after registration of sale-deed in his favour, Panna Lal Mishra, instituted Case No. 379 under Section 9-A(2) of the Act, 1953 to be recorded as Bhumidhar of the disputed plots. It is stated by the respondents that in the aforesaid case, the Gaon Sabha filed its objections alleging that the sale-deed produced by Panna Lal Mishra in support of his case was a forged document. It also appears from the records that in C.H. Form No. 2A a part of Plot No. 554 was recorded as 'Marghat' and, therefore, another case regarding Plot No. 554/1 was also instituted by Panna Lal Mishra contesting the aforesaid entry in C.H. Form 2A. The respondents state that the Consolidation Officer (hereinafter referred to as, 'C.O.') vide his order dated 30.11.1990 allowed Case No. 379 relying on the sale-deed produced by Panna Lal Mishra. The C.O. also, after inspection of Plot No 554/1, found that the plot was not in the form of 'Marghat' and the entry in C.H. Form 2A was contrary to the entries in C.H. Forms 41 and 45 prepared during the previous consolidation operations and, therefore, passed order dated 9.6.1992 directing that Panna Lal Mishra be recorded as Bhumidhar of Plot No. 554/1. The Gaon Sabha filed Appeal Nos. 149 and 600 challenging the orders dated 30.11.1990 and 9.6.1992. The aforesaid appeals were dismissed by the Settlement Officer of Consolidation (hereinafter referred to as, 'S.O.C.') vide his order dated 16.2.2006. Subsequently, the Gaon Sabha filed Revision Nos. 265 and 266 before the Deputy Director of Consolidation (hereinafter referred to as, 'D.D.C.') challenging the orders of the C.O. and the S.O.C. and the said revisions were also dismissed by the D.D.C. vide order dated 25.5.2006. Meanwhile, during the pendency of the aforesaid proceedings Panna Lal Mishra died and respondent Nos. 6 to 10 continued with the litigation before the consolidation courts as heirs and legal

representatives of Panna Lal Mishra. It has been stated in Writ-B No. 5199 of 2012 and by Shri Ashok Mehta, Senior Counsel, who represented the respondent Nos. 6 to 10, that notification under Section 52 of the Act, 1953 closing the consolidation operations in the village was published on 6.9.1997. The said fact has not been disputed by the counsel for the petitioner. C.H. Form 45 prepared during the second consolidation operations in the village recorded the name of Panna Lal Mishra as the chak holder/tenure holder of the disputed plots ostensibly on the basis of the different orders passed by the consolidation courts. However, the petitioner denies the proceedings before the consolidation courts as stated by the respondents and alleges that no order regarding the disputed plots were passed by the consolidation courts in favour of Panna Lal Mishra. It is the case of the petitioner that Panna Lal Mishra fraudulently got his name recorded in C.H. Form 45.

7. One Shamim Khan, S/o Wale Khan claiming himself to be the nephew of Mohd. Ali Khan and alleging that Mohd. Ali Khan had died issueless on 18.2.1989, filed an application praying that C.H. Form 45 be corrected and he may be recorded as the chak holder of the disputed plots. In his application Shamim Khan raised the same plea as the petitioner in the present petition that entries in C.H. Form 45 recording Panna Lal Mishra as the tenure holder of the disputed plots were forged and no orders had been passed by the consolidation courts in favour of Panna Lal Mishra. On the aforesaid application of Shamim Khan, the D.D.C. called for a report from the C.O., who reported that C.H. Form 23 relating to the disputed plots contains a recital that vide his order dated 30.11.1990 the C.O. had held Panna Lal Mishra to be the tenure holder of the disputed plots, but the said entry in C.H. Form 23 was blurred. It was further reported by the C.O. that the records did not indicate that Case No. 379 was instituted by Panna Lal Mishra and some other case was registered at Serial No. 379 in the 'Misilband Register'. The D.D.C. vide her order dated 4.11.2009 allowed the application of Shamim Khan and directed that C.H. Form 45 be corrected and entries in the basic year records showing 'Mohd. Ali Khan, resident of Pakistan under the Administration/ Management of the Custodian' against the disputed plots be recorded in C.H. Form 45. Through its aforesaid order, the D.D.C. also **remanded** the matter to the C.O. and directed that the dispute regarding succession to Mohd. Ali Khan be heard afresh after proper publication of notice and in accordance with law.

8. Respondent Nos. 6 to 10 filed a recall application before the D.D.C. for recall of the order dated 4.11.2009. The petitioner as well as Shamim Khan filed objections to the aforesaid recall application. The D.D.C. vide her order dated 7.12.2011 recalled her previous order dated 4.11.2009 and restored the entries in C.H. Form 45 as they stood before the order dated 4.11.2009. The order dated 7.12.2011 was passed by the D.D.C. relying on the certified copies of the different orders passed by the consolidation authorities and produced by respondent Nos. 6 to 10 and also after perusing the sale-deed allegedly executed in favour of Panna Lal Mishra. In her order dated 7.12.2011, the D.D.C. also took note of the fact that the disputed plots had been acquired and the dispute raised by Shamim Khan was barred by Section 48-A of the Act, 1953 and also that the application of

Shamim Khan was filed after consolidation operations were closed by a notification issued under Section 52 of the Act, 1953.

9. The order dated 7.12.2011 passed by the D.D.C. was challenged by Shamim Khan in Writ-B No. 5199 of 2012. Interestingly, in the aforesaid writ petition, Shamim Khan claimed title to the disputed plots on the basis of a 'Hibbanama' executed by the deceased Mohd. Ali Khan on 7.5.1988. Subsequently, the writ petition was dismissed as withdrawn vide order dated 22.7.2016 passed by this Court.

10. While, Writ-B No. 5199 of 2012 was pending before this Court, the present petition was also filed challenging the order dated 7.2.2011. The present petitioner claims that he is the only nephew of Mohd. Ali Khan, that Mohd. Ali Khan died issueless in March, 1981 and that the title of the disputed plots devolved on the petitioner, he being the sole nephew of Mohd. Ali Khan, as well as by virtue of a Will dated 10.3.1965 allegedly executed by Mohd. Ali Khan in his favour. The other facts pleaded in the petition are that the disputed plots were not evacuee property and had never vested in the Custodian, that the disputed plots were never transferred to Panna Lal Mishra, that the sale-deed pleaded by Panna lal Mishra is a forged document and no orders had been passed bythe consolidation courts in favour of Panna Lal Mishra. The details of the case taken up by the petitioner have been referred earlier.

11. Respondent Nos. 6 to 10 have filed their counter affidavits wherein they have reiterated their case as referred earlier in the judgement.

12. Respondent Nos. 1 and 2, i.e., the Union of India has also filed its counter affidavit bringing on record the notifications dated 26.11.1957 issued under Section 12 of the Act, 1954 and 23.3.1997 through which the properties acquired through notification dated 26.11.1957 were transferred to State of U.P. for management and disposal.

13. The D.D.C. has also filed her affidavit bringing on record a letter issued by the Board of Revenue expressing its inability to give a copy of the sale certificate issued in favour of Panna Lal Mishra on the ground that the records in the Board of Revenue were tattered.

14. In the present writ petition the Court passed an order dated 5.3.2018, the relevant extract of which is reproduced below :-

"...

The Collector Bareilly is, therefore, directed to file his affidavit bringing on record the records being maintained in his office regarding the disputed property being declared as Evacuee property, i.e. the extract of register showing declaration of the disputed property as Evacuee property, the order of appointment of Pannalal Mishra as Superdigar thereof and the records showing the sale certificate for execution of sale deed dated 26.11.1981 in favour of Pannalal Mishra. An officer well-acquainted with the records from the office of the Collector, Bareilly shall also remain personally present in the Court along with the original register maintained therein, extract of which has been filed as CA-3 (Page 10) to the affidavit of respondent 5.

There is one more aspect of the matter, the sale deed dated 26.11.1981 discloses that the Ministry of Rehablitation, Government of India vide notification dated 26.11.1957 issued under Section 12

of the Displaced Persons (Compensation and Rehablitation) Act had acquired the Evacuee property (described in the Schedule to the said sale deed) and it was executed by the Managing Office/Assistant Custodian (Acquired Evacuee Property), U.P., Lucknow on behalf of the President of India. Shri Pradeep Sisodiya, Assistant Solicitor General of India is, therefore, called upon to file affidavit on behalf of the respondents 1 and 2 explaining the averments as contained in the sale deed dated 26.11.1981. The contradictions appearing from contents of Page 55 and Page 58 (first and last page of the sale deed) are required to be explained by respondents 1 and 2. The notification dated 26.11.1957 under the aforesaid Act (as noted in the sale deed) shall also be placed before the Court along with the affidavit to be filed on behalf of respondents 1 and 2. The required information shall be placed before the Court by the next date fixed.

Let the matter be posted in the cause list on 20.3.2018."

15. In pursuance to the order dated 5.3.2018, the Collector, Bareilly has filed his affidavit annexing C.H. Forms 41 and 45 of 1366 Fasli, the relevant extract of the Basic Register and copy of the order dated 5.8.1967 giving the property in the 'Supardagi' of Panna Lal Mishra. The original records from the office of the Collector were produced on the date of hearing before this Court. The Court compared the photocopies of the document annexed with the affidavit of the District Magistrate, Bareilly with the original. Photocopy of the Basic Register annexed with the affidavit of the District Magistrate, Bareilly identifies with the original Register produced before this Court. The original records were also produced from the office of the Central Record Room, District-Bareilly and the said Register indicates that the sale-deed dated 26.11.1981/3.4.1982 had been registered in the office of the Registrar on a sale certificate issued by the Managing Officer/Assistant Custodian Acquired Evacuee Property, U.P., Lucknow. Certified copy of the extract of the Registers were handed over to the Court, which were taken on record. However, the order declaring the disputed plots as Evacuee Property or any notification notifying the disputed plots as evacuee property have not been filed or produced before this Court. Further, the permission of the Custodian General permitting sale of the disputed plots to Panna Lal Mishra has neither been filed with the affidavits of the respondents nor produced before this Court. The relevance of the aforesaid omision shall be considered later in the judgement.

16. It was argued by the counsel for the petitioner that Mohd. Ali Khan, original tenure holder of the disputed plots had not migrated to Pakistan, that no order was passed by the Custodian declaring the disputed plots as evacuee property and no notification notifying the disputed plots as evacuee property was published either in the Gazette or through any other mode as required under Rule 7 of the Rules, 1954. It was argued that there is no evidence that the disputed plots were evacuee property and had vested as evacuee property in the Custodian. It was also argued that the sale of the disputed plots in favour of Panna Lal Mishra is in violation of Section 10(2)(o) of the Act, 1950 as the permission of the Custodian General was not obtained before allegedly transferring the disputed plots to Panna Lal Mishra. It was further argued that the report of the C.O. submitted before the D.D.C. stating that no Case No. 379 was registered at the instance of Panna Lal

Mishra regarding the disputed plots shows that Panna Lal Mishra had fraudulently got his name recorded in C.H. Form 45. It was argued that in the circumstances, vide her order dated 4.11.2009, the D.D.C. rightly directed that C.H. Form 45 be corrected so as to display the entries in Basic year records and also rightly directed the C.O. to decide succession to Mohd. Ali Khan afresh after publication of notice. It was argued that for the aforesaid reasons, the order dated 7.12.2011 passed by the D.D.C. recalling the order dated 4.11.2009 is contrary to law and liable to be set aside.

17. Rebutting the argument of the counsel for the petitioner, the counsel for the respondents have argued that the entries in the Basic Register relating to evacuee propeties indicate that the disputed plots were evacuee property and had vested in the Custodian and were recorded as such in C.H. Form 45 prepared during the first consolidation operations in 1366 Fasli. It was argued that after the plots were acquired under Section 12 of the Act, 1954 by notification dated 26.11.1957, they vested in the Central Government and were subsequently transferred for administration and management alongwith other plots acquired under Section 12 of the Act, 1954 to the State Government and are managed by the Managing Officer appointed under the Act, 1954. It was argued that the sale-deed has been executed in exercise of powers conferred on the competent authority under the Act, 1954. It was argued that the recall application filed by Shamim Khan was not maintainable because the entries in C.H. Form 45 did not adversely affect his title as in the Basic year records the plots were recorded to be under the administration of Custodian and by virtue of Section 48-A of the Act, 1953 the title of the Custodian can not be adjudicated by the consolidation authorities. It was argued that for the same reasons the present petition is not maintainable. It was further argued that the recall application filed by Shamim Khan was also not maintainable as it was filed after the notification under Section 52 of the Act, 1953. It was further argued by the respondents that the records clearly indicate that Panna Lal Mishra was recorded as Bhumidhar of the disputed plots in C.H. Form 45 by virtue of order dated 30.11.1990 which was affirmed by the S.O.C. and the D.D.C. in the appeals and revisions filed against the order by the Gaon Sabha. It was argued that for the aforesaid reasons, the D.D.C. rightly recalled the order dated 4.9.2011 through her impugned order dated 7.12.2011 and the writ petition is liable to be dismissed.

18. I have considered the submissions of the counsel for the parties.

19. The issues in the present writ petition are whether the available records show that the disputed plots were evacuee properties and had vested in the Custodian, the legal effect of the failure of the State-respondents to produce, before this Court, any order passed or notification issued by the Custodian under Section 7 of the Act, 1950 declaring the disputed plots to be evacuee property and whether the sale-deed dated 26.11.1981/3.4.1982 is valid even though the sale certificate was issued by the Managing Officer and the transfer in favour of Panna Lal Mishra was made without obtaining the permission of the Custodian General as required under Section 10(2)(o) of the Act, 1950. The other issue in the present petition relates to the proceedings in the consolidation courts from which the present writ petition arises and whether any irregularity in the said proceedings can be a

cause to set aside the order dated 7.2.2011 passed by the D.D.C. at the instance of the petitioner.

20. The first legislative enactment regarding evacuee property and relevant for the present writ petition was U.P. Ordinance No. I of 1949. Section 2(c)(i) of U.P. Ordinance No. I of 1949 defined an evacuee to mean any person who on account of setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has on or after the Ist day of March 1947, left any place in the United Provinces for any place outside the territories forming part of India. Section 2(d) of the Ordinance defines evacuee property to mean any property in which an evacuee had any right or interest. The definition of evacuee as given in U.P. Ordinance No. I of 1949 is similar to the definition of 'evacuee' given in Section 2(c)(i) of the Act, 1950. Section 2(f) of the Act, 1950 defines evacuee property to mean any property of an evacuee, whether held by him as owner or as a trustee or as a beneficiary or as a tenant or in any other capacity. Section 5 of U.P. Ordinance No. I of 1949 provided that,*'Subject to the provisions of this Ordinance, all evacuee property situated in the United Provinces shall vest in the Custodian.'* Section 6 of U.P. Ordinance No. I of 1949 required the Custodian to notify, from time to time, by publication in the official Gazette or in such other manner as may be prescribed, evacuee properties which had vested in him under the Ordinance. **Under U.P. Ordinance No. I of 1949, if a person was an evacuee as defined in the Ordinance, his property automatically vested in the Custodian and no orders declaring the property to be evacuee property were required to be passed for that purpose**. The failure of the Custodian to notify through publication the evacuee property did not invalidate the 'vesting' as the act of notifying was to be subsequent to vesting. U.P. Ordinance No. I of 1949 expired on August 23, 1949.

21. On June 13, 1949, the Governor General promulgated Administration of Evacuee Property (Chief Commissioner's Provinces) Ordinance No. XII of 1949. Section 5 of Ordinance No. XII of 1949 provided that subject to the provisions of the Ordinance, all evacuee properties situated in Provinces shall vest in the Custodian for that Province. Section 5 of Ordinance No. XII of 1949 is reproduced below :-

"Section 5(1). **Subject to the provisions of this Ordinance, all evacuee property situated in a Province shall vest in the Custodian for that Province.**

(2) **Where, immediately before the commencement of this Ordinance any evacuee property in a Province had vested in any person exercising the powers of a Custodian under any corresponding law in force in that Province immediately before such commencement, the evacuee property shall on the commencement of this Ordinance, be deemed to have vested in the Custodian appointed for the Province under this Ordinance."**

(Emphasis added)

22. Subsequently, by Section 4(b) of Ordinance No. XX of 1949, Ordinance No. XII of 1949 was extended to the United Provinces. By Section 8 of Ordinance No. XX of 1949 Section 41 was included in Ordinance No. 12 of 1949. Section 41 is reproduced below :-

"41. Provisions relating to expiry of U.P. Ordinance I of 1949- Notwithstanding the expiry of the United

Provinces Administration of Evacuee Property Ordinance, 1949 (U.P. Ordinance I of 1949), immediately before the commencement of the Evacuee Property (Chief Commissioner's Provinces) Ordinance, 1949, anything done or any action taken in exercise of any power conferred by the first named Ordinance shall be deemed to have been done or taken in the exercise of the powers, conferred by this Ordinance as amended by the second named Ordinance, and any penalty incurred or proceeding commenced under the first named Ordinance **shall be deemed to be a penalty incurred or proceeding commenced under this Ordinance as if the ordinance** as so amended were in force on the day on which such thing was done, action taken, penalty incurred or proceeding commenced."

(Emphasis added)

23. Thus, the evacuee properties in the United Provinces which automatically vested in the Custodian by virtue of Section 5 of U.P. Ordinance No. I of 1949 were deemed to have vested in the Custodian under Section 5 of Ordinance No. XII of 1949 and by Section 41 of Ordinance No. XX of 1949 anything done or any action taken in exercise of any power conferred by U.P Ordinance No. I of 1949 were deemed to have been done or taken in exercise of powers conferred by Ordinance No. XII of 1949.

24. Subsequently, by Ordinance No. XXVII of 1949, Ordinance No. XII of 1949 was also repealed. Section 8 of Ordinance No. XXVII of 1949 provided as follows :-

"8. *Vesting of evacuee property in the Custodian*.-(1) Any property declared to be evacuee property under section 7 shall vest in the Custodian.

(2) **Where immediately before the commencement of this Ordinance any evacuee property in a Province had vested in any person exercising the powers of a Custodian under any law repealed hereby, the evacuee property shall, on the commencement of this Ordinance, be deemed to have vested in the Custodian appointed or deemed to have been appointed for the Province under this Ordinance, and shall continue to so vest.**

(3) ...

(Emphasis added)

25. Section 8(2) of Ordinance No. XXVII of 1949 was subsequently substituted by the following Section 8(2). The substituted Section 8(2) of Ordinance XXVII of 1949 is reproduced below :-

"Section8(2). Where immediately before the commencement of this Ordinance, any property in a province had vested as evacuee property in any person exercising the powers of a Custodian under any law repealed hereby **the property shall on the commencement of this Ordinance be deemed to be evacuee property declared as such within** the meaning of this Ordinance **and shall be deemed to have vested in the Custodian** appointed or deemed to have been appointed for the Province under this

Provided that where, at the commencement of this Ordinance, there is pending before the Custodian for any province any claim preferred to him in respect of any property under Section 8 of the Administration of Evacuee Property, Ordinance 1949 (XII of 1949), or under any other corresponding law repealed hereby, then, notwithstanding anything contained in this Ordinance or in any other law for the time being in force such claim

shall be disposed of as if the definitions of 'evacuee property' and 'evacuee' contained in section 2 of this Ordinance had become applicable thereto."

(Emphasis added)

The effect of substituted Section 8(2) of Ordinance No. XVII of 1949 was that any property vesting in the Custodian as evacuee property under the previous Ordinances was deemed to have vested in the Custodian under Ordinance No. XVII of 1949 and on the commencement of Ordinance No. XVII of 1949, was deemed to be evacuee property declared as such within the meaning of the Ordinance and deemed to have vested in the Custodian and shall continue to so vest.

26. By Administration of Evacuee Property Act, 1950, Ordinance No. 27 of 1949 was also repealed. Section 8(2) of the Act, 1950 provides that where immediately before the commencement of the Act, 1950 'any property in a State had vested as evacuee property in any person exercising the powers of Custodian under any law repealed hereby, the property shall, on the commencement of the Act, be deemed to be evacuee property declared as such within the meaning of this Act and shall be deemed to have vested in the Custodian ..... and shall continue to so vest'. Act, 1950 was also amended by the Administration of Evacuee Property (Amendment) Act I of 1960 and Section 8(2-A) was introduced in the Act, 1950 with retrospective effect. Section 8(2-A) of the Act, 1950 is reproduced below :-

"8(2-A). Without prejudice to the generality of the provisions contained in sub-section (2), **all property which under any law repealed hereby purports to have vested as evacuee property in any person exercising the powers of Custodian in any State shall, notwithstanding any defect in, or the invalidity of, such law or any judgment, decree or order of any court, be deemed for all purposes to have validly vested in that person,** as if the provisions of such law had been enacted by Parliament **and such property shall,** on the commencement of this Act, **be deemed to have been evacuee property declared as such within the meaning of this Act and accordingly, any order made or other action taken by the Custodian** or any other authority in relation to such property **shall be deemed to have been validly and lawfully made or taken."**

(Emphasis added)

27. By virtue of Section 8(2-A) of the Act, 1950 any property which **purports** to have vested as evacuee property in the Custodian under the Ordinances referred earlier shall be deemed to have validly vested in him and such property shall be deemed **to have been declared as evacuee property** as such within the meaning of Act, 1950 and any order made or any action taken by the Custodian or any authority in relation to such property **shall be deemed to have been validly and lawfully made or taken.** The implications of the word 'purport' in Section 8(2-A) of the Act, 1950 came up for interpretation before the Supreme Court in ***Azimunnissa & Others Vs. The Deputy Custodian, Evacuee Properties, District-Deoria & Others, AIR (1961) S.C. 365.*** In the aforesaid case, the Supreme Court after noting the different Ordinances issued regarding evacuee properties, held that a property which was evacuee property under Section 2(d) of Ordinance No. I of 1949 vested in the Custodian under Section 5 of that Ordinance and such vesting was deemed to be under Ordinance No. XII of 1949 and

was also deemed to have vested in the Custodian under Ordinance No. XVII of 1949. It was held by the Supreme Court that such a vesting would be valid under Act, 1950 because Section 8(2-A) of the Act, 1950 validates a vesting which purported to have taken place as a result of Ordinance No. XVII of 1949. It was further held by the Supreme Court that such property, i.e., the property which '**purports**' to have vested in the Custodian under Ordinance No. XVII of 1949 shall, by virue of Section 8(2-A) of the Act, 1950, be deemed to be evacuee property under the Act, 1950. The observations of the Supreme Court in paragraph Nos. 15, 20 and 21 are reproduced below :-

"15. The argument raised on behalf of the petitioner was that U. P. Ordinance 1 of 1949, Central Ordinance XII of 1949 and Central Ordinance XX of 1949 were invalid as the legislative competence of the Governor and of the Governor-General in regard to evacuee and evacuee property matters was wanting ; and all that sub-section 2-A of S. 8 added by Act I of 1960 did was to save any vesting which purported to have taken place under Ordinance XXVII but it did not purport to cure any invalidity due to constitutional incompetence and that the law made without constitutional authority could not be validated. Reference was made to Saghir Ahmad v. State of U. P. 1955 1 S.C.R. 707 : (AIR 1954 SC 728) where at page 728 (of SCR) : (at p. 739 of AIR) the following statement from Cooley's Constitutional Limitations Vol. 1 page 384 (note) :-

"A statute void for unconstitutionality is dead and cannot be vitalised by subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted."

was held to be sound law.

20. The word " purport " has many shades of meaning. It means fictitious, what appears on the face of the instrument; the apparent and not the legal import and therefore any act which **purports** to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable; Dicker v. Angerstein, 3 Ch D 600 at p. 603. **Purporting is therefore indicative of what appears on the face of it or, is apparent even though in law it may not be so. This means that at the time when the Act purported to vest the property in dispute in the Custodian even though the power was not exercisable, S. 8(2-A) by giving a retrospective effect to S. 8(2) of the Act makes the vesting as if it was vesting under S. 8(2) of the Act and therefore the attack on the ground of invalidity cannot be sustained.** By S. 5 of U. P. Ordinance 1 of 1949 the property of Khatoon Bibi who became an 'evacuee' under S. 2(c) and her property 'evacuee property' under S. 2(d) was vested in the Custodian of Evacuee Property of the province of U. P. That Ordinance was allowed to lapse. By Central Ordinance XII of 1949 as subsequently amended the vesting of evacuee property was deemed to be under that Ordinance, which in its turn was repealed under S. 55 of Ordinance XXVII of 1949 which was a valid piece of legislation. **By S. 8(2) of that Ordinance the vesting under the previous Ordinance was deemed to be under that Ordinance as if it was in force on the date of the vesting.** Ordinance XXVII of 1949 was repealed by the Act which contained provisions as to vesting in S. 8(2), which was similarly worded as the corresponding provision of the Ordinance and therefore by a fiction of law the original vesting was to be treated as if the Act was in force when the first vesting took

place. The High Court of Allahabad in Azizunnissa's case (S) AIR 1957 All 561 held the vesting to be invalid because upto the time of Ordinance XII of 1949 and even Ordinance XX of 1949 legislative competence was lacking, and even by the deeming provisions in S. 8(2) of Ordinance XXVII of 1949 or Act XXXI of 1950 there was no valid vesting, because the original vesting was bad. We think it unnecessary to decide as to whether the deeming provisions of S. 8(2) of the Act or of Ordinance XXVII of 1949 was sufficient to give validity to the vesting. **Section 8(2-A) as introduced into the Act, in our opinion, makes the vesting valid, because it gives validity to the vesting which purported to have taken place as a result of Ordinance XXVII of 1949 even though it was only apparently so and was not so in law, because that is what 'purport' implies.**

21. **The effect of S. 8(2-A) is that what purported to have vested under S. 8(2) of Ordinance XXVII of 1949 and which is to be deemed to be vested under S. 8 of the Act which repealed that Ordinance, notwithstanding any invalidity in the original vesting or any decree or order of the Court shall be deemed to be evacuee property validly vested in the Custodian and any order made by the Custodian in relation to the property shall be deemed to be valid. Thus retrospective effect is given to the Act to validate** (1) what **purports** to be vested; (2) removes all defects or invalidity in the vesting or fictional vesting under S. 8(2) of Ordinance XXVII of 1949 or S. 8(2) of the Act which repealed the Ordinance; (3) makes the decrees and judgments to the contrary of any court in regard to the vesting ineffective; (4) **makes the property evacuee property by its deeming effect;** and (5) validates all orders passed by the Custodian in regard to the property. Because of the retrospective effect given to the Act and the validating effect of Act 1 of 1960 Saghir Ahmad's case (1955) I SCR 707: (AIR 1954 SC 728) would have no application. In the view we have taken the other question does not survive and the share of Khatoon Bibi must be held to be evacuee property validly vested in the Custodian. Therefore the property in dispute does fall within the definition of composite property as given in S. 2(d) and cannot be held to be invalid."

(Emphasis added)

28. Subsequently, in ***M/s. Haji Esmail Noor Mohammad and Co. and Others Vs. Competent Officer, Lucknow and Others, AIR (1967) SC 1244,*** the Supreme Court held that Section 7 of the Act, 1950 applied only to properties other than those which had vested automatically in the Custodian, that no notice or declaration under Section 7(1) declaring the interest as evacuee property was required in such cases and the automatic vesting of evacuee property in the Custodian under the different Ordinances referred earlier can not be reopened either in the Central Ordinance or the Central Act for it had vested there under by a fiction. The observations of the Supreme Court in paragraph No. 7 which are relevant for the present case are reproduced below :-

7. Section 8(2) of this Act corresponds to S. 8(2) of the Central Ordinance No. 27 of 1949. This Act repeals the Ordinance and practically enacts its provisions. **Under this Act also the automatic vesting of the evacuee property in the Custodian under the U.P. Ordinance No. 1 of 1949 deemed to have continued to vest under the Custodian**

appointed under the Central Ordinance No. 27 of 1949 is continued, by fiction, under this Act. The High Court of Allahabad in Azimunnissa's case, AIR 1957 All 561 held that there was no valid vesting under Ordinance XII of 1949 or even under Ordinance XX of 1949 for lack of legislative competence and, that, therefore, the deeming, clause in Ordinance XXVII of 1949 or Act XXXI of 1950 would not continue the vesting. **This defect was cured by Act 1 of 1960 retrospectively validating the vesting under the earlier laws.** This aspect of the case was considered by this Court in Azimunnissa v. The Deputy Custodian, Evacuee Properties, District-Deoria 1961-2 SCR 91 at p. 104: (AIR 1961 SC 365 at p. 371). Therein Kapur, J., speaking the Court, observed :

"The effect of s. 8(2-A) is that what purported to have vested under S. 8 (2) of Ordinance XXVII of 1949 and which is to be deemed to be vested under S. 8 of the Act which repealed that Ordinance, notwithstanding any invalidity in the original vesting or any decree or order of the Court shall be deemed to be evacuee property validly vested in the Custodian and any order made by the Custodian in relation to the property shall be deemed to be valid. Thus retrospective effect is given to the Act to validate (1) what **purports** to be vested; (2) removes all defects or invalidity in the vesting or fictional vesting under S. 8(2) of Ordinance XXVII of 1949 or S. 8(2) of Ordinance XXVII of 1949 or S. 8(2) of the Act which repealed the Ordinance; (3) makes the decrees and judgments to the contrary of any court in regard to the vesting in-effective; (4) makes the property evacuee property by its deeming effect; and (5) validates all orders passed by the Custodian in regard to the property."

In the instant case, from the narration of the facts it is clear that Abdul Latif Hajee Esmail, in view of the disturbed conditions, went away to Pakistan in the year 1948 and, therefore, he was an evacuee within the meaning of the U.P. Ordinance 1 of 1949. **His property, i.e., his interest in the partnership business, automatically vested under the Ordinance** in the Custodian. The Deputy Custodian of Evacuee Property, Kanpur, issued notice to the firm on September 7, 1949, informing the firm that the Kanpur property of the firm would be taken possession. The said vesting was deemed to have taken place under the Central Ordinance 27 of 1949 and the Central Act 31 of 1950. Subsequent proceedings were taken under the provisions of the said Central Ordinance and Act. **As stated above, the automatic vesting of Abdul Latif Hajee Esmail's share in the firm was continued by Central Ordinance 27 of 1949 and Central Act 31 of 1950 by the deeming provisions contained therein. Therefore, no question of issuing further notice or making a declaration that the said interest was evacuee property under S. 7(1)of the Ordinance arises. Section 7 only applies to properties other than those which have been vested automatically in the Custodian. Such a vesting cannot be reopened under the Central Ordinance or the Central Act, for it has already vested thereunder by a fiction.** It follows that the petitioners have no interest in the share of Abdul Latif Hajee Esmail in the firm which had vested in the Custodian."

(Emphasis added)

29. The issue of automatic vesting of evacuee property in the Custodian also came up before a Division Bench of this Court reported in ***Smt. Roori Devi Vs. Assistant Custodian General, AIR (1970) All 583.*** In the aforesaid case, it was argued

on behalf of the evacuee that because no action had been taken by the Custodian under the U.P. Ordinance No. I of 1949 or Ordinance No. XII of 1949 the property belonging to the evacuee could not vest in the Custodian and the same can not be held to be an evacuee property. Repelling the contention, the Division Bench, after referring to the judgements of the Supreme Court, held that as the erstwhile owner of the disputed property was an evacuee, her interest in the property automatically vested in the Custodian under Ordinance No. I of 1949 and would be deemed to have vested in the Custodian even under the Act, 1950 and a notification notifying the property as evacuee property was not necessary for a vesting of the evacuee property in the Custodian. The relevant observations of the Division Bench in paragraph Nos. 12, 13, 15 and 16 are reproduced below :-

"12. In the present case on the finding of fact recorded by the Opposite Party No. 1 it is clear that Smt. Mahboobul Nisa who owned the property in dispute migrated to Pakistan in February, 1948. Therefore, she was an evacuee within the meaning of the U. P. Ordinance No. 1 of 1949 and her interest in the property in dispute automatically vested under the Ordinance in the Custodian. This automatic vesting was continued by Amendment Ordinance No. 20 of 1949 and Ordinance No. 27 of 1949 and finally by Act 31 of 1950. The defect that was pointed out by this Court in Azizun Nisa's case, AIR 1957 AH 561 was cured by Act 1 of 1960 retrospectively validating the vesting under the earlier laws with the result that the property in dispute would be deemed to have vested in the Custodian even under Act 31 of 1950.

13. **It is contended by Sri Bashir Ahmad learned counsel for the petitioner that in the instant case no action was taken or overt act done by the Custodian in respect of the property in dispute under U. P. Ordinance No. 1 of 1949 or Ordinance No. 12 of 1949 or Ordinance No. 27 of 1949 or Act 31 of 1950 as such the property in dispute cannot be held to have vested in the Custodian. Learned counsel referred to Sections 5 and 6 of Ordinance 1 of 1949 and submitted that these two sections should be read together and unless the Custodian notified by publication about the vesting of the property or did some overt act in respect of that property the property continued to be owned and possessed by the original owner.** In support of this contention of his he placed reliance on a Division Bench case of Madhya Pradesh High Court in Rubab Bai v. Asstt. Custodian of Evacuee Property, AIR 1962 Madh Pra 38 and on a Single Judge decision of this Court in Smt. Israr Fatima v. Custodian Evacuee Property, U. P., AIR 1968 All 232.

15. It is difficult to accept this view of the Madhya Pradesh High Court in face of the clear provision of Section 5 of Ordinance No. 1 of 1949 which provides for automatic vesting and also in view of the Supreme Court decision in AIR 1961 SC 365. **Once it is held that there is automatic vesting it is contradiction in terms to say that there will be no vesting unless certain conditions are fulfilled. Section 6 of Ordinance No. 1 of 1949 merely speaks of the procedure to be followed after vesting. It is something subsequent to vesting. Therefore, it cannot be said that unless there is notification there is no vesting.** In our opinion as soon as there is a determination of the fact that a certain person in terms of Section 2(c) of the Ordinance is an evacuee and has migrated to Pakistan before the

coming into force of Ordinance No. 1 of 1949 his property will be deemed to have vested in the Custodian by virtue of Section 5 of Ordinance 1 of 1949. The Division Bench view of the Madhya Pradesh High Court referred to above was not followed by the same High Court in a later Division Bench decision in Union of India v. Ismail Abdul Shukoor, AIR 1968 Madh Pra 159. Two Muslim partners of a Firm in India were doing business at Karachi since 1946 and they continued to remain there even after the partition of India, they were treated as evacuees and the interest held by them in the partnership property in India was held to be evacuee property within the meaning of these terms as defined in Section 3 of the State Ordinance. It was held that such a property automatically vested in the Custodian and the vesting was not dependent on any notification being issued by the Custodian, This latter Division Bench case rightly held that the earlier Division Bench case was not binding on them in view of the decision of the Supreme Court in AIR 1961 SC 365.

16. In AIR 1968 All 232 it was held, that "the word 'may' used in Sub-section (1) of Section 6 of Ordinance I of 1949 has the force of 'shall' and does not make it optional for the Custodian whether to notify by publication the property that has vested in him or not. Sub-section (1) of Section 5, no doubt vests the evacuee property in the Custodian automatically without its being notified, but it must be determined as to what that property actually is and such property cannot be determined without a notification being made and objections being invited from interested persons." **This authority also does not help the petitioner. It does not say that if there is no notification the property will not vest in the Custodian."**

(Emphasis added)

30. The above discussion leads to the conclusion that under U.P. Ordinance No. I of 1949, any property in which an evacuee had any right or interest **automatically vested** in the Custodian and any property which **purports** to have vested as evacuee property in the Custodian, continued to be so vested under the subsequent Ordinances and by virtue of Sections 8(2) and 8(2-A) of the Act, 1950 shall be **deemed to have validly vested** in the Custodian and **shall also be deemed to be evacuee property declared as such within** the meaning of Act, 1950. No order declaring the property as evacuee property and no notice as referred in Section 7(1) of the Act, 1950 was required in relation to properties which had vested as evacuee properties in the Custodian under U.P. Ordinance No. I of 1949. Passing an order or issuing a declaration that the property was evacuee property was not a condition precedent for vesting and the mere fact that the person, who had any right or interest in the property, was an evacuee as defined in Section 2(c) of the Ordinance No. I of 1949 resulted in automatic vesting of the property in the Custodian and the property is deemed to have been declared as evacuee property for the purposes of Act, 1950. Further, the failure of the Custodian to issue a notification under Section 6 of U.P. Ordinance No. I of 1949 or under Section 7(3) of the Act, 1950, notifying the property as evacuee property by publication either in official Gazette or by other means prescribed, has no effect on the validity of such vesting.

31. In the present case, the respondents have not produced any order declaring the disputed plots to be evacuee property or any publication notifying that the disputed plots had vested as evacuee property in the Custodian and, therefore, it

is to be presumed that no order was passed declaring the disputed plots as evacuee property and no such notification was published. But, in light of the above discussion, the absence of any such order or notification does not negate the case of the respondents that the the disputed plots were evacuee properties and had vested in the Custodian as such.

32. The disputed plots are recorded as evacuee property in the Basic Register relating to evacuee properties maintained by the Assistant Custodian, Bareilly. The extract of the said Register has been annexed in the counter affidavit of the District Magistrate, Bareilly and the original records had been produced before this Court. The Registers regarding the evacuee properties are prepared under Rule 33 of the Rules, 1950. Section 49 of the Act, 1950 provides that all records prepared or Registers maintained under this Act shall be deemed to be public documents within the meaning of the Indian Evidence Act, 1872 (hereinafter referred to as, 'Act, 1872') and shall be presumed to be genuine unless the contrary is proved. A similar provision, Section 34, existed in U.P. Ordinance No. I of 1949.

33. A perusal of the Basic Register shows that the disputed plots were also allotted to certain persons and the allotment was atleast since 1358 Fasli. On the right side of the Register a note has been made that the property was **'Declared under the Ordinance'**. Section 49 of the Act, 1950 raises a presumption that the aforesaid entries in the Basic Register are genuine and correct. The presumption that the aforesaid entries are genuine and correctly reflect the nature of the disputed plots, i.e., the disputed plots were evacuee property and vested in the Custodian under the different Ordinances in force before the Act, 1950 can also be raised under Section 114 (Illustration e) of the Act, 1972. The note 'Declared under the Ordinance' indicates that the disputed plots purported to have vested in the Custodian under the Ordinances referred earlier in the judgement. In light of Section 8(2A) of the Act, 1950 the disputed plots **which purport to have vested as evacuee property** in the Custodian under the Ordinances shall be deemed to have validly vested in the Custodian and shall on the commencement of Act, 1950 **be deemed to have been evacuee property declared as such within** the meaning of Act, 1950. The note also indicates that the property had vested in the Custodian before the enactment of Act, 1950 and accordingly, an order made or other action taken by the Custodian or any other authority in relation to the disputed plots shall be deemed to have been validly and lawfully made or taken.

34. The presumption under Section 49 of the Act, 1950 regarding the entries in the Basic Register could have been rebutted by proving before the appropriate forum that Mohd. Ali Khan had not migrated to Pakistan and was in India on the relevant date, i.e., Mohd. Ali Khan was not an evacuee. It is not the case of the petitioner and there is nothing on record to show that any steps were taken by Mohd. Ali Khan or any of his heirs before any competent authority claiming that the disputed plots were not evacuee property. It has been noted previously that C.H. Form 45 prepared in 1366 Fasli recorded the disputed plots to be under the administration and management of the Custodian. No steps even after C.H. Form 45 was prepared in 1366 Fasli were taken either by Mohd. Ali Khan or any of his

heirs or legal representatives for restoration of the disputed plots under Section 16 of the Act, 1950 or for correction of C.H. Form 45. No appeal under Section 24 of the Act, 1950 or revision under Section 27 of the Act, 1950 was filed before the Custodian or the Custodian General either by Mohd. Ali Khan or any of his heirs. The appeal or revision could have been filed in view of the 'deemed declaration' provided in Section 8(2-A) of the Act. Thus, the presumption in favour of the entries in the Basic Register indicating that the disputed plots were evacuee property stands unrebutted.

35. For the aforesaid reasons, it is held that the disputed plots were evacuee property and the absence of an order declaring the disputed plots to be evacuee property or a notification notifying the disputed plots to have vested in the Custodian are not relevant and have no implications on the nature of the disputed plots.

36. So far as the validity of the sale-deed executed in favour of Panna Lal Mishra is concerned, the original records were produced before this Court which showed that the sale-deed had been registered in the office of the Sub-Registrar and, therefore, there is no substance in the allegation that the sale-deed is a forged document. At this stage it is also relevant to note that in the previous order dated 5.3.2018 passed by a Co-ordinate Bench of this Court the issue regarding the validity of the act of State-authorities in giving the disputed plots in the 'Supardagi' of Panna Lal Mishra was also raised and respondent Nos. 3 and 4 were called upon to produce the order dated 18.5.1967 by which the disputed plots were given in the 'Supardagi' of Panna Lal Mishra. The order has been annexed with the affidavit of the District Magistrate, Bareilly. However, the issue regarding 'Supardagi' of the disputed plots is not relevant to adjudicate the validity of the sale-deed. The original records as well as certified copy of the sale-deed handed over to this Court indicate that a sale certificate was issued by the Managing Officer/Assistant Custodian Acquired Evacuee Property and the deed was registered before the Sub-Registrar.

37. In order to decide the competence of the Assistant Custodian Evacuee Property/Managing Officer to issue the sale certificate, the provisions of Act, 1954 have to be considered. The Act, 1954 defines evacuee property as any property which has been declared or is deemed to have been declared as evacuee property under the Act, 1950. Section 12 of the Act, 1954 empowers the Central Government to acquire any evacuee property by publishing a notification to the said effect in the official Gazette and on the publication of the notification in the official Gazette **the right, title or interest of any evacuee in the evacuee property shall stand extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances**. Section 16 of the Act, 1954 empowers the Central Government to appoint Managing Officers for custody, management and disposal of the property acquired under Section 12 of the Act, 1954, and which is made a part of the compensation pool. Sections 17 and 20 of the Act, 1954 empower the Managing Officers to dispose of such property. Sections 22 and 23 of the Act, 1954 provide for Appeal to the Settlement Commissioner and the Chief Settlement Commissioner against the order of Managing Officer and the Assistant Settlement Commissioner. Relevant

extracts of Sections 12, 14, 16, 17, 20, 22 and 23 of the Act, 1954 are reproduced below :-

"Section 12. Power to acquire evacuee property for rehabilitation of displaced person. (1) If the Central Government is of opinion that it is necessary to acquire any evacuee property for a public purpose, being a purpose connected with the relief and rehabilitation of displaced persons, including payment of compensation to such persons, **the Central Government may at any time acquire such evacuee property by publishing in the Official Gazette a notification to the effect that the Central Government has decided to acquire such evacuee property in pursuance of this section.**

(2) On the publication of a notification under sub- section **(1), the right, title and interest of any evacuee in the evacuee property specified in the notification shall, on and from the beginning of the date on which the notification is so published, be extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances.**

(3) It shall be lawful for the Central Government, if it so considers necessary, to issue from time to time the notification referred to in Sub- section (1) in respect of-

(a) all evacuee property generally, or

(b) any class of evacuee property, or

(c) all evacuee property situated in a specified area

(d) any particular evacuee property.

(4) All evacuee property acquired under this section shall form part of the compensation pool.

14. Compensation pool.-(1) For the purpose of payment of compensation and rehabilitation grants to displaced persons, there shall be constituted a compensation pool which **shall consist of-**

(a) **all evacuee property acquired under section 12,** including the sale proceeds of any such property and all profits and income accruing from such property;

...

...

...

(2) **The compensation pool shall vest in the Central Government free from all encumbrances** and shall be utilised in accordance with the provisions of this Act and the rules made thereunder.

16. Management of compensation pool.-(1) The Central Government may take such measures as it considers necessary or expedient for the custody, management and disposal of the compensation pool in order that it may be effectively utilised in accordance with the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the Central Government may, for the purposes referred to in sub- section (1), by notification in the Official Gazette,-

(a) **appoint such officers as it may deem fit (hereinafter referred to as managing officers); or**

(b) constitute such authority or corporation, as it may deem fit (hereinafter referred to as managing corporation).

...

...

...

17. Functions and duties of managing officers and managing corporations.- (1) All managing officers or managing corporations shall perform such functions as may be assigned to

them by or under this Act under the general superintendence and control of the Chief Settlement Commissioner.

(2) **Subject to the provisions of this Act and the rules made thereunder, a managing officer** or managing corporation **may take such measures as he or it considers necessary or expedient for the purpose of** securing, administering, preserving, managing or **disposing of any property in the compensation pool entrusted to him** or it and generally for the purpose of satisfactorily discharging any of the duties imposed on him or it by or under this Act and may, for any such purpose as aforesaid, do all acts and incur all expenses necessary or incidental thereto.

...

...

...

20. Power to transfer property out of the compensation pool.-(1) Subject to any rules that may be made under this Act, **the managing officer or managing corporation may transfer any property out of the compensation pool-**

(a) **by sale of such property** to a displaced person or any association of displaced persons, whether incorporated or not, or **to any other person, whether the property is sold by public auction or otherwise;**

...

...

...

22. Appeals to the Settlement Commissioner.-(1) Subject to the provisions of sub- section (2), any person aggrieved by an order of the Settlement Officer or a managing officer under this Act may, within thirty days from the date of the order, prefer an appeal to the Settlement Commissioner in such form and manner as may be prescribed:

Provided that the Settlement Commissioner may entertain the appeal after the expiry of the said period of thirty days, if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) ...

(3) The Settlement Commissioner may, after hearing the appeal, confirm, vary or reverse the order appealed from and pass such order in relation thereto as he deems fit.

23. Appeals to the Chief Settlement Commissioner. (1) Subject to the provisions of sub-section (2), any person aggrieved by an order of the Settlement Commissioner or the Additional Settlement Commissioner or an Assistant Settlement Commissioner or a managing corporation under this Act may, within thirty days from the date of the order, prefer an appeal to the Chief Settlement Commissioner in such form and manner as may be prescribed:

Provided that the Chief Settlement Commissioner may entertain the appeal after the expiry of the said period of thirty days, if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2)No appeal shall lie from any order passed in appeal under section 22.

(3)The Chief Settlement Commissioner may, after hearing the appeal, confirm, vary or reverse the order appealed from and pass such order in relation thereto as he deems fit.

(Emphasis added)

38. The Central Government vide its notification dated 26th November, 1957 issued under Section 12(1) of the Act, 1954 acquired all tenancy rights of the evacuees which had become Sirdaris as well as Sir and Khudkasht rights of evacuees which had become Bhumidhars under U.P. Act No. 1 of 1951 and which

had been retrieved under the Act, 1950 or under any other previous Acts or Ordinances and which had been allotted to displaced persons. Evacuee properties regarding which proceedings were pending under the the Act, 1950 disputing that the property was evacuee property or where the limitation period for disputing the vesting of the property in the Custodian as evacuee property had not expired or any property for which proceedings under Section 16 of the Act, 1950 for restoration of the property were pending, were exempted from acquisition. A copy of the notification has been filed alongwith the counter affidavit of respondent No. 2. The petitioner has not disputed the notification dated 26.11.1957. It is not the case of the petitioner that the disputed plots fall in any class of property exempted from acquisition by notification dated 26.11.1957. It has been observed earlier that no steps were taken either by Mohd. Ali Khan, the original tenure holder of the disputed plots, or any of his heirs to dispute before any forum the vesting of the disputed plots as evacuee property in the Custodian or for restoration of the property under Section 16 of the Act, 1950. Thus, under Section 12(2) of the Act, 1954 the right, title and interest of Mohd. Ali Khan in the disputed plots stood extinguished on 26.11.1957 and on the said date the disputed plots vested in the Central Government free from all encumbrances. The evacuee properties which had vested in the Central Government under Section 12 of the Act, 1954 were transferred for management, administration and disposal to the State Government by virtue of notification dated 23.3.1977. The hand-book of the Board of Revenue containing the different instructions and notifications regarding management and disposal of evacuee properties handed over to the Court by the Standing Counsel of the State of U.P. show that the Tehsildars were appointed as Managing Officers/Assistant Custodian in relation to evacuee properties. The aforesaid explains the fact that the sale-deed executed in favour of Panna Lal Mishra has been signed by the Managing Officer/Assistant Custodian. Under Section 20 of the Act, 1954 the Managing Officer was empowered to transfer, by sale, any evacuee property to any person other than a displaced person or association of displaced persons. It is also relevant to note that no appeal was filed by Mohd. Ali Khan or his heirs against the order dated 26.2.1970 passed by the Assistant Settlement Commissioner permitting disposal of the disputed plots in favour of Panna Lal Mishra. In light of the aforesaid, the sale certificate/sale deed can not be held to be invalid because the sale certificate was signed and issued by the Managing Officer/Assistant Custodian.

39. It was also argued by the petitioner that the sale-deed was invalid because the sale had been executed without prior approval of the Custodian General as required under Section 10(2)(o) of the Act, 1950. After the notification dated 26.11.1957 issued under Section 12 of the Act, 1954, the disputed plots vested in the Central Government free from all encumbrances and the disposal of the disputed plots was not to be by the Custodian under Section 10(2)(o) of the Act, 1950, but by the Managing Officer under Section 20 of the Act, 1954. Act, 1954 does not stipulate any permission of the Custodian General for disposal, by sale, of evacuee properties. Thus, no permission

of the Custodian General was required to dispose of the disputed plots and the sale-deed is not invalid for being violative of Section 10(2)(o) of the Act, 1950. In view of the aforesaid there is no infirmity in the sale-deed dated 26.11.1981/3.4.1982.

40. In light of the findings recorded above, the issue regarding the regularity in the proceedings of the consolidation courts and the authenticity of the different records and orders passed by the consolidation courts is not relevant for deciding the rights of the parties. The petitioner and Shamim Khan claimed title to the disputed plots from Mohd. Ali Khan. The disputed plots were acquired by the Central Government under Section 12 of the Act, 1954. The acquisition under Section 12 of the Act, 1954 extinguished the rights, title and interest of the evacuee, i.e., Mohd. Ali Khan in the disputed plots. In the circumstances, the proceedings before the consolidations courts could not have been reopened at the instance of either the petitioner or Shamim Khan.

41. In light of the findings recorded above that the disputed plots were evacuee property and there is no infirmity in the sale deed executed in favour of Panna Lal Mishra, C.H. Form 45 correctly reflected the title of the disputed plots. Further, the reopening of the consolidation proceedings would invite a dispute regarding the title of the Custodian in the disputed plots which is barred by Section 48-A of the Act, 1953. The order dated 4.9.2011 was contrary to law because through the aforesaid order, the D.D.C. had directed that the proceedings regarding succession to the title of Mohd. Ali Khan in the disputed plots be started a fresh which could not have been done as the interest of Mohd. Ali Khan in the disputed plots stood extinguished after notification dated 26.11.1957 and the disputed plots had vested in the Central Government. It is difficult to comprehend as to how the D.D.C. by her order dated 4.11.2009 **remanded** back the matter to the C.O. for passing fresh orders even though on her own findings recorded in the order dated 4.11.2009, no case had been instituted regarding the title of the disputed plots. In case, Panna La Mishra was not entitled to be recorded as Bhumidhar of the disputed plots and the entries in C.H. Form 45 were forged, the basic year entries showing that the disputed plots were evacuee property and under the Administration of the Custodian could have been restored. The restoration of said entries would not benefit either the petitioner or Shamim Khan. Apparently, the petitioner or Shamim Khan had no locus to get the proceedings before the consolidation courts reopened. The D.D.C. vide her order dated 7.2.2011 rightly recalled her previous order dated 4.9.2011. For the same reasons as recorded above, petitioner has no locus to challenge the order dated 7.2.2011.

42. In view of the aforesaid, there is no illegality in the order dated 7.2.2011 passed by the Deputy Director of Consolidation, Bareilly so as to occasion interference under Article 226 of the Constitution of India.

43. The writ petition lacks merit, and is, accordingly ***dismissed.***

44. Interim order, if any, stands vacated.

(2022)04ILR A1284
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.03.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Matters U/A 227 No. 759 of 2022

Hanuman Prasad Mishra ...Petitioner
Versus
Chandra Mohan Purswani ...Respondent

Counsel for the Petitioner:
Vivek Kumar, Apoorva Tewari

Counsel for the Respondent:
Satya Narain Bhanu

Civil Law - U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972-Appellant fails to appear before the Court below-Rent Appeal dismissed-claim-should have been dismissed in default and not on merits-need of landlord found genuine-High court directed the matter to be decided in two months-order not interfered.

Petition dismissed. (E-9)

List of Cases cited:

1. Writ-A No.21265 of 2008 (Shashi Bhushan Anand @ Toni & ors. Vs Smt. Ram Devi & anr.)

2. Shri Baradakanta Mishra Ex-Commissioner of Endowments Vs Shri Bhimsen Dixit reported in (1973) 1 SCC 446

3. East India Commercial Co. Ltd. Calcutta & anr. Vs The Collector of Customs, Calcutta reported in AIR 1962 SC 1893

4. Shiv Swaroop Gupta Vs M.C. Gupta reported in AIR (2001) SC 2896

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

(1) Heard Shri Anil Kumar Tewari, learned Senior Advocate assisted by Shri Apoorva Tewari for the petitioner and Shri D.K. Saxena, learned counsel appearing on behalf of the respondent who has filed his Power today.

(2) This petition has been filed challenging the judgment and order dated 02.03.2022 passed by the Additional District Judge, Court No.1, Lucknow, dismissing the Rent Appeal No.6 of 2014 and praying for restoring the same to its original number.

(3) Learned Senior Counsel has taken this Court through the provision of Rule 22 of the Rules framed under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to U.P. Act, 1972) and has pointed out Sub Rule (a) of Rule 22 to say that the provisions of Order 41 Rule 17 of the CPC would apply where the appellant fails to appear and the Appeal filed by the appellant should have been dismissed in default and not on merits. Learned Senior counsel has also pointed out the judgment rendered by a Co-ordinate Bench of this Court in Writ-A No.21265 of 2008 **(Shashi Bhushan Anand @ Toni & Others Vs. Smt. Ram Devi & Another)** decided on 05.08.2014 to buttress his arguments.

(4) In the said case, this Court was considering a similar matter where the judgment of the Prescribed Authority was challenged by the petitioner before the Appellate Court but the Appellate Court had dismissed the Appeal arising therefrom on 11.05.2007 and rejected the application of the petitioner for recall of the said judgment on 22.01.2008. This Court had observed that in view of Section 34 of the Act of 1972 read with Rule 22 of the Rules framed under the Act the same powers as are vested in the Civil Court under the Code of Civil Procedure are given to the

Trial Court under the Act 1972 to discuss an appeal or revision for default and to restore it for sufficient cause. It had relied upon the several judgments of this Court and of the Supreme Court to say that just because the earlier counsel of the appellant was present before the Court and had refused to argue it would not amount to an appearance within the meaning of Rule 17 of Order 14 of the CPC. In the said case of **Shashi Bhushan Anand @ Toni & Others** (Supra), the other counsel who was subsequently engaged was not present and the Court held that there was no appearance of any counsel on behalf of the petitioner. The Appeal should have been dismissed in default rather than on merits. The Court had held that the Appellate Court exceeded its jurisdiction and decided the Appeal on merits in the absence of either of the counsels for the appellant/petitioner. The petition was allowed and the matter was remanded to the Appellate Court for decision afresh.

(5) Learned counsel for the petitioner has submitted that the petitioner had approached this Court earlier also challenging the order dated 01.11.2021 passed by the Additional District Judge-I, Lucknow, as also the judgment dated 26.08.2021 passed in Rent Appeal No.6 of 2014 in reference to which application for recall was moved which was registered as Miscellaneous Case No.801-C of 2021. It has been submitted that this Court after placing reliance upon Shashi Bhushan Anand (Supra) and quoting the said judgment in extenso had observed that the Appellate Court should have dismissed the Appeal in default but should not have decided the same on merits. It had also referred to the earlier directions of this Court to decide the matter expeditiously. It had therefore while remanding the matter to the Appellate Court for taking a decision on the Appeal on merits strictly as per law, also directed that the same be decided as early as possible say within a period of two months from the date of production of certified copy of the order, if there is no legal impediment, and while taking such a decision in Appeal, the Court concerned shall providing proper opportunity of hearing to the parties concerned. This Court also provided that the petitioner shall not seek any adjournment before the Court concerned as on earlier occasions also this Court had expedited the proceedings in the Appeal.

(6) Learned counsel for the petitioner had pointed out to the Court that the petitioner had moved an application for transfer of the Appeal to another Court which was dismissed for non-prosecution and against which the application for recall was moved which was pending before the District Judge but this Court observed that it was open for the petitioner to approach the District Judge for transfer of the matter.

(7) It has been argued that after this judgment dated 23.11.2021 setting aside the judgment and order dated 26.08.2021, the Appellate Court was bound to follow the law and to decide the Appeal within time prescribed and also in case of counsel for appellant failing to appear and to assist it could have only dismissed the Appeal in default but not on merit.

(8) Learned counsel for the petitioner has also pointed out the judgment rendered by the Hon'ble Supreme Court in the case of **Shri Baradakanta Mishra Ex-Commissioner of Endowments Vs. Shri Bhimsen Dixit reported in (1973) 1 SCC 446** and Paragraph-14 thereof where the Supreme Court observed that under Article

227 of the Constitution of India, the High Court was vested with the power of Superintendence over the Subordinate Courts and Tribunals in the State, When a specific direction had been issued to the Tribunal, then the Tribunal could not ignore the law declared by the High Court and start proceedings in direct violation of it.

(9) The learned counsel for the petitioner has also referred to observations made in **East India Commercial Co. Ltd. Calcutta and Another Vs. The Collector of Customs, Calcutta reported in AIR 1962 SC 1893,** where the Supreme Court had observed thus"..... *"if a Tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer."* It has been argued that after this Court had remanded the matter to the Trial Court to decide the Appeal afresh on merits, only on the ground that it could not have been decided on merits on failure of counsel for the appellant to appear and assist the Appellate Court could have only dismissed the Appeal in default and deciding the same on merits amounted to contemptuous conduct.

(10) It has been argued by the learned counsel appearing on behalf of the petitioner that after the order impugned was passed on 02.03.2022 a recall application has been moved by the petitioner on 09.03.2002 which has been registered as Miscellaneous Case No.222 of 2022 and despite knowledge that the Execution case was fixed on 16.03.2022 the Appellate Court has fixed the recall application for hearing only for 25.03.2022.

(11) In sum and substance, it is the argument of the learned counsel for the petitioner that this Court having set aside the earlier judgment passed by the Appellate Court on merits by observing that since the counsel for the appellant had not appeared the matter could only have been dismissed in default under Order 41 Rule 17 of the CPC by the Appellate Court and could not have been dismissed on merits, yet the Appellate Court has proceeded to decide the Appeal on merits in the absence of the counsel for the appellant.

(12) There is no quarrel with the basic proposition of law on which the argument has been made by the learned Senior Counsel, however the law has to be applied in the context of facts which are different in each case. The facts are evident from a perusal of the pleadings on record are as follows:-

"The petitioner's grandfather was initially inducted as tenant in the disputed shop situated In Building No.2, Misra Bhawan, Arya Nagar P.S. Naka Hindola, Lucknow. After his death the tenancy devolved upon the father of the petitioner. The respondent purchased the shop in question from Dr. R. N. Misra, Dr. D.N. Mishra, Late Colonel J. Misra and Shivanand Misra on 21.08.1999, and the sale deed was registered on 25.01.2000. The petitioners father died on 11.03.2011 and the tenancy of the shop in question devolved upon the petitioner. The Respondent filed an application for release

of the shop in question under Section 21(1)a of U.P. Act No.13 of 1972 registered as P.A. Case No.67 of 2012 **[Chandra Mohan Purswani Versus Hanuman Prasad Mishra]**. The case was allowed by the Prescribed Authority on 24.12.2013 and the petitioner was directed to hand over vacant possession of the shop in question within two months from the date of the judgement.

(a) The petitioner challenged the judgement dated 24.12.2013 in Rent Appeal No.6 of 2014. In the meantime the Respondent had already filed the Execution Case No.24 of 2014 which was pending consideration before the Additional Civil Judge (Senior Division), Court No.20 Lucknow. In Rent Appeal No.6 of 2014, the Appellate Court stayed the order of the Prescribed Authority on 17.02.2014. On 21.11.2014 the petitioner filed an application seeking amendment in the written statement for challenging the title of the Respondent on the ground that the shop in question was put in trust for the benefit of Jai Narayan Mishra Degree College and the shop could not be alienated by the Trust without the permission of the Director, Department of Education. The Application for amendment was rejected on 29.10.2015 with the finding that the Respondent had been admitted as Landlord in the original written statement and such admission could not be withdrawn by amending such written statement in Appeal.

(b) On 15.07.2016 the petitioner made another application bearing No.C-57 for recall of order dated 29.10.2015 and for the consideration of the application for amendment in the written statement. The application for recall of order was rejected on 14.05.2018 on the ground that the order dated 29.10.2015 had been passed on merits by the Appellate Court.

(c) The petitioner filed another application Paper No.C-94 seeking amendment in the written statement contending that the sale deed dated 21.08.1999 had been executed by alleged Trustees who had never been inducted as Trustees of the Trust owning the shop in question. The application Paper No.C 94 was rejected on 14.03.2019. The petitioner filed Petition No.8250 (R/C) of 2019 challenging the order dated 14.03.2019. This Court dismissed such petition on 29.03.2019.

(d) The petitioner preferred C.M.A. No.40741 of 2019, seeking a review of the order dated 14.03.2019 which was rejected on 16.04.2014. The petitioner preferred another Application Paper No.C-134 seeking leave to deliver interrogatories upon the Respondent on 4.2.2021 with respect to shops which had come into the possession of the Respondent during the pendency of Rent Appeal No.6 of 2014. The Appellate Court by its order dated 4.02.2021, proceeded to treat such application as an application for adjournment and accepted it on payment of cost of Rs.500/- and adjourned the Appeal to 10.02.2021. On 10.02.2021 the petitioner preferred an application for Recall of order dated 4.02.2021 and prayed that his application bearing Paper No.C134 be decided on merit. The application for Recall of order dated 4.02.2021 was heard and rejected by the Appellate Court on the same day. The petitioner preferred another Application bearing Paper No.A -138 seeking amendment in the written statement for asserting that during the pendency of the Appeal, the bonafide need of the Landlord had been satisfied by release of a large portion of the building in his favour by other tenants. The said application was heard on merits on 15.02.2021 itself and the Appellate Court proceeded to consider the said application as an application for adjournment and

vacated the interim order dated 17.02.2014 passed in Rent Appeal No.6 of 2014 at the time of its admission.

(e) The petitioner challenged the order dated 15.02.2021 before this Court in Writ Petition No.8445 (R/C) of 2021 which was disposed of by this Court by its order dated 25.03.2021 directing the Appellate Court to hear and decide the application bearing Paper No.A-138 for amendment of the written statement on the next date fixed that is on 26.03.2021 and thereafter decide the Rent Appeal itself expeditiously.

(f) In the meantime the petitioner had moved another application bearing Paper No.C - 142 on 20.02.2021 praying for recall of order dated 15.02.2021 and for restoration of interim order dated 17.02.2014. The Appellate Court heard such application for recall and restored the interim order on 16.03.2021.

(g) The petitioner moved another application Paper No.C-152 on 17.03.2021 for disposal of application, Paper No. C-153 on 17.03.2021, and then another application Paper No. C-158 while both applications were pending the Appellate Court passed an order on 26.03.2021 that the counsel for the petitioner instead of making submissions in support of the amendment application bearing Paper No.A-138 had sought an adjournment.

(h) On 30.03.2021 the petitioner filed another application bearing Paper No.C-160 duly supported by an affidavit bearing Paper No.C-161 for recall of order dated 26.03.2021.

(i) The petitioner also made an application bearing Paper No.C-159 praying for the application for Recall to be heard on 31.03.2021 itself. On 31.03.2021 the Appellate Court directed that the application bearing Paper No.C-159 and C-160 be listed on the next day that is on 1.4.2021. On the next day the applications were not decided and the Rent Appeal was directed to be listed on 6.04.2021 for final hearing.

(j) The petitioner in the meantime had moved a

Transfer Application before the District Judge, Lucknow, and on 6.4.2021 the Rent Appeal was adjourned to 09.04.2021 on account of pendency of the Transfer Application. The Rent Appeal remained pending and was fixed for 13.08.2021 for hearing.

(k) The petitioner moved another Application Paper No.C-179. The Court remained closed on 14.08.2021 and 15.08.2021 on account of being Second Saturday and Sunday. The next date fixed in the matter was 17.08.2021. The petitioner could not reach the Court on time and later on enquired and it was found that the Appellate Court had listed the Appeal on 21.08.2021 for arguments.

(l) The Appeal was thereafter adjourned to 24.08.2021 when it was adjourned for hearing to 26.08.2021. On 26.08.2021 the counsel for the petitioner found out that an ex-parte final judgement had been rendered on 26.08.2021 dismissing the Appeal.

(m) The petitioner filed Miscellaneous Case No.801 C of 2021 seeking restoration of the Rent Appeal and for recall of ex-parte judgement. The Appellate Court issued notice to the Respondent fixing 5.10.2021 for hearing.

(n) In the meantime the petitioner also filed a Petition No.23811 (R/C) of 2021 before this Court praying that Miscellaneous Case No.801 C of 2021 be directed to be decided expeditiously by the Appellate Court. This Court by an order dated 8.10.2021 directed the Appellate Court to decide the Restoration Application on the next date fixed or by hearing the same on a day to day basis. The Appellate

Court rejected the Miscellaneous Case No.801 C of 2021 holding that the judgement dated 26.08.2021 was not passed in the absence of the counsel for the petitioner and had been passed on merits.

(o) The petitioner challenged the judgement dated 26.08.2021 in Petition No.26690 (R/C) of 2021. This Court by its order dated 23.11.2021 allowed the petition and set aside the order dated 26.08.2021 with a finding that in the event of non-appearance of the counsel for the appellant, the Appellate Court could only dismiss the Rent Appeal No.6 of 2014 for want of prosecution and could not render a judgement on merits.

(p) It is the case of the petitioner that during the COVID-19 Pandemic the functioning of the Civil Court was severely restricted with effect from 9.01.2022 and the Courts were open only for a limited category of cases. With effect from 16.01.2022 the entry of litigants in the Civil Court was also barred. The Appellate Court listed the matter on 17.01.2022, 21.01.2022, 24.01.2022, and 27.01.2022 in quick succession but did not indicate whether the matter would be heard by virtual mode or the counsel were to appear physically. On 27.01.2022 the petitioner was directed to file written submissions within one day and the Appeal was directed to be listed on 29.01.2022. It was adjourned on 29.01.2022 and listed on 3.02.2022. The matter was again listed on 8.02.2022 and 11.02.2022 on which dates the counsel for the petitioner could not enter the Courts premises because entry was prohibited as per Covid-19 Protocol. Regular hearing in the Civil Court commenced only with effect from 14.02.2022 therefore, it has been argued that the non-appearance of the petitioner/appellant recorded in the order sheet on successive dates appears to be deliberate on the part of the Appellate Court. No hearing took place on all such dates as the counsel for the petitioner did not appear. The Appellate Court fixed the matter on 14.02.2022 for delivery of judgement but later on, adjourned the matter to 24.02.2022 giving time to the counsel for the petitioner to appear and argue the matter or to file written submissions. The counsel for the petitioner did not appear and did not file any written submissions in support of the Appeal on 24.02.2022 and the Appeal was fixed for judgement on 2.03.2022 without hearing the counsel for the petitioner. On 2.03.2022 the judgement was delivered rejecting the Appeal on merits and recording that no oral or written submissions have been made by the Appellant in support of the Appeal."

(13) From a perusal of the judgment and order impugned this Court finds that the Appellate Court has observed that despite several opportunities being given to the appellant for arguing the Appeal on merits, such opportunity was not availed of whereas in the judgments of the High Court dated 11.01.2018, 25.03.2021 and 29.03.2021 it had directed the Appeal to be decided within six months, 15 days respectively or as expeditiously as possible, and the latest judgment of this Court in Petition No.26690 (R/C) of 2021 on 23.11.2021 had directed that the Appeal be decided within two months and that the Appellant would not seek any adjournments. The counsel for the appellant had not appeared.

(14) The Appellate Court has made certain observations with regard to conduct of the counsel for the appellant which are necessary to be quoted for a better appreciation of the controversy:-

''प्रत्यर्थी के विद्वान अधिवक्ता के तर्कों को सुना तथा उनकी ओर से दाखिल लिखित तर्कों को अवलोकन किया गया। अपीलार्थी की ओर से

पर्याप्त अवसर दिये जाने के उपरान्त भी कोई मौखिक या लिखित तर्क प्रस्तुत नहीं किये गये।

माननीय उच्च न्यायालय द्वारा अपने आदेश दिनांकित 23–11–2021 के द्वारा इस न्यायालय द्वारा पारित निर्णय एवं आदेश दिनांकित 26–08–2021 को अपास्त करके पत्रावली को दो माह के अन्दर अपीलार्थी को सुनकर विधि सम्मत आदेश पारित करने के लिए निर्देशित किया गया था। माननीय उच्च न्यायालय के आदेश के अनुक्रम में प्रत्यर्थी द्वारा दिनांक 13–12–2021 को माननीय उच्च न्यायालय के आदेश की प्रमाणित प्रति प्रस्तुत की गयी, नोटिस जारी किये जाने के उपरान्त दिनांक 24–12–2021 को स्वयं अपीलार्थी हाजिर आया और उसके द्वारा माननीय उच्च न्यायालय के उक्त आदेश की ही प्रति दाखिल की गयी। माननीय उच्च न्यायालय के आदेश के अवलोकन से यह विदित होता है कि माननीय उच्च न्यायालय द्वारा दोनों पक्षों को सुनकर उक्त आदेश पारित किया गया है कि अधीनस्थ न्यायालय दो माह के अन्दर अपीलार्थी को सुनवाई का मौका देकर विधिसम्मत आदेश पारित करना सुनिश्चित करें।

यहॉ यह भी उल्लेखनीय है कि माननीय उच्च न्यायालय द्वारा अपने आदेश में अपीलार्थी के इस तर्क पर ध्यान देते हुए यह अभिमत दिया गया था कि वह चाहे तो न्यायालय के विरूद्व अपना स्थानान्तरण प्रार्थना–पत्र प्रस्तुत कर सकता है, इसके लिए वह स्वतंत्र है। इस क्रम में अपीलार्थी के द्वारा दिनांक 07–01–2022 को स्थानान्तरण प्रार्थना–पत्र संख्या 30/2022, माननीय जनपद न्यायाधीश महोदय के यहॉ प्रस्तुत किया गया, जिस पर दोनों पक्षों को विस्तारपूर्वक सुनकर दिनांक 21–01–2022 को स्थानान्तरण प्रार्थना–पत्र निरस्त कर दिया गया। माननीय जनपद न्यायाधीश महोदय ने अपने उक्त आदेश दिनांकित 21–01–2022 के द्वारा अपीलार्थी की पूरी गतिविधि तथा इस पत्रावली का निस्तारण न होने देने के आचरण का विशिष्ट रूप से उल्लेख किया गया है। उक्त आदेश पारित होने के उपरान्त न्यायालय द्वारा अपीलार्थी को सुनवाई के लिए कई बार अवसर दिया गया लेकिन यह जानबूझकर न्यायालय के समक्ष नहीं आये और उनके जूनियर अधिवक्ता आर्डरशीट पर आदेश पारित होने के बाद तिथि की जानकारी प्राप्त करके चले जाते हैं।

उल्लेखनीय है कि माननीय उच्च न्यायालय द्वारा पारित आदेश दिनांकित 23-11-2021 से लेकर आज तक कई तिथियां नियत होने तथा माननीय उच्च न्यायालय के द्वारा प्रदत्त दो माह की समय सीमा समाप्त हो गयी है, लेकिन पर्याप्त अवसर दिये जाने के बाद भी अपीलार्थी की ओर से न तो कोई लिखित बहस दाखिल की गयी और न ही व्यक्तिगत रूप से उपस्थित होकर मौखिक बहस की गयी, जबकि माननीय उच्च न्यायालय द्वारा अपने परिपत्र संख्या: 2419/LXXXVII-CPC/e-Courts/Allahabad दिनांकित 02-01-2022 की गाइडलाइन के पैरा-6 में यह निर्देशित किया गया है कि पक्षकार अपनी लिखित बहस कम्प्यूटर सेक्सन में दाखिल कर सकते हैं ताकि न्यायालय द्वारा उक्त लिखित बहस के आधार पर निर्णय पारित किया जा सके। उक्त परिपत्र के अनुक्रम में अपीलार्थी को पर्याप्त एवं समुचित अवसर प्रदान किये जाने के उपरान्त भी उनके द्वारा कोई लिखित बहस दाखिल नहीं की गयी और न ही मौखिक बहस हेतु उनकी ओर से कोई न्यायालय के समक्ष उपस्थित हुआ।

यह भी उल्लेखनीय है कि अपीलार्थी की ओर से प्रस्तुत स्थानान्तरण प्रार्थना पत्र पर बहस हेतु माननीय जनपद न्यायाधीश महोदय के समक्ष अपीलार्थी उपस्थित हुए और उनकी ओर से मौखिक बहस भी की गयी। उनका यह आचरण यह प्रदर्शित करता है कि अपीलार्थी जानबूझकर इस अपील को माननीय उच्च न्यायालय द्वारा निर्धारित समय सीमा के अन्तर्गत् निस्तारित नहीं होने देना चाहते हैं। चूँकि माननीय उच्च न्यायाल; अपीलार्थी जानबूझकर इस अपील को माननीय उच्च न्यायालय द्वारा प्रदत्त दो माह की समय सीमा व्यतीत हो x;h है, और न्यायालय द्वारा अपीलार्थी को सौखिक बहस अथवा लिखित बहस हेतु बाध्य नहीं किया जा सकता जबकि वह जानबूझकर दुराशय से न्यायालय के समक्ष मौखिक अथवा लिखित बहस प्रस्तुत नहीं करना चाहते। इसलिए इस अपील के निस्तारण

में और विलम्ब किया जाना समुचित नहीं होगा। बल्कि पत्रावली पर उपलब्ध समस्त प्रलेखीय साक्ष्यों के आधार पर अपील का निस्तारण गुणदोष के आधार पर किया जाना न्यायसंगत होगा तदनुसार पत्रावली पर उपलब्ध समस्त प्रलेखीय साक्ष्यों के आधार पर अपील का निस्तारण गुणदोष के आधार पर किया जा रहा है।''

(15) It has been argued on behalf of the learned counsel for the petitioner that this Court had stopped the Subordinate Courts from hearing the counsels physically and he has referred to guidelines issued by the High Court, dated 16.01.2022 wherein in addition to earlier guidelines, the High Court had directed the District Judge to ensure 50% of the Judicial Officers of the total strength to attend the Court on time on rotation basis and that Judicial Officers and staff who were in the Family way were to be allowed work from home and the litigants and their representatives would be prohibited in the Court premises but in urgent cases with prior permission of the District Judge, Such persons may be allowed to enter the Court premises. These guidelines were to be effective from 17.01.2022 till further orders.

(16) Shri B.K. Saxena, who appears for the respondent has on the other hand, referred to the Guidelines dated 06.02.2022 and 13.02.2022. In 06.02.2022 Guidelines Direction No.1 of the Guidelines issued on 16.01.2022 was withdrawn and all Judicial Officers were directed to function in Court. Point No.7 in the Guidelines issued on 09.01.2022 also stood withdrawn but the remaining Guidelines were to operative with Modification with effect from 08.02.2022. In the Guidelines issued on 13.02.2022, the High Court had directed all the Courts to remain open and to take all Judicial Work and Administrative matters as per applicable Provisions and Rules and Circulars issued from time to time. The Courts were directed not to close even if Covid-19 Positive cases was found in the Court Campus but would continue to work after complete sanitization. The Presiding Officer was directed to take all possible steps to ensure that limited number of parties/counsel are present anyone time for court proceedings, but should not prevent appearance of the parties in the case unless for reasons of illness. Masks were directed to be used as well as sanitizer and social distancing guidelines were to be followed in the Court premises. Necessary cooperation from concerned Bar Association was to be sought to restrict /prohibit the entry of the necessary Advocates /Litigants into Court premises. The Advocates/Litigants were to leave the Court rooms/campus, as soon as their matter was over and only such Advocates and Litigants were to be permitted to enter into the Court Premises whose cases/matters were listed on a particular date.

(17) It has been submitted by Shri B. K. Saxena, that Courts started functioning physically in a limited manner with effect from 08.02.2022 and after the guidelines were issued on 13.02.2022 all Courts started functioning in full strength. The entry of Advocates whose matters were urgent were not prohibited at any point of time. The Advocates whose matters were listed were permitted to enter into Court premises and were asked to leave after their matter was over. He has referred to the orders passed by the Appellate Court which have also been referred to by the learned counsel for the petitioner i.e. the orders dated 11.02.2022 filed at Page no.65 of the paper book,

wherein the Appellate Court had observed that on calling out of the case, the counsel for the respondent was present. The counsel for the appellant was not present, no written submissions were filed by the appellant. The matter was directed to be listed on 14.02.2022. On 14.02.2022 the counsel for the appellant failed to appear and did not file written statements whereas the respondents written submissions had already been filed and respondents counsel was present. The Court looking into the Covid-19 Pandemic gave the appellant one more opportunity to appear and argue the matter and also to file written submissions. The Court directed the matters to be listed again on 24.02.2022. On 24.02.2022 again no one appeared on behalf of the appellant, no written submissions were filed. The Court had noted that counsel for the respondent was present in Court. The Court directed the matter to be listed on 02.03.2022 for the delivery of judgment. It has been argued by Shri Saxena, that counsel for the respondents was present on every date. The counsel for the appellant, however, did not appear. If the entry of Advocates was prohibited in Court campus even counsel for the respondent could not have appeared.

(18) This Court has perused the Guidelines issued by the High Court and it appears that physical functioning of the Subordinate Courts and Tribunals was affected for sometime with effect from 08.02.2022. All the Courts started functioning and also presence of counsels were not restricted and they could apply for permission in urgent matters to the District Judge to appear before the court concerned. However, they had to leave the Court as soon as their matter was over.

(19) It is apparent from the order passed by this Court on earlier dated 23.11.2021 that the Court had given only two months time from the date of production of certified copy of the order before the Appellate Court for the Appellate Court to decide the matter and the petitioner was directed not to take any adjournments. The Court had reiterated its earlier orders where this High Court had directed the Appellate Court to decide the Appeal as expeditiously as possible. This Court has also noticed from the Appellate Court's order that this Court's order was not produced by the appellant initially before the Appellate Court and the respondent filed the order before the Appellate Court on 13.12.2021. Thereafter a date was fixed for arguments after issuance of notice to the appellant.

(20) From the facts as mentioned in the pleadings on record and as have come out from the judgment and order dated 02.03.2022, this Court is of the considered opinion that there was no contemptuous disregard of this High Court's directions dated 23.11.2021 by the learned Appellate Court. It is apparent that the respondent has a decree in his favour of the learned Trial Court since 24.12.2013. The Execution case has already been filed by the respondent which is pending before the court concerned. The release application was filed by the respondent in 2002. The respondent has not been able to get peaceful vacant possession of the premises in question for the past ten years.

(21) This Court has also considered the judgment of the learned Trial Court as well as the Appellate Court on its merits and has found that the learned Trial Court and the Appellate Court have both noticed that the Landlord wished to establish an independent business of running a Restaurant on the premises in question which was commercial in nature and the Landlord had also stated

that when his Restaurant would start running smoothly and profitably, then he would shift his family from the First Floor and the Second Floor and take another residential accommodation, and start using the building in question as a Hotel after taking due permissions and making alterations as are necessary in the construction. The learned Trial Court as well as the Appellate Court have noticed that the building in question was situated in Arya Nagar, Naka Hindola, with Aishbagh Road on the North and a PWD Road on the South and it is a busy Commercial area which has hundreds of Restaurants/Hotels for travellers as it was close to Charbagh Railway Station and the Airport. The need of the Landlord was found genuine and bonafide.

(22) With regard to the comparative hardships, the Appellate Court has relied upon judgments of the Supreme Court and of this Court namely **Shiv Swaroop Gupta Vs. M.C. Gupta reported in AIR (2001) SC 2896** that if the tenant fails to look for alternative accommodation even during long pendency of release application, the issue can be decided in favour of the Landlord.

(23) The proposition in law having been correctly appreciated and also the facts as mentioned in the pleadings on record, this Court sitting in limited jurisdiction under Article 227 of the Constitution of India, does not find any good ground to show interference in the order impugned.

(24) The petition stands **dismissed.**

(25) No order as to costs.

(26) Learned Senior counsel at this stage, has requested that some time be given to the petitioner to vacate the premises. **The petitioner shall vacate the premises within two months from today** and shall continue to pay rent/damages as directed by the learned Trial Court during the time of his possession till such time that he delivers vacant and peaceful possession to the Landlord the rent, if any has already been deposited by the petitioner, shall be adjusted in such dues as are admissible to the Landlord.

(27) Since this Court has not interfered in the order of the learned Courts below, it is expected that the Landlord shall give two years of rent that he had offered for the property which was commercial, as compensation to the tenant on his delivering vacant and peaceful possession of the shop in question to the Landlord.

(2022)04ILR A1294
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Matters U/A 227 No. 868 of 2021

Chhaila Khan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mahabir Yadav, Sri Najakat Ali, Sri Ram Awtar, Sri R.A. Rao

Counsel for the Respondents:
A.G.A.

Criminal Law - Code of Criminal Procedure -Allegation of forgery against the Tahsildar-Cognizance only taken if sanction u/s 197 Cr.P.C. granted by the Government-Lower court rightly held that without sanction the court cannot take cognizance.

Petition dismissed. (E-9)

List of Cases cited:

Gian Singh Vs St. of Pun. & anr., (2012)10 SCC 303,

(Delivered by Hon'ble Mohd. Aslam, J.)

1. Heard Shri Mahabir Yadav, learned counsel for the petitioner and Shri L.D. Rajbhar, learned A.G.A. on behalf of the State.

2. The instant petition under Article 227 of the Constitution of India has been filed with the prayer to quash the impugned order dated 03.11.2020 passed by the learned Additional Sessions Judge, Court No.2, Rampur in Criminal Revision No.112 of 2018 (Chhaila Khan v. State of U.P. & Ors.) as well as the impugned order dated 13.07.2018 passed in Criminal Misc. Case No.225 of 2018 (Chhaila Khan v. Niyamat Khan & Ors.).

3. The brief facts necessary for disposal of this petition are that the land Arazi No.286 (area 0.785 hectare) situated in Village-Bhitar Gaon, Tehsil- Shahbad, District-Rampur was vested with the State Government. The respondents in collusion with respondent no.9-Bhagwant Swaroop posted as Tehsildar made forgery in the column of 'tippadi', deleted the sign of cross and entered their names fraudulently. A case numbered as Case No.05 of 2001-02 (Niyamat Khan & Anr. v. State of U.P.) was filed and learned Additional Collector-Rampur vide order dated 30.3.2002 held that the said land vested with the State Government. The opposite party challenged the said order by filing Revision No.145 of 2008-09 before learned Additional Commissioner (Judicial) Moradabad, Division Moradabad. The said revision was dismissed on 20.11.2009 and the order dated 30.3.2002 was affirmed.

4. It is contended by learned counsel for the petitioner that inspite of the aforesaid orders passed by the courts below, the revenue authorities are not complying with the orders and the private respondents are still in possession of the said land. It is further contended that forged entry was made by the private respondents in collusion with respondent no.9.

5. Per contra, learned A.G.A. has vehemently opposed the contentions of learned counsel for the petitioner and contended that under Section 156(3) Cr.P.C., the court may pass order of registration of the First Information Report against the accused regarding which he is competent to take cognizance i.e. in contrast of Section 154 Cr.P.C. It is further contended that it is also barred by Section 195 Cr.P.C. for which only complaint can be filed before the competent authority before whom the judicial proceeding was pending. Learned A.G.A. has also contended that the said application under Section 156(3) Cr.P.C. was also barred by Section 197 Cr.P.C.

6. I have given thoughtful consideration to the contentions raised by learned counsel for the parties.

7. The power of lodging FIR by the the Station House Officer under Section 154 Cr.P.C. and the power of Magistrate under Section 156(3) Cr.P.C. is almost similar with one distinction that order for registration of FIR under Section 156 (3) Cr.P.C., the learned court was competent to take cognizance of offence on the basis of the application under Section 156 (3) Cr.P.C. Cognizance can only be taken in the

cases in which sanction under Section 197 Cr.P.C. was granted by the Government. No such cognizance could be taken against the public servant regarding illegal act done by the public servant in discharge of his official duty.

8. In above circumstances, learned lower court has rightly held that without sanction the court cannot take cognizance. Apart from the complaint being barred by Section 156 (3) Cr.P.C. it is also barred by Section 195 Cr.P.C. because the proceedings could be initiated after enquiry under Section 340 Cr.P.C. by lodging the complaint and no cognizance otherwise could be taken.

9. In this regard, the relevant Sections 195 Cr.P.C. and 197 are reproduced below:-

*"**195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.-** (1) No Court shall take cognizance-*

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence,

except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub- clause (ii),

except on the complaint in writing of that Court, or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate."

*"**197. Prosecution of Judges and public servants-**(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-*

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government: [Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the

expression" State Government" occurring therein, the expression" Central Government" were substituted.]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub- section will apply as if for the expression" Central Government" occurring therein, the expression" State Government" were substituted.

[(3A) Notwithstanding anything contained in sub- section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.]

[(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991 , receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

10. In above circumstances, this Court is not inclined to interfere in the impugned order.

11. The petition under Article 227 of the Constitution of India is ***dismissed,*** accordingly.

(2022)04ILR A1297
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2021

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matters U/A 227 No. 3015 of 2018

Hari Mohan Sharma ...Petitioner
Versus
Goverdhan Dutta & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anshul Kumar Singhal

Counsel for the Respondents:
Sri Shyam Sunder Sharma

Civil Law - Code of Civil Procedure-Order XXII Rule 5 - Parties impleaded by the Trial court-challenged-since no proprietory right in the estate of deceased would be determined-under Order XXII Rule 5-allowing substitution - hardly affect the merit of suit-impugned order affirmed.

Petition dismissed. (E-9)

List of Cases cited:

1. Mohinder Kaur & anr. Vs Piara Singh & ors. of Punjab & Haryana Court

2. Chiragh Din Vs Dhlawar Khan AIR 1934 Lah 465

3. Mahomed Khan Vs Jan Mohammad, AIR 1939 Lah 580

4. Daular Ram Vs Mt. Meero, AIR 1941 Lah 142

5. Raj Bahadur Vs Narayan Prasad, AIR 1926 All 349

6. Jai Narain Vs Ram Deo AIR 1933 Oudh 207

7. Dashrath Rao 14 of 17 Kate Vs Brij Mohan Srivastava, (2010) 1 SCC 277

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

1. Heard Shri Anshul Kumar Singhal, learned counsel for the petitioner and Shri Shyam Sunder Sharma, learned counsel for the respondents.

2. By means of this petition under Article 227 of the Constitution, the petitioner seeks to set aside the order dated 13.01.2015 passed by the Additional Civil Judge (Senior Division), Mathura in Original Suit No. 173 of 1982 and the connected Original Suit No. 254 of 1982 and also the order dated 13.02.2018 passed by the Additional District Judge, Court No. 8, Mathura in Civil Revision No. 64 of 2015.

3. The controversy involved in the present case arises for the two sets of legal heirs of late Goverdhan Dutt claiming to substitute Goverdhan Dutt in the connected suit proceedings. While Original Suit No. 173 of 1982 was instituted by the present petitioner seeking permanent prohibitory injunction against Goverdhan Dutt, Goverdhan Dutt also instituted a suit being Original Suit No. 254 of 1982 against the present petitioner seeking the relief in the nature of mandatory injunction and a consequential relief for restoration of possession of the suit land. Both the above suits came to be connected for the purposes of adjudication and disposal.

4. It is during the pendency of above suit proceedings, Goverdhan Dutt died. While Smt. Babli @ Chitra, daughter of one Jai Prakash Hada was claimed by the present petitioner, to be legal heir of late Goverdhan Dutt as grand daughter of late Goverdhan Dutt, in the suit filed by late Goverdhan Dutt being Original Suit No. 254 of 1982, the respondent nos. 2, 3 & 4 herein in this petition, filed an application seeking substitution/ impleadment to continue the suit proceedings as heirs and legal representatives of late Goverdhan Dutt. The objections were filed by the l respective parties *qua* two substitution applications.

5. The trial court in its judgment found it to be appropriate to allow both the rival parties to be parties in the suits as legal representatives of Goverdhan Dutt for the purposes of continuation of suit proceedings instead of adjudicating the issue of right of the parties to be substituted exclusively as heir/legal representative of late Goverdhan Dutt. Against the said order, revision was filed by the present petitioner which also came to be dismissed.

6. Learned counsel for the petitioner submitted that it was a duty cast upon the court to determine the issue of legal right to be heir/ legal representative of a party in the event of dispute being raised, under Order

XXII Rule 5 of Code of Civil Procedure, 1908 (in short "CPC') as it provides for the same. Learned counsel for the petitioner argued that determination of rights of a person to be heir/ legal representative of a deceased party in the suit, can be very well determined by permitting the parties to lead evidence in support thereof. He submits that the proviso to Rule 5 of Order XXII CPC is clearly of indicative of the intendment of legislature that the court concerned should decide the controversy of heir-ship, if any raised and, therefore, according to him the trial court was not justified in allowing the substitution application of both the claimants to substitute the deceased defendant in one suit and as plaintiff in another connected suit. According to learned counsel for the petitioner, the legal principles had been wrongly interpreted by the trial court. He also submitted that the court revising the order of trial court, simply confirmed the order without recording any independent finding on the question as to legal representative, as mandated Order XXII Rule 5 CPC.

7. *Per contra*, it has been submitted by learned counsel for the respondents that the legal position was that any application in suit or appeal by a party to substitute the deceased in a suit or appeal for that matter, was only for the purposes of adjudication of the case, meaning thereby, the suit proceedings were to be brought to their logical end and were not to be lingered on for technical pleas as to who would be the right person to substitute the deceased party. He submited that the rival parties claiming to be rightful heirs/ legal representatives could draw any declaratory decree *qua* proprietary right in the suit property in appropriate proceedings.

8. Having heard learned counsel for the respective parties and their respective arguments raised across the bar and having gone through the pleadings so raised, I find that the discretion exercised by the trial court confirmed in revision, has to be looked into, whether right or wrong, in the backdrop of the plaint case of the respective parties and the consequential proceedings drawn.

9. I find that petitioner was seeking injunction in the nature of permanent prohibitory injunction, whereas, late Goverdhan Dutt had instituted the suit seeking mandatory injunction and recovery of possession. Thus the suits that have been connected, the pleas taken were for injunction and mandatory injunction respectively.

10. The petitioner before this Court has filed a suit in the nature of permanent prohibitory injunction. If he wants to injunct a party, it would be his choice to implead that party, if in his choice Chitra Jaiswal is the only heir of late Goverdhan Dutt and she should be injuncted, it does not bind the rival heirs if they are not impleaded or substituted. Similarly if injunction is also granted against further three persons who are claiming to be heirs of late Goverdhan Dutt, it does not in any manner affects the right of present petitioner rather helps him out in getting the decree of injunction purposefully executable and therefore, for the purpose of continuation of O.S. No. 173 of 1982 if both the rival legal representatives of late Goverdhan Dutt are impleaded, no prejudice would be caused to the present petitioner.

11. Again in the suit filed by Goverdhan Dutt, it could not be a concern of the petitioner as to who steps into the shows of plaintiff of that case because the petitioner is

the defendant and a suit of mandatory injunction would be decreed only in the event petitioner fails to prove his case for prohibitory injunction as owner in possession of the suit land. As far as the proprietary right in respect of a particular property left by Goverdhan Dutt is concerned that would be determinable in the event petitioner loses his suit and then the *lis* could be between the two rival sets claiming to be the heir of late Goverdhan Dutt in appropriate suit proceedings.

12. Argument that has been very vehemently pressed before me by learned council for the petitioner was that adjudication as provided rule 5 of order XXII CPC was a must to finally adjudicate the heir-ship.

13. In my view the legal position *qua* heir-ship to the estate of a deceased is quite different from the right to consider for continuation of a suit proceeding as legal heir of a deceased party in such out. The issue is no more *res integra* but I find it to be a fit case to refresh the already settled legal position.

14. For appreciating the legal principle the relevant provision of order XXII of CPC is reproduced hereunder in its entirety:

"ORDER XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

1. No abatement by party's death, if right to sue survives.--The death of a plaintiff or defendant shall not cause the suit to abate ***if the right to sue survives***

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit."

(Allahabad amendment)

2. **Procedure where one of several plaintiffs or defendants dies and right to sue survives--**Where there are more plaintiffs or defendants than one, and any of them dies, and where the ***right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to the effect to be made on the record, and the suit shall proceed*** at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

3. **Procedure in case of death of one of several plaintiff or of sole plaintiff.--** (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies ***and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative, of the deceased plaintiff to be made a party and shall proceed with the suit.***

(2) ***Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased*** plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

4. **Procedure in case of death of one of several defendants or of sole defendant.--** (1) Where one of two or more defendants dies and the ***right to sue does not survive against the surviving defendant*** or defendants alone, or a sole defendant or sole surviving defendant dies and ***the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the***

deceased defendant to be made a part and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

[(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of. any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may. in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where--

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.]

4-A. Procedure where there is no legal representative.- (1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court-

(a) may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased person as it thinks fit; and

(b) shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person.

5. Determination of question as to legal representative.- Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

[Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any sob-ordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefore, and the Appellate Court may take the same into consideration in determining the question.]

(Emphasis added)

15. Upon bare reading of the rule 1 it is clear that the suit would not abate automatically in the event of a death of either of the parties thereto and so also any of the proceedings undertaken by the original court as a consequence of preliminary decree where final decree is must if rights to sue survives.

16. Rule 2 provides for a procedure where one of the plaintiffs or defendants dies and right to sue survives. The rule provides that in the event of more than one plaintiffs or the defendants, as the case may be, and right to sue survives with the other remaining parties, the court shall make an entry accordingly and proceed with the suit.

17. Rule 3 provides for substitution in case of the death of one of the several plaintiffs or sole plaintiff. The rule provides for the court to cause legal representative of the deceased plaintiff to be made as a party and shall proceed with the suit in the event right to sue survives. Sub rule (2) of Rule 3 provides for abatement as against the deceased plaintiff if no application for substitution is filed within prescribed period of limitation and the court can also award cost to the defendants to be recovered from the estate of deceased plaintiff.

18. Similar is the provision contained under rule 4(1) and the court shall proceed with the suit. However, sub rule (2) gives an opportunity to a legal representative to make a defence also appropriate to his character as such. Sub rule (3) provides for abatement against the deceased defendant as well and sub rule 2 of Rule 3 is that no application is necessarily required for abatement in the event of death of the defendant. So the abatement is by fiction of law.

19. Sub rule (4) further vests right with the plaintiff not to substitute the legal representatives of a defendant who failed to submit any written statement or even if submitted, he failed to appear and contest the suit at the hearing and in such event even the judgment may be pronounced against the deceased defendant and the same will be having the same force as if the defendant had not died. Sub rule (5)(a) prescribes the limitation period for the plaintiff to file substitution application, whereas, sub rule 5(b) provides for setting aside the abatement and admission of belated substitution application with the aid of section 5 of Indian Limitation Act, 1963.

20. Rule 4(A) provides an opportunity for the court to appoint Administrator General or any officer of the court or such other person as would be just and proper in its discretion, to represent the estate of deceased person who was party to the suit and is not survived by any heir or legal representative for the purpose of suit only and the judgment of the suit shall bind the estate of such deceased person. Sub rule (2) of rule 4(A) shall ensure that a notice given to a person to represent the estate of deceased person, if willing to be so appointed and has no interest adverse to that of the deceased.

21. Rule 5 of Order XXII provides for determination of question as to whether a person is or is not entitled to be held legal representative of deceased plaintiff or deceased defendant. Proviso to rule 5 provides that in the event such a situation arises in an appeal, the court before determining that question, may direct the subordinate court to try such question and

return the record with evidence determining right of a person to be legal representative and then the appellate court may take the same into consideration in determining the question.

22. The provisions as contained in different rules and their respective sub rules of order XXII indicate four undisputed principles on the issue of substitution of a deceased plaintiff or defendant:

(a). If the right to sue survives then for the purposes of orderly conduct of the suit proceedings, the court will cause legal representative to substitute the original party on either side as the case may be, as there should be no abatement in such circumstances;

(b). In case of death of plaintiff/ plaintiffs or defendant/ defendants and in the event substitution is not filed within the limitation prescribed under the Indian Limitation Act, 1963, the abatement of suit proceedings as against such deceased party is automatic and therefore, if the substitution is filed belatedly, the plaintiff shall have to apply for setting aside the abatement as well;

(c). The parties to the suit have a right to apply for appointment of Administrator General or any other officer of the court or any such other person to represent the estate of the deceased if the cause is still surviving, to be appointed in the discretion of the court concerned; and

(d). when a question arises as to who can be held to be legal representatives of a deceased party to the suit, then such question shall be determined by the court of first instance. In case of appeal the appellate court though shall have to determine the question itself but may ask for the trial court to return findings after evaluation of evidence *qua* right of the party to be impleaded as legal representative of the deceased party in the suit.

23. So the analogy would be that suit should not abate, if the right to sue survives and the parties to the suit even if die, the court shall cause their representatives to be recorded and shall proceed to conclude the suit proceedings and in the event of dispute it is also determinable as to right to be recorded as a legal representative.

24. This above analogy leads to only one conclusion that the legislature intended for a suit once instituted to be brought to its logical end and for the technicalities of the death of either of the parties in the event right to sue survives, the legal representative be brought on record so as to achieve the end result i.e. conclusion of the suit proceedings with the adjudication of *lis*. This means that even a determination under rule 5 is aimed at achieving the above end result and not beyond that.

25. Thus, while a legal representative to be brought on record to protect the estate of deceased it is only limited to the right to that extent and continuation of suit proceedings. Whether a person gets an enforceable right in the estate of a deceased, meaning thereby the proprietary rights, that being not an issue in the suit the question would be how far such a decision would if adjudicated, will have binding force in case if suit is brought claiming right to the estate of the deceased. Right to property is between plaintiff and the defendant only and right to sue being limited to that extent and if any proprietary right is claimed by legal representatives, in my considered view, such a party will have to seek a remedy otherwise available in common law and even if there is

adjudication under rule 5, it will not operate as *res judicata* in such subsequent suit.

26. In my above view, I find support from the judgment in the case of Mohinder Kaur & Anr v. Piara Singh & Ors of Punjab and Haryana Court in which an argument was advanced by learned Advocate that the view taken by the Lahore High Court in the case if Chiragh Din v. Dhlawar Khan AIR 1934 Lah 465; Mahomed Khan v. Jan Mohammad, AIR 1939 Lah 580 and Daular Ram v. Mt. Meero, AIR 1941 Lah 142 that the decision under Order XXII Rule 5 of CPC would not operate as res-judicata in a subsequent suit for succession or heirship of the deceased party, was no more a good law and in support of his argument, learned Advocate in that case had relied upon a judgment of Allahabad High Court in Raj Bahadur v. Narayan Prasad, AIR 1926 All 349 and one Jai Narain v. Ram Deo AIR 1933 Oudh 207. The High Court rejected the argument and held that the inquiry under rule 5 of Order XXII to be only summary in nature and thus vide para 9 held thus:

"9. We are, therefore, of the opinion that in essence a decision under Order 22, Rule 5, Civil Procedure Code, is only directed to answer an orderly conduct of the proceedings with a view to avoid the delay in the final decision of the suit till the persons claiming to be the representatives of the deceased party get the question of succession settled through a different suit and such a decision does not put an end to the litigation in that regard. It also does not determine any of the issues in controversy in the suit. Besides this it is obvious that such a proceeding is of a very summary nature against the result of which no appeal is provided for. The grant of an opportunity to lead some sort of evidence in support of the claim of being a legal representative of the deceased party would not in any manner change the nature of the proceeding, In the instant case the brevity of the order (reproduced above) with which the report submitted by the trial Court after enquiry submitted by the trial Court after enquiry into the matter was accepted, is a clear pointer to the fact that the proceedings resorted to were treated to be of a very summary nature. It is thus manifest that the Civil Procedure Code proceeds upon the view of not imparting any finality to the determination of the question of succession r heirship of the deceased party."

27. This above view of the Punjab and Haryana High Court and the subsequent decision of the Allahabad High Court overruling Raj Narayan *(supra)* finds favour in the judgment of Supreme Court in Dashrath Rao Kate v. Brij Mohan Srivastava, (2010) 1 SCC 277 and vide paragraph nos. 16 and 17, the court held thus:

"16. As a legal position, it cannot be disputed that normally, an enquiry under Order 22 Rule 5, CPC is of a summary nature and findings therein cannot amount to res judicata, however, that legal position is true only in respect of those parties, who set up a rival claim against the legatee. For example, here, there were two other persons, they being Ramesh and Arun Kate, who were joined in the Civil Revision as the legal representatives of Sukhiabai. The finding on the Will in the order dated 9.9.1997 passed by the Trial Court could not become final as against them or for that matter, anybody else, claiming a rival title to the property, vis-`- vis, the appellant herein, and, therefore, to that extent, the

observations of the High Court are correct. However, it could not be expected that when the question regarding the Will was gone into in a detailed enquiry, where the evidence was recorded not only of the appellant, but also of the attesting witness of the Will and where these witnesses were thoroughly cross-examined and where the defendant also examined himself and tried to prove that the Will was a false document and it was held that he had utterly failed in proving that the document was false, particularly because the document was fully proved by the appellant and his attesting witness, it would be futile to expect the witness to lead that evidence again in the main suit. It was at the instance of the High Court in the revisional jurisdiction that the direction was given that the Trial Court should first decide as to whether who could be the legal representative of Sukhiabai and after complete enquiry, the Trial Court held the Will to be proved. The Will was not only attacked by the appellant on its proof, but also on merits, inasmuch as the respondent/defendant went on to contend before the Trial Court during that enquiry that the Will was unnatural, unfair and was executed in doubtful circumstances. The respondent/defendant had also relied on the reported decision of this Court in Girja Dutt Singh Vs. Gangotri Datt Singh [AIR 1955 SC 346]. The Trial Court, however, rejected this contention. On the other hand, the Trial Court found on merits that the appellant was living with Sukhiabai and Sukhiabai had adopted him orally.

17. Evidence of Ramesh Kate was also referred to, who asserted about this fact. Reference was also made to the evidence of Sukihabai herself in the Rent Control Case No. 14/90-91 that she had adopted Dashrath Rao (appellant herein) and that Dashrath Rao lived with her. Clear cut findings were given by the High Court in these proceedings that from the evidence of Prabhakar Rao (PW-2), the attesting witness, it was clear that Sukhiabai had signed in his presence and he had also signed in present of Sukhiabai and had also seen the other attesting witness signing the Will and attesting the same. Not only this, but the Trial Court also wrote a finding that the objection raised by the defendant (respondent herein) that Sukhiabai was not in a position to understand the Will on account of her poor physical condition, was also rejected by the Trial Court. It was also noted that the Will was executed six years prior to her death and as such, there was no question of Sukhiabai being suffered with any mental or physical disability for executing the Will. Therefore, it is on this basis that the Will was held to be proved. Once this was the position and in the same suit, the further evidence was led, there was no point on the part of the appellant/plaintiff to repeat all this evidence all over again. We have closely seen the relied upon ruling of the Himachal Pradesh High Court in Suraj Mani & Anr. Vs. Kishori Lal (cited supra). The ruling undoubtedly correctly holds that the finding in an enquiry under Order 22 Rule 5 cannot operate as res judicata, provided the very question needs to be decided. The factual situation, however, differs substantially. The case before the Himachal Pradesh High Court only pertained to the correctness of the order passed in the enquiry under Order 22 Rule 5, CPC. That was not a case where the question, as in the present case, fell for consideration. In fact, the Himachal Pradesh High Court also observed and, in our view, correctly, that it was still open to the petitioner (therein) during the trial of the suit to establish that the Will was competent and confered no right, title or

interest on the respondent and, therefore, the respondent was not entitled to any relief in the suit. Unfortunately, on evidence in this case, the respondent/defendant did not do anything and did not even challenge the evidence of the appellant that he had become owner of the Will. Merely because the evidence of respondent/defendant and Prabhakar Rao (PW- 2) was not repeated all over again, it cannot be held that the appellant/plaintiff could be non-suited on this ground."

28. In view of the above pronouncement of law on the subject, since no proprietary right in the estate of the deceased would be going to be determined under Order XXII rule 5, whether the application for substitution of respondent no. 1 is allowed or respondent nos. 2, 3 & 4 are allowed in respect of the deceased Goverdhan Dutt, it will hardly affect the merit of the suit and particularly claim of petitioner in his suit for perpetual injunction.

29. In view of the above, I do not find any fault with the order of trial court affirmed in revision that both the parties be impleaded for the purposes of continuation of the suit proceedings so as to bring them to their logical end. Even in the absence of legal representatives being set up, the court could have appointed in its discretion Administrator General or any other person to represent the estate of late Goverdhan Dutt who is defendant in the suit of the present petitioner as the very object of provision contained in Order XXII is to continue orderly the suit proceedings and to bring the suit proceedings to their logical end.

30. Hence, no interference is warranted in exercise of power under Article 227 of the Constitution of India with the orders impugned.

31. Petition lacks merit and is accordingly rejected with no order as to cost.

(2022)04ILR A1306
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2022

BEFORE

THE HON'BLE SIDDHARTH, J.

Matters U/A 227 No. 3600 of 2019

Smt. Saumitra Devi & Ors. ...Petitioners
Versus
M/S S.G. Rockbuilt Pvt. Ltd., Janakpuri, New Delhi & Anr. ...Respondents

Counsel for the Petitioners:
Sri Rakesh Pande, Sri Dileep Chandra Mathur, Sri Prem Shankar Kushwaha

Counsel for the Respondents:
Sri Kamlesh Kumar Mishra, Sri A.K. Srivastava

Civil Law - LOK Adalat Act,1987 - Petitioners entered into agreement to sale-later cancelled the agreement by a notice-Respondents filed a suit for specific performance of contract-7 issues framed-date fixed for deciding issue no. 4 and for disposal of compromise-none of the parties appeared to verify the compromise before Lok Adalat-but award was passed-Review-dismissed -present petition-settlement between parties can be challenged if violation of procedure u/s 20 of Act,1987-balatant violation of Regulation 9, 10 (2), and (3) of Regulation of 2009-in referring the dispute to Lok Adalat-violation of Rules and Regulation by a single member in purported capacity of Lok Adalat.

Petition allowed. (E-9)

List of Cases cited:

1. Estate Officer Vs Colonel H.Vs Mankotia (Retired), 2021 0 Supreme (SC) 597

2. P T Thomas Vs Thomas Job, 2005 (10) JT 304

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri Dileep Chandra Mathur, learned counsel for the petitioners and Sri A.K. Srivastava, learned counsel for the respondents.

2. This petition has been filed under Article 227 of the Constitution of India praying for setting-aside the order dated 14.05.2016 passed by Additional Chief Judicial Magistrate/Additional Civil Judge (S.D.), Gautam Buddh Nagar, in Original Suit No. 1323 of 2011, M/S S.G. Rockbuild Pvt. Ltd. Vs. Pradeep Kumar and others. Further prayer has been made to set-aside the order dated 13.11.2018 passed by Additional Civil Judge (S.D.)/Additional Chief Judicial Magistrate, Gautam Buddh Nagar, in Review Petition No. 04 of 2016 in Original Suit No. 1323 of 2011, M/S S.G. Rockbuild Pvt. Ltd. Vs. Pradeep Kumar and others.

3. The brief facts pleaded in the petition are that the defendants/petitioners entered into a registered agreement to sale dated 09.04.2008 with the plaintiffs/respondents on certain terms and conditions. The defendants/petitioners cancelled the agreement to sale by means of notice dated 13.10.2011. On 02.11.2011, the plaintiffs/respondents instituted an Original Suit No. 1323 of 2011 praying for a decree of specific performance of contract of sale dated 09.04.2008 against the defendants/petitioners. An application under Order 7, Rule 11 C.P.C. was filed by the defendants/petitioners before the trial court praying for rejection of the plaint of the original suit aforesaid.

4. It is alleged in the petition that the plaintiffs/respondents under undue pressure entered into compromise with the defendants/petitioners for specific performance of contract of sale dated 09.04.2008 and the same was filed and allegedly verified by the court on 20.02.2016. On 23.02.2016, the trial court framed 7 issues for adjudication in the suit and decided issue no. 3 on the same date. The date of 28.03.2016 was fixed for deciding issue no. 4 which was decided and the case was directed to be fixed for 14.05.2016 for disposal of compromise before Lok Adalat. None of the parties appeared before the Lok Adalat to verify the compromise or accept the terms of compromise but on 14.05.2016, the award was passed. Against the aforesaid award dated 14.05.2016 which was passed by the court in the capacity of Lok Adalat, the petitioners filed a review petition. The plaintiffs/respondents filed their objection to the review petition on 30.07.2016. The review petition was dismissed by the order dated 13.11.2018.

5. Learned counsel for the defendants/petitioners has submitted that the trial court passed the award dated 14.05.2016 assuming the powers of Lok Adalat which is against the provisions of Legal Services Authorities Act, 1987. He has submitted that as per Section 19, atleast two members are required to decide the compromise or settlement between the parties in Lok Adalat but in the present case, it has not been complied and the case has been decided by Additional Civil Judge (Senior Division), Gautam Buddh Nagar. He has further submitted that under Section

20 of the aforesaid act, one of the parties is required to make an application to the court to refer the matter to Lok Adalat for settlement and if the court is satisfied that there is chance of settlement between the parties, sends the matter to Lok Adalat. In the present case, the trial court without recording any satisfaction, decided the case acting as Lok Adalat. As per Section 20 of the Act aforesaid, the cases can only be referred to Lok Adalat after giving reasonable opportunity of hearing to the parties. In the present case, none of the parties made any application. As per Regulation 13 (6) of the National Legal Services Authority Regulation, 2009, Lok Adalat shall not determine reference at its own motion but only on the basis of settlement arrived at between the parties before it. As per Regulation 17 aforesaid, the award passed by Lok Adalat has to be verified by all the parties and the Lok Adalat is required to mention about the refund of court fees. If the counsels are not present, the members of Lok Adalat are required to identify the parties and before affixing their photographs are required to verify their signatures. It has been submitted that the award passed by the Lok Adalat is illegal and deserves to be set-aside. Learned counsel for the petitioner has relied upon the judgement of the Apex Court in the case of **Estate Officer Vs. Colonel H.V. Mankotia (Retired), 2021 0 Supreme (SC) 597** in support of his arguments.

6. Sri A.K. Srivastava, learned counsel for the respondents has opposed the arguments advanced on behalf of the petitioner. He has submitted that the present petition is not maintainable in view of the judgement of the Apex Court in the case of **P T Thomas Vs. Thomas Job, 2005 (10) JT 304**, whereby the Apex Court has held that award of Lok Adalat is final and no appeal or writ petition under Article 226 of the Constitution of India lies against the same.

7. After hearing the rival submissions, this Court finds that before proceeding further with this case, a look at the relevant sections of **The Legal Services Authorities Act, 1987** and relevant regulations of **The National Legal Services Authority (Lok Adalat) Regulations, 2009,** would be relevant for deciding present dispute and they are being quoted hereinbelow :-

The Legal Services Authorities Act, 1987 :-

19. Organization of Lok Adalats-- (1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organise Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

(2) Every Lok Adalat organised for an area shall consist of such number of

(a) serving or retired judicial officers; and

(b) other persons, of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee, or as the case may be, the Taluk Legal Services Committee, organising such Lok Adalats.

(3) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats organised by the Supreme Court Legal Services Committee shall be such as may be preseribed by the Central

Government in consultation with the Chief Justice of India. .

(4) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats other than referred to in sub-section (3) shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of any case pending before; or

(ii) any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organised.

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

20. Cognizance of Cases by Lok Adalats-- (1) Where in any case referred to in clause (i) of sub-section (5) of Section 19- (i) (a) the parties thereof agree; or (i) (b) one of the parties thereof makes an application to the court, for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement; or

(ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat:

Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heard to the parties.

(2) Notwithstanding anything contained in any other law for the time being in force, the Authority or Committee organising the Lok Adalat under sub-section (1) of Section 19 may, on receipt of an application from any, one of the parties to any matter refeèrred to in clause (ti) of sub-section (5) of Section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination:

Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

(3) Where any case is referred to a Lok Adalat under sub-section (1) or where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice equity, fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reterence received under sub-section (1) for disposal in accordance with law.

(6) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub-section (2), that Lok Adalat shall advice the parties to seek remedy in a court.

(7) Where the record of the case is returned under sub-section (5) to the court, such court shall proceed to deal with such case from the stage which was reached before such reference under sub-section (1).

The National Legal Services Authority (Lok Adalat) Regulations, 2009 :-

5. Notice to parties concerned :- The Member-Secretary of Secretary of the High Court Legal Services Committee or District Authority or, as the case may be, the Chairman of the Taluk Legal Services Committee convening and organizing the Lok Adalat shall inform every party concerned whose case is referred to the Adalat, well in time so as to afford him an opportunity to prepare himself for the Lok Adalat:

Provided that such notice may be dispensed with, if the Court while referring the case to the Lok Adalat fixes or informs the date and time of the Lok Adalat in the presence of the parties, or their advocates:

Provided further that if a party is not willing to refer their case to Lok Adalat, the case may be considered on its merits by the Court concerned.

6. Composition of Lok Adalat:- (a) At State Authority Level - The Member Secretary organising the Lok Adalat shall constitute benches of the Lok Adalats, each bench comprising of a sitting or retired Judge of the High Court or a serving or retired judicial officer and any one or two of the following:-

(i) a member of the legal profession;

(ii) a social worker of repute who is engaged in the upliftment of the weaker sections of the people, including the Scheduled Castes, the Scheduled Tribes, women, children, rural and urban labour and interested in the implementation of legal services schenmes or programmes.

(iii) a professional from the field related to the subject matter of the Lok Adalat; and

(iv) a mediator or a professional or a serving or retired senior executive.

(b) At High Court Level:- The Secretary of the High Court Legal Services Committee organizing the Lok Adalat shall constitute benches of the Lok Adalats, each bench comprising of a sitting or retired Judge of the High Court or a serving or retired Judicial Officer and any one or 'two of the following: a member of the legal profession; (ii) a social worker belonging to the category as mentioned in item (ii) of sub-para (a) above; (iii) a professional from the field related to the subject matter of the Lok Adalat; and (iv) a mediator or a professional or a serving or retired senior executive.

(c) At District Level:- The Secretary of the District Authority organizing the Lok Adalats shall constitute benches of the Lok Adalats, each bench comprising of a sitting or retired judicial officer and any one or two of the following- (i) a member of the legal profession; (ii) a social worker belonging to the category as mentioned in item (ii) of sub-para (a) above or a person engaged in para-legal activities of the area, preferably a Woman; (iii) a professional from the field related to the subject matter of the Lok Adalat; and (iv) a mediator or a professional or a serving or retired senior executive.

(d) At Taluk Level:- The Chairman of the Taluk Legal Services Committee organizing the Lok Adalat shall constitute benches of the Lok Adalat, each bench comprising of a sitting or retired judicial officer and any one or two of the following:-

(i) a member of the legal profession;

(ii) a social worker belonging to the category as mentioned in item(ii) of sub-para (a) above or a person engaged in para-legal activities of the area, preferably a Woman,

(iii) a professional from the field related to the subject matter of the Lok Adalat; and

(iv) a mediator or a professional or a serving or retired senior executive.

7. Allotment of cases to Lok Adalats:- (1) The Member Secretary, the Secretary of the High Court Legal Services Committee, the District Authority or Chairman of the Taluk Legal Services Committee, as the case may be, shall assign specific cases to each bench of the Lok Adalat.

(2) The Member Secretary, the Secretary of the High Court Legal Services Committee or the District Authority or Chairman of the Taluk Legal Services Committee, as the case may be, may prepare a cause list for each bench of the Lok Adalat and intimate the same to all Concerned at least two days before the date of holding of the Lok Adalat. Every bench of the Lok Adalat shall make sincere efforts to bring about a conciliated settlement in every case put before it without bringing about any kind of coercion, threat, undue influence, allurement or misrepresentation.

8. Holding of Lok Adalats- Lok Adalats may be organised at such time and place and on such days, including holidays as the State Authority, High Court Legal Services Committee, District Authority, or the Taluk Legal Services Committee, as the casc may be, organising the Lok Adalat deems appropriate.

9. Jurisdiction of Lok Adalats.- Lok Adalats shall have the power only to help the parties to arrive at a compromise or settlement between the parties to a dispute and, while so doing, it shall not issue any direction or order in respect of such dispute between the parties.

10. Reference of cases and matters. -(1) Lok Adalat shall get jurisdiction to deal with a case only when a court of competent jurisdiction orders the case to be referred in the manner prescribed in Section 20 of the Act or under Section 89 of the Code of Civil Procedure, 1908 (5 of 1908).

(1A) A pre-litigation matter may be referred to the Lok Adalat by the concerned Legal Services Institution on the request of any of the parties after giving a reasonable opportunity of being heard to the other party.

(2) A mechanical reference of pending cases to Lok Adalat shall be avoided and the referring court shall, prima facie satisfy itself that there are chances of settlement of the case through Lok Adalat and the case is appropriate to be referred to Lok Adalat:

Provided that matters relating to divorce and criminal cases which are not compoundable under the Code of Criminal Procedure, 1973 (2 of 1974) shall not be referred to Lok Adalat.

(3) In a pending case where only one of the parties had made application to the court for referring the case to Lok Adalat, or where the court suo motu is satisfied that the case is appropriate to take cognizance by Lok Adalat, the case shall not be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the parties.

(4) The need based continuous Lok Adalats may be constituted in order to facilitate regular reference and timely disposal of cases.

12. Pre-Litigation matters. - (1) In a Pre-litigation matter it may be ensured that the court for which a Lok Adalat is organised has territorial jurisdiction to adjudicate in the matter.

(2) Before referring a Pre-litigation matter to Lok Adalat the

Authority concerned or Committee, as the case may be, shall give a reasonable hearing to the parties concerned.

Provided that the version of each party, shall be obtained by the Authority concerned or, as the case may be, the Committee for placing it before the Lok Adalat,

(3) An award based on settlement between the parties can be challenged only on violation of procedure prescribed in section 20 of the Act by filing a petition under articles 226 and 227 of the Constitütion of India.

13. Procedure in Lok Adalats.- (1) Members of Lok Adalat have the role of statutory conciliators only and have no judicial role and they, mutatis mutandis, may follow the procedure laid down in sections 67 to 76 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

(2) Members of Lok Adalat shall not pressurise or coerce any of the parties, to compromise or settle cases or matters, either directly or indirectly.

(3) In a Lok Adalat the members shall discuss the subject matter with the parties for arriving at a just settlement or compromise and such members of the Lok Adalat shall assist the parties in an independent and impartial manner in their attempt to reach amicable settlement of their dispute:

Provided that if it found necessary the assistance of an independent person or a trained mediator may also be availed of the by Lok Adalat.

(4) Members of Lok Adalat shall be guided by principles of natural justice, equity, fairplay, objectivity, giving consideration to, among other things, the rights and obligations of the parties, custom and usages and the circumstances surrounding the dispute.

(5) The Lok Adalat may conduct the proceedings in such a manner as it considers appropriate taking into account the circumstances of the case, wishes of the parties including any request by a party to the Lok Adalat to hear oral statements, and the need for a speedy settlement of the dispute.

(6) The Lok Adalat shall not determine a reference, at its own instance, but shall determine only on the basis of a compromise or settlement between the parties by making an award in terms of the compromise or settlement arrived at:

Provided that no Lok Adalat has the power to hear the parties to adjudicate their dispute as a regular court:

Provided further that the aware of the Lok Adalat is neither a verdict nor an opinion arrived at by any decision making process.

16. Communication between Lok Adalat and parties. - (1) A Lok Adalat may invite the parties to nmeet it or may communicate with it oraly or in writing and it may meet or communicate with the parties together or with each of them separately. The factual information concerning the dispute received from a party may be disclosed to the other party in order that the other party may have the opportunity to present any explanation:

Provided that the Lok Adalat shall not disclose any information, if one of the party desires to keep it confidential.

(2) Each party may on his own initiative or at the invitation of the Lok Adalat, submit suggestions for settlement of the dispute.

(3) When it appears to the Lok Adalat that there exists elements of a settlement which may be acceptable to the parties, the terms of a possible settlement may be formulated by the Lok Adalat and given to the parties for their observations and modifications, if any, suggested by the parties can be taken into consideration and terms of a possible settlement nmay be re-formulated by the Lok Adalat.

(4) If the parties reach a compromise or settlement of the dispute,

the Lok Adalat may draw up or assist the parties in drawing up the compromise or settlement.

17. Award - (1) Drawing up of the award is merely an administrative act by incorporating the terms of settlement or compromise agreed by parties under the guidance and assistance from Lok Adalat.

(2) When both parties sign or affix their thumb impression and the members of the Lok Adalat countersign it, it becomes an award. (see a specimen at Appendix-1) Every award of the Lok Adalat shall be categorical and lucid and shall be written in regional language used in the local courts or in English. It shall also contain particulars of the case viz., case number, name of court and names of parties, date of receipt, register number assigned to the case in the permanent Register (maintained as provided under Regulation- 20) and date of settlement. Wherever the parties are represented by counsel, they should also be required to sign the settlement or award before the members of the Lok Adalat affix their signature.

(3) In cases referred to Lok Adalat from a court, it shall be mentioned in the award that the plaintiff or petitioner is entitled to refund of the court fees remitted.

(4) Where the parties are not accompanied or represented by counsel, the members of the Lok Adalat shall also verify the identity of parties, before recording the settlement.

(5) Member of the Lok Adalat shall ensure that the parties affix their signatures only after fully understanding the terms of settlement arrived at and recorded. The members of the Lok Adalat shall also satisfy themselves about the following before affixing their signatures: that the terms of settlement are not unreasonable or illegal or one-Sided; and (a) that the parties have entered into the settlement voluntarily and not on account of (b) any threat, coercion or undue influence.

(6) Members of the Lok Adalat should affix their signatures only in settlement reached before them and should avoid affixing signatures to settlement reached by the parties outside the Lok Adalat with the assistance of some third parties, to ensure that the Lok Adalats are not used by unscrupulous parties to commit fraud, forgery, etc.

(7) Lok Adalat shall not grant any bail or a divorce by mutual consent.

(8) The original award shall form part of the judicial records (in pre-litigation matter, the original award may be kept with the Legal Services Authority or committee, concerned) and a copy of the award shall be given to each of the parties duly certifying them to be true by the officer designated by the Member-Secretary or Secretary of the High Court Legal Services Committee or District Legal Services Authority or, as the case may be- the Chairman of Taluk Legal Services Committees free of cost and the official seal of the Authority concerned or Committee shall be affixed on all awards.

8. From the perusal of the aforesaid sections of the Legal Services Authorities Act, 1987, (hereinafter referred to as "Act of 1987') and the National Legal Services Authority (Lok Adalat) Regulations, 2009, (hereinafter referred to as "Regulations of 2009'), it is clear that as per Section 19 of the Act of 1987, every Lok Adalat is to consist of two members as stated in Section 19 (2) (a) (b) of the Act. As per Section 19 (5), a Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or

a settlement between the parties to a dispute. As per Section 20 (1), a case can be referred to the Lok Adalat only if one of the parties to the dispute makes an application to the Court, for referring the same or if the Court is satisfied that the matter is an appropriate one to be taken cognizance by the Lok Adalat, the court can refer the same to the Lok Adalat. However, the proviso to Section 20 (1) is very clear that no case shall be referred to Lok Adalat without the consent of the parties or on the direction of the Court except after giving a reasonable opportunity of hearing. The certified copy of the order sheet of the Original Suit No. 1323 of 2011 which is on record shows that on 20.02.2016, the disputed compromise was filed before the trial court. On 23.02.2016, the trial court framed 7 issues for adjudication in the suit and decided only issue no. 3 on the same date. The case was directed to be listed on 28.03.2016. On 28.03.2016, issue no. 4, regarding insufficiency of court fees was decided by the trial court and one line was added in the order directing the case to be listed on 14.05.2016 before the Lok Adalat for disposal of the compromise between the parties. On 14.05.2016, by a nine line order, the Additional Civil Judge (Senior Division), Gautam Buddh Nagar, recorded the finding that the parties are present. The case is decided in terms of the compromise paper no. 61 Ka.1/1, 61 Ka.1/1/2, 61 Ka.1/2 and the compromise was directed to be made part of the decree. The first line of the order records that the record of the case has been put up before the Lok Adalat. This Court does not finds signature of either of the parties or their counsel on the order sheet of the Court dated 28.03.2016 and 14.05.2016 which shows that the orders were passed behind the back of the parties and their counsels.

9. Regulation 5 of Regulations of 2009 clearly provides that the Member Secretary of the Lok Adalat shall inform every party concerned, whose case is referred to Lok Adalat, well in time, so as to afford him an opportunity to prepare himself for the Lok Adalat. The only explanation is proviso 1 to Regulation 5 which provides that notice may be dispensed with, if the Court while referring the case to Lok Adalat fixes or informs the date and time of the Lok Adalat in the presence of the parties, or their advocates. In the present case as discussed above, neither the parties nor their counsels were present before the Lok Adalat on 14.05.2016 when the trial court passed the order of referring the case to Lok Adalat.

10. Regulation 6 of Regulations of 2009 reiterates that the Benches of Lok Adalat would comprise of two members as mentioned in Section 19 (2) of the Act of 1987. In the present case, only the Additional Civil Judge (Senior Division), Gautam Buddh Nagar, has signed the award dated 14.05.2016 which cannot be considered to be in accordance with Section 19 (2) and Regulation 6 (c) of Regulations of 2009.

11. Regulation 7 of Regulations of 2009 provides that the Member Secretary shall assign specific cases to each bench of the Lok Adalat. In the present case, the order of assignment of the case to the same bench which referred the matter to the Lok Adalat has not been explained by the counsel for the respondents.

12. Regulation 9 of Regulations of 2009 provides that Lok Adalats shall have the power only to help the parties to arrive at a compromise or settlement and as per Section 10 of Regulations of 2009, a

mechanical reference of pending cases to Lok Adalat is to be avoided and the referring court shall, prima facie, satisfy itself that there are chances of settlement of the case through Lok Adalat and the case is appropriate to be referred to Lok Adalat. No such compliance is evident from the material on record and the order sheet of the court below.

13. Regulation 10 (3) provides that the Court will not refer any case to Lok Adalat except after giving reasonable opportunity of being heard to the parties. In this case, no such opportunity was granted as discussed above.

14. In the present case, it is clear that on 28.03.2016, the issue no. 3 framed in the suit was decided and the case was directed to be listed before Lok Adalat on 14.05.2016. Therefore, there is blatant violation of Regulation 9, Regulation 10(2) and (3) of Regulations of 2009 by the trial court in referring the dispute to the Lok Adalat. As per Regulation 12 (3) of Regulations of 2009, there is clear provision that an award based on settlement between the parties can be challenged only on violation of procedure prescribed in Section 20 of the Act of 1987 by filing a petition under Article 226 and 227 of the Constitution of India. Hence, there cannot be any dispute that this petition under Article 227 of the Constitution of India is maintainable before this Court in view of Regulation 12 (3) of Regulations of 2009. The argument to the contrary raised by the learned counsel for the respondent relying upon the judgment of the Apex court in the case of **P.T. Thomas (supra)**, is of no avail since the Hon'ble Supreme Court in the aforesaid case did not considered the regulations laid down in the Regulations of 2009 and particularly Regulation 12 (3).

15. Regulation 13 (3) of Regulations of 2009 provides that the members of the Lok Adalat shall discuss the subject matter with the parties for arriving at a just settlement or compromise and they shall assist the parties in an independent and impartial manner in their attempt to reach amicable settlement of their dispute. In the present case, no settlement or compromise was arrived at before the Lok Adalat. The compromise dated 20.02.2020 was filed earlier and the court/Lok Adalat simply directed that the suit stands decided in terms of the aforesaid compromise.

16. No compromise with the assistance of the members of the Lok Adalat was arrived at all before the Lok Adalat.

17. Regulation 13 (6) clearly bars the Lok Adalat from determining a reference at its own instance and it has been directed to determine the same only on the basis of compromise or settlement between the parties by making an award in terms of the compromise or settlement arrived at.

18. Regulation 17 of Regulations of 2009 provides that drawing up of the award is merely an administrative act by incorporating the terms of settlement or compromise agreed by the parties under the guidance and assistance of the Lok Adalat. As per sub-clause (2) to Regulation 17 of Regulations of 2009, only when both the parties signed or affixed their thumb impression and the members of Lok Adalat countersigned it, it becomes an award as per specimen at Appendix- I of the regulations, which is quoted below :-

APPENDIX-I
BEFORE THE LOK ADALAT
HELD AT .....

[Organized by.....Authority/.....Committee under

Section 19, of Legal Services Authorities Act, 1987 (Central Act)]

Petitioner/Plaintiff/Complainant :

Defendant/Respondent :

No. of proceedings of the ..... Court/Authority/Committee

***Present* :**

Names of Judicial Officer/ Retired Judicial Officer :

Name of Members :

(1)

(2)

AWARD

The dispute between the parties having been referred for determination to the Lok Adalat and the parties having compromise/settled the case/matter, the following award is passed in terms of the settlement :

.....
.....

.....
.....

.....
.....

.....

The parties are informed that the court fee, if any, paid by any of them shall be refunded.

Petitioner/Plaintiff/Complainant

Defendant/Respondent

Judicial Officer

Member Member

Date :

(Seal of the Authority/Committee)

19. The sub-clause (3) of Regulation 17 of Regulations of 2009 provides that in cases referred to Lok Adalat from a court, it shall be mentioned in the award that the plaintiff/petitioner is entitled to refund of the court fees remitted. Sub-clause (4) further provides that where the parties are not accompanied or represented by their counsels, the members of Lok Adalat shall also verify and identify the parties.

20. In the present case, it is clear that no award has been drawn, as per Appendix-I. No order of refund of court fees has been passed nor the signatures of the parties has been verified by the members of Lok Adalat before recording the compromise or settlement between the parties. The members of the Lok Adalat were required to ensure that the parties affixed their signatures only after fully understanding the terms of settlement arrived at as per sub-clause (5) of Regulation 17 of Regulations of 2009 and the settlement is not unreasonable, illegal nor one-sided and the parties have entered into settlement voluntarily and not on account of any threat, coercion or undue influence. The Members of Lok Adalat have been cautioned under Regulation 17 (6) to ensure that Lok Adalats are not used by unscrupulous parties to commit fraud, forgery, etc.

21. From the above consideration, it is clear that the impugned award was passed in gross violation of the provisions of the Act of 1987 and the Regulations of 2009 by a single member in the purported capacity of Lok Adalat. The petition under Article 227 of the Constitution of India is hence maintainable in view of Regulation 12 (3) of Regulations of 2009 since there is gross violation of procedure prescribed under Section 20 of the Act of 1987 and also the

regulations framed in exercise of powers conferred by Section 29 of the Legal Services Authorities Act, 1987, duly notified vide notification **F.No.L/28/09/NALSA.**

22. In view of the above, the impugned award dated 14.05.2016 passed by the Additional Chief Judicial Magistrate/Additional Civil Judge (Senior Division), Gautam Buddh Nagar, in Original Suit No. 1323 of 2011, M/S S.G. Rockbuild Pvt. Ltd. Vs. Pradeep Kumar and others, is hereby quashed along with order dated 13.11.2018 passed by the same court on the Review Petition No. 04 of 2016 in Original Suit No. 1323 of 2011, M/S S.G. Rockbuild Pvt. Ltd. Vs. Pradeep Kumar and others.

23. The petition is accordingly, allowed.

24. The record of the suit shall be placed before the competent court for decision in accordance with law after giving adequate opportunity of hearing to the parties. The record shall be placed before the court concerned on 26.04.2022. Both the parties are represented before this Court through their counsels and hence, they will appear before the trial court personally or through their counsels on the next date fixed.

(2022)04ILR A1317
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2022

BEFORE

THE HON'BLE SIDDHARTH, J.

Matters U/A 227 No. 6890 of 2021

Hasmukh Prajapati ...Petitioner
Versus
Jai Prakash Associates Ltd., Gautam Budh Nagar ...Respondent

Counsel for the Petitioner:
Sri Veerendra Kumar Shukla, Sri Vidhu Prakash Pandey

Counsel for the Respondent:
Sri Anurag Khana (Sr. Adv.), Sri Rohan Gupta, Ms. Kriti Singh

Civil Law - Arbitration and Conciliation Act, 1996 -Arbitral award passed by sole arbitrator at New Delhi-proceeding initiated u/s 34 of Act before Commercial Court, District Gautam Budh Nagar-order challenged-if an application under Part I made in court-that court alone will have the jurisdiction over arbitral proceeding- Application u/s 11 was application under Part I of the Act,1996-section 42 will be attracted-Impugned order legal.

Petition dismissed. (E-9)

List of Cases cited:

1. BGS SGS SOMA JV Vs NHPC Ltd., 2019 0 Supreme (SC) 1350

2. Roger Shashoua Vs Mukesh Sharma & ors., (2017) 14 SCC 722

3. Sundaram Finance Limited Vs Abdul Samad & anr., (2018) 3 SCC 622

4. Mankastu Impex Pvt. Ltd. Vs Air Visual Ltd., (2020) 5 SCC 399

5. Mankastu Impex Pvt. Ltd. Vs Airvisual Ltd., (2020) 5 SCC 399

6. Shashoua (2009) EWHC 957

7. Bharat Aluminium Co Vs Kaiser Aluminium Technical 14 Services Inc, (2012) 9 SCC 552

8. Enercon (India) Ltd. & ors. Vs Enercon Gmbh & anr., (2014) 5 SCC 1.

9. Shashoua Principle, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Rep 376

10. Union of India Vs Hardy Exploration & Production (India) Inc., (2019) 13 SCC 472

11. M/s Inox Renewables Ltd. Vs Jayesh Electricals Ltd., passed on 13.04.2021 in Civil Appeal No. 1556 of 2021 arising out of SLP (C) No. 29161 of 2019)

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri Vidhu Prakash Pandey, learned counsel for the petitioner and Sri Anurag Khanna, learned Senior Advocate assisted by Sri Rohan Gupta, learned counsels for the respondent.

2. This petition under Article 227 of the Constitution of India has been filed challenging the order dated 18.08.2021 passed by Presiding Officer, Commercial Court, Gautam Budh Nagar, in Misc. Application No. 6 of 2020 in Arbitration Application No. 26 of 2019, Jai Prakash Associates Ltd. Vs. Hasmukh Prajapati, preferred u/s 34 of Arbitration and Conciliation Act, 1996 (arising out of award dated 16.02.2019 passed by the Arbitral Tribunal (Sole Arbitrator), New Delhi, in Arbitration No. 15 of 2018, Hasmukh Prajapati Vs. Jai Prakash Associates Ltd.) partly allowing the claim of the petitioner.

3. The brief facts of the case are as follows :-

(i) The petitioner booked an Apartment No.0301 in Kalypso Court, Tower No. l, Jaypee Greens Noida, admeasuring 315.12Sq. mtrs, in terms of the Concession Agreement, executed between Yamuna Expressway Industrial Development Authority and Jaypee Industries Limited, for the project of Yamuna Expressway Industrial Development Authority and as per the standard terms and conditions of the allotment of the apartment at Jaypee

Greens, respondent was under obligation to hand over the possession of constructed apartment to the allottee maximum within 36 months and additional grace period of 90 days from the date of its allotment.

(ii) The petitioner deposited Rs.18,48,000/- on 17.11.2007 on account of advance, against booking of said apartment which has been allotted in favour of petitioner vide provisional allotment letter dated 11.02.2008 for a total consideration of Rs. 1,96,02,400/-, subjcet to standard terms and conditions and the provisional allotment letter dated 11.02.2008 has been partially modified. Accordingly, the details of consideration has been revised from Rs.1,96,02,400/- to Rs.1,75,22,560/- and converted from "InstalIments Linked Plan" to "Down Payment Plan".

(iii) As per the payment plan, the petitioner has deposited balance of full Down Payment amount of Rs. 1,38,27,527/- through Demand Draft, issued by GE Money Housing Finance Co. on 27.08.2008 and balance payment of Rs.2,99,360/- was made on 09.09.2008 for booking against unit Ref. No.K0010301 in Kalypso Court-1, Jaypec Greens, Noida but even after expiry of 36 months, the permissible time for handing over possession of fully constructed/ ready apartment, even after passing of 4 years, the possession of apartment, allotted to the petitioner, has not been handed over rather illegal demand notices have been sent by the respondent.

(iv) Vide letter dated 18.07.2014, the petitioner has been informed about delivery of possession of apartment, subject

to NGT clearance and due to the said reason, the apartment was not ready for delivery to its allottee. NGT has restrained Noida to issue completion certificate and the said condition finds mention in the letter dated 18.07.2014 itself.

(v) As on 14.04.2015, the petitioner's dues became Rs. 3,79,939.53 but still flat was not constructed.

(vi) Vide order dated 02.06.2015, the petitioner has been informed through partially modified allotment letter demanding additional car parking charges of Rs. 5,00,000/- but the petitioner visited the office and came to know that a huge interest has also been imposed on him.

(vii) For waiver of interest on unpaid amount and delivery of possession of apartment no. KLP 0301, the petitioner moved several applications before respondent but it neither delivered possession nor waived the interest on unpaid amount and ultimately, the petitioner has received the offer of possession of apartment vide a letter on 20.12.2015.

(viii) Petitioner has received letter for the possession of apartment vide letter dated 21.04.2016 and after the gap of more than nine years, respondents have handed over the possession of the apartment, booked by the petitioner on 08.06.2007 for which, the petitioner has taken housing loan in the year 2008 from N.B.F.C. and paying the interest at the rate of 13% from 2008 and the respondent has enjoyed the money deposited by the petitioner for more than nine years without any cogent and justifiable reason.

(ix) Petitioner preferred Arbitration Application No.8 of 2017, "Hasmukh Prajapati Vs. Jai Prakash Associates Ltd" in which, respondent filed counter affidavit, wherein it has been admitted that in case of any dispute, arising between the parties, the place of the arbitration will be at "New Delhi", therefore all the proceedings, arising out of the arbitration proceedings, shall be maintainable at New Delhi.

(x) This Court vide order dated 01.02.2018 appointed Hon'ble Mr. Justice Sunil Ambwani (Retd.), Office B-27 (FF) Defence Colony, New Delhi, as arbitrator and the petitioner filed his claim before sole arbitrator, having its seat at New Delhi which was registered as Arbitration Case No. 15 of 2018, Hasmukh Prajapati Vs. Jai Prakash Associates Ltd. The Tribunal, having its venue at New Delhi, was pleased to pass an award dated 16.02.2019 and partly allowed the claim of the petitioner as claimed through the Arbitration Case No.15 of 2018.

(xi) Assailing the arbitral award dated 16.02.2019, passed by Arbitral Tribunal comprising of Hon'ble Mr. Justice Sunil Ambwani, delivered at New Delhi, the respondent preferred an Arbitration Application No.26 of 2019 (Jai Prakash Associates Ltd. Vs. Hasmukh Prajapati) under Section 34 of Arbitration and Conciliation Act, before Distriet Judge, Gautam Budh Nagar in which, exceeding its jurisdiction, the court of District Judge, Gautam Budh Nagar, proceeded with the case and issued notice to the petitioner.

(xii) Questioning the legality and validity of the arbitration proceedings under Section 34 of the Act, before the District Judge, Gautam Budh Nagar, the petitioner filed a Writ-C No.33003 of 2019, Hasmukh Prajapati Vs. Jai Prakash Associates, before this Court. This Court has directed the petitioner to raise the objection, regarding the jurisdiction of the Court to adjudicate the issue raised under Section 34 of the Act, before the learned court below itself vide its order dated 17.10.2019.

(xiii) In compliance to the order dated 17.10.2019 of this Court, the petitioner moved an application being Paper No.16Ga along with affidavit (17Ga) in Arbitration Application No. 26 of 2019 (Jai Prakash Associates Vs. Hasmukh Prajapati) which has been rejected by the Commercial Court, Gautam Budh Nagar, by passing the impugned order dated 18.08.2021 (Annexure No. 9 to the petition). Hence, the petitioner has approached this Court against the same through the present petition.

4. The order dated 18.08.2021 passed by the Commercial Court, Gautam Budh Nagar, has been assailed in the present petition before this Court.

5. The issue to be decided by this Court is whether the Commercial Court at Gautam Budh Nagar has jurisdiction to hear the case u/s 34 of the Arbitration and Conciliation Act, 1996 regarding the arbitral award dated 16.02.2019 passed by sole arbitrator, having its venue at New Delhi, which has been specified in the arbitration agreement, but not the seat of the arbitration. The other issues are regarding the application of provision of Section 42 of the Act aforesaid to the execution of final award after conclusion of arbitration proceedings in terms of Section 32 of the Act and whether execution application for enforcement of arbitral award passed at New Delhi can be filed at Gautam Budh Nagar which has no supervisory jurisdiction over the Arbitral Tribunal.

6. Learned counsel for the petitioner has submitted that from the perusal of the arbitral award dated 16.02.2019, it is quite evident that "Venue of Arbitration" proceedings has been chosen to be at "New Delhi" by both the parties and the arbitration clause does not specifies the "Seat of Arbitration". Thus, in the absence of the specified "Seat of Arbitration" in arbitral agreement, the venue of arbitration will be the juridical seat of arbitration proceedings and as such, the impugned proceedings under Section 34 of the Arbitration and Conciliation Act, challenging the arbitral award dated 16.10.2019, is not maintainable in District-Gautam Budh Nagar, rather it is maintainable in the court at Delhi having supervisory jurisdiction over the Arbitral Tribunal. The impugned order dated 18.08.2021 and the proceedings under Section 34 are wholly illegal and untenable and the same are liable to be set aside by this Court holding the same to be without jurisdiction. In support of the aforesaid submissions/arguments, the petitioner has relied upon the judgment of the Hon'ble Supreme Court reported as **2019 0 Supreme (SC) 1350, BGS SGS SOMA JV Versus NHPC Ltd.** The relevant paragraph nos. 98, 99 and 100 relied upon are as follows :-

98. We have extracted the arbitration agreement in the present case (as contained in Clause 67.3 of the agreement between the parties) in paragraph 3 of this judgment. As per the arbitration agreement, in case a dispute was to arise with a foreign contractor, clause 67.3(ii) would apply. Under this sub-clause, a dispute which would amount to an 'international commercial arbitration within the meaning of Section 2(1)(f) of the Arbitration Act, 1990, would have to be finally settled in accordance with the Arbitration Act, 1990 read with the UNCITRAL Arbitration Rules, and in case of any conflict, the

Arbitration Act, 1996, is to prevail (as an award made under Part I is considered a domestic award under Section 2(7) of the Arbitration Act, 1996,

notwithstanding the fact that it is an award made in an international commercial arbitration). Applying the *Shashoua* principle delineated above, it is clear that if the dispute was with a foreign contractor under Clause 67.3 of the agreement, the fact that arbitration proceedings shall be held at New Delhi/Faridabad, India in sub-clause (vi) of Clause 67.3, would amount to the designation of either of these places as the "seat" of arbitration, as a supranational body of law is to be applied, namely, the UNCITRAL Arbitration Rules, in conjunction with the Arbitration Act, 1996. As such arbitration would be an international commercial arbitration which would be decided in India, the Arbitration Act,1996, is to apply as well. There being no other contra indication in such a situation, either New Delhi or Faridabad, India is the designated "seat" under the agreement, and it is thereafter for the parties to choose as to in which of the two places the arbitration is finally to be held.

99. Given the fact that if there were a dispute between NHPC Ltd. and a foreign contractor, clause 67.3(vi) would have to be read as a clause designating the "seat of arbitration, the same must follow even when sub-clause (vi) is to be read with sub-clause (i) of Clause 67.3, where the dispute between NHPC Ltd. would be with an Indian Contractor. The arbitration clause in the present case states that "Arbitration Proceedings shall be held at New Delhi/Faridabad, India...", thereby signifying that all the hearings, including the making of the award, are to take place at one of the stated places. Negatively speaking, the clause does not state that the venue is so that some, or all, of the hearings take place at the venue; neither does it use language such as "the Tribunal may meet", or "may hear witnesses, experts or parties". The expression "shall be held" also indicates that the so-called "venue" is really the "seat" of the arbitral proceedings. The dispute is to be settled in accordance with the Arbitration Act, 1996 which, therefore, applies a national body of rules to the arbitration that is to be held either at New Delhi or Faridabad, given the fact that the present arbitration would be Indian and not international. It is clear, therefore, that even in such a scenario, New Delhi/Faridabad, India has been designated as the "seat" of the arbitration proceedings.

100. However, the fact that in all the three appeals before us the proceedings were finally held at New Delhi, and the awards were signed in New Delhi, and not at Faridabad, would lead to the conclusion that both parties have chosen New Delhi as the "seat" of arbitration under Section 20(1) of the Arbitration Act, 1996. This being the case, both parties have, therefore, chosen that the Courts at New Delhi alone would have exclusive jurisdiction over the arbitral proceedings. Therefore, the fact that a part of the cause of action may have arisen at Faridabad would not be relevant once the "seat" has been chosen, which would then amount to an exclusive jurisdiction clause so far as Courts or the "seat" are concerned.

7. He has next submitted that in the matter of **BGS SGS SOMA JV Versus NHPC Ltd. (supra)**, it has been held by the Hon'ble Supreme Court that if both the parties have chosen the seat of arbitration at New Delhi, court of Delhi, will have the exclusive jurisdiction to entertain and hear the dispute under Section 34 of the Act. It has been held by the Hon'ble Supreme Court that once the "Seat" has been chosen, it would then amount to an exclusive jurisdiction clause so far as Court of the Seat is concerned.

8. He has next submitted that in the case in hand, no seat of arbitration was

specified, moreover, the parties agreed about venue of arbitration to be at New Delhi and accordingly, the arbitral proceedings took place at New Delhi and award has been passed and signed at New Delhi. In **BGS SGS SOMA JV Versus NHPC Ltd. (supra)**, the Hon'ble Supreme Court has dealt with several judgments including **Roger *Shashoua* V. Mukesh Sharma & Ors., (2017) 14 SCC 722** in which it has been held that if the "Venue of Arbitration" is designated without specifying the "Seat of Arbitration" in the arbitration agreement, the stated "Venue'" is the "Juridical Seat of Arbitration". Thus the application under Section 34 is maintainable at New Delhi and the court at Gautam Buddh Nagar, U.P., India, has got no jurisdiction to entertain the case under Section 34 of the Arbitration and Conciliation Act, 1996.

9. He has also submitted that the provisions of Section 42 of Arbitration and Conciliation Act provides that any application with respect to an arbitration agreement can be made to that court alone which has supervisory jurisdiction over the Arbitral Tribunal and in no other court. The language of the aforesaid provision is self explanatory that it is applicable till the finalization of the arbitral proceedings and after termination of the arbitral proceedings i.e., after pronouncement of the final award by the Arbitral Tribunal, in terms of Section 32 of the Arbitration and Conciliation Act, the arbitral proceedings stands terminated.

10. He has further submitted that Section 36 of the Arbitration and Conciliation Act provides that the arbitral award shall be enforced under the relevant provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court and in the present case after the pronouncement of the arbitral award, the arbitration proceedings stands terminated and hence, the provisions of Section 42 of Arbitration Act are not affected, thus, the application for execution can be filed before any court where the said decree/award can be executed. Thus, filing of execution proceedings in the Court at District- Gautam Budh Nagar is not tenable in the eyes of law. In support of the arguments advanced in support of other issues raised, the petitioner has relied upon the judgment of Hon'ble Supreme Court in the case of **Sundaram Finance Limited V. Abdul Samad and another, (2018) 3 SCC 622** (Relevant paragraph nos. 17, 19 and 20). The relevant paragraph nos. 17, 19 and 20 of the aforesaid judgement are as follows :-

17. However, what has been lost sight of is Section 32 of the said Act, which reads as under:

32. Termination of proceedings- (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2).

(2) The Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where- (a) the claimant withdraws his claim, unless the respondent objects to b the order and the Arbiral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings; or (c) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings."

The aforesaid provision provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.

19. The Madras High Court in Kotak Mahindra Bank Ltd. v. Sivakama Sundaris referred to Section 46 of the said Code, which spoke of precepts but stopped at that. In the context of the Code, thus, the view adopted is that the decree of a civil court is liable to be executed primarily by the court, which passes the decree where an execution application has to be filed at the first instance. An award under Section 36 of the said Act, is equated to a decree of the court for the purposes of execution and only for that purpose. Thus, it was rightly observed that while an award passed by the Arbitral Tribunal is deemed to be a decree under Section 36 of the said Act, there was no deeming fiction anywhere to hold that the court within whose jurisdiction the arbitral award was passed should be taken to be the court, which passed the decree. The said Act actually transcends all territorial barriers.

20. We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such a decree can be executed and there is no requirement for obtaining a transfer of the decree from the court, which would have jurisdiction over the arbitral proceedings.

11. Learned counsel for the petitioner has submitted that the "venue" and "place of arbitration" can not be used interchangeably. In the case in hand the "Seat of Arbitration" has not been designated, only "Venue of Arbitration" has been agreed by the parties in the arbitration agreement and entire arbitral proceedings took place at the said venue. Thus, no question of interchange arises and paragraphs 20 and 21 of the judgment relied upon by the counsel for respondent in the case of **Mankastu Impex Private Limited Vs. Air Visual Limited, (2020) 5 SCC 399** has no relevance to the facts of the case. It is not applicable at all.

12. Learned Senior Counsel for the respondent has submitted that the Clause 10.6 of the standard terms and conditions of allotment/ provisional allotment provided as under :

"Governing Law and Jurisdiction: the allotment/provisional allotment shall be governed and interpreted by and construed in accordance with the laws of India, without giving effect, if applicable, to the principles of conflict of laws, thereof or thereunder and subject to the provisions of Clause 10.9 hereof, the Courts of Gautam Budh Nagar, U.P., India, shall have jurisdiction over all matters arising out of or relating to this allotment/provisional allotment."

13. He has further submitted that further Clause 10.9 of the standard terms and conditions of allotment/provisional allotment states as under : *"Dispute Resolution: Any and all disputes arising out of or in connection with or in relation hereto shall so far as possible, in the first instance, be amicably settled between the Company and the Applicant. In the event of disputes, claim and/or differences not being amicably resolved such disputes shall be*

referred to sole arbitration of a person not below the rank of General Manager nominated for the purpose of Chairman of the Company. The proceedings of the Arbiration shall be conducted in accordance with the provisions of the Arbitration & Conciliation act, 1996, as amended from time to time, or any reules made thereunder. The applicant hereby gives his consent to the appointment of the sole arbitator as specified herein above and waives any objections that he may have to such appointment or to the award that may be given by the Arbitrator. The venue of the arbitration shall be New Delhi, India."

14. He has next submitted that in the case of **Mankastu Impex Private Limited vs. Airvisual Limited, (2020) 5 SCC 399** at Para 20 it has been held by a three Judge Bench of the Hon'ble Apex Court that : *"It is well settled that "seat of arbitration" and "venue of arbitration" cannot be used interchangeably. It has also been established that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties."* Therefore, it is amply clear that seat and venue of arbitration cannot be used interchangeably and venue merely refers to a convenient location selected by the parties to carry out the arbitration proceedings. Furthermore, the "seat' of arbitration should be determined from other clauses in the agreement and the conduct of the parties.

15. He has also submitted that while Clause 10.6 categorically provides that the governing law and jurisdiction would be at Gautam Budh Nagar, the words *"subject to provisions of clause 10.9'* have been used only to pave the way for the agreement to provide for the venue of arbitration proceedings at New Delhi which was a convenient location to carry out the arbitration proceedings. It may be noted that in case, the words in Clause 10.6 - *subject to provisions of Clause 10.9'* were interpreted to mean that the 'seat' of arbitration would remain at New Delhi, Clause 10.6, would be rendered completely nugatory and contradictory, since in that event, the courts at Gautam Budh Nagar could never have any jurisdiction. Therefore, in the present case, Clause 10.6 of the standard terms and conditions confers exclusive jurisdiction to the courts of Gautam Budh Nagar, U.P., and venue of arbitration which in the present case is New Delhi, which was merely a convenient location to carry out the arbitration proceedings. In the present case, the petitioner has himself submitted to the jurisdiction of the Courts in Uttar Pradesh, at the very first instance, since he had preferred an application under Section 11 before this Hon'ble Court, pursuant to which the arbitrator was appointed. Execution proceedings have also been filed by the respondent before the Commercial Court, Gautam Budh Nagar. Therefore, the petitioner was always clear that the jurisdiction was at Gautam Budh Nagar and not at New Delhi. Furthermore, in case the argument of the petitioner is accepted and New Delhi is held to be the 'seat' of arbitration, it would render the reference order passed by this Hon'ble Court under Section 11, without jurisdiction, rendering the award itself a nullity. Alternatively, even if it was assumed that New Delhi and Gautam Buddha Nagar had concurrent jurisdiction, under Section 42 of the Act, 1996, the Courts at New Delhi would have no jurisdiction to entertain any subsequent

applications, since the very first application under Section 11 had been filed before this Hon'ble Court. Therefore, Commercial Court at Gautam Budh Nagar has Jurisdiction to entertain the application under Section 34, preferred by the respondent. Hence, the petition lacks merit and is liable to be dismissed.

16. This petition first of all involves resolution of a controversy that has gained considerable importance in arbitration proceedings regarding the "Venue-Seat" issue.

17. The juridical seat of arbitration, as a concept, did not find a place in the Arbitration Act of 1940. Significant importance was afforded to the juridical seat of arbitration under the Arbitration and Conciliation Act, 1996. However, the jurisdiction of the courts over such arbitral proceedings remained with the court exercising original jurisdiction as per Section 2(1)(e) of the 1996 Act. While Section 20 of the 1996 Act granted parties the autonomy to choose the "place' of arbitration. It did so in an ambiguous manner without distinguishing between "seat' and "venue'. Addressing the ambiguity, 246th Law Commission Report had suggested replacing the words "place' for "seat' or "venue.' However, these amendments were not enacted. As a result, the conflict between the juridical seat and jurisdiction of the court persisted along with the confusion pertaining to the distinction between "seat' and "venue'.

18. It is notable that the act does not defines the term "seat" or "venue". Section 20 of the Act merely defines the "place of arbitration" which is often used interchangeably with the terms "seat" and "venue". This use of the terms "seat" and "venue" interchangeably often leads to controversy which has been resolved at number of times by the Hon'ble Supreme Court but it keeps on arising in different factual sittings of different cases and becomes subject matter of decisions by the courts repeatedly.

19. The term "seat" is of utmost importance as it connotes the situs of arbitration. The term "venue" is often confused with the term "seat" but it is more a place often chosen as convenient location by the parties to carry out arbitration proceedings but should not be confused with "seat". The term "seat" carries more weight than "venue" or "place".

20. In 2009, the English judgment of ***Shashoua*** **(2009) EWHC 957** held that the seat of arbitration is to have an exclusive jurisdiction over all proceedings that arise out of the arbitration. It laid the *significant contrary indicia* test as per which a place of arbitration is a stipulation that such place shall be the seat of the arbitration and consequently determine the *lex fori* in the absence of any *significant contrary indicia*. The position was further confirmed by the Division Bench of Hon'ble Supreme Court in the case of **Roger *Shashoua* & Ors v Mukesh Sharma & Ors (supra).**

21. The **Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc, (2012) 9 SCC 552** judgment, rendered by the Hon'ble Supreme Court in 2012, relied on the principle laid in *Shashoua* and acknowledged that the terms "seat' and "place' can be used interchangeably. It held while laying the principle of "concurrent jurisdiction' in paragraph 96 of the judgment that two courts can have jurisdiction over arbitration applications viz. (i) courts possessing the subject-

matter/cause of action jurisdiction and (ii) courts where the place/seat of arbitration was designated. However, the principle of concurrent jurisdiction was not intended to replace the principle of "*significant contrary indicia*.' The existence of multiple venues was only perceived to be a matter of convenience.

22. The Hon'ble Supreme Court in the case of **BALCO (supra)** clarified the legal position in paragraph no. 96 as under:

Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

"2. Definitions (1) In this Part, unless the context otherwise requires -

(a)-(d)

(e) **"Court"** means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

23. The above observation in BALCO were understood to give concurrent jurisdiction over the arbitral proceedings to (i) courts possessing the subject-matter/cause of action jurisdiction and (ii) courts where the place/seat of arbitration was designated.

24. What ensued post BALCO, was a clash between the territoriality principle, as espoused under Section 20 of the 1996 Act and the cause of action/subject-matter jurisdiction of the courts, as per Section 2(1)(e) of the 1996 Act.

25. The cases that followed post BALCO clarified that concurrent jurisdiction is vested in the courts of seat and venue, only in case of domestic arbitrations when the seat of arbitrations is in India as there is no risk of conflict of judgments of different jurisdictions, as all courts in India would follow the Indian Law as held in **Enercon (India) Ltd. and Ors. v. Enercon Gmbh and Anr., (2014) 5 SCC 1.**

26. However, in 2018, there appeared room for uncertainty as it was noticed that the Hon'ble Supreme Court had deviated from the **Shashoua Principle, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Rep 376** approved by the same court in **BALCO (supra)**. In the case of **Union of India v. Hardy Exploration and Production (India) Inc., (2019) 13 SCC 472,** the Hon'ble Supreme Court held that the parties had Kuala Lumpur as the venue of arbitration but were silent on the seat. After dispute arose, the arbitration proceedings commenced and the award was signed at Kuala Lumpur. Thereafter the appellant sought to challenge the award under the Act before the Delhi High Court contending that Delhi was the seat of arbitration. On appeal the Hon'ble Supreme Court delivered a judgment deviating from the **Shashoua Principle (supra)**. The Court held that the parties had not chosen the seat of arbitration and noted that the Tribunal also had not made any findings with respect to the same. It was observed that Kuala Lumpur was designated by the parties as the venue of arbitration and thus it did not mean that Kuala Lumpur had become the seat of arbitration. The Court concluded that a venue could become a seat of arbitration only if something else is added to it as a concomitant. Opinion of the Hon'ble Supreme Court does not appears to be in consonance with the **Shashoua Principle (supra)** approved by the same court in **BALCO (supra).**

27. Thereafter in 2019, the Hon'ble Supreme Court had another occasion to revisit this issue in **BGS SGS SOMA JV (supra)**. It is interesting to note that in this case, the coordinate Bench (3 Judges) had reiterated the **Shashoua Principle (supra)** contrary to the observations made in **Hardy Exploration (supra)**. The Court propounded a test and laid down that when a particular place is designated as the venue of arbitration the same should be considered to be the seat of arbitration. It noted that this should be coupled with the fact that the parties have not made any other contrary indication that the venue is not the seat of arbitration. The Court observed that the decision in **Hardy Exploration (supra)** is per incuriam as it did not follow ratio laid down by the Constitutional Bench in **BALCO (supra)** that wholeheartedly adopted the *Shashoua* Principle (supra) in Indian law. It appears that there is uncertainty whether the decision of the Court in **Hardy Exploration (supra)** or **BGS SGS SOMA JV (supra)** holds the field, as a concurrent Bench could not have overruled the judgment in **Hardy Exploration (supra)**.

28. In March 2020, another conundrum had arisen before the Hon'ble Supreme Court in **Mankastu Impex (P) Ltd. v. Airvisual Ltd. (supra)**. In this case the arbitration agreement was unique as it

did not use the words "seat" or "venue". The arbitration agreement laid down that the arbitration would be administered in Hong Kong and the place of arbitration was Hong Kong. It also stated that the governing law was Indian law and that the courts of New Delhi shall have jurisdiction. Accordingly when dispute arose, Mankastu approached the Hon'ble Supreme Court of India for appointment of arbitrator contending that as Indian law was the governing law and the courts at New Delhi had jurisdiction therefore New Delhi was the seat of arbitration. Mankastu relied on **Hardy Exploration (supra)**. Airvisual contended as Hong Kong was designated as the place of arbitration and therefore Hong Kong was also the seat of arbitration. Airvisual relied on **BGS SGS SOMA JV (supra)** for this purpose.

29. It is interesting to note the method of inquiry adopted by the Hon'ble Supreme Court in arriving at its conclusion that Hong Kong was the seat of arbitration. The Hon'ble Supreme Court instead of applying the ratio in **Hardy Exploration (supra)** or BGS SGS SOMA JV (supra), employed a different method of inquiry altogether. Although, the Hon'ble Supreme Court did not expressly follow **Hardy Exploration (supra)**, it appears to have arrived at a similar conclusion on a different line of reasoning. The Court held that it would not be safe to conclude that the place of arbitration would automatically become the seat of arbitration without examining other pertinent indications in the contract to discern the true intention of the parties. The Hon'ble Supreme Court observed that since it was agreed that the arbitration proceedings should be administered in Hong Kong, thus, seat of arbitration was Hong Kong.

30. Recently a Division Bench of the Hon'ble Supreme Court in **M/s Inox Renewables Ltd. v. Jayesh Electricals Ltd.,** passed on 13.04.2021 in **Civil Appeal No. 1556 of 2021 arising out of SLP (C) No. 29161 of 2019)** has reiterated the decision in **BGS SGS SOMA JV (supra)**, equating the juridical concepts of seat and venue. In this regard, the Court has clarified that a shift in venue by mutual agreement between the parties would tantamount to shifting of the place/ seat of arbitration.

31. From the above consideration of the judgement of the Hon'ble Supreme Court regarding the "seat" and "venue" controversy, this Court finds that the judgement of the Hon'ble Supreme Court in the case of **BALCO (supra)** still holds good. The judgement in the case of **Hardy Exploration (supra)** or **BGS SGS SOMA JV (supra)** are of two coordinate Benches of three Hon'ble Judges and their ratios are contrary to each other. While **Hardy Exploration (supra)** stipulated that a chosen venue could not by itself assume the status of seat of arbitration in the absence of additional indica, **BGS SGS SOMA JV (supra)** prescribed that a chosen seat of arbitration proceedings would become the seat of arbitration in the absence of any "significant contrary indica". The recent judgement in the case of **M/s Inox Renewables Ltd. (supra)** follows **BGS SGS SOMA JV (supra).**

32. The Hon'ble Supreme Court in the case of **BALCO (supra)** clearly held that there was concurrent jurisdiction conferred on the courts ceased with the subject matter in dispute and the courts where the arbitration was carried out. However, such concurrent jurisdictions will not replace the

"significant contrary indica test" as per the **Shashoua** principle.

33. In the present case, the arbitration agreement clearly shows that the parties agreed as per Clause 10.6 that the governing law and the jurisdiction of the courts would be the courts of Gautam Buddh Nagar, U.P., India and it shall have jurisdiction over all matters arising out of or relating to the allotment/provisional allotment subject to the provisions of Clause 10.9 of the standard terms and conditions. This exception regarding Clause 10.9 constitutes "significant contrary indica" as per **Shashoua** principle in agreement regarding treating the "venue" of arbitration (New Delhi) as "seat" of arbitration proceedings (Gautam Buddh Nagar) where the cause of action arose. In Clause 10.9 regarding dispute resolution, it was agreed that the "venue" of arbitration shall be New Delhi, India. Accordingly, the sole arbitrator conducted the arbitration proceedings at the agreed venue of New Delhi and passed the award. From the standard terms and conditions/agreement between the parties, it is clear that the parties never clearly stated about the seat of arbitration but from Clause 10.6 of the agreement, the courts at Gautam Buddh Nagar, U.P., India, was agreed to have jurisdiction over all matters arising out of or relating to the allotment/provisional allotment. This clause proves that the parties had chosen the "seat" of arbitration as Gautam Buddh Nagar, U.P., India, and the "venue" of arbitration as New Delhi, India.

34. The petitioner approached this Court for appointment of the Arbitrator under Section 11 of the Act. Earlier, when the dispute regarding jurisdiction was raised, the petitioner again approached this Court by way of WRIT- C No. 33003 of 2019 and this Court directed vide order dated 17.10.2019 that the petitioner may raise objection regarding the jurisdiction of the court at Gautam Buddh Nagar, U.P., India before the court concerned and in compliance of the order of this Court, the impugned order dated 18.08.2021 has been passed by the Commercial Court at Gautam Buddh Nagar, U.P., India. This Court has jurisdiction over the courts at Gautam Buddh Nagar, U.P., India. The petitioner never approached the Delhi High Court for appointment of Arbitrator nor he has initiated any execution proceedings u/s 36 of the Act before any court at Delhi. This Court finds force in the argument of the learned counsel for the respondent that in case the argument of the petitioner is accepted and New Delhi is held to be the seat of arbitration, the reference order passed by this Court u/s 11 would become without jurisdiction and if Clause 10.6 of the agreement, which provides exception for Clause 10.9, is interpreted to mean that the seat of arbitration would be New Delhi, Clause 10.6 would become redundant.

35. The other issues raised by the learned counsel for the petitioner regarding application of Section 42 of the Act to the execution of final award and whether execution application can be filed at Gautam Buddh Nagar for enforcement of arbitral award passed at New Delhi also require consideration.

36. Before proceeding to decide the aforesaid issues, a look at Section 42 and Section 2(1)(e) of the Act is required which are as follows :-

"42. Jurisdiction - Notwithstanding anything contained elsewhere in this Part or in any other law

for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

Section 2(1)(e) -

"(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court."

What clearly follows from the above definition is that as regards arbitrations, other than international commercial arbitrations, the principal Civil Court of original jurisdiction in a district, which has the jurisdiction to decide the question forming the subject-matter of the arbitration if the same had been subject-matter of a suit, would be the competent "Court" for the purpose of this Act. It specifically includes the High Court which has ordinary original civil jurisdiction, like Allahabad High Court.

37. Prior to the amendment of 2015, the question as to whether application u/s 11 falls within the purview of Section 42 had been deliberated upon and answered in the negative in catena of judgments.

38. By way of the Arbitration & Conciliation (Amendment) Act, 2015 (herein after referred to as the Amendment Act), inter alia, a significant change that has been brought about in Section 11 of the Arbitration & Conciliation Act, 1996, is the insertion of the words "High Court" and "Supreme Court " instead of "Chief Justice" and "Chief Justice of India".

39. This particular amendment has a direct bearing on the interpretation of Section 42 of the Act which envisages exclusion/bar of all courts other than 'Court' before which any application under Part I has been initially made with respect to an arbitration agreement.

40. A perusal of Section 42 of the Arbitration and Conciliation Act, 1996 clearly indicates that if in respect of an arbitration agreement any application under Part I is made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and no other court. The first application which is made before a court should have jurisdiction to entertain subsequent applications. Secondly for the purpose of applicability of the Section 42 of Arbitration Act, the court has to decide whether the first application was the application provided in the first part of the Arbitration and Conciliation Act, 1996. Since the application u/s 11 of the Act was an application under Part I of the Arbitration and Conciliation Act, 1996,

Section 42 of the Arbitration and Conciliation Act, 1996 will be attracted to the proceedings u/s 34 of the Act. The award passed at New Delhi can be executed in the court at Gautam Buddh Nagar in view of paragraph no. 20 of the judgement of the Apex Court in the case of **Sundaram Finance Limited (supra)** also.

41. In view of the above consideration, it is held that the order dated 18.08.2021 passed by the Commercial Court, Gautam Buddh Nagar, is in accordance with law.

42. The petition is accordingly, dismissed.
