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ALLAHABAD SERIES

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(2022) 8 ILRA 6
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Jail Appeal No. 153 of 2021

Sonu ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Rahul Jain

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 363, 366 & 376D - The Protection of Children From Sexual Offences Act, 2012 - Section 5/6 - The Code of Criminal Procedure, 1973 - Section 161,164,313 - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 15 - The Juvenile Justice (Care And Protection Of Children) Act, 2007 - Juvenile Justice Rules 2007 - Rule 12 (3) Rule 12 (3) B , Rule 12 (3) (A) (i) to (iii) - consent of a minor prosecutrix does not matter if she was taken to separate places for making sexual intercourse away from her lawful guardians.(Para - 27)

(B) Criminal Law - sentence - rehabilitary & reformative aspects in sentencing - 'Proper Sentence' - sentence should not be either excessively harsh or ridiculously low - While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality' - Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. (Para -34,36)

Victim kidnapped - transferred to several persons - beaten and subjected to physical, mental and sexual assault - later on was thrown - found minor by lower court – conviction – Hence appeal.**(Para - 16,26)**

HELD:-Proved beyond reasonable doubt that accused-appellant committed offence under Section 363 and 366 IPC .Committed offence under Section 376 IPC read with Section 4 of the POCSO Act. Not a case of gang rape. Not guilty of Section 376D and Section 6 of the POCSO Act. No accused person is incapable of being reformed, therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. **(Para -32,36,38)**

Jail appeal partly allowed and partly rejected. (E-7)

List of Cases cited:-

1. Mahadeo Vs St. of Maha. & anr. (2013), 2014 SCC 637

2. Jernail Singh Vs St. of Har. (2013) 7SCC 263

3. Mukesh Vs St. for NCT of Delhi & ors., AIR 2017 SC 2161 (Three-Judge Bench)

4. Ashok Kumar Chaudhary Vs St. of Bihar, 2008 (61) ACC 972 (SC)

5. Rabindra Mahto Vs St. of Jhark., 2006 (54) ACC 543 (SC)

6. Ravi Kumar Vs St. of Punj., 2005 (2) SCJ 505

7. St. of H.P. Vs Shree Kant Shekari, (2004) 8 SCC 153

8. Munshi Prasad Vs St. of Bihar, 2002(1) JIC 186 (SC)

9. Ravindra Kumar Vs St. of Punj., 2001 (2) JIC 981 (SC)

10. Sheo Ram Vs St. of U.P., (1998) 1 SCC 149

11. St. of Karn. Vs Moin Patel, AIR 1996 SC 3041

12. St. of U.P. Vs Manoj Kumar Pandey, AIR 2009 SC 711 (Three-Judge Bench)

13. Santosh Moolya Vs St. of Karn., (2010), 5 SCC 445"

14. Mohan Das Survanshi Vs St. of M.P., 1999 Cr LJ 3451 (MP)

15. Manoj Mishra @ Chhotkau Vs St. of U.P., 2021

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

17. Deo Narain Mandal Vs St. of UP, (2004) 7 SCC 257

18. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

19. Jameel Vs St. of U.P. (2010) 12 SCC 532

20. Guru Basavraj Vs St. of Karn., (2012) 8 SCC 734

21. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

22. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

23. Raj Bala Vs St. of Har., (2016) 1 SCC 463

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

1. The appeal has been preferred against the conviction and sentence of the appellant Sonu S/o Late Phool Chand, under Section 363, 366, 376D I.P.C. & Section 5/6 of POCSO Act in Session Trial No. 8/2018 in Case Crime No. 111/2017, P.S. Kotwali, District Vindhyachal, U.P. By Special Judge POCSO Act / Additional Sessions Judge, Mirzapur on 14.10.2020.

2. The grounds of appeal are that there was no evidence on record to prove the alleged incident. No one had seen Sonu along with the victim on the date and time of incident. Though, it is stated that the victim was kidnapped at about 10:00 A.M from the nearby market place, no eye-witness saw the occurrence in day light makes the allegation improbable. No witness, neither father nor mother of the victim were aware about the date-of-birth of the victim as to whether at the time of occurrence she was minor or not. There was dispute between the father of the victim and the uncle of the appellant. The victim had relations with Dinesh and Sonu. Sonu has helped the victim to get married with Dinesh. Sonu has been made scapegoat in the matter. There are glaring contradiction between the statement and cross-examination of the witnesses P.W.-1, P.W.-2 & P.W.-3. The Trial Judge has not relied upon the medical age already framing mind to convict the appellant. In cross-examination, witness has stated that Sonu had done nothing and had not gone with the victim though at some places, victim has deposed against the appellant. There is no explanation of delay in lodging the F.I.R. after three months from the incident. The victim has stated to the I.O. that she was living in Bahraich with her husband Dinesh. There is no independent eye-witness. P.W.-1 and P.W.-2 have given heresay evidence. The charge is not proved from the evidence of sole witness, victim P.W.-3. Appellant has no previous criminal antecedent, therefore, the appeal be allowed and the conviction and sentence awarded by the learned Trial Court be quashed.

3. In brief, the case of the prosecution is this that informant/plaintiff PW1- Ram Ashrey father of the victim, moved an application for lodging the F.I.R. with the averment that on 27.10.2016, daughter of the informant P.W.- 1 aged about 17 years old left the house at about 10 A.M. for

school, appellant-Sonu with two unknown youngsters kidnapped and abducted her daughter. Even after prolong search, he could not find her daughter. He used to talk with his daughter from an unknown mobile no. 9565005779 provided by Sonu. Sonu informed P.W.-1 that on mobile no. 946763015, he will know about his daughter. Through that given mobile number, he contacted his daughter who informed that she was in Jammu & Kashmir.

4. On the basis of written FIR Ex. Ka-1, a case was registered under Section 363 IPC on 12.03.2017, S.I. Bhuval Singh, Virendra Yadav, Krishna Nand Rai, Jai Lal and lastly, S.H.O. Ashok Kumar Singh investigated the matter. The charge-sheet was submitted by the last I.O.. The victim was found in injured condition in a field near pitch road in P.S. Hardi, District Bahraich, U.P., for which another crime no. 0338/2017, under Section 307 IPC was registered on 05.03.2017. That case was transferred to District Mirzapur where investigation was completed against the appellant Sonu and charge-sheet was submitted under Sections 363, 366, 376, 307 IPC and ¾ POCSO Act. Investigation about rest accused persons remain pending.

5. The accused was charged under the above sections which he denied and sought trial. Prosecution submitted following documentary evidences:-

1. Tehrir FIR, Ex. Ka.-1.
2. Statement of victim under Section 164 Cr.P.C., Ex. Ka.-2
3. Medical Report Ex. Ka.-3.
4. G.D. regarding institution of case, Ex. Ka.-4.

6. Map of Case Crime No. 338/17, under Section 307 IPC, P.S. Hardi, District Bahraich. Ex-K-5 (Map of this Case Crime No. 3K/10 and chik FIR 3K/2 and also chik 3k/4 and 5 relating Section 307 IPC, P.S. Hardi, District Bahraich, have not been exhibited.)

7. Charge-sheet Ex-K-6

8. Following witnesses were examined to prove the prosecution case.

1.PW1 Ram Ashrey, informant, father of the victim.
2.PW2 Pankali, mother of the victim.
3. PW3 Victim herself.
4. PW4 Dr. Anuradha Mishra.
5. PW5 Ram Lallan Bajpai.
6. PW6 Haldhar @ Rakesh Yadav.
7.PW7 Head Constable Writer, Umakant Rai.
8. PW8 S.I. Suresh Kumar Singh, I.O.
9. PW9 S.I. Ashok Kumar Singh, I.O.

9. After completion of prosecution evidence, the statement of the accused-appellant was recorded under Section 313 Cr.P.C., wherein he said that due to enmity between his maternal uncle and the informant, he has falsely been implicated in this case. The appellant did not produce any oral or documentary evidence in his defence in the lower court. The Lower Court heard the argument of both the parties and came to the conclusion that the victim was aged about 17 years, at the time of occurrence. In this regard, Lower Court has referred to section 94 of Juvenile Justice Act 2015 and also relied on the case of ***Mahadeo vs. State of Maharashtra and another (2013), 2014 SCC 637***, in which principles have been laid down by the

Hon'ble Apex Court about Rule 12 (3) of Juvenile Justice Rules 2007 and Rule 12 (3) B and also Rule 12 (3) (A) (i) to (iii), and the same has been reiterated by the Hon'ble Supreme Court in the case of ***Jernail Singh Vs. State of Haryana (2013) 7SCC 263.*** In this regard the Lower Court has also examined educational certificates of the victim in which, her date of birth is mentioned as 20.10.2001. At the time of occurrence, the victim was studying in class 10 in Maharaja Pratap Inter College, Bihasara.

10. Victim's father and mother PW1 and PW2 and Victim herself as PW3 have supported the prosecution version. In their statement given on oath before the Court, informant PW1 has proved that aforementioned mobile numbers were provided by the accused Sonu, by which he could contact the victim. He also found mobile number of the accused in the book of victim. Accused also abused him and used unparliamentary language on asking about the victim.

11. The Lower Court has accepted the explanation given by the informant PW1 regarding non lodging of FIR promptly and accepted the explanation that to prevent propaganda, he did not lodge the FIR just after the incident. It is a common practice in the Indian society that when any offence is committed against female member of the family, firstly, family members try to solve the problem at their own end and upon failure, they take recourse of law. In this regard, following citations are relevant in which Hon'ble Supreme Court and High Courts have held that if delay is properly explained then lodging the delayed F.I.R. is not fatal to the prosecution case. In case of abduction, kidnapping and rape of female member of the family, people think over repeated times and try to solve the problem at their own end fearing social admonition and when they became helpless then they lodge the F.I.R.

About delayed FIR and delayed recording of statement of PWs by I.O. u/s 161 CrPC, Hon'ble Supreme Court has held that if causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending the copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by reliable evidence: Hon'ble Supreme Court has in catena of cases held the above discussed law:-

1a. Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench)

1. Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 (SC)

2. Rabindra Mahto Vs. State of Jharkhand, 2006 (54) ACC 543 (SC)

3. Ravi Kumar Vs. State of Punjab, 2005 (2) SCJ 505

4. State of H.P. Vs. Shree Kant Shekari, (2004) 8 SCC 153

5. Munshi Prasad Vs. State of Bihar, 2002(1) JIC 186 (SC)

6. Ravindra Kumar Vs. State of Punjab, 2001 (2) JIC 981 (SC)

7. Sheo Ram Vs. State of U.P., (1998) 1 SCC 149

8. State of Karnataka Vs. Moin Patel, AIR 1996 SC 3041

Hon'ble Supreme Court has held that the normal rule is that prosecution has to explain delay and lack of prejudice does not apply per se to rape cases, vide.

(I) State of U.P. Vs. Manoj Kumar Pandey, AIR 2009 SC 711 (Three-Judge Bench)

(ii) Santosh Moolya Vs. State of Karnataka, (2010), 5 SCC 445"

12. PW2, mother of the victim has also deposed that at times accused Sonu and his friends used to come at her house. She further deposed that on 27.10.2016 when victim left the house for school, Sonu had come with two other friends who, took away her daughter. When PW1 and PW2, father and mother of the victim, came to know about the victim, they went to Bahraich and K.G.M.U. Lucknow, where, police had admitted the victim.

13. PW3, victim had narrated the whole story that on 27.10.2016, when she was going school, Sonu along with another person met her at Chauraha (crossing) and on their direction, she sat on their Motorcycle, where from she was taken to a mountain at Mirzapur, there she was raped by the accused-appellant Sonu. At the same place, she was made unconscious by Guddu and was taken away to Bahraich, where she was given to Dinesh, Guddu returned from there. Dinesh kept her for two-three months in his house, where he used to beat her. Dinesh at several occasions forcefully raped her and torn her clothes. Sonu wanted to marry her. According to her, she was married another person, Lalla Prasad, aged about 25 years, by Dinesh.

14. As per the evidence of P.W.-5 & P.W. 6, the Victim was found in naked and unconscious condition without clothes in the area of P.S. - Hardi, District-Bahraich. There was tube for passing urine on the body of the victim, her hymen was old torned. She was also subjected to physical and sexual assault when she was found in District Bahraich, there were marks of injuries at her body. The victim has proved her statement recorded under Section 164 Cr.P.C.

15. P.W.-5 Ram Lalla Bajpai and PW6 Haldhar @ Rakesh have deposed that victim was found in unconscious state. There were injuries on her body.

16. Thus, it is proved that the victim was kidnapped from Mirzapur and was transferred to several persons and was beaten and subjected to physical, mental and sexual assault and later on was thrown in the area of P.S. Hardi District Bahraich.

17. According to PW6 Haldhar @ Rakesh Yadav there were injuries upon both the eyes and nose of the victim. There was swelling on her face. There was dried blood at her nose face and cheeks.

18. P.W.-7 Constable Uma Kant Rai proved chik FIR and G.D. regarding institution of case. P.W.-7 S.I. Investigator Suresh Kumar Singh had started investigation of Case Crime No. 3311/17, under Section 307 IPC, P.S. Hardi, District Bahraich, which was transferred to P.S. Mirzapur after knowing that main offence had been committed under the jurisdiction of P.S. Vindhyachal, Mirzapur.

19. PW-8 Suresh Kumar Singh, S.I was appointed Investigating Officer of Case Crime No. 338/17 Section 307 IPC, PS Hardi, District-Bahraich, collected the articles received from the spot recording the statements, visited the spot, recorded the medical report in C.D. Parcha

and transferred the case P.S.- Vindhyachal, Mirzapur, for further investigation.

20. P.W.-9, S.I. Investigator, Ashok Kumar Singh had finally investigated the case and submitted the charge sheet in the afore-mentioned sections and proved the same. He has also proved the papers regarding acts done during the course of investigation.

21. On the basis of oral and documentary evidences, the Lower Court convicted the accused appellant under Sections 363, 366, 376D IPC and Section 6 POSCO Act and discharged the accused appellant under Section 307 IPC. After conviction Lower Trial Court sentenced the accused-appellant under Section 363 IPC for rigorous Imprisonment of five years and 10 thousand Rs. fine and in default of payment of fine three months additional imprisonment. The Lower Trial Court has also sentenced the appellant for seven years rigorous imprisonment and 10 thousand Rs. fine and in case of non-payment of fine he would undergo three months additional imprisonment under Section 366 IPC. The accused has been sentenced for life imprisonment and Rs. 50 thousand fine under Section 376D IPC equivalent Section 6 of POCSO Act and in case of non-payment of fine simple imprisonment of 1 year has been awarded.

22. As already noted that the appellant has not produced any evidence in his defence and there is not even an iota of the evidence in support of his false implication at the behest of plaintiff due to enmity with his maternal uncle. Even alleged enmity is not established.

23. Section 359 defines kidnapping which is as under:-

Kidnapping is of two kinds; kidnapping from India and kidnapping from lawful guardianship.

In this case the matter relates to kidnapping from the lawful guardianship.

24. Section 361 relates to kidnapping from lawful guardianship- whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

25. Section 363 relates to punishment for kidnapping whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

26. In this case, the victim has been found minor by the Lower Court, which is not rebutted by the accused-appellant. The Lower Court has given a categorical finding by referring to the concerned Section and Rules of Juvenile Justice Act, 2015. The Trial Court concluded that the date of birth 20.10.2001 of the victim as written in the progress report of year 2015-2016 in Jayanti Singh Lal Man Singh Ucchatar Madhyamik Vidhyalya, Jignapur is correct. The occurrence has taken place on 27.10.2016, thus, the victim was aged about 15 years 7 days old at the time of occurrence, which is below 16 years. The victim's mother PW2 has deposed that her daughter was about 17 years old at the time of occurrence. Thus, at the time of occurrence. Thus victim was a minor and was under the lawful guardianship of her parents where from she was kidnapped for which the accused-appellant has been rightly punished on the basis of evidence of P.W.-1, P.W.-2 and P.W.-3. The accused-

appellant has also been punished and sentenced under Section 363/366 IPC for kidnapping, abduction, inducing a woman to compel her from marriage, it is as under:-

Section 366 relates to kidnapping, abducting or inducing woman to compel her marriage, etc.-

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order tat she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.

Section 375 relates to 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 persons; 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 persons; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

Under the circumstances falling under any of the following seven descriptions:

First. - Against her will.

Secondly. - Without her consent.

Thirdly. - With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. - With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or thorough another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. - With or without her consent, when she is under eighteen years of age.

Sevently. - When she is unable to communicate consent.

Explanation 1.- For the purposes of this section, "vagina" shall also be include labia majora.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only to

that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2. - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

Section 376 relates to Punishment for rape:-

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which1[shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].

(2) Whoever,--

(a) being a police officer, commits rape--

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.--For the purposes of this sub-section,--

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence

or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);

(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

1[(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous 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 that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.]

27. In the case of **Mohan Das Survanshi Vs State of Madhya Pradesh, 1999 Cr LJ 3451 (MP)**, the Court held that consent of a minor prosecutrix does not matter if she was taken to separate places for making sexual intercourse away from her lawful guardians, her name different in FIR does not matter as it was her pet name, under such circumstances accused is guilty of kidnapping and raping a minor for days.

28. In this regard P.W.-1 and P.W.-2 have deposed that accused -appellant Sonu used to come at their house with one or two persons, and PW3 has deposed that she was on the way to school, when she was taken away by Sonu and another unknown person. On their direction, she sat on their Motorcycle but they did not leave her at her school and carried her to Mirzapur Mountain where, Sonu raped her and Guddu thereafter had taken her to Bahraich. Thus, when the victim was on the way to school even then she was under the lawful guardianship of her parents being minor girl. Later on, she has deposed that Guddu had given her in the custody of Dinesh who got her married to Lalla Prashad, who makes bricks in Delhi. The accused-appellant had knowledge about the consequences of kidnapping and abduction of a minor girl. Medical evidence of PW4 also corroborates the oral evidence of P.W.-1, P.W.-2 and P.W.-3. Doctor PW4 found the victim's hymen old torned. She opined that it might be due to injury or due to inter course. Thus, the Lower Trial Court has rightly convicted the appellant under Sections 363 and 366 IPC.

29. From the above discussed evidences, it is also proved that she was raped by Sonu and one Dinesh but Dinesh was not present in Mirzapur when she was raped on the Mountain at Mirzapur by Sonu. There is no evidence that Sonu was also present when Dinesh had raped her. It is also not established that who was another person and whether one Guddu named by the victim was also present when she was being raped by Sonu at the Mountain of Mirzapur. Therefore, it is clearly established from the evidence of the victim PW3 that at the time of rape she was alone raped by the accused-appellant Sonu. Therefore, Section 376D is not attracted as it is not established by any evidence that it is a case of gang rape. Though, it is established and proved beyond reasonable doubt that she was raped by two or three

persons at different locations and at different time. Therefore, this Court is of the opinion that Section 376D is not made out and the accused is not liable to be punished and sentenced under Section 376D IPC and the Lower Court has erred in coming to the above conclusion. Thus, the accused-appellant is proved to have committed the offence of rape with the minor prosecutrix of this case.

30. The Lower Trial Court has convicted and sentenced the accused-appellant under Section 6 of the POSCO Act. Section 6 POSCO Act was amended on 16.08.2019 and minimum sentence of 20 years imprisonment was added along with imposition of fine. Since, it is proved that it is not a case of gang rape as the victim was raped by more than one person at different time intervals and the trial is going on only for the accused -appellant Sonu, who kidnapped and abducted the victim from Mirzapur and committed penetrative sexual assault on her. Therefore, this case is covered under Section 4 of the POSCO Act. The offence was committed on 27.10.2016 and Section 4 was amended on 16.08.2019 and minimum sentence 07 years was amended and enhanced to minimum 10 years. By the same amendment, section 4 clause (2) of the POSCO Act was added and it was provided that if penetrative sexual assault has been committed upon a child below 16 years of age, the accused shall be punished with imprisonment for a term not less than 20 years which may extend to imprisonment for life. Before the date of occurrence i.e. 16.08.2019, sub-Section 2 of Section 4 was not part of the statute.

31. So far as Section 376 IPC is concerned, this Section was amended on 03.02.2013, earlier this Section was substituted by Act 43 of 1983 w.e.f. 25.12.1983. On 21.04.2018 the sentence clause was amended thereby incorporating, "shall not be less than 10 years but, which may extend to imprisonment of life and shall also be liable to fine". Before the aforesaid date minimum seven years sentence was provided. Earlier, it has been concluded by this Court that it is not a case of gang rape by the accused-appellant but the victim was subjected to rape by Sonu alone for which Sonu was tried by the lower trial Court and this appeal too.

32. In view of the above discussion, it is proved beyond reasonable doubt that accused-appellant Sonu has committed the offence under Section 363 and 366 IPC and also committed the offence under Section 376 IPC read with Section 4 of the POCSO Act. In this context the law laid down by the Hon'ble Supreme Court in **Manoj Mishra @ Chhotkau Vs State of Uttar Pradesh 2021,** is relevant wherein after rape of a minor girl, the Session Trial under Sections 363, 366, 376D and ¾ POCSO Act was conducted and the accused was convicted and sentenced and duly affirmed by the High Court, Lucknow Bench, as follows:-

(I) The Trial Court awarded 3 years RI and Rs. 3,000/- fine for the offence u/s 363 I.P.C.

(ii) The Trial Court awarded RI and Rs. 5,000/- fine for the offence u/s 366 I.P.C.

(iii) The Trial Court awarded RI and Rs. 25,000/- fine for the offence u/s 376 I.P.C.

(iv) The Trial Court awarded RI and Rs. 2,000/- fine for the offence u/s 506 I.P.C.

(v) The Trial Court awarded RI and Rs. 7,000/- fine for the offence u/s 4 POCSO Act.

The Supreme Court found that it was not a case of gang rape, therefore, confirmed the conviction and sentence awarded by the trial Court and confirmed by the High Court under Section 363 & 366 I.P.C. but converted the Section 376 D into Section 376 I.P.C and held that prior to the amendment w.e.f. 21.04.2018 the minimum sentence was 07 years which became 10 years minimum w.e.f. 21.04.2018 and since the accused has undergone sentence for more than 8 years, the appellant shall be released on payment of fine.

33. The Supreme Court held that appellant was father of five children and there was not apprehension that appellant would indulge in similar acts in future. He had no criminal antecedent. Section 376D was not made out therefore, the Hon'ble Supreme Court released the appellant for undergone sentence for more than 8 years and ordered to release him after payment of fine. The facts of the above cited case is similar to the case in hand.

34. In **Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926,** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

34. The term, 'Proper Sentence', was explained in **Deo Narain Mandal Vs. State of UP, (2004) 7 SCC 257** by observing that sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

35. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, Supreme Court referred its earlier judgments rendered in **Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463],** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of

crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The Supreme Court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

36. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed, therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

37. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Supreme Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

38. In this case, the accused-appellant has no criminal antecedent. It is not a case of gang rape. He belongs to a poor family. He is about 24 years old, therefore, a lenient view regarding sentence may be adopted. Consideration may be given to the young age, future & financial condition of the accused. The appellant is not even financially able to arrange a private Advocate due to which, an amicus curiae has been provided to him. Considering the overall circumstances, this Court is of the opinion the punishment and sentence under Section 363 & 366 IPC is liable to be maintained and that the accused has not been found guilty of Section 376D and Section 6 of the POCSO Act instead he has been found guilty of Section 376 IPC and Section 4 POCSO Act. Therefore, adopting a reformative approach, the accused is liable to be punished for seven years rigorous imprisonment and Rs. 25,000/- fine under Section 376 I.P.C and Section 4 POCSO Act.

Order in Appeal.

1. The appeal is accordingly **partly allowed** and **partly rejected.** The punishment and sentence awarded by the Lower Court under Section 363, 366 IPC is maintained.

2. The conviction under Section 376D IPC and Section 6 POCSO Act is modified under Section 376 IPC and Section 4 of the POCSO Act and is awarded seven years rigorous imprisonment and fine of Rs. 50,000/-. In case of non-payment of fine under Section 376 and Section 4 of the POCSO Act, the accused-appellant shall undergo one year additional rigorous imprisonment. The fine imposed as above shall be given to the victim as amount of compensation. As the accused-appellant is already in jail the period of his incarceration in jail shall be adjusted as per rules. All the sentences shall run concurrently.

3. The Registry to return the lower court record along with the copy of this order.

(2022) 8 ILRA 18
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 1197 of 1984

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

Counsel for the Appellants:
Sri K.S. Chauhan, Sri Kunwar Bhadur Dixit, Sri Anurag Shukla

Counsel for the Respondent:
A.G.A.

Criminal Law- Indian Penal Code, 1860- Section 307/34-Injured sustained six pellet injuries-Injury No. 4 reported by Doctor to be fatal, as it was on vital part i.e. abdomen, however he further opined that there was no internal organ damage- To bring home the charges under section 307 I.P.C., the crime is to be committed with an intention or knowledge and under such circumstances that, if a death is caused, the accused will be guilty of murder, but in this case, the prosecution as per it's own admitted case in view of the statements of P.W.-1 and P.W.-2 could not prove that accused persons had any such intent to commit murder of the injured Ramesh, neither it has been proved that they had knowledge in the given circumstances that by such act of the accused, the death of the injured would have been caused. However, the fact that there is eyewitness testimony regarding the incident, the presence of the accused is admitted and the injury report have been proved.

Where the prosecution fails to establish that the accused had either the intention to commit the murder of the injured or the knowledge that his act will cause the death of the injured, then the accused cannot be convicted under Section 307 of the IPC.

Indian Penal Code, 1860- Sections 307 & 324- Evidence adduced by the prosecution has not been established beyond doubt, that the offence committed by the appellants falls under section 307 I.P.C. rather in my opinion and considering the nature of the injuries, it amounts to an offence under section 324 I.P.C. So far as the injuries are concerned there is nothing on record to show that these injuries could be fatal for the injured or the injuries were caused by these injured persons with the intention to kill the injured. The conviction under section 307 read with 34 I.P.C. is unsustainable, however the appellants in view of the

evidence on record are liable to be convicted for the offence under section 324 I.P.C.

As evidently, the injuries are neither fatal in nature and nor the accused had any intention to commit the murder of the injured, hence the offence will fall under the purview of Section 324 IPC instead of Section 307 IPC.

Probation of Offenders Act, 1958 - Section 4 - Code of Criminal Procedure, 1973- Section 360 - Considering the fact that appellant no. 3 has died and appellant no. 1 is 75 years old and appellant no. 2 is 80 years old and the appeal is of the year 1984 and so also the fact that the appellants are first offender, hence, benefit of section 4 Probation of Offender Act can be given to the appellant Nos. 1 and 2.

Since the appellants have been found to have committed the offence punishable under Section 324/34 of the IPC, and the same is their first offence as well as in view of the fact that the appellants are now advanced in age ,the appellants deserve the benefit of Section 4 of the Probation of Offenders Act as well as that of Section 360 of the Cr.P.C. (Para 16, 17, 20, 21, 24, 26)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon:-

1. Sarju Prasad Vs St. of Bih, AIR 1965 SC 843

2. Ramesh Vs St. of U. P.,AIR 1992 SC 664

3. Merambhai Punjabhai Khachar & ors Vs St. of Guj.,AIR 1996 SC 3236

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard Shri Anurag Shukla, Advocate holding brief of Shri Kunwar Bhadur Dixit, learned counsel for the appellant, Shri V.K. Singh Parmar, learned AGA for the State and perused the record.

2. Appeal with respect to appellant no. 3 has already been dismissed as abated vide order dated 13.11.2018.

3. This appeal has been field by the appellants Kehari and Hori Lal against the judgement and order dated 29.03.1984 passed by VI Additional Sessions Judge, Mainpuri, whereby the appellants have been convicted under section 307 read with 34 I.P.C. and have been sentenced to undergo 3 years rigorous imprisonment.

4. The prosecution story in brief is that on 05th December, 1980 at around 3 p.m., informant and his real brother Ramesh alongwith Mohan Lal resident of village Baroli, Kanuji Singh resident of Hamlet Baley Khet and Layik Singh of the village went towards the field at Nagla Swamy for cutting the mustard crop. A litigation between Mohan Lal and accused persons Badan and Hori Lal was pending with regard to the mustard field. On the field, accused Hori Lal, Kehari and Tulsi Ram were present, who were armed with the illegal weapon, they exhorted Mohan Lal, who was with the informant and said that *"today the case will be decided and your gang will be finished'*. Accused Hori Lal, Kehari and Tulsi Ram who were armed with the country made pistol and *pauniya* (another form of country made pistol), with the intent to commit murder made indiscriminate firing, which resulted fire arm injury to brother Ramesh on his abdomen and left arm, who felt on the spot and somehow the informant and Mohan Lal were saved by the pellets. On hue and cry Ram Singh resident of Nagla Swami, Uma Shanker resident of Rustam Pur etc. came running with exhortation to the accused, on this, the accused persons ran away from the place of occurrence. Due to the serious condition of the brother Ramesh, he was

got admitted in the District Hospital Mainpuri.

5. A written report regarding the incident was given by the informant which is Ext.-Ka-1. Consequently, a chik F.I.R. in Case Crime No. 252 of 1980, under section 307 I.P.C. was registered. The chik F.I.R. is Ext. Ka-5. The injury report of the injured Ramesh is Ext.-Ka-6. The Investigating Officer after conducting the investigation and taking statement, submitted charge-sheet, which is Ext.-Ka-4. After committal charges were framed by the learned Sessions Judge vide order dated 21.08.1982 and the accused persons were charged under section 307 read with 34 I.P.C.

6. To bring home the charges the prosecution has examined P.W.-1 Suresh Chandra, brother of the injured, P.W.-2 Mohan Lal, eyewitness, P.W.-3 S.I. Sri Ameer Ulla, Investigating Officer and P.W.-4 Dr. S.C. Dubey, Medical Officer who examined the injuries of the injured.

7. Learned counsel for the appellants submits that cross case were lodged by both the sides. Appellants side have also been injured. The prosecution has not been able to prove it's case beyond reasonable doubt, in as much as the accused with intent to commit murder had fired on the injured. He further submits that injured has not been examined by the prosecution.

8. Per-contra, learned AGA has opposed and he has submitted that the presence of the accused is admitted in view of the cross version of the F.I.R. Prosecution has successfully examined the eyewitnesses P.W.-1 and P.W.-2 to show the complicity of the accused persons. As per the opinion of Dr. S.C. Dubey, the injury no. 4 was fatal which came to the accused.

9. Learned counsel for the appellants has further submitted that appeal is of the year 1984 and appellant no. 3 has already died, appellant no. 1 Hori Lal is 75 years old and appellant no. 2 Kehari is 80 years old, they do not have any criminal antecedents. Learned counsel for the appellants fairly submits that if the statement of the P.W.-1 and P.W.-2 who are only eyewitness of the prosecution, are considered, both eye witnesses have clearly stated that while they arrived at the field of Ram Sanehi, the accused persons armed with country made pistols fired at Mohan Lal P.W.-2, however, the shot came on the Ramesh the injured. The statement of P.W.-1 and P.W.-2 demolishes the prosecution case.

10. So far as section 307 I.P.C. is concerned, as per the admitted case of the prosecution in view of the statement given by P.W.-1 and P.W.-2 there was no intention to commit murder of the injured Ramesh, who has not been examined. The shot was fired rather on P.W.-2 and not on the injured and he accidentally got injured as he was infront of P.W.-2.

11. Perusal of the statement of P.W.-1 Suresh Chandra shows that he and injured Ramesh going to their field alongwith them Mohan Lal P.W.-2 was also there and as soon they reached to the field of Ramsanehi, then accused Hori Lal, Tulsi and Kehari came, who were armed with country made pistol and they shot on Mohan Lal, however the shot came to Ramesh and he received pellet injuries in his abdomen, leg and hand. General role of assault by fire arm has been attributed by P.W.-1 to all of the accused persons .

12. P.W.-2 Mohan Lal, though has made out statement in as much as he

assigned specific weapon to each of the accused persons. He assigned *Pauniya* to Hori Lal and Tulsi Ram and Tamancha to Kehari. However, he also made the same statement which has been made by P.W.-1 to the extent that accused persons fired on P.W.-2 Mohan Lal with intent to kill him, however the pellet did not came to P.W.-2 rather Ramesh was shot.

13. P.W.-4 Dr. S.C. Dubey had examined the injured, who sustained 6 injuries and out of 6 injuries, injury nos. 1 and 6 were pellet injuries. He opined that injuries would have came from the fire arm. He further opined that abrasion could have come from the pellets. He opined that injury no. 4 was fatal, as it was on vital part i.e. abdomen, however he further opined that there was no internal organ damage.

14. P.W.-3 the Investigating Officer was also examined before the trial court who had taken the blood stained cloths of the injured and prepared the recovery memo. He also proved the Ext.- Ka-5 chik F.I.R. He has prepared the site plan.

15. In view of the statements of P.W.-1 and P.W.-2, it is clear that the intention to commit murder was of P.W.-2 and not to the injured Ramesh. The testimony of P.W. 1 and P.W.-2 further shows that there was no motive for the accused who have committed this crime. The presence of the accused is admitted at the place of occurrence. In view of the cross F.I.R. lodged by one Badan Singh father of the accused which is exhibited as Ext. Kha-5.

16. To bring home the charges under section 307 I.P.C., the crime is to be committed with an intention or knowledge and under such circumstances that, if a death is caused, the accused will be guilty of murder, but in this case, the prosecution as per it's own admitted case in view of the statements of P.W.-1 and P.W.-2 could not prove that accused persons had any such intent to commit murder of the injured Ramesh, neither it has been proved that they had knowledge in the given circumstances that by such act of the accused, the death of the injured would have been caused. However, the fact that there is eyewitness testimony regarding the incident, the presence of the accused is admitted and the injury report have been proved.

17. I am of the view that evidence adduced by the prosecution has not been established beyond doubt, that the offence committed by the appellants falls under section 307 I.P.C. rather in my opinion and considering the nature of the injuries, it amounts to an offence under section 324 I.P.C. as the Supreme Court in the case of **Sarju Prasad Vs. State of Bihar : AIR 1965 SC 843** has held as under:-

"In this state of the evidence we must hold that the prosecution has not established that the offence committed by the appellant falls squarely under Section 307, I. P. C. In our opinion, it amounts only to an offence under Section 324, I. P. C".

18. In the case of **Ramesh Vs. State of U. P. : AIR 1992 SC** Page 664, where a single injury was found on the back of the injured, the appeal of accused-appellants who was tried along with two others was convicted u/s 307/34 IPC and sentenced to undergo rigorous imprisonment for four years, while the two others were acquitted, was partly allowed by the Apex Court. His conviction was altered into section 324 IPC and the sentence was reduced to the period already undergone with fine of Rs. 3000/-, which was to be paid to the complainant as compensation.

19. In the case of **Merambhai Punjabhai Khachar and others Vs. State of Gujarat : AIR 1996 SC Page 3236**, there was an attempt to commit murder by fire arm and a pellet hit the victim, however, the Apex Court held that Section 307 IPC cannot be held to have

20. So far as the injuries are concerned there is nothing on record to show that these injuries could be fatal for the injured or the injuries were caused by these injured persons with the intention to kill the injured. The conviction under section 307 read with 34 I.P.C. is unsustainable, however the appellants in view of the evidence on record are liable to be convicted for the offence under section 324 I.P.C.

21. Considering the fact that appellant no. 3 has died and appellant no. 1 is 75 years old and appellant no. 2 is 80 years old and the appeal is of the year 1984 and so also the fact that the appellants are first offender, hence, benefit of section 4 Probation of Offender Act can be given to the appellant Nos. 1 and 2.

22. Learned AGA, on the other hand, does not dispute the fact that the appellant nos. 1 & 2 are the first offender but he vehemently submitted that if the benefit of Section 4 of the Probation of Offenders Act be given to the appellant nos.1 & 2, some restrictions may be provided so that appellant nos. 1 & 2 may not repeat such a crime in future.

23. As to whether the appellants are entitled to get the benefit of Section 4 of the Probation of Offenders Act or not, I deem it appropriate to reproduce Section 4 of the Probation of Offenders Act, which reads as under:-

"4. Power of court to release certain offenders on probation of good conduct.-(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2)Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose

such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

24. It is relevant to mention here that Section 360 Cr.P.C. also confers the powers on the Court to release the accused on probation for good conduct or after admonition.

25. For the reasons aforesaid, the appeal filed by the appellant no.1. Kehari and appellant no. 2. Hori Lal is partly allowed.

26. The conviction of appellant no. 1, namely, Kehari and appellant no. 2 Hori Lal under Section 307 read with Section 34 IPC and sentence awarded to them is set aside. However, both the appellants are found guilty for the offence punishable under Section 324 read with Section 34 IPC and are convicted thereunder. They shall get benefit of Section 4 of Probation of Offenders Act. They shall file two bonds to the tune of Rs.20,000/- each coupled with personal bonds to the effect that they shall not commit any offence and shall be of good behaviour and shall maintain peace during the period of one year. If they are in breach of any of the conditions, they shall subject himself to undergo one year rigorous imprisonment. The bonds aforesaid shall be filed by the accused/appellant nos.1 and 2 within two months from the date of judgement. The time for submitting the bail bonds shall not be extended on any ground whatsoever.

27. Let a copy of this judgment along with original lower Court record be sent to the Court concerned for compliance forthwith.

(2022) 8 ILRA 23
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 4904 of 2014

Vinod ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Chandrabhan Kushwaha, Sri Mahendra Pal Singh Gaur, Pradeep Kumar, Ms. Gunjan Sharma

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Indian Penal Code, 1860- Sections 304B & 498-A- Dowry Prohibition Act,1961 - Section 4- Conviction- Sentence of Life Imprisonment- Appeal pressed only on the Quantum of Sentence-

Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream-'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. Perusal of record goes to show that there is no doubt that deceased had committed suicide- It is also pertinent to note that there were no injury marks on the body of the deceased, hence, undoubtedly it is a case of hanging and we are of the considered opinion that learned trial court has awarded very harsh and severe punishment, which is life imprisonment- sentence is reduced to the period of 10 years under Section 304-B I.P.C.

Settled law that punishment should not be either unduly harsh or ridiculously inadequate but it ought to be proportionate to the gravity of the offence as well as other factors. As the criminal jurisprudence of our country is reformative and not retributive, hence applying the doctrine of proportionality sentence reduced to a period of ten years. (Para 19, 20, 21, 22, 23)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case Law relied upon:-

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Deo Narain Mandal Vs St. of U.P. ,(2004) 7 SCC 257

3. Ravada Sasikala Vs St.of A.P. AIR 2017 SC 1166

(Delivered by Hon'ble Ajai Tyagi, J.)

1. The appeal has been preferred by the appellant-Vinod against the judgment and order dated 15.11.2014, passed by learned Additional Sessions Judge, Court No.6, Badaun in Session Trail No. 172 of 2013 (State of UP vs. Vinod), arising out of Case Crime No. 547 of 2012, under Sections 498-A, 304B Indian Penal Code, 1860 (in short "I.P.C.') and Section 3/4 of Dowry Prohibition Act, Police Station-Kadarchowk, District Badaun whereby the appellant is convicted and sentenced for the offence under Section 304-B I.P.C. for life imprisonment, under Section 498-A I.P.C. for three years rigorous imprisonment with a fine of Rs.3,000/- and in default of payment of fine, further imprisonment for three months. Accused-appellant is also convicted and sentenced for the offence Section 4 of D.P. Act for one year rigorous imprisonment with a fine of Rs.1,000/- and in default of payment of fine, further imprisonment for one month.

2. Brief facts of the case giving rise to this appeal are that a written report was submitted by complainant Natthu Lal (father of the deceased) at police station Kadarchowk, District Badaun with the averments that marriage of his daughter Seema was solemnized with accused-Vinod before one and half year. He had given dowry as per his capacity. After marriage accused-Vinod and his family members demanding motorcycle, gold chain and ring as additional dowry and used to compel his daughter to bring the aforesaid articles. It is further averred that on 23.10.2012, appellant-Vinod and his family members had murdered his daughter, who is having injury marks on her neck and feet. It is also stated in written report that accused-Vinod himself informed him on phone that they have killed his daughter.

3. On the basis of above written report, a case crime no.547 of 2012 was registered at Police Station Kadarchowk, under Sections 498-A, 304-B I.P.C. and Section 3/4 of Dowry Prohibition Act. Investigation was taken up by Circle Office, who visited the spot, prepared the site plan and recorded the statement of witnesses. Inquest report was prepared and post-mortem of the dead body was conduced and its report was also prepared by doctor. After completion of investigation, I.O. submitted the charge sheet against accused-Vinod only, who is the husband of the deceased. Other accused named in the First Information Report were not charge sheeted. Case being exclusively triable by the court of session was committed to the court of session for trial, hence, trial taken placed against accused-Vinod.

4. Learned Sessions Court framed the charges against accused-Vinod under Section 3 r/w 4 of Dowry Prohibition Act, under Section 498-A and 304-B I.P.C. Charges were read over to the accused, who denied the charges and claimed to be tried.

5. To bring home the charges, the prosecution examined following witnesses:

1.	Natthu Lal	P.W.-1
2.	Satendra Pal	P.W.-2
3.	Mahendra Kumar Singh	P.W.-3
4.	Dr. S.K.Saxena	P.W.-4
5.	Jai Kesh	P.W.-5

6. In support of oral evidence, prosecution submitted following documentary evidence, which was proved by leading oral evidence:-

1.	FIR	Ex.ka-8
2.	Written report	Ex.ka-1
3.	Post-mortem report	Ex.ka-7
4.	Panchayatnama	Ex.ka-2
5.	Charge sheet Mool	Ex.ka-11
6.	Site plan with index	Ex.ka-10

7. After completion of prosecution evidence, the statement of accused was recorded under Section 313 of Criminal Procedure Code (Cr.P.C.), in which he denied his involvement in the crime and told that false evidence was led against him. The accused examined D.W-1 Ram Nath and D.W.-2 Satyapal in defence.

8. Heard Ms. Gunjan Sharma, learned Advocate holding brief of Mr. Pradeep Kumar, counsel for the appellant and Mr. N.K. Srivastava, learned counsel for the State. Record has been perused.

9. Perusal of record shows that occurrence of this case had taken place on 23.10.2012. As per the prosecution story, accused-appellant and his family members committed the offence but they were not charge sheeted because no sufficient evidence was found against them during the course of investigation.

10. Leaned counsel for the appellant has submitted that as per the F.I.R., family members of the appellant were also involved in the offence but no evidence was found against them, which goes to show that entire F.I.R. is fabricated and false averments were made by the complainant to rope in all the family members of the appellant. Such type of F.I.R. is highly suspicious and cannot be believed. It is further submitted that if the offence was committed by appellant, there could be no reason that he himself

informed the father of the deceased as is evident from the version of F.I.R.

11. It is next submitted by learned counsel for the appellant that prosecution has examined P.W.-1, Natthu Lal, father of the deceased and P.W.-2 Satendra Pal, brother of the deceased, as a witnesses of fact but their testimony has material contradictions, which go to the root of the case. Demand of additional dowry is not proved, even the F.I.R. does not mention any story of torture on the part of the appellant.

12. With regard to the medical evidence, learned counsel for the appellant has submitted that as per the post-mortem report, there is only ligature mark of injury was found on the neck of the deceased and doctor has also opined that deceased has committed suicide. No other mark of injury was found on the body of the deceased, hence, it is proved that deceased was not tortured or beaten up etc. which falsify the prosecution story.

13. After the aforesaid arguments, learned counsel for the appellant submits that he wanted to press the appeal only on the ground of quantum of sentence and it is also submitted that learned trial court has awarded very severe punishment of life imprisonment while there was no torture either mental or physical on the part of the accused-appellant is proved.

14. Learned A.G.A. for the State has vehemently objected to the submissions of learned counsel for the accused-appellant and submitted that death of deceased had taken place within 7 years of her marriage. P.W.-1 and P.W.-3 have proved the demand of additional dowry. It is also submitted that even the death by suicide is covered within the category of dowry death. Learned trial court has rightly convicted and sentenced the accused-appellant.

15. During the course of arguments, learned counsel for the appellant has submitted that he wants to press this appeal only on the ground of quantum of compensation and no merits. In this regard, we have to analyse the theory of punishment prevailing in India.

16. In ***Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926],*** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

17. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP***

[(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

18. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,*** the Supreme Court referred the judgments in ***Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463]*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

19. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

20. Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

21. As discussed above, 'reformative theory of punishment' is to be adopted and

for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

22. Perusal of record goes to show that there is no doubt that deceased had committed suicide. Antemortem injury in post-mortem report show that there was only ligature mark around the neck above the thyroid cartilage obliquely. It was sized about 24 cm X 1 cm. Dr. S.K. Saxena, P.W.-4 has also opined that in the opinion of panel of doctors cause of death was hanging. It is also pertinent to note that there were no injury marks on the body of the deceased, hence, undoubtedly it is a case of hanging and we are of the considered opinion that learned trial court has awarded very harsh and severe punishment, which is life imprisonment.

23. Keeping overall facts and circumstances of this case, in our opinion, ends of justice would be met if the sentence is reduced to the period of 10 years under Section 304-B I.P.C. Sentence under Section 498-A I.P.C. and Section 4 of Dowry Prohibition Act has already been served. Fine imposed under Section 498-A I.P.C. and Section 4 of Dowry Prohibition Act is maintained and sentence in default of fine is also maintained.

24. Accordingly, the appeal is ***partly allowed***, as modified above.

25. Record be sent to trial court immediately.

(2022) 8 ILRA 28
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 6158 of 2008

Harish Kumar & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Raj Singh, Sri Devendra Swaroop, Sri R.D. Dauholia, Sri Siddharth Singh, Sri Vijendra Singh, Sri Sunil Kumar Upadhaya

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Indian Penal Code, 1860- Sections 498-A & 304-B- Indian Evidence Act, 1872- Section 32- Dying Declaration- While going through the evidence of the witnesses, it cannot be said that Section 498A read with Section 304B of I.P.C is not made out qua the accused no. 1- Harish Kumar. This takes us to the evidence against the mother-in-law- Kashtoori Devi, while going through the oral testimony of P.W.-1, P.W.-2 and P.W.-3 we do not find any reason to believe that she was a party to the incident, her presence has not been proved. There is no overt act of mother-in-law even in the oral dying declaration. There are 40% burns. The investigation of the investigating authority qua the mother-in-law appears to be faulty. We, therefore, cannot uphold the conviction of the mother-in-law-Kashtoori Devi. We give benefit of doubt to the mother in law namely Kashtoori Devi.

As the mother-in- law of the deceased has not been assigned any overt act in the dying declaration and neither is there any evidence against her in the testimony of the prosecution witnesses, hence her conviction set aside.

Indian Penal Code, 1860- Sections 498-A & 304-B – Quantum of Punishment- As the accused has been in jail for more than 13 years i.e sufficient for him, hence he may set free if not required in any other offence. As far as Section 498A of I.P.C is concerned he has already undergone the punishment and if the fine is not paid the default sentence would also have been over by now which would began after the incarceration awarded by the trial court as over began from that date. As far as Section 304B of I.P.C. is concerned we punish him for 12 years and the default sentence is maintained. If the accused has served out his sentence he be released if not wanted in other offence.

Settled law that the criminal jurisprudence of our Country is reformative and not retributive, hence punishment should not be unduly harsh but proportionate to the gravity of the offence and other relevant factors. Accordingly, sentence reduced to 12 years. (Para 9, 12, 13)

Criminal Appeal partly allowed. (E-3)

Case Law/Judgements relied upon:-

1. Ganesh Babu @ Ganesh Vs St. of Kar. (2020 Lawsuit (Kar) 658 (cited)

2. Kashmira Devi Vs St. of U.K. & ors. AIR 2020 SC 652 (cited)

3. Mirza Iqbal @ Golu & anr. Vs St. of U.P & anr. 2021 0 Supreme (SC) 795

4. Criminal Appeal No. 2878 of 2013

5. St. of M.P. Vs Jogendra, (2022) 5 SCC 401

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. This appeal challenges the judgment and order dated 28.08.2008 passed by Additional Sessions Judge, Court No.10, Aligarh in Sessions Trial No. 597 of 2006 convicting accused-appellants under Section 304-B of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo imprisonment for life and under Section 498-A of I.P.C three-three years rigorous imprisonment with fine of Rs.5,000/- and in default of payment of fine, further to undergo imprisonment for six months to all the appellants.

2. Factual scenario as culled out from the record and the judgment of the Court below is that the accused-appellant Harish Kumar is the husband of the deceased who died after seven days suffering out of septicemia. He is in jail since 2006 namely since the date incident occurred. The other co-accused namely the father-in-law- Naurangi Lal of the deceased breathed his last therefore qua him the appeal is abated, the third accused is minor and a juvenile, hence she was tried by Juvenile Board and as per the submission of the counsel for the appellant she has been acquitted, the mother-in-law- Kashtoori Devi who was in jail for two and a half year and thereafter she has been released on bail by this Court. The genesis of the incident occurred when the brother of the deceased was informed that his sister who had been sent to the matrimonial home on 05.12.2005, her body is seen to have been ablazed. Thereafter, she was shifted to the hospital with burn injuries, there was superficial to deep burn injuries and the injuries were 40% superficial to deep burn injuries, she was admitted in the hospital immediately on the date of the incident and after a period of about 7 days i.e on 13.12.2005 at about 6:50 p.m, she breathed her last. It is under these circumstances that the prosecution

was moved into motion. The investigation culminated into charge-sheet being laid against all the four accused.

3. The offence being triable by the court of Sessions. The learned Magisterial Trial Court committed the accused to the Sessions Court. The learned Sessions Judge, summoned the accused from jail those who are not on bail and after completing all the formalities the accused-appellants were charged on 28.08.2006 and an alternative charge on 16.01.2007 for commission of offence under Sections 323, 498A, 504 and 304-B I.P.C.

4. On being read over the charges, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 9 witnesses who are as follows:

1	Deepu @ Deepak Kumar	PW1
2	Smt. Kamla Devi	PW2
3	Head Moharir-59 Ram Chandra Rathore	PW3
4	Dr. N.K.Tandon	PW4
5	Dr. Hansraj Singh	PW5
6	S.I. Raghuraj Singh Harij	PW6
7	Anand Kumar	PW7
8	S.I. Chiraunji Lal	PW8
9	Ratnesh Chaturvedi	PW9

And said witnesses tried to prove the documentary evidence produced by the prosecution. On prosecution the evidence been laid end after closing process Kashtoori, Naurangi Lal and Pinky are the accused whose statement were recorded under Section 313 Cr.P.C. The statement of Section 313 Cr.P.C is one of denial.

5. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.
2	Written Report	Ex.Ka.
3	Injury Report	Ex.Ka.
4	Postmortem Report	Ex.Ka.
5	Panchayatnama	Ex.Ka.
6	Site Plan with Index	Ex.Ka.

6. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Trial Court convicted the three accused for commission for offence under Section 304-B of I.P.C for life imprisonment and under Section 498-A of I.P.C three-three years imprisonment with Rs. 5000/- as fine. The State nor the private respondent preferred any appeal.

7. Heard Sri Sunil Kumar Upadhaya, learned counsel for the appellant, Sri Patanjali Mishra, learned A.G.A for the State and perused the record.

8. As far as father-in-law of the deceased is concerned as we have narrated herein above, the case has abated that takes us to the evidence against the mother-in-law. Even if we go the by the oral dying declaration which is submitted by the learned counsel for the State that the deceased orally confined to her brother which is borne out from the F.I.R that her husband Harish Kumar has set her ablaze. This dying declaration has been heavily relied by the Counsel for the State and has further submitted the name of all the accused which have been given by the deceased in dying declaration to the brother.

9. While going through the evidence of the witnesses, it cannot be said that Section 498A read with Section 304B of

I.P.C is not made out qua the accused no. 1-Harish Kumar. This takes us to the evidence against the mother-in-law-Kashtoori Devi, while going through the oral testimony of P.W.-1, P.W.-2 and P.W.-3 we do not find any reason to believe that she was a party to the incident, her presence has not been proved. There is no overt act of mother-in-law even in the oral dying declaration. There are 40% burns. The investigation of the investigating authority qua the mother-in-law appears to be faulty. We, therefore, cannot uphold the conviction of the mother-in-law-Kashtoori Devi. We give benefit of doubt to the mother in law namely Kashtoori Devi.

10. This takes us to the question of applicability of Section 304B of I.P.C to the facts of this case. The learned counsel for the appellant has relied on the following decisions so as to contend that punishment of life imprisonment pronounced by learned trial Judge is bad:-

i. Ganesh Babu @ Ganesh Vs. State of Karnataka (2020 Lawsuit (Kar) 658;

ii. Kashmira Devi Vs. State of Uttraakhand and Ors. (AIR 2020 SC 652);

iii. Mirza Iqbal @ Golu and Another Vs. State of Uttar Pradesh and Another [2021 0 Supreme(SC) 795]

11. It would be relevant for us to refer a recent judgment of this High Court in Criminal Appeal No. 2878 of 2013 :-

14. While coming to the conclusion that the accused is the perpetrator of the offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters. This Court would refer to the following precedents, namely, Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

15. 'Proper Sentence' was explained in Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding

sentence cannot be exercised arbitrarily or whimsically.

16. In Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166, the Supreme Court referred the judgments in Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

17. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

12. The facts that even the judgment of **Mirza Iqbal (Supra)** which is the recent judgment. As the accused has been in jail for more than 13 years i.e sufficient for him, hence he may set free if not required in any other offence. As far as Section 498A of I.P.C is concerned he has already undergone the punishment and if the fine is not paid the default sentence would also have been over by now which would began after the incarceration awarded by the trial court as over began from that date. As far as Section 304B of I.P.C. is concerned we punish him for 12 years and the default sentence is maintained. If the accused has served out his sentence he be released if not wanted in other offence.

13. By going through the evidence on record it is very clear that the act of the appellant Harish Kumar was not such which cannot be substituted by giving a lessor sentence than life imprisonment. The

period of 13 years which he spent is enough punishment in the facts of this case. The minor contradictions will have to be ignored and they cannot for the dent in the prosecution of the husband. Medical evidence is quite clear and corroborates the facts and circumstances. Punishment would be 12 years incarceration, the fine and default sentence are also maintained.

14. Recent judgment of State of **M.P Vs. Jogendra, (2022) 5 SCC 401.** Paragraph-20 of the said judgment can be followed, however, instead of seven years period undergone would be more than relevant the facts and circumstances of this case.

15. Accordingly, the appeal is partly allowed with the modification of the sentence as above. Record and proceedings be sent back to the Court below forthwith.

16. A copy of this order be sent to the jail authorities for following this order and doing the needful.

17. This Court is thankful to learned Advocates for ably assisting the Court.

(2022) 8 ILRA 33
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 7552 of 2008

Baru ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rajiv Kumar Saini, Sri Amit Kumar Chaudhary, Sri Brijendra Singh Khokher, Sri Chandra Shekhar Mishra, Sri G.S. Chaturvedi, Sri Harish Chandra Singh, Sri Noor Mohammad, Sri Onkar Singh, Sri Rajesh Ji Verma, Sri Vinod Tripathi

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Indian Evidence Act, 1872- Section 106 - Burden of Proof - The impugned judgment of the Court below of Section 106 of Indian Evidence Act, 1872, which cannot be made applicable in the facts and circumstances of this case. The burden cannot be shifted on the accused to prove his innocence. This is a case of direct evidence that PW1 and PW2 are eye-witness and they saw the occurrence. Hence, this is not the fact which was in special knowledge of accused Baru. Hence, Section 106 of Indian Evidence Act has no applicability in this case.

Settled law that the prosecution can shift the burden on the accused only where the facts are especially within the knowledge of the accused in a case, which rests on circumstantial evidence, but Section 106 of the Evidence Act cannot be made applicable in a case of direct ocular evidence.

Indian Evidence Act, 1872 - Section 3 - If the trial court has disbelieved the recovery of iron rods on the pointing out of the accused persons, it has also broken the chain of circumstances because the prosecution based its case on the fact that the three accused persons inflicted blows to the deceased by iron rods.

Where the court proceeds on the premise that the case rests on circumstantial evidence and the recovery of the weapon is disbelieved then the chain of the circumstances stands broken.

Indian Evidence Act, 1872- Section 3 - Learned trial court has committed gross error and illegality by convicting the Baru

on the same set of evidence on which the other accused persons were acquitted.

Settled law that the conviction of an accused cannot be secured when on the same set of evidence the co-accused have been acquitted. (Para 11, 14)

Criminal Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Daulat Ram & Daulati Para 11, 14 Vs St. of Har., 2015 (2) AII JIC 446

2. Sharad Vs St. of Mah., AIR 1984 SC 1622

(Delivered by Hon'ble Ajai Tyagi, J.)

1. Heard Sri Noor Mohammad, learned counsel for the appellant and Sri N.K. Srivastava, learned A.G.A. for the State.

2. This appeal challenges the judgment and order dated 25.10.2008 passed by the Additional District & Sessions Judge, Saharanpur in Sessions Trial No.56 of 2008 convicting & sentencing Baru, appellant, for commission of offence under Sections 302 of Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.') to undergo rigorous imprisonment for life with fine of Rs.10,000/- and in case of default of payment of fine, further to undergo two years' imprisonment. The accused has undergone more than 14 years of incarceration. He is the sole convict of the above offence.

3. Brief facts of the case are that a first information report was lodged by complainant -Ashok Kumar, brother of the the deceased Brahm Dutt, averring that on 30.07.2007 deceased was siting in his village with his brother Mage Ram and complainant Ashok Kumar. At about 9:00 pm, Titu son of Pandit Om Prakash came there and asked Brahm Dutt that Baru and Vinod are calling him on the roof of Baru because he wants settlement with him, in this way Titu took away Bhram Dutt on the roof of Baru. After five minutes complainant and his brother Mage Ram heard the voice of Brahm Dutt, who was crying to save him. Complainant and his brother Mage Ram went on to the roof of Baru by having torch in their hands and in the light of torch they saw that Titu S/o Om Prakash, Baru S/o Thakur Ram Singh and Vinod were beating the deceased Brahm Dutt with iron rods in their hands by hitting on the head of the deceased. When these persons saw the complainant and his brother they ran away by jumping east wall. It is also averred that the dead body of the deceased is lying on the roof of Baru and in his murder Ex-Pradhan Pandit Ramesh was also conspirator.

4. On the basis of the aforesaid written report, a first information report was lodged and investigation was taken up by the I.O. During the course of investigation post mortem of deceased was conducted. I.O. recovered three iron rods on the pointing out of accused Baru, Titu and Vinod. Accused Titu, Baru and Vinod were charged under Section 302 read with Section 34 IPC. Accused Ramesh Pandit was charged of offence under Section 120B IPC. After the trial learned court below acquitted accused Titu, Vinod and Ramesh and convicted Baru for the offence under Section 302 of IPC.

5. This F.I.R. culminated into recording of statements of the witnesses and charge-sheet was laid against four accused-persons. The accused was alleged to have committed murder, hence, he was committed to the Court of Sessions. The

accused being summoned, pleaded not guilty and wanted to be tried.

6. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charge, examined seven witnesses, who are as under:-:

1	Ashok Kumar	PW1
2	Mage Ram	PW2
3	Brahma Singh	PW3
4	Dr. Krishna Kumar	PW4
5	Shravan Kumar	PW5
6	Shravan Kumar	PW6

7. In support of ocular version following documents were filed:

1	First Information Report	Ex.Ka.
2	Written Report	Ex.Ka.
3	Recovery Memo of blood-stained & plain earth	Ex.Ka.
4	Recovery Memo of Iron 'Bariya'	Ex.Ka.
5	Postmortem Report	Ex.Ka.
6	Site Plan	Ex.Ka.

8. On the witnesses being examined and the prosecution having concluded its evidence, the accused was put to questions under Section 313 Cr.P.C. On hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the accused-appellant only and acquitted the other three accused as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the appellant has preferred the present appeal.

9. Learned counsel for the appellant has placed heavy reliance on the decision of the Apex Court in **Daulat Ram & Daulati vs. State of Haryana, 2015 (2) AII JIC 446** and has contended that in similar facts, three named accused in the F.I.R. have been acquitted. Same role has been ascribed to the present appellant also. There is conviction only based on incriminating evidence given by the accused himself. There is no specific role ascribed to the appellant. The main two eye-witnesses, who according to the prosecution have witnessed the incident have not supported the prosecution case. P.W.1 and P.W.2 have not supported the prosecution case. P.W.5 has also not supported the prosecution case and has been declared person not supporting prosecution and has been cross examined by the learned counsel for the State.

10. Learned A.G.A. for the State has contended that the accused has been named in the F.I.R., the weapon of crime has been recovered at his instance and P.W.1 before declared hostile, has supported the prosecution case. Moreover, it is submitted by learned A.G.A. that the judgment of the Apex Court in **Daulat Ram & Daulati (Supra)** will not apply to the facts of this case.

11. Having considered the facts and submissions, three things emerges. One, there are three injuries as per postmortem report but none of the witnesses has deposed as to which injuries has been caused by the accused-appellant. Two, weapon (iron rods) have been used by three accused persons who got them required but the judgement is silent on the role of other two accused. Post mortem report has three ante mortem injuries. If all the three injuries are inflicted by Baru, then what was done by other two with iron rods which were recovered on their pointing out? Three, the impugned judgment of the

Court below of Section 106 of Indian Evidence Act, 1872, which cannot be made applicable in the facts and circumstances of this case. The burden cannot be shifted on the accused to prove his innocence. This is a case of direct evidence that PW1 and PW2 are eye-witness and they saw the occurrence. Hence, this is not the fact which was in special knowledge of accused Baru. Hence, Section 106 of Indian Evidence Act has no applicability in this case. If the evidence of this case is analysed with the angle of circumstantial evidence then the chain of circumstances should be completed while in this case, the only circumstance against the accused Baru is that the dead body of the deceased was found on the roof of his house. Learned trial court has stated in the judgement that the dead body of the deceased was found on the roof of the house of the accused Baru because the deceased was called upon by co-accused Titu to the roof of the house of Baru for some settlement, but this observation does not hold good because the contents of first information report were denied by PW2 as well as complainant and they have not supported the prosecution case. Hence, the first information report has itself become highly suspicious. This finding itself is perverse. We find that the judgment is based on what can be said to be moral conviction.

12. Recently the Apex Court has held that where there are no credible witnesses who deposed and the chain of circumstances is not complete to prove the offence of the accused, the accused cannot be convicted. Hence, if we analyse the evidence from the angle of circumstance also then following settled law is to be kept in mind. Three Judge Bench in the case of **Sharad Vs. State of Maharashtra,** [AIR 1984 SC 1622] held as under:

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (alias) Simmi v. State of Uttar Pradesh and Ramgopal v. State of Maharashtra. It may be useful to extract what Mahajan, J. has laid down in Hanumant case:

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

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 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, const*itute the panchsheel of the proof of a case based on circumstantial evidence."

13. In this case, motive is not proved by the prosecution. Recovery of so called weapon i.e. iron rod is also very doubtful and makes the prosecution case highly suspicious. Hence, chain of circumstances is not complete in a way which could point out that the offence is committed by the appellant only and none else.

14. Moreover, learned trial court has also stated that the so called eye-witness, namely, PW1 and PW2 had turned hostile. Hence, in such a situation the recovery of iron rods on the pointing out of the accused persons lost importance. We have failed to understand if the trial court has disbelieved the recovery of iron rods on the pointing out of the accused persons, it has also broken the chain of circumstances because the prosecution based its case on the fact that the three accused persons inflicted blows to the deceased by iron rods. Learned trial court has committed gross error and illegality by convicting the Baru on the same set of evidence on which the other accused persons were acquitted. The case of the prosecution is shattered by the eye-witnesses PW1 and PW2 with regard to all the accused persons. Hence, it cannot be altogether ignored by us that the other co-accused persons, with the similar role on the basis of the same evidence, have been acquitted from the charges of murder. The other witnesses are formal witnesses and their evidence is not incriminating against the appellant.

15. For the reasons, as discussed above, we are of the opinion that although this is the case of direct evidence and the case is not proved against the accused-appellant by the evidence led by prosecution and even if as we have analysed the evidence from the angle from circumstantial evidence also, we are of the view that the chain of circumstances is not at all completed to prove the charges levelled against the accused-appellant.

16. In view of the above, we have no other option but to reverse the conviction. The accused is acquitted. Judgment and order passed by the learned Sessions Judge is set aside. This appeal is **allowed**. As he has been already enlarged on bail, he need

not surrender and if the fine has been paid by him, the State shall refund the amount of fine.

17. Record and proceedings be sent back to the Court below forthwith.

18. This Court is thankful to both the learned Advocates for ably assisting the Court.

(2022) 8 ILRA 38
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 4470 of 2013

Nanak Chand Gautam ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rahul Chaturvedi, Sri Jitendra Kumar, Sri Prasoon Tomar

Counsel for the Respondents:
Govt. Advocate, Sri Suresh Chandra Pandey

A. Criminal Law - Criminal Procedure Code, 1973 – Section 256 & 302 – Complainant died in a complaint case filed u/s 138 N.I. Act – Effect – While legal heirs of the complainant sought permission u/s 302 to continue the prosecution, the accused moved application u/s 256 to dismiss the complaint – Application u/s 256 was rejected and permission u/s 302 was allowed – Validity challenged – In case of death of the complainant, the legal heirs of the complainant could be allowed to continue the prosecution and the complaint cannot be dismissed on the aforesaid ground – Chand Devi Daga's case relied upon – High Court found no error in the impugned order of the trial court in rejecting the application u/s 256 Cr.P.C. and allowing the legal heirs of the complainant to prosecute the complaint under Section 138 N.I. Act. (Para 13 and 14)

Application dismissed. (E-1)

Cases relied on :-

1. Ashwin Nanubhal Vyas Vs St. of Mah.; AIR 1967 SC 983

2. Jimmy Jahangir Madan Vs Bolly Cariyappa Hindley; (2004) 12 SCC 509

3. Balasaheb K. Thackeray & anr. Vs Venkat @ Babru; (2006) 5 SCC 530

4. Chand Devi Daga & ors. Vs Manju K. Humatani & ors.; (2018) 1 SCC 71

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Prasoon Tomar, learned counsel for the applicant, Mr. Suresh Chandra Pandey, learned counsel for the opposite party no.2 and Mr. Pankaj Kumar Srivastava and Amit Singh Chauhan, learned A.G.A for the State and perused the material available on record.

2. The present application under Section 482 Cr.P.C. has been filed to quash the impugned order dated 08.11.2012 by which the learned Magistrate has rejected the application No.115B U/s 256 Cr.P.C. in Criminal Case No.1336/IX/2008 (Radhey Shyam Agarwal Vs. Nanak Chand Gautam) U/s 138 N.I. Act, Police Station-Kotwali, Mathura, pending in the Court of VIth Judicial Magistrate, Mathura.

3. The records go to show that a complaint under Section 138 N.I. Act was filed by Late Radhey Shyam Agrawal

against the applicant, challenging the proceedings an application No.13672 of 1993 (Nanak Chand Vs. State of U.P.) was filed before the Hon'ble Court and the Hon'ble Court on 13.09.1993 stayed the further proceedings of the criminal case No.2955/IX/1992, filed under Section 138 N.I. Act. Subsequently, the aforesaid case was dismissed in default and stay order was vacated on 02.09.1997. Earlier, on an application of the applicant, the trial Court vide order dated 13.03.2006 closed the evidence of defence of the applicant and fixed 24.03.2006 as the date for argument. Thereafter, on 14.04.2006 the applicant moved an application with the prayer to provide opportunity for producing evidence in his defence, on which on 10.09.2008, last opportunity was given to the applicant/accused for producing evidence in his defence. On 20.02.2009, the application of the applicant was rejected and opportunity for producing evidence was closed by a detailed order. A Criminal Revision was filed against the order dated 20.02.2009 in the Court of Sessions Judge, Mathura on 15.04.2009 and the same was also dismissed.

4. The complaint was filed by father of opposite party no.2 on 15.11.1990 and the applicant was summoned on 15.08.1991 but due to delaying tactics of the applicant, the case could not be decided. During pendency of the aforesaid case, the complainant namely, Radhey Shyam Agarwal expired, therefore, an application under Section 256 Cr.P.C. was moved by the applicant on 04.02.2010 before the Court of Judicial Magistrate, Mathura for dismissal of the complaint on the ground of complainant's death. On 05.07.2010, an objection was filed by son of the complainant stating therein that the complaint does not come to an end in case of death of the complainant on account of relevant provisions as laid down in Code of Criminal Procedure.

5. The son of the complainant namely, Rajeev Agarwal moved an application dated 20.08.2010 in the Court concerned for impleading him as legal representative as the complainant in the proceedings under Section 138 N.I. Act being his father had expired. The application moved by the applicant on 04.02.2010 under Section 256 Cr.P.C. has been rejected by order dated 08.11.2012 against which the present case has been filed.

6. Learned counsel for the applicant submits that in the Code of Criminal Procedure, 1973 (hereinafter referred to as "the 1973 Code") there is no provision which permits legal representatives of complainant to be substituted for prosecuting the complaint. Placing reliance upon the Section 256 Cr.P.C., he further submits that the complaint was to be dismissed on the ground of death of the complainant. On the other hand, relying upon provisions of Section 256 Cr.P.C., Section 302 Cr.P.C. as well as the 1973 Code, learned counsel for the opposite party as well as learned A.G.A. submit that the 1973 Code does not contain any provision that on death of complainant, the complaint cannot be allowed to be prosecuted by any other person including the legal representatives.

7. Learned counsel for the opposite party no.2 submits that the application moved for substituting him in place of complainant, has already been allowed in the year 2010 and the trial is going on.

8. I have considered the submissions made by counsel for the parties and perusal the records.

9. Before looking into the facts of the present case, it would be appropriate to place the extract of Section 256 of the Code of Criminal Procedure, 1973 as contained in Chapter XX, which is as under:-

*"**256. Non-appearance or death of complainant--(1)** If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:*

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub section (1) shall, so far as may be, apply also to cases where the non appearance of the complainant is due to his death."

10. It would be also appropriate to discuss the analogous provision to Section 256 of the 1973 Code as contained in Section 247 of the Criminal Procedure Code, 1898. The proviso to Section 247 was added in 1955 which said that "where the Magistrate is of the opinion that personal attendance is not necessary, he may dispense with such attendance". By the aforesaid proviso, the whole thing was left to the discretion of the Court. Sub Section (1) of 256 contains the above proviso in the similar manner. Thus, even in case of trial of summons, it is not necessary or mandatory that after the death of the complainant the complaint is to be rejected, in exercise of the power under proviso to Section 256(1), the Magistrate can proceed with the complaint. At this juncture, it is relevant to place the principles applicable as discussed by this Court in case of **Ashwin Nanubhal Vyas v. State of Maharashtra** with reference to Section 495 of Cr.P.C. 1898 (hereinafter referred as old code), reported in **AIR 1967 SC 983**, wherein it was held that the Magistrate has power to permit a relative as complainant to continue the prosecution. In case of **Jimmy Jahangir Madan v. Bolly Cariyappa Hindley, reported in 2004 12 SCC 509,** after referring to Ashwin case, it was held that heir of the complainant can be allowed to file a petition under Section 302 of the Code to continue the prosecution, it would be appropriate to extract Section 302 of the Code, which reads as under:-

*"**302. Permission to conduct prosecution.**--(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:*

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with

respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

11. Thus, if any, permission is sought for by the legal heirs of the deceased complainant to continue prosecution, the same shall be considered in its perspective by the Court dealing with the matter. Sections 256 and 302 have been considered in case of **Balasaheb K. Thackeray And Another v. Venkat Alias Babru,** reported in **2006 5 SCC** 530, wherein dealing with the aforesaid provisions, the Court held that the complaint cannot be dismissed on the ground that complainant had died.

12. The following has been held in paragraph 3 to 6 of the aforesaid judgement, which are as under:

"3. Learned counsel for the appellants with reference to Section 256 of the Code submitted that the complaint was to be dismissed on the ground of the death of the complainant. As noted above the learned counsel for Respondent 1's legal heirs submitted that the legal heirs of the complainant shall file an application for permission to prosecute and, therefore, the complaint still survives consideration.

4. At this juncture it is relevant to take note of what has been stated by this Court earlier on the principles applicable. In Ashwin Nanubhai Vyas v. State of Maharashtra with reference to Section 495 of the Code of Criminal Procedure, 1898 (hereinafter referred to as "the old Code") it was held that the Magistrate had the power to permit a relative to act as the complainant to continue the prosecution. In Jimmy Jahangir Madan v. Bolly Cariyappa Hindley after referring to Ashwin case it was held that heir of the complainant can be allowed to file a petition under Section 302 of the Code to continue the prosecution.

5. Section 302 of the Code reads as under: "302. Permission to conduct prosecution.--(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

6. To bring in application of Section 302 of the Code, permission to conduct the prosecution has to be obtained from the Magistrate inquiring into or trying a case. The Magistrate is empowered to permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person other than the Advocate General or the Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission."

13. While dealing with the issue as to what is the effect of death of the complainant, the Court in case of **Chand Devi Daga and others v. Manju K. Humatani and others,** reported in **2018 1 SCC 71** has held that in case of death of the complainant, the legal heirs of the complainant could be allowed to continue

the prosecution and the complaint cannot be dismissed on the aforesaid ground.

14. In view of the above discussion, this Court is of the opinion that the Court concerned did not commit any error in rejecting the application of the applicant and allowing the legal heirs of the complainant to prosecute the complaint under Section 138 N.I. Act.

15. This Court does not find any error in the order dated 08.11.2012, accordingly, the application under Section 482 Cr.P.C. is **dismissed.** Interim order, granted earlier stands discharged.

16. However, the concerned Court is directed to conclude the trial within six months from the date of production of a certified copy of this order.

17. Office is directed to communicate about this order to the Court concerned forthwith.

(2022) 8 ILRA 42
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Special Appeal No. 117 of 2022

Ghaziabad Development Authority ...Appellant

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri Satendra Tripathi

Counsel for the Respondents:
C.S.C., Sanjay Kumar Mishra, Sri Vibhu Rai, Sri Anoop Trivedi (Senior Adv.)

A. Service Law – UP Development Authorities Centralized Services Retirement Benefits Rules, 2011 – R. 2(1) – Pension and other retirement benefit – Entitlement – Earlier the petitioner was appointed on the post of the Law Assistant, which was subsequently merged and re-designated as Law Officer – Denial of the Pensionary benefit on the ground of non-fulfillment of 20 years qualifying service – Legality challenged – Division Bench found no error in Judgment of Single Judge holding that writ petitioner had rendered the qualifying service of more than 20 years and as such the decision to deny the writ petitioner the retiral benefits could not be sustained. (Para 7 and 9)

Special Appeal dismissed. (E-1)

List of Cases cited:-

1. Special Leave to Appeal (C) No. 1109 of 2022; St. of Guj. & ors. Vs Talsibhai Dhanjibhai Patel decided on 18.2.2022; 2022 Live Law (SC) 187

(Delivered by Hon'ble Pritinker Diwaker, J.
&
Hon'ble Ashutosh Srivastava, J.)

1. Sri Satendra Tripathi, learned counsel for the appellant, learned Standing Counsel for the State-respondents and Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Vibhu Rai, learned counsel for respondent No.2.

2. The present intra Court Appeal has been filed questioning the legality, propriety and correctness of the judgement and order of the learned Single Judge dated 22.9.2021 passed in Writ-A No. 63 of 2020 (*Rajendra Kumar Tyagi vs. State of U.P. and another*) whereby and whereunder the

writ petition has been allowed holding that the writ petitioner/respondent satisfies the eligibility criteria prescribed under the Retirement Benefits Rules of 2011 and has rendered the qualified service of more than 20 years and stands entitled to retirement benefits and directions has been issued that the writ petitioner/respondent shall be entitled to payment of pension alongwith interest @ 6% per annum from the date of his retirement till actual payment.

3. The writ petition was instituted with the allegation that the writ petitioner was appointed on the post of Legal Assistant consequent to an advertisement dated 18.2.1988 issued for appointment to the posts of Cost Accountant, Assistant Cost Accountant, Legal Assistant and Stenographer Typist. The writ petitioner faced selection and appointment letter dated 7.5.1988 was issued appointing the writ petitioner on the post of Legal Assistant on ad hoc basis till further orders. The writ petitioner joined his services and worked as Law Assistant. Meanwhile, one Sri Naresh Dutt Tyagi who was working as Law Officer with the appellant Development Authority superannuated on 30.9.2000 and he was paid his pension. It was pleaded in the writ petition that the post of Law Officer was sanctioned by the Board of the Ghaziabad Development Authority in terms of the provisions of Section 5(2) of the U.P. Urban Planning and Development Act, 1973. Subsequently, vide Government Order dated 10.3.2017, the post of Law Assistant and Law Officer were merged and re-designated as Law Officer and the writ petitioner was absorbed on the post of Law Officer in terms of the order dated 15.3.2017. The writ petitioner attained the age of superannuation and retired on 31.7.2018 and submitted his claim for payment of pension but the same was declined solely on the ground that the post of Law Assistant was not sanctioned and accordingly the writ petitioner was not entitled for payment of the pension.

4. It was the specific case of the writ petitioner/respondent before the learned Single Judge that he stood entitled to pensionary benefit in terms of Rule 2(1) of the U.P. Development Authorities Centralized Services Retirement Benefits Rules, 2011 and also satisfied the eligibility criteria provided therein. It was also stated that the writ petitioner continued to discharge his duties as a Law Assistant in pursuance to a substantive appointment made in accordance with law and continued to draw his salary from the State funds throughout the tenure of his appointment. The denial of pensionary benefits to the writ petitioner/respondent was thus wholly unjustified.

5. The judgement and order of the learned Single Judge is being resisted by the learned Counsel for the appellant mainly on the grounds that:

(i) the writ petitioner/respondent did not hold the post under the centralized services in terms of U.P. Development Authorities Regulations, 1985 and as such was not entitled to the retiral benefits under the U.P. Development Authorities Centralized Services Retirement Benefits Rules, 2011.

(ii) the post of Legal Assistant held by the writ petitioner/respondent was neither created by the State Government nor sanctioned by the State Government nor the writ petitioner/respondent was appointed by the State Government.

(iii) the appointment of the writ petitioner/respondent was not a substantive

appointment inasmuch as it was neither sanctioned by State Government nor the appointment was made by the State Government as is required under the U.P. Development Authorities Regulations, 1985.

(iv) the services of the writ petitioner/respondent were never regularized and could not be equated to that of Sri Naresh Dutt Tyagi who was appointed on 5.6.1979 and his post was duly sanctioned by the State Government.

6. It is thus submitted that the learned Single Judge erred in law in allowing the writ petition and in issuing directions for payment of the retiral dues along with interest and as such the intra Court Appeal deserves to be allowed.

7. We have heard the learned counsel for the parties and have perused the record. We find that the learned Single Judge has noted the fact that the writ petitioner was appointed on 7.5.1988 pursuant to an advertisement issued by the appellant itself and faced selection. The writ petitioner was also absorbed on the post of Law Officer in terms of order dated 15.3.2017 (Annexure-10 to the writ petition). The writ petitioner/respondent has been drawing salary from the State funds throughout the tenure of his appointment which fact was not disputed by the appellant. The learned Single Judge also found that the writ petitioner qualified the eligibility criteria prescribed under the Retirement Benefits Rules, 2011 and had rendered the qualifying service of more than 20 years and as such the decision to deny the writ petitioner the retiral benefits could not be sustained.

8. Recently the Apex court in the case of the **State of Gujarat and others vs. Talsibhai Dhanjibhai Patel,** Special Leave to Appeal (C) No. 1109 of 2022 decided on 18.2.2022 reported in **2022 Live Law (SC) 187** had the occasion to consider a similar situation and observed as under:-

"It is unfortunate that the State continued to take the services of the respondent as an ad-hoc for 30 years and thereafter now to contend that as the services rendered by the respondent are ad-hoc, he is not entitled to pension/pensionary benefit. The State cannot be permitted to take the benefit of its own wrong. To take the Services continuously for 30 years and thereafter to contend that an employee who has rendered 30 years continues service shall not be eligible for pension is nothing but unreasonable. As a welfare State, the State as such ought not to have taken such a stand.

In the present case, the High Court has not committed any error in directing the State to pay pensionary benefits to the respondent who has retired after rendering more than 30 years service."

9. In view of the above, we do not find any error in the judgement and order of the learned Single Judge so as to warrant an interference.

10. Accordingly, the Intra Court Appeal stands **dismissed.**

(2022) 8 ILRA 44
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Special Appeal Defective No. 135 of 2022

Rajeev Pandey & Anr. ...Appellants
Versus
Prem Shankar ...Respondent

Counsel for the Appellants:

Sri Pranab Kumar Ganguli

Counsel for the Respondent:
Sri Krishna Kant Mishra

A. Allahabad High Court Rules, 1952 – Ch. VIII, R. 5 – Special Appeal – Maintainability – Intra Court Appeal against order passed in a contempt proceeding holding that prima facie case is made out and directing for appearing in person – Held, jurisdiction to punish for contempt has to be cautiously exercised and cannot be a substitute for the execution of an order of the Court – Learned Single Judge while exercising the contempt jurisdiction has clearly transgressed the powers conferred upon him – Held, the Intra Court Appeal to be maintainable. (Para 13, 15 and 20)

B. Contempt of Court Act, 1971 – Contempt jurisdiction – Scope – Held, under the exercise of contempt jurisdiction, the High Court cannot go into the merits of the order of which a breach is complained of, or for that matter, decide upon issues which are left undecided. Orders supplemental to what has been decided by the order of which breach is complained, cannot be issued in exercise of contempt jurisdiction – Further held, in exercise of the contempt jurisdiction, the order of the Court of which a breach is complained of, has to be read and interpreted as it is and not as it should be and the Court cannot take a different view in exercise of the contempt jurisdiction on the merits of the case. (Para 6 and 10)

C. Contempt of Court Act, 1971 – Section 12 – Contempt jurisdiction – Scope of interference – Writ Court directed authority to dispose of representation by a speaking order – Order passed in compliance thereof, how far can be interfered with in contempt – Held, correctness, legality or propriety of the order passed in compliance of the direction cannot be gone into in contempt proceedings. The correctness or otherwise of the order passed in compliance of the direction of the Writ Court, if required may be tested in appropriate proceedings but certainly not in contempt proceedings. (Para 17)

Special Appeal allowed. (E-1)

List of Cases cited:-

1. Midnapore Peoples' Coop Bank Ltd. & ors. Vs Chunilal Nanda & ors.; 2006 (5) SCC 399

2. Jhareswar Prasad Paul Vs Tarak Nath Ganguly; 2002 (5) SCC 352

3. Director of Education, Uttaranchal & ors. Vs Ved Prakash Joshi & ors.; 2005 (6) SCC 98

4. Civil Appeal No. 1816 of 2014; Sudhir Vasudeva, Chairman & M.D. ONGC & others Vs M. George Ravishekaran & ors. decided on 4.2.2014

5. Bihar Finance Service House Construction Cooperative Society Ltd. Vs Gautam Goswami & ors.; 2008 (5) SCC 339

6. U.O.I. Vs Subedar Devassy; (2006) 1 SCC 613

7. Niyaj Mohammad Vs St. of Har.; 1994 (6) SCC 332

8. R.N. Dey Vs Bhagyabati Pramanik; 2002 (4) SCC 400

9. Midnapore Peoples' Corp. Bank Ltd. & ors. Vs Chunilal Nanda & ors.; (2006) 5 SCC 399

(Delivered by Hon'ble Pritinker Diwaker, J.
&
Hon'ble Ashutosh Srivastava, J.)

1. This Intra Court Appeal has been filed questioning the legality, propriety and correctness of the order dated 10.3.2022 passed by the learned Single Judge in Contempt Application (Civil) No. 5344 of 2021 *(Prem Shanker vs. Rajeev Pandey, Special Land Acquisition Officer/City Magistrate, Bareilly and another)* whereby and whereunder exercising powers under the Contempt of Courts Act, 1971, the learned Single Judge, holding that prima

facie a case for contempt is made out, has directed the appellants herein to appear in person before him to show cause as to why the contempt proceedings may not be initiated against them for alleged violation of the order dated 30.7.2019 passed in Writ-C No. 17534 of 2019.

2. It is vehemently contended on behalf of the appellants that the order passed by the learned Single Judge is legally not sustainable as it exceeds the jurisdiction conferred under the Contempt of Courts Act, 1971. The Writ Court vide its order dated 30.7.2019 had disposed of the writ petition with the liberty to the petitioner to file a fresh representation ventilating all his grievances which he had taken in the writ petition before the appellant No.1, Special Land Acquisition Officer/City Magistrate, Bareilly, who in turn was directed to consider and decide the same strictly in accordance with law by a speaking and reasoned order within a period of three months from the date of filing the representation before him. The appellant No.1 in compliance of the direction of the Writ Court passed a detailed / reasoned order dated 26.10.2020 deciding the claim of the writ petitioner. The writ petitioner, instead of assailing the validity and correctness of the order dated 26.10.2020 in appropriate proceedings, chose to invoke the contempt jurisdiction and the learned Single Judge travelling beyond the order of the Writ Court of which the breach was complained has proceeded to pass the impugned order. The learned Single Judge has traversed beyond the order of the Writ Court and the impugned order is totally uncalled for and unwarranted. The contempt jurisdiction ought not to have been exercised as there is no deliberate and wilful disobedience of the order of the Writ Court. It is accordingly prayed that the impugned order of the learned Single Judge is liable to be set aside and the contempt petition itself be dismissed. Reliance has been placed on the decisions of this Court dated 17.2.2014 passed in **Special Appeal Defective No. 77 of 2014;** Decision dated 27.10.2015 passed in **Special Appeal Defective No. 707 of 2015;** Decision dated 12.2.2020 passed in **Special Appeal No. 1225 of 2019**; and decision of the Apex Court reported in **2006 (5) SCC 399** ***(Midnapore Peoples' Coop Bank Ltd. And others vs. Chunilal Nanda and others).***

3. A preliminary objection as regards the maintainability of the Intra Court Appeal has been raised by the learned counsel representing the applicant/respondent. He submits that the order of the learned Single Judge merely requires the personal presence of the appellants to answer the show cause as to why contempt proceedings may not be initiated against them. Such an order being purely interlocutory and not affecting the rights of the appellants in terms of framing a charge or punishing them for contempt, an appeal under Chapter 8 Rule 5 of the Rules of the Court may not lay. The appeal is thus liable to be dismissed at the threshold. Reliance has been placed on the decision dated 13.7.2020 passed in **Special Appeal No. 262 of 2020**. Reliance is also placed on the decision of the Punjab & Haryana High Court dated 20.5.1994 passed in **Shri A.S. Chatha vs. Malook Singh and others** as also of the High Court of Andhra Pradesh : Amaravati dated 15.9.2021 passed in **Pola Bhaskar vs. Shaik Shain Bi and others.**

4. We have heard the learned counsel for the parties and have perused the record. The moot question for decision in this

Appeal is regarding the maintainability of the Intra Court Appeal under Chapter 8 Rule 5 of the Rules of the Court against an order of Contempt Court issuing notice to the opposite party to appear in person before the Court to show cause as to why contempt proceedings be not drawn against the opposite party and as to whether a Contempt Court can go behind the order of the Writ Court so as to enlarge the scope of the contempt jurisdiction.

5. At this juncture, for proper appreciation of the issue involved, it would be trite to reproduce the provision of Chapter VIII Rule 5 of the Rules of the Allahabad High Court Rules under which the present appeal has been filed.

"5. Special appeal :- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction 66[or in the exercise of the jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award--(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."

6. In order to answer the above question, it would be necessary to bear in mind the basic parameters governing the exercise of the contempt jurisdiction. The High Court, when it exercises jurisdiction to punish for a breach or disobedience of its order, has to first and foremost have due regard to the directions which were issued and of which breach is complained of. It is trite law that under the exercise of contempt jurisdiction, the High Courts cannot go into the merits of the order of which a breach is complained of, or for that matter, decide upon issues which are left undecided. Orders supplemental to what has been decided by the order of which breach is complained, cannot be issued in exercise of contempt jurisdiction. Rather what needs to be considered is whether there has been compliance of the direction(s) issued in the judgement or order in its letter and spirit. In considering this question, the Courts are expected to examine the conduct of the party alleged to be acting in contempt of the direction(s) of the Court. It is to be borne in mind that the contempt jurisdiction of the Courts serves a sacrosanct purpose of ensuring that the majesty and dignity of the Courts of law is always upheld. To ensure that the utmost respect which the Courts command is not whittled down, care must be had that judgements and orders of the Courts inspire confidence and it can only be done when these very judgements and orders are given effect to. With that said, the principles relating to civil contempt have been enunciated in several decisions of the Apex Court.

7. In **Jhareswar Prasad Paul vs. Tarak Nath Ganguly [2002 (5) SCC 352]**, the principle was enunciated in the following observation made in Para-11 as under:

"The court exercising contempt jurisdiction is not entitled to enter into questions which have not been dealt with and decided in the judgment or order, violation of which is alleged by the applicant. The court has to consider the direction issued in the judgment or order and not to consider the question as to what the judgment or order should have contained. At the cost of repetition be it stated here that the court exercising contempt jurisdiction is primarily concerned with the question of contumacious conduct of the party, which alleged to have committed deliberate default in complying with the directions in the judgment or order. If the judgment or order does not contain any specific direction regarding a matter or if there is any ambiguity in the directions issued therein then it will be better to direct the parties to approach the court which disposed of the matter for clarification of the order instead of the court exercising contempt jurisdiction taking upon itself the power to decide the original proceeding in a manner not dealt with by the court passing the judgment or order."

8. The same principle was reiterated in the judgement rendered in the case of **Director of Education, Uttaranchal and others vs. Ved Prakash Joshi and others, reported in 2005 (6) SCC 98** by the following observations:

"The Court exercising contempt jurisdiction cannot take upon itself power to decide the original proceedings in a manner not dealt with by the Court passing the judgment or order. Right or wrong the order has to be obeyed. Flouting an order of the Court would render the party liable for contempt. While dealing with an application for contempt the Court cannot traverse beyond the order, non-compliance of which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible."

9. Again in the case of **Sudhir Vasudeva, Chairman & M.D. ONGC & others vs. M. George Ravishekaran and others (Civil Appeal No. 1816 of 2014)** decided on 4.2.2014, the Apex 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 betaken 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 [(2002) 5 SCC 352], V.M.Manohar Prasad vs. N. Ratnam Raju and Another [(2004) 13 SCC 610], Bihar Finance Service House Construction Cooperative Society Ltd. vs. Gautam Goswami and Others [(2008) 5 SCC 339] and Union of India and Others vs. Subedar Devassy PV [(2006) 1 SCC 613].*** *"*

10. Yet again the Apex Court while reiterating the principle that in exercise of the contempt jurisdiction, the order of the Court of which a breach is complained of, has to be read and interpreted as it is and not as it should be and the Court cannot take a different view in exercise of the contempt jurisdiction on the merits of the case and cannot make either an addition or deletion from the original order of the Court, made the following observation in the case of **Bihar Finance Service House Construction Cooperative Society Ltd. vs. Gautam Goswami and others,** reported in **2008 (5) SCC 339 as under:-**

"30. Parameters of the jurisdiction of this Court under the Contempt of Courts Act, 1970 are well settled.

31. While dealing with such an application, the court is concerned primarily with:

(i) whether the order passed by it has attained finality or not;

(ii) Whether the same is complied with or not.

32. While exercising the said jurisdiction this Court does not intend to reopen the issue which could have been raised in the original proceeding nor shall it embark upon other questions including the plea of equities which could fall for consideration only in the original proceedings. The court is not concerned with as to whether the original order was right or wrong. The court must not take a different view or traverse beyond the same. It cannot ordinarily give an additional direction or delete a direction issued. In short, it will not do anything which would amount to exercise of its review jurisdiction."

11. Further, in the judgement in the case of **Union of India vs. Subedar Devassy,** reported in **(2006) 1 SCC 613,** the Supreme Court observed as under:-

"While dealing with an application for contempt, the court is really concerned with the question whether the earlier decision which has received its finality had been complied with or not. It would not be permissible for a court to examine the correctness of the earlier decision whicgh had not been assailed and to take a view different from what was taken in the earlier decision. A similar view was taken in K.G. Derasari v. Union of India, [2001] 10 SCC 496. The court exercising contempt jurisdiction is primarily concerned with the question of

contumacious conduct of the party who is alleged to have committed default in complying with the directions in the judgment or order. If there was no ambiguity or indefiniteness in the order, it is for the party concerned to approach the higher court if according to him the same is not legally tenable. Such a question has necessarily to be agitated before the higher court. The court exercising contempt jurisdiction cannot take upon itself power to decide the original proceedings in a manner not dealt with by the court passing the judgment or order. Though strong reliance was placed by learned counsel for the appellants on a three-Judge Bench decision in Niaz Mohd. v. State of Haryana, [1994] 6 SCC 332 we find that the same has no application to the facts of the present case. In that case the question arose about the impossibility to obey the order. If that was the stand of the appellants, the least it could have done was to assail correctness of the judgment before the higher court.

The above position was highlighted in Prithawi Nath Ram v. State of Jharkhand and Ors., [2004] 7 SCC 261.

On the question of impossibility to carry out the direction, the views expressed in T.R. Dhananjaya v. J. Vasudevan, [1995] 5 SCC 619 need to be noted. It was held that when the claim inter se had been adjudicated and had attained finality, it is not open to the respondent to go behind the orders and truncate the effect thereof by hovering over the rules to get around the result, to legitimise legal alibi to circumvent the order passed by a court.

In Mohd. Iqbal Khanday v. Abdul Majid Rather, [1994] 4 SCC 34, it was held that if a party is aggrieved by the order, he should take prompt steps to invoke appellate proceedings and cannot ignore the order and plead about the difficulties of implementation at the time contempt proceedings are initiated.

If any party concerned is aggrieved by the order which in its opinion is wrong or against rules or its implementation is neither practicable nor feasible, it should always either approach the court that passed the order or invoke jurisdiction of the appellate court. Rightness or wrongness of the order cannot be urged in contempt proceedings. Right or wrong, the order has to be obeyed. Flouting an order of the court would render the party liable for contempt. While dealing with an application for contempt the court cannot traverse beyond the order, non-compliance with which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible."

12. The Apex Court while emphasising the principle that before a Court punishes a contemner for non-compliance of a direction, the Court must be satisfied that disobedience of the judgement, decree, direction or writ was wilful or intentional in the case of **Niyaj Mohammad vs. State of Haryana [1994 (6) SCC 332]** held as under:-

"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 wilful and intentional. The Civil Court while

executing a decree against the judgment debtor 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 consequences thereof. But wile 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 which it was not possible for the contemner to comply with the order, the Court may not punish the alleged contemner."

13. Then again while emphasising the principle that the jurisdiction to punish for contempt has to be cautiously exercised and cannot be a substitute for the execution of an order of the Court, the Apex Court in the case of **R.N. Dey vs. Bhagyabati Pramanik [2002 (4) SCC 400]** made the following observation:-

".....But, at the same time, it is to be noticed that under the coercion of contempt proceeding, appellants cannot be directed to pay the compensation amount which they are disputing by asserting that claimants were not the owners of the property in question and that decree was obtained by suppressing the material fact and by fraud. Even presuming that claimants are entitled to recover the amount of compensation as awarded by the trial court as no stay order is granted by the High Court, at the most they are entitled to recover the same by executing the said award wherein the State can or may contend that the award is nullity. In such a situation, as there was no willful or deliberate disobedience of the order, the initiation of contempt proceedings was wholly unjustified."

14. The Apex Court in the case of **Midnapore Peoples' Coop Bank Ltd. And others vs. Chunilal Nanda and others [(2006) 5 SCC 399]**, while considering a case where the High Court, in a contempt proceeding, renders a decision on merits of a dispute between the parties, either by an interlocutory order or final judgement, the question whether the same would be appealable under Section 19 of the Contempt of Courts Act, 1971 and if not what would be the remedy of the person aggrieved, held that any direction issued or decision made by the High Court in contempt proceedings on the merits of a dispute between the parties, unless the same is incidental to or inextricably connected with the order punishing for contempt, would not be in the exercise of "jurisdiction to punish for contempt" and therefore, would not be appealable under Section 19 of the Act, 1971. Such an order, passed by the Contempt Court, was held, amenable to a challenge in an intra Court Appeal under the relevant rules of the High Court. The position with regard to filing of appeals against orders in contempt proceedings were summarized thus:-

"11. The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarized thus :

I. An appeal under section 19 is maintainable only against an order or decision of the High Court passed in

exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt' and therefore, not appealable under section 19 of CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases)."

15. Now applying the principles as culled out from the various decisions referred to above to the case at hand, we find that the learned Single Judge while exercising the contempt jurisdiction has clearly transgressed the powers conferred upon him. The operative portion of the order of the Writ Court which is alleged to have been breached reads as under:-

"In view of the above, without expressing any opinion on the merits of the case, we dispose of this writ petition with liberty to the petitioner to file a fresh comprehensive representation ventilating all his grievances which he has taken by him in this writ petition before the respondent no. 2, Special Land Acquisition Officer, Bareilly within a period of two weeks from today along with certified copy of this order and in case any such representation is filed by the petitioner before the respondent no. 2 within the time indicated hereinabove, he shall consider and decide the same strictly in accordance with law by a speaking and reasoned order as expeditiously as possible preferably within a period of three months from the date of filing of such representation by the petitioner before him. "

16. A perusal of the above reveals that the Writ Court required the writ petitioner/applicant/respondent to prefer a comprehensive representation ventilating his grievances before the Special Land Acquisition Officer, Bareilly, who in turn was directed to decide the same strictly in accordance with law by a speaking and reasoned order expeditiously within three months. The above order of the Writ Court does

not bear reference to any Government Order dated 19.3.2015 or to the fact that the compensation was required to be determined in terms of the said Government Order. The Special Land Acquisition Officer, in compliance of the order of the Writ Court, vide order dated 26.10.2020 has decided the representation of the writ petitioner holding him entitled to compensation for the land utilised and the onus to compute and pay the compensation has been fixed upon the PWD Department. The matter thereafter was referred to a Committee headed by the Additional District Magistrate, Bareilly which was required to determine the rate on which the amount of compensation was to be determined. The Committee vide its decision dated 17.1.2022 determined the rate of Rs. 704.54 per sq. meters for the land utilised. The learned Single Judge while exercising the powers of a Contempt Court taking note that the compensation has been determined by the Committee by its order dated 17.1.2022 has recorded finding that prima facie a case for contempt is made out as the order of the Committee is in the teeth of the order of the Writ Court.

17. In our view, the scope of contempt jurisdiction is to see whether the order of the Writ Court has been complied with in substance or deliberately flouted leading to an inference of a "wilful, deliberate and contumacious" violation of the order of which non compliance is alleged. In the case at hand where the direction is only to dispose of the representation by a speaking order, the correctness, legality or propriety of the order passed in compliance of the direction cannot be gone into in contempt proceedings. The correctness or otherwise of the order passed in compliance of the direction of the Writ Court, if required may be tested in appropriate proceedings but certainly not in contempt proceedings.

18. Once the direction as contained in the judgement and order dated 30.7.2019 passed in Writ-C No. 17534 of 2019 *(Prem Shankar vs. State of U.P. and 3 others)* had been complied with culminating into an order dated 26.10.2020 passed by the Special Land Acquisition Officer, Bareilly and determination of compensation by the Committee by an order dated 17.1.2022, passing of the order by the learned Single Judge dated 10.3.2022 giving rise to the instant appeal could possibly not have risen in contempt jurisdiction. The order dated 10.3.2022 passed by the learned Single Judge results in expanding the scope of contempt jurisdiction by going behind the direction contained in the order of the Writ Court dated 30.7.2019 contempt, of which, is alleged. If the writ petitioner/applicant/respondent was not satisfied, his remedy lay elsewhere but certainly not by invoking the contempt jurisdiction under Section 12 of the Contempt of Courts Act, 1971.

19. The case laws relied upon by the counsel for the appellants propound the above position of the law. The case laws relied upon by the learned counsel for the applicant (writ petitioner)/respondent deal with the maintainability of an appeal under Section 19 of the Contempt of Courts Act, 1971, and the instant Special Appeal has been preferred under Chapter VIII Rule 5 and thus, they are not applicable to the case at hand. As regards the decision dated 13.7.2020 passed in Special Appeal No. 262 of 2020 the same in our opinion was passed under circumstances peculiar to that case and the learned Bench opined that the order impugned was merely of a procedural nature and did not in any manner touch the merits of

the controversy or dispute between the parties so as to be deemed to have been issued under Article 226 of the Constitution of India. This is not the position in the case at hand.

20. In view of the above, while holding the Intra Court Appeal to be maintainable, we set aside the order dated 10.3.2022 passed by the learned Single Judge in Contempt Application (Civil) No. 5344 of 2021 *(Prem Shankar vs. Rajeev Pandey, Special Land Acquisition Officer/City Magistrate, Bareilly and another)* and dismissing the Contempt Application. Accordingly, the impugned order dated 10.3.2022 is set aside and the Contempt Application (Civil) No. 5344 of 2021 is dismissed.

21. The Intra Court appeal is **allowed**.

(2022) 8 ILRA 54
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Special Appeal No. 229 of 2021 (O & M)
with other connected cases

Gaurav Vats ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Mr. Anoop Trivedi (Senior Advocate), Mr. Vibhu Rai, Mr. Hari Om, Mr. Akash Khare

Counsel for the Respondents:
Mr. Manish Goyal, (A.A.G.), Ms. Akansha Sharma (Standing Counsel), Sri Ankit Gaur (State Law Officer)

A. Service Law – Constitution of India – Article 14 & 15 – Appointment given to the women candidates on account of miscalculating the horizontal reservation – No allegations of fraud or misrepresentation against the women candidates – Error of recruiting agency – Effect on the validity of appointment – Held, it is the undisputed case that the selected women candidates were not responsible for the error in wrong calculation of horizontal reservation. They were not responsible for the irregularities so committed. They had undergone the training and had worked for some time – Division Bench found no illegality in adjusting the appointed women candidates against the available vacancies – Anmol Kumar Tiwari's case followed. (Para 8 and 11)

Special Appeal dismissed. (E-1)

List of Cases cited:-

1. Vikas Pratap Singh & ors. Vs St. of Chhattisgarh & ors.; (2013) 14 SCC 494

2. Anmol Kumar Tiwari & ors. Vs St. of Jharkhand & ors.; (2021) 5 SCC 424

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. This order will dispose of a bunch of 17 Special Appeals bearing Special Appeal Nos. 229 and 320 of 2021, Special Appeal Defective Nos. 428, 496, 497, 498, 499, 502, 503, 505, 509, 533, 535, 579, 580, 582 and 926 of 2021.

2. Vide common judgment passed by learned Single Judge dated March 24, 2021, a bunch of 189 writ petitions led by **Writ-A No. 43064 of 2014,** titled as **Gaurav Vats Vs. State of U.P. and others,** was decided. The appeals have been filed only in 17 cases.

3. The brief facts of the case are that the process for recruitment of 35,000 Police Constables was initiated in the year 2009. The result was declared on May 17, 2010. There was certain issue regarding

horizontal reservation. Writ petition bearing **Writ-A No. 38299 of 2010**, titled as **Rajeev Kumar Vs. State of U.P. and others,** was filed in this Court which was dismissed vide order dated July 5, 2010. Against the aforesaid order, Special Appeal No. 1120 of 2010 was filed which was disposed of by judgment dated August 3, 2010. Finding error in providing horizontal reservation, the matter was referred to the State for fresh calculation of vacancies and appointment of the candidates. Against the aforesaid order, the State filed Special Leave Petition No. 32344 of 2010 which was dismissed by the Hon'ble Supreme Court vide order dated July 12, 2013. Thereafter, an order was passed by the State on February 24, 2014, admitting that there was error in appointment of 856 women candidates in the process of providing horizontal reservation. Though the candidates who were entitled to get benefit were given the same, however, it was directed that the women candidates already appointed be adjusted against the available vacancies.

4. The aforesaid order was impugned in the writ petitions, giving rise to the present appeals.

5. The arguments raised are that the vacancies for the year 2009 having been increased from 35,000 to 35,844, the reservation for each of the category is required to be provided in terms thereof and all women candidates could not be appointed against the increased vacancies, as the same will defeat the very principle for providing reservation and as a result of which the percentage of reservation and especially the quota in women category will cross the maximum limit.

6. On the other hand, learned counsel for the State submitted that after the judgment of this Court in the first round, the issue had to be resolved. The women candidates, who were appointed in excess on account of wrong calculation of vacancies while providing for horizontal reservation had, in fact, been provided training and were serving the Department. Hence, instead of shunting them out, they were adjusted against the available vacancies. Over all, there is no disturbance to the quota. While making adjustments of these candidates, the principle for reservation may not be applicable strictly. There was no fault of the women candidates, who were given appointment on account of error committed by the recruiting agency.

7. After hearing learned counsel for the parties and considering the peculiar facts and circumstances of the case, in our view, the order passed by the learned Single Judge does not call for interference by this Court in the present appeals. It is not in dispute that on account of error committed by the recruiting agency, there was some miscalculation of vacancies while providing horizontal reservation, which resulted in excess appointment of women candidates. The advertisement for recruitment of Police Constables was issued in the year 2009. The result was declared on May 17, 2010 and thereafter the selected candidates were sent for training.

8. After the challenge to the selection process attained finality before the Hon'ble Supreme Court when Special Leave Petition filed by the State was dismissed on July 12, 2013, corrective steps were taken by the State. Entire vacancy position and horizontal reservation were recalculated, as a result of which 856 male candidates, who were entitled to be appointed, were given appointments. As against that, the 856

female candidates, who were wrongly given appointment not on account of any omission or commission by them, were directed to be adjusted against the available vacancies. It was in terms of law laid down by the Hon'ble Supreme Court in **Vikas Pratap Singh and others Vs. State of Chhattisgarh and others, (2013) 14 SCC 494,** which now stands reiterated in **Anmol Kumar Tiwari and others Vs. State of Jharkhand and others, (2021) 5 SCC 424**. In the aforesaid judgment, the Hon'ble Supreme Court observed that in case appointment of the candidates in excess was on account of error committed by the State authorities and no fault on part of the candidates, and they have served the department for sometime, then selection be not set aside. They be put at the bottom of the list. It is the undisputed case that the selected women candidates were not responsible for the error in wrong calculation of horizontal reservation. They were not responsible for the irregularities so committed. They had undergone the training and had worked for some time. There were no allegations of fraud or misrepresentation against women candidates who were appointed in excess of the quota while calculating horizontal reservation. Hence, they were allowed to continue.

9. Another issue which was considered in the aforesaid judgment was the claim of certain candidates who submitted that they had secured marks more than the candidates who were adjusted. The argument raised by them was not found to be meritorious, for the reason that all the advertised vacancies stood filled up as in recalculation, 844 women candidates were found to be appointed in excess of their quota by wrongly calculating the horizontal reservations. As against those, male candidates were given appointments. The women candidates, who were initially given the benefit of horizontal reservation, though erroneously, were adjusted against available/future vacancies. It was in the peculiar facts of the case that the selection process in the case before the Hon'ble Supreme Court was initiated in the year 2008 and subsequent thereto, during the intervening period, there had been large scale selection and appointments.

10. Relevant paragraphs 11 and 12 of the judgment in **Anmol Kumar Tiwari's case (supra)** are extracted below:-

"11. Two issues arise for our consideration. The first relates to the correctness of the direction given by the High Court to reinstate the writ petitioners. The High Court directed reinstatement of the writ petitioners after taking into account the fact that they were beneficiaries of the select list that was prepared in an irregular manner. However, the High Court found that the writ petitioners were not responsible for the irregularities committed by the authorities in preparation of the select list. Moreover, the writ petitioners were appointed after completion of training and worked for some time. The High Court was of the opinion that the writ petitioners ought to be considered for reinstatement without affecting the rights of other candidates who were already selected. A similar situation arose in Vikas Pratap Singh's case, where this Court considered that the appellants therein were appointed due to an error committed by the respondents in the matter of valuation of answer scripts. As there was no allegation of fraud or misrepresentation committed by the appellants therein, the termination of their services was set aside as it would

adversely affect their careers. That the appellants therein had successfully undergone training and were serving the State for more than 3 years was another reason that was given by this Court for setting aside the orders passed by the High Court. As the writ petitioners are similarly situated to the appellants in Vikas Pratap Singh case, we are in agreement with the High Court that the writ petitioners are entitled to the relief granted. Moreover, though on pain of contempt, the writ petitioners have been reinstated and are working at present.

12. The second issue relates to the claim of the intervenors in the writ petitions for appointment. There is no doubt that selections to public employment should be on the basis of merit. Appointment of persons with lesser merit ignoring those who have secured more marks would be in violation of the Articles 14 and 16 of the Constitution of India. The intervenors in the writ petitions admittedly have secured more marks than the writ petitioners. After cancellation of the appointments of the writ petitioners, 43 persons have been appointed from the revised select list. Those 43 persons have secured more marks than the intervenors. By the appointment of 43 persons, the number of posts that were advertised i.e. 384 have been filled up. The intervenors have no right for appointment to posts beyond those advertised. The contention on behalf of the intervenors in the writ petitions is that they cannot be ignored when relief is granted to the writ petitioners who were less meritorious than them. We are unable to agree. Relief granted to writ petitioners is mainly on the ground that they have already been appointed and have served the State for some time and they cannot be punished for no fault of theirs. The intervenors are not similarly situated to them and they cannot seek the same relief. The other ground taken by the intervenors in the writ petitions before us is that relief was denied to them only on the basis of a wrong statement made on behalf of the State Government that there were no vacancies. No doubt, the intervenors have placed on record material to show that there was no shortage of vacancies for their appointment. One of the reasons given by the High Court for not granting relief to the intervenors is lack of vacancies. However, we are not inclined to direct appointment of the intervenors as selections in issue pertain to an advertisement issued in 2008. Subsequently, selections to posts of Sub-Inspectors have been held and a large number of persons were appointed. The number of posts advertised in 2008 is 384 and the intervenors have no right for appointment for posts beyond those advertised. They cannot claim any parity with the writ petitioners."

11. In view of the aforesaid authoritative pronouncement of the law on the subject and finding that the women candidates who were granted appointments on account of error committed by recruiting agency while calculating the horizontal reservation, had undergone training and were working for quite some time before the error was corrected in terms of the order passed by this Court, it was in special facts and circumstances of the case. The claim of the appellants to appoint them while taking the vacancies as 35,844 as against 35,000 advertised and providing the reservation and appointment in terms thereof, cannot be accepted at this stage, as the selection and appointment pertain to the year 2009-10 and the vacancies advertised

were 35,000, which stood filled up. More than a decade has passed since then and during the intervening period, number of other selections have been made.

12. For the reasons mentioned above, we do not find any merit in the present appeals. The same are, accordingly, dismissed.

(2022) 8 ILRA 58
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Special Appeal No. 306 of 2022

Vice Chairman, ABSS Institute of Technology, Meerut ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Vibhu Rai, Sri Abhinav Gaur, Sri Anoop Trivedi (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Ajal Krishna, Sri Rohit Pandey, Sri Vijay Tripathi

A. Service Law – Constitution of India – Article 226 – Writ – Termination order challenged – Interim order passed staying the termination order – Permissibility – Interim order, to what extent, can be passed – Principle laid down – An interim order can be passed by a Court of law only in aid of a final relief prayed for. An interim order ought not to be passed by a Court which is in the nature of a final relief itself. if such an order is passed virtually nothing will remain to be adjudicated at the final hearing stage. (Para 3)

Special Appeal allowed. (E-1)

List of Cases cited:-

1. St. of U.P. & ors. Vs Sandeep Kumar Balmiki & ors.; 2009 (17) SCC 555

2. Delhi Cloth & General Mills Co. Ltd. Vs Rameshwar Dayal; AIR 1961 SC 689

3. U.P. Rajya Krishi Utpadan Mandi Parishad & ors. Vs Sanjiv Rajan; 1993 Supp (3) SCC 483

4. St. of Har. Vs Suman Dutta; (2000) 10 SCC 311

(Delivered by Hon'ble Pritinker Diwaker, J.
&
Hon'ble Ashutosh Srivastava, J.)

1. This Intra Court Appeal has been filed questioning the interlocutory order dated 23.3.2022 passed by the learned Single Judge in Writ-A No. 2695 of 2022 *(Dr. Sanjay Kumar Sharma vs. State of U.P. and 4 others)* whereby and whereunder entertaining the writ petition against the termination order dated 6.4.2021 passed by the Vice Chairman Abbs Institute of Technology, Meerut a private educational institution and inviting a response to the writ petition has stayed the termination order dated 6.4.2021 and permitted the writ petitioner/respondent to perform his duty as he was discharging earlier and shall be paid his salary which shall be subject to final outcome.

2. A perusal of the impugned order of the learned Single Judge reveals that while the writ petition has been kept pending by inviting counter and rejoinder affidavits the termination order dated 6.4.2021 passed by the appellant who was arrayed as respondent No.2 in the writ petition has been stayed with further direction permitting the petitioner/respondent to perform his duties and paid salary, the learned Single Judge has virtually granted

the final relief to the writ petitioner/ respondent.

3. An interim order can be passed by a Court of law only in aid of a final relief prayed for. An interim order ought not to be passed by a Court which is in the nature of a final relief itself. if such an order is passed virtually nothing will remain to be adjudicated at the final hearing stage. In the case at hand the learned Single Judge by staying the termination order and directing for payment of salary to the writ petitioner/respondent has virtually granted the reliefs prayed for in the writ petition which could not have been done at the initial stage. We also find that the termination order is dated 6.4.2021. The writ petition was filed on 20.12.2021 and the interim order staying the termination order was passed on 23.3.2022.

4. The Apex Court in the case of ***State of U.P. and others vs. Sandeep Kumar Balmiki and others,*** *reported in* ***2009 (17) SCC 555,*** while considering the property of granting final relief at the interim stage, made the following observations which is being quoted hereunder:-

"In our view, the interim order granted by the High Court staying the order of termination could not be passed at this stage in view of the fact that if such relief is granted at this stage, the writ petition shall stand automatically allowed without permitting the parties to place their respective cases at the time of final hearing of the writ petition. In this case also, the appellants have not yet filed counter affidavit to the writ petition of the respondents.

That being the position and in view of the fact that the final relief could not be granted at the interim stage, we set aside the impugned order and vacate the interim order passed by the High Court."

5. In ***Delhi Cloth & General Mills Co. Ltd. vs. Rameshwar Dayal, AIR 1961 SC 689***, this Court examined the point as to whether a workman could be ordered to be reinstated as an interim measure pending final adjudication by the Tribunal under the Industrial Disputes Act. In the said case the employer dismissed the workman for disobeying the orders of the managing authority. The workman filed an application before the Industrial Tribunal under Section 33-A of the Industrial Disputes Act, 1947 contesting his dismissal on various grounds, whereupon the Tribunal passed an order to the effect that as an interim measure the workman be permitted to work and if the management failed to take him back his full wages be paid from the date he reported for duty. The employer challenged the order of the Tribunal by filing a writ petition before the High Court which was dismissed. On appeal by a certificate of the High Court it was held that the order of reinstatement could not be given as an interim relief because that would be giving the employee the very relief which he would get if order of dismissal is not found to be justified. Order passed by the Tribunal was held to be manifestly erroneous and set aside. It was observed:

"We are of opinion that such an order cannot be passed in law as an interim relief, for that would amount to giving the respondent at the outset the relief to which he would be entitled only if the employer failed in the proceedings under s. 33-A. As was pointed out in Hotel Imperial's case (1960(1) SCR 476, ordinarily, interim relief should not be the whole relief that the workmen would get if they succeeded

finally. The order therefore of the Tribunal in this case allowing reinstatement as an interim relief or in lieu thereof payment of full wages is manifestly erroneous and must therefore be set aside."

6. In ***U.P. Rajya Krishi Utpadan Mandi Parishad & Ors. vs. Sanjiv Rajan,* 1993 Supp (3) SCC 483**, it was held by this Court that it was desirable that an order of suspension passed by a competent authority should not be ordinarily interfered by an interlocutory order pending the proceeding. It was observed:

"Whether the employees should or should not continue in their office during the period of inquiry is a matter to be assessed by the authority concerned and ordinarily, the Court should not interfere with the orders of suspension unless they are passed mala fide and without there being even a prima facie evidence on record connecting the employees with the misconduct in question."

7. In ***State of Haryana vs. Suman Dutta, (2000) 10 SCC 311***, this Court set aside the order passed by the High Court staying the order of termination as an interim measure in the pending proceeding. It was observed:

"We are clearly of the opinion that the High Court erred in law in staying the order of termination as an interim measure in the pending writ petition. By such interim order if an employee is allowed to continue in service and then ultimately the writ petition is dismissed, then it would tantamount to usurpation of public office without any right to the same."

8. From the abovenoted decisions, it is evident that the Apex Court has consistently been of the view that by way of an interim order the order of suspension termination, dismissal and transfer etc. should not be stayed during the pendency of the proceedings in Court.

9. In view of the above, we are of the considered opinion that the impugned order to the extent it stays the termination order dated 6.4.2021 and permits the writ petitioner to perform his duty as he was discharging earlier and shall be paid his salary which shall be subject to final outcome cannot be sustained and is accordingly set aside. The appeal is allowed to the extent indicated above.

10. The writ petition shall be heard on its merit upon exchange of the pleadings as directed by the learned Single Judge. We leave it open for the parties to request the learned Single Judge to decide the writ petition at an early date.

(2022) 8 ILRA 60
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Special Appeal No. 530 of 2019

Famina Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Sanjay Kumar Srivastava

Counsel for the Respondents:

C.S.C.

A. Service Law – Constitution of India – Article 226 – Writ – Maintainability – Female Staff Nurse – Appointment on the contract basis – Termination from service – Right of contract-based employee to get renewal of service, how far exist – Appointment governed by the statute distinguished from the appointment governed by a contract – No contract employee has a right to have his or her contract renewed from time to time – Yogesh Mahajan's case relied upon. (Para 4, 6 and 7)

Special Appeal dismissed. (E-1)

List of Cases cited:-

1. Rajesh Bhardwaj Vs U.O.I.; 2019 (2) ADJ 830

2. Yogesh Mahajan Vs Prof. R.C. Deka, Director, All India Institute of Medical Sciences; 2018 (3) SCC 218

(Delivered by Hon'ble Pritinker Diwaker, J.
&
Hon'ble Ashutosh Srivastava, J.)

1. This Intra Court Appeal has been filed questioning the legality, propriety and correctness of the judgment of the learned Single Judge dated 29.03.2019 passed in Writ (A) No.4359 of 2019 (Famina Singh Vs. State of U.P. & 2 others) whereby the learned Single Judge has found no good ground to entertain the writ petition and dismissed the same as it related to termination of the contractual engagement relying upon the Division Bench decision rendered in ***Rajesh Bhardwaj Vs. Union of India, reported in 2019 (2) ADJ 830.***

2. It has been vehemently contended by the learned counsel for the appellant that the decision rendered in the case of Rajesh Bhardwaj Vs. Union of India, relied upon by the learned Single Judge does not lay down the proposition of law that a writ petition at the instance of a contractual employee would not be maintainable and the learned Single Judge manifestly erred in law in non-suiting the writ petitioner/appellant on that score. Non renewal of a contractual appointment very much lies within the purview of writ jurisdiction under Article 226 of the Constitution of India. The writ petitioner though initially appointed on the post of Female Staff Nurse on contract basis vide order dated 15.04.2015 had been working continuously without break in service under orders of extension being passed from time to time. Vide order dated 12.03.2018 the Respondent No.3 issued a notice to the petitioner that her services will be terminated after giving one month payment. Against the termination notice issued by the Respondent No.3, the petitioner filed a writ petition being Civil Misc. Writ Petition No.8457 of 2018, which was disposed of with a direction to the petitioner to approach the respondent authority for redressal of her grievances. In pursuance of the order passed in the writ petition, the petitioner filed a detailed representation on 02.04.2018 before the respondent authority which was rejected vide order dated 10.05.2018. After rejection of his representation the petitioner again filed a writ petition being Writ Petition No.4359 of 2019 which was dismissed vide order dated 29.03.2019.

3. We have heard the learned counsel for the petitioner/appellant and the learned Standing Counsel for the State respondents and have perused the record.

4. The factum that the appellant/petitioner was appointed on contract basis vide order dated 15.04.2015

and such appointment was the contractual appointment is not in dispute.

5. Having heard the learned counsel for the appellant and having perused the decision rendered in the case of ***Rajesh Bhardwaj Vs. Union of India (Supra)*** we find that the coordinate Bench while dealing with the question Nos.2, 3 & 4 framed by it opined as under:-

"30. ..... In these circumstances, in the cases like petitioner, consistently it has been laid down that employment is simply a part of contract. If employment is terminated or contract of service is terminated, Court shall not grant relief of reinstatement, i.e. specific performance of contract of personal service, as it is barred by the provisions of Specific Relief Act, 1963 (hereinafter referred to as "Act, 1963") and, therefore, no remedy under Article 226 shall be available since employee, if complains about wrongful termination of service, then must avail remedy in common law by claiming damages.

6. Then again in para 31 of the aforesaid judgment while drawing a distinction between nature of appointment/engagement governed by statute or statutory rules i.e. governed by "status" and governed by a contract of service opined as under :-

"31. ..... Nature of engagement/appointment of petitioner is not to be governed by 'status' but by a 'contract of service' entered into between master and servant. A distinction between an appointment under a contract and status was noticed and explained by Supreme Court in Roshan Lal Tandon Vs. Union of India AIR 1967 SC 1889. Court held that when a matter is governed by status, the employee has no vested contractual rights in regard to the terms of service but where employment is purely in the realm of a simple contract of employment, it is strictly governed by terms and conditions of employment settled between the parties. To remind the difference between 'status' and 'contractual appointment', we may take up case of a Government Servant. Origin of employment in a Government department is contractual. There is an offer and acceptance in every case but once appointed to the post or office, the person appointed, i.e., Government Servant, acquires a status and his rights and obligations are no longer determined by consent of both the parties but same are governed by Statute or statutory rules which may be framed and altered unilaterally by employer, i.e., the Government. Legal position of a Government Servant, thus, is more one of 'status' than of a 'contract'. The hallmark of 'status' is that attachment to a legal relationship of rights and duties must be by public law and not by mere agreement of parties. Relationship between Government (employer) and Government Servant (employee) is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. In the language of jurisprudence, 'status' is a condition of membership of a group, whereof powers and duties are exclusively determined by law and not by agreement between the parties concerned. Thus, where appointment and conditions of service are governed by Statute, relationship of 'employer' and 'employee' is that of 'status' and not a mere contract. However, in other cases, it is purely a contract of service resulting in a relationship of ordinary master and servant."

7. Recently, the Apex Court in the case reported in ***2018 (3) SCC 218 (Yogesh Mahajan Vs. Prof. R.C. Deka, Director,***

All India Institute of Medical Sciences) while dealing with the contractual appointment and non renewal of contract refused relief observing as under:-

"6. It is settled law that no contract employee has a right to have his or her contract renewed from time to time. That being so, we are in agreement with the Central Administrative Tribunal and the High Court that the petitioner was unable to show any statutory or other right to have his contract extended beyond 30th June, 2010. At best, the petitioner could claim that the concerned authorities should consider extending his contract. We find that in fact due consideration was given to this and in spite of a favourable recommendation having been made, the All India Institute of Medical Sciences did not find it appropriate or necessary to continue with his services on a contractual basis. We do not find any arbitrariness in the view taken by the concerned authorities and therefore reject this contention of the petitioner.

7. We are also in agreement with the view expressed by the Central Administrative Tribunal and the High Court that the petitioner is not entitled to the benefit of the decision of this Court in Uma Devi. There is nothing on record to indicate that the appointment of the petitioner on a contractual basis or on an ad hoc basis was made in accordance with any regular procedure or by following the necessary rules. That being so, no right accrues in favour of the petitioner for regularisation of his services. The decision in Uma Devi does not advance the case of the petitioner."

8. In view of the above, we find no error or illegality in the view taken by the learned Single Judge in dismissing the writ petition. The special appeal lacks merit and is, accordingly, **dismissed.**

(2022) 8 ILRA 63
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.08.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ A No. 4054 of 2022

Deepak Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ghaus Beg, Lalta Prasad Misra

Counsel for the Respondents:
C.S.C.

A. Service Law – Departmental enquiry – Minor penalty of censure entry – Charge of being engaged in corrupt practice – Creation of properties and assets in his own name and relatives – Duty of St. – Held, whenever there are allegations particularly relating to corruption or defalcation of funds from St. exchequer, it is primary duty of the St. Government to take immediate steps and hold preliminary inquiry to verify the veracity of the allegations, and stop any further such activity. (Para 21)

B. Complaint of corrupt practice – Departmental enquiry – GO dated 09.05.1997 and 01.08.1997 provide for making the complaint on affidavit – Non-compliance thereof, how far effect the enquiry – Directory or mandatory – Provisions of Government Orders dated 9th May, 1997 and 1st August, 1997 are only to ensure that a public servant is not harassed and is not faced with baseless and false allegations. It is not the mandate of the said Government Orders that no preliminary inquiry can proceed

unless and until the complaint is given on affidavit. It is only a measure as to filter baseless and motivated complaints and to provide guidelines to the authorities to see that a person making complaint is serious about his complaint and there is substantial material in the same and is not made with oblique motive without having any basis – The said Government Orders are, only 'guidelines' and are directory and not mandatory – Each complaint has to be examined individually to come to a conclusion as to whether the allegations are serious and worthy of an inquiry or are otherwise baseless, made with intention to harass the Government servant. (Para 34)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. May George Vs Special Tehsildar & ors.; (2010) 13 SCC 98

2. St. of U.P. & ors. Vs Babu Ram Upadhya; AIR 1961 SC 751

3. B.S. Khurana & ors. Vs Municipal Corporation of Delhi & ors. (2000) 7 SCC 679

4. St. of Har. & anr. Vs Raghubir Dayal; (1995) 1 SCC 133

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

1. Heard Dr. Lalta Prasad Misra as well as Sri Ghaus Beg, learned counsel for the petitioner as well as Sri Rahul Shukla, learned Chief Standing Counsel appearing for the respondents.

2. By means of present writ petition the petitioner has assailed order passed by the State Government dated 27.04.2022, whereby an open inquiry is sought to be conducted by the Vigilance Establishment on the ground that respondents have already conducted an inquiry with regard to same allegations and no material was found against the petitioner and hence the proceedings were concluded in favour of the petitioner and by means of impugned order the petitioner is sought to be victimised and harassed yet again by holding vigilance inquiry.

3. Brief facts of the case are that the petitioner was initially appointed on the ex-cadre post of Assistant Director, City Cleansing Department, Nagar Malapalika, Kanour in the year 1991. Subsequently, petitioner's services were absorbed in the vacant post of Assistant Engineer (E/M) inthe cadre of Centralized Services created under Rule 3 of the U.P. Palika (Centralized) Service Rules, 1966 and was further confirmed by order dated 11.05.1994. He was then promoted to the post of Chief Engineer (E/M) in 2016.

4. A complaint dated 25.04.2017, was made against the petitioner by one Vinod Kumar Pandey, Advocate alleging that petitioner while discharging his duties as Chief Engineer in Nagar Nigam, Lucknow had amassed huge property by corrupt means. On the basis of aforesaid complaint an inquiry was initiated by the State Government by order dated 15.11.2017. The inquiry was conducted by Economic Offences Wing Organization, Lucknow. In the said inquiry written and oral evidences were led and inquiry report was submitted on 14.06.2019. In the said inquiry report allegations against the petitioner could not be proved. The inquiry report was duly forwarded by the Additional Director General of Police, Economic Offences who vide letter dated 21.06.2019, informed the State Government that allegations regarding financial irregularities and financial embezzlement has not been proved but, for some other minor misconduct recommended for initiation of

departmental proceedings against the petitioner.

5. Accordingly, departmental proceedings were initiated against the petitioner pursuant to which a show cause notice dated 09.10.2019 was given seeking his response. The State Government considering reply of the petitioner dated 27.02.2020 and 13.03.2020, passed an order dated 13.06.2020, whereby minor penalty of "censure entry" was imposed against the petitioner.

6. It is submitted by learned counsel for the petitioner that yet another complaint dated 09.08.2019 has been made by one Dr. S.K. Sharma, Advocate to the Chief Minister, U.P. levelling similar allegations of accumulating assets disproportionate to petitioner's known source of income. The said complaint has resulted in passing of the impugned order which has been challenged by the petitioner in the present writ petition.

7. The complaint made by Dr. S.K. Sharma, Advocate resulted in an inquiry by the Vigilance Establishment, Lucknow. After conducting the inquiry, a report was submitted on 03rd June, 2021, which is marked as "confidential" document and has been annexed alongwith the writ petition. In the inquiry report Superintendent of Police, U.P. Vigilance Establishment records that a complaint was received from Dr. S.K. Sharma, Advocate alleging that the petitioner has amassed huge wealth and property for himself as well as in the name of his relatives to the tune of nearly Rs.500 Crores.

8. During the inquiry it was found that income of the petitioner from all known sources was around Rs.1,06,67,598/- and he has acquired certain properties in Nainital and also that he has certain LIC policies. The income and assets of his wife were also taken into account and considered that petitioner has received remittances from his relatives living in UK, which has been shown to have been gifted to him.

9. Inquiry was concluded in his favour stating that the petitioner has been able to demonstrate that assets, commensurate with his income, but the inquiry officer only found that he had not informed the authorities with regard to acquisition of the properties for which further disciplinary proceedings were recommended.

10. Dr. L.P. Mishra, learned counsel for the petitioner while assailing the impugned order dated 27.04.2022, whereby open vigilance inquiry has been directed to be held against the petitioner, has submitted that present inquiry is being initiated on the basis of certain baseless and unverified evidences which are contrary to the Government Orders issued in this regard which provide that it is mandatory that allegations have to be supported by an affidavit. He submits that the Government Order dated 9th May, 1997, states that looking into the large number of complaints received with regard to higher officials mainly category I, it is provided that whenever a complaint is received, from a MP/MLA or any other person holding high post, then firstly, it should be verified from the person making such complaint that he had infact made the said complaint. In case complaint is received from any other person then the complainant should be asked to submit his complaint on affidavit. Similar provisions were reiterated in the Government Order dated 1st August, 1997.

11. The second ground of challenge is that once an inquiry into the allegations with regard to accumulation of disproportionate assets has already been conducted and punishment of "censure" entry has been awarded, then it is not open for the Government to conduct another inquiry on the same set of facts. Counsel for the petitioner submits that second inquiry in the given circumstances would be impermissible and contrary to law and amounts to "double jeopardy" inasmuch a person can be punished only once for his misconduct and cannot be repeatedly punished for the same misconduct again and again as the same would be violative of Articles 14 and 21 of the Constitution of India.

12. Sri Rahul Shukla, learned Additional Chief Standing Counsel appearing for the respondents while opposing the writ petition has submitted that there are very serious allegations against the petitioner, who was holding post of Chief Engineer, Nagar Nigam, Lucknow. He submits that the petitioner was awarded punishment of "censure" entry on the ground that, on 02.04.2013 and 18.06.2013, petitioner had purchased fire arms and acquisition of the said fire arms was never informed to the State Government and for the said negligence a show cause notice was given to him pursuant to which "censure" entry was given to him only on the ground that he had informed the State Government about the aforesaid acquisition with delay. He further submits that punishment of 'censure' entry was not awarded to the petitioner for acquiring any of the properties for which earlier matter was inquired by the Economic Offence Wing, and therefore submitted that both the allegations are distinct and different and hence vehemently opposed the arguments of the petitioner that he has been already punished for the same allegations.

13. Learned Additional Chief Standing Counsel has drawn attention of this Court to the confidential letter dated 03.06.2021 written by Superintendent of Police, U.P. Vigilance Establishment stating that on the basis of complaint dated 09.08.2019, made by one Dr. S.K. Sharma, Advocate, property of nearly Rs.500/- Crores have been acquired by the petitioner. The Vigilance Establishment was asked to enquire into the said matter by means of order dated 20.08.2020.

14. In pursuance to the aforesaid directions supplementary Intelligence Report was submitted to the State Government on 05.05.2022.

15. It has been further stated that details of the complaint were got verified from the complainant who submitted all the details to the Vigilance Establishment including bank details of Smt. Shalini Yadav, wife of petitioner. Cognizance has also been taken to a news report published in the media with regard to certain allegations with regard to the petitioner having accumulated assets more than his known sources of income.

16. The Vigilance Establishment conducted inquiry and submitted its report to the State Government on 03.06.2021. It has been informed that the State Government did not agree with the previous open Vigilance Inquiry and it has also been stated that in the earlier Vigilance Inquiry only 10 properties were subjected to scrutiny, but according to fresh complaint the petitioner is alleged to have amassed 14 properties which are subject matter of present inquiry.

17. The learned Additional Chief Standing Counsel has submitted categorically that the petitioner has not been punished in pursuance to the first inquiry conducted by the Economic Offences Vigilance Department for amassing disproportionate assets, but had been awarded only 'censure' entry for tendering delayed information to the State Government with regard to acquisition of fire arm by the petitioner. It is stated that the issue pertaining to the allegations of corruption and also for accumulating disproportionate assets no formal inquiry or proceedings have been initiated against the petitioner, and it is only at the stage of preliminary inquiry.

18. It has further been submitted that on 28.09.2021, the Government being of the view that earlier inquiries have not been conducted in proper manner has rejected all the earlier inquiry reports and all the previous inquiry officers have been replaced with the direction to again inquire into the allegations against the petitioner and the inquiry need to be conducted by an officer not below the rank of Inspector General of Police.

19. It is in the aforesaid facts of the case that prayer has been made for quashing the impugned order whereby Vigilance Establishment has been asked to conduct an open inquiry against the petitioner. The said Vigilance inquiry has been assailed firstly on the ground that same has been initiated on the basis of baseless and unverified allegations, contrary to the provisions of Government Orders dated 9th May, 1997 and 1st August, 1997. In the first Government Order all the Principal Secretaries have been informed that in case a complaint has been made by officials occupying high positions, then it should be verified whether they had been sent by the complainant and in all the other matters the complainant should be asked to submit an affidavit, in support of his allegations leveled against the delinquent employee.

20. It is urged that the aforesaid provisions are mandatory and present inquiry being conducted contrary to the aforesaid Government Orders is a nullity hence deserves to be set aside.

21. Perusal of the complaints made against the petitioner reveal that while holding post of Chief Engineer of Nagar Nigam, Lucknow he is alleged to have purchased several properties and also created assets in his own name and that in the name of his relatives which cannot be explained from his known sources of income and hence there is presumption that he is engaged in corrupt practices. When ever there are allegations particularly relating to corruption or defalcation of funds from State exchequer, it is primary duty of the State Government to take immediate steps and hold preliminary inquiry to verify the veracity of the allegations, and stop any further such activity.

22. This Court is of the considered view that every rupee which is amassed by any person holding public office, through corrupt means infact is that money which should have been found its place in the State exchequer rather than pocketed in illegal, unjustified manner resulting in unjust enrichment of such public officials.

23. It is due to the fact that government functions as a trustee of the public funds and it is duty bound to protect and preserve the public money and

undoubtedly prevent it from same finding its way into the hands of unscrupulous public servant.

24. In the present case, on the basis of one such complaint inquiry was conducted by the Economic Offences Wing where the report was submitted to the State Government on 18.06.2019, exonerating the petitioner where they inquired into ten properties acquired by the petitioner. In the present case the inquiry has been initiated pursuant to the complaint made by one Dr. S.K. Sharma, Advocate. The State Government proceeded to verify the contents of the complaints. The complainant provided details of his complaint and also provided material on the basis of which said complaint was made.

25. Dr. L.P. Mishra, lerned counsel for the petitioner has submitted that unless the complaint is given on affidavit, the State Government cannot initiate any inquiry proceedings. To consider as to whether the provisions of the above two Government Orders requiring the complaint to be submitted on an affidavit are mandatory or directory, it will be useful to refer to some legal pronouncements of Hon'ble the Apex Court in this regard.

26. The Hon'ble Supreme Court in the case of **May George Vs. Special Tehsildar and Others, (2010) 13 SCC 98**, has stated the precepts, which can be summed up and usefully applied by this Court, as follows:

(a) While determining whether a provision is mandatory or directory, somewhat on similar lines as afore-noticed, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve;

(b) To find out the intent of the legislature, it may also be necessary to examine serious general inconveniences or injustices which may be caused to persons affected by the application of such provision;

(c) Whether the provisions are enabling the State to do some things and/or whether they prescribe the methodology or formalities for doing certain things;

(d) As a factor to determine legislative intent, the court may also consider, inter alia, the nature and design of the statute and the consequences which would flow from construing it, one way or the other;

(e) It is also permissible to examine the impact of other provisions in the same statute and the consequences of non-compliance of such provisions;

(f) Physiology of the provisions is not by itself a determinative factor. The use of the words `shall' or `may', respectively would ordinarily indicate imperative or directory character, but not always.

(g) The test to be applied is whether non-compliance with the provision would render the entire proceedings invalid or not.

(h) The Court has to give due weightage to whether the interpretation intended to be given by the Court would further the purpose of law or if this purpose could be defeated by terming it mandatory or otherwise.

27. Reference can be made to the following paragraphs of **May George (supra) :**

*"16. In **Dattatraya Moreshwar Vs. The State of Bombay and Others, AIR 1952 SC 181**, the Court observed that law which creates public duties is directory but if it confers private rights it is mandatory.*

Relevant passage from this judgment is quoted below:

`7.....It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done."

28. A Constitution Bench of the Apex Court in **State of U.P. and Others Vs. Babu Ram Upadhya, AIR 1961 SC 751,** decided the issue observing:

"29.....For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non- compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

29. In **B.S. Khurana and Ors. v. Municipal Corporation of Delhi and Ors., (2000) 7 SCC 679],** the Apex Court considered the provisions of the Delhi Municipal Corporation Act, 1957, particularly those dealing with transfer of immovable property owned by the Municipal Corporation. After considering the scheme of the Act for the purpose of transferring the property belonging to the Corporation, the Court held that the Commissioner could alienate the property only on obtaining the prior sanction of the Corporation and this condition was held to be mandatory for the reason that the effect of non-observance of the statutory prescription would vitiate the transfer though no specific power had been conferred upon the Corporation to transfer the property.

30. In **State of Haryana and Anr. v. Raghubir Dayal, (1995) 1 SCC 133**, the Apex Court has observed as under:

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

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

31. The purpose of the aforesaid government Orders is very clear which is to prevent unnecessary harassment to the public servant which may be occasioned by lodging of false and frivolous complaints by anonymous persons only with the oblique purpose of causing harm to the reputation and career such public servant, without there being any basis for the said allegations.

32. At this stage, we would hasten to add, the aforesaid Government Orders, on the other hand does not grant an omnibus or to prevent any inquiry where there are serious allegations of corruption, and the allegations are based on verifiable facts. In case there are serious allegations of corruption and amassing of property through corrupt means, then mere giving a list of property would be sufficient to initiate preliminary inquiry.

33. These Government Orders cannot be utilised by public servant to stall any inquiry, as this could never have been the intention of the State Government while passing the Government Orders. Where it is found that the allegations relate to actions/facts which are not in the public domain and are dependent upon the statements or material which can be disclosed only by private individuals, in such cases it would be necessary to proceed only when such allegations are made on affidavit, as most people tend to retract from their statements when asked to depose against a public servant during inquiry.

34. The provisions of Government Orders dated 9th May, 1997 and 1st August, 1997 are only to ensure that a public servant is not harassed and is not faced with base less and false allegations. It is not the mandate of the said Government Orders that no preliminary inquiry can proceed unless and until the complaint is given on affidavit. It is only a measure as to filter baseless and motivated complaints and to provide guidelines to the authorities to see that a person making complaint is serious about his complaint and there is substantial material in the same and is not made with oblique motive without having any basis. The said Government Orders also do not prescribe the consequences of non compliance and therefore, this Court is of the considered view that the said Government Orders are, only 'guidelines' and are directory and not mandatory. Each complaint has to be examined individually to come to a conclusion as to whether the allegations are serious and worthy of an inquiry or are otherwise baseless, made with intention to harass the Government servant. It is also noticeable that if after a complaint is made on the basis of an affidavit it has to be followed by an inquiry to verify the contents contained therein and in any case the affidavit in itself cannot be sole basis for taking any action against the delinquent employee.

35. Considering the facts on record specially considering the order dated 30th June, 2021, it is noticed that it is only after

due diligence and after verifying the requisite facts, that the competent authority as well as the Vigilance Establishment proceeded to inquiry into the matter.

36. The arguments of learned counsel for the petitioner with regard to the said issue does not merit any interference and are hence, rejected.

37. The second ground for assailing the said Vigilance inquiry is the fact that in the present case where the petitioner has already been awarded punishment of 'censure', he cannot be proceeded against on the same set of facts and has invoked principle of "double jeopardy".

38. It has been brought forth clearly in the various documents annexed with the writ petition as well as stand taken by the respondents that punishment of 'censure' was awarded only because the petitioner has purchased fire arm and sought permission of the State Government after great delay. Issue of disproportionate assets and amassing wealth beyond known sources of income no departmental proceedings were ever initiated against him and no charge sheet was ever served on him. It has also come on record that with regard to inquiry conducted by the Economic Offices Wing and subsequently by the Vigilance department never attained finality and consequently it cannot be said that the petitioner is being punished again on the basis of facts on which the present inquiry is being conducted. The principle of "double jeopardy" is not applicable to the facts of the present case.

39. In the light of aforesaid decisions second ground raised by the petitioner is accordingly rejected.

40. It was further contended that once an inquiry is concluded in favour of the petitioner and inquiry report submitted the competent authority even conducted inquiry again on the same set of facts, would amount to harassment and may merit interference of this Court in exercise of powers under Article 226 of the Constitution of India.

41. It is noticed that on the first occasion there were allegations regarding purchase of only ten properties by the petitioner, and the inquiry report submitted by the Economic Offences Wing to the State Government was never accepted and hence subsequent Vigilance inquiry was initiated. The Vigilance Establishment also conducted inquiry and submitted its report to the State Government, which again was not accepted, as the State Government was of the opinion that inquiry was not conducted fairly and hence fresh inquiry is sought to be conducted on the basis of 14 properties acquired by the petitioner, by a senior Police Officer not below the rank of Inspector General of Police.

42. It has been vehemently submitted that four properties which are alleged to have been acquired by the petitioner were never subject matter of the earlier preliminary inquiries and hence it cannot be said that subject matter of the earlier inquiries are same as that of the present inquiry.

43. It cannot be said that the petitioner is being harassed. It was informed to this Court that now inquiry is being directed to be conducted by the officials not below the rank of Inspector General of Police to ensure that proper and fair inquiry is made into the allegations leveled against the petitioner.

44. It is further noticed that mere conducting preliminary inquiry cannot amount to harassment as at this stage the petitioner is not subjected to any adverse consequences as a result of the said inquiry. The Vigilance inquiry is a fact finding inquiry were only veracity of the allegations are sought to be tested and it is only when the allegations are found to be correct then only disciplinary proceedings are initiated and the petitioner is given charge sheet.

45. Considering the aforesaid facts, this Court does not find any reason to interfere with the impugned order, whereby open Vigilance inquiry is sought to be initiated against the petitioner.

46. The writ petition being devoid of merits, is accordingly **dismissed.**

(2022) 8 ILRA 72
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.07.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Writ A No. 4636 of 2022

State of U.P. & Ors. ...Petitioners
Versus
Chandra Lal Sonkar ...Respondent

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondent:

A. Service Law – Dismissal from service – Misconduct – Making a call, how far material for evaluating a misconduct – No allegation of influencing the Court – Effect – Held, call details do not seem to be a collection of any incriminating material except something which may doubt the employer of a person in his personal liberty being in contact with another person of doubtful credentials – Mere doubt on the part of the disciplinary authority unless supported by a definite damage or loss caused to the St., cannot be evaluated to be a misconduct – Division Bench of the High Court found no illegality in the reasoning recorded by the Tribunal for setting aside the impugned order of dismissal from service. (Para 8, 9 and 10)

Writ dismissed. (E-1)

List of Cases cited:-

1. S.B.I. & ors. Vs Samarendra Kishore Endow & anr.; (1994) 2 SCC 537

(Delivered by Hon'ble Attau Rahman Masoodi, J.
&
Hon'ble Narendra Kumar Johari, J.)

1. This writ petition filed under Article 226 of the Constitution of India by the State is directed against the judgement/order dated 25.1.2022 rendered by U.P. Public Service Tribunal in Claim Petition No. 1528 of 2021.

2. The opposite party feeling aggrieved against the order of dismissal from service had instituted the claim petition under Section 4 of the U.P. Public Service Tribunal Act, 1976 and upon exchange of the pleadings before the Tribunal, the case was contested and challenge to the order of dismissal from service was upheld by the Tribunal. The Tribunal passed the following order:

"Petition is allowed. Punishment order dated 22.7.2021 (Annexure-1) is quashed with all consequential benefits. It

will be open to the respondents to pass some other appropriate punishment against petitioner, if they are advised to do so. No costs."

3. The facts in brief are that the opposite party was proceeded against for misconduct with the issuance of a charge sheet on 7.10.2020. The charges were levelled against the opposite party which are reproduced in the impugned judgement. The opposite party submitted his reply in response to the charge sheet wherein all the four charges were denied.

4. The enquiry officer submitted enquiry report on 1.3.2021 based on which a show cause notice was issued on 22.3.2021. The petitioner again submitted his reply on 1.4.2021 and final punishment order of dismissal from service was passed on 227.2021 which was assailed before the Tribunal in the aforesaid claim petition.

5. The Tribunal while adjudicating upon the case, dealt with the rival contentions and recorded its findings in paragraphs 11 to 18 of the impugned judgement.

6. For our consideration, the opinion recorded by the Tribunal in paragraph 28 is reproduced hereunder:

"28. In the instant case, petitioner has admitted having made calls to Usman and Islam. There is not even an iota of evidence that petitioner in any manner had helped them or any relation with them. He was not posted in the court of special judge Anti Dacoity. It is his case that no officer from prosecution cadre is posted in the said court. ADGC drawn from bar is posted in the said court. There is no allegation that taking advantage of the position,he tried to influence court There is no allegation of any financial transaction or extraneous factor while making calls. On the other hand entire evidence lends support to the defence case that in order to help policed people, he was trying to mediate. In the absence of mens rea it is not possible to hold any employee guilty of misconduct."

7. It is in the light of paragraph 28 extracted above that we had put a definite question to learned counsel for the State as to what essentially constituted the misconduct against the opposite party for which the disciplinary proceedings were drawn except procuring call details which have neither diminished the confidentiality of the State or a proceeding drawn by the State against any culprit nor anything in the matter of causing a financial loss was pointed out on the basis of any material whatsoever.

8. The call details do not seem to be a collection of any incriminating material except something which may doubt the employer of a person in his personal liberty being in contact with another person of doubtful credentials.

9. In this situation mere doubt on the part of the disciplinary authority unless supported by a definite damage or loss caused to the State, cannot be evaluated to be a misconduct. Even the integrity of a public servant proceeded against during this period cannot be said to be under any cloud unless the contents of conversation were ascertained for arriving at a satisfaction to support the public cause. We must emphasize that what lies within the mind of a public servant or any human being is beyond the scrutiny of law unless it affects the sovereign order through an act of commission or omission. In the case at

hand we are convinced that the use of artificial device cannot be construed beyond a harmless mental activity.

10. That being so, the reasoning recorded by the Tribunal for setting aside the impugned order of dismissal from service is a possible view and the rationality thereof, merely on the strength of a doubt, does not support the State to assail the judgement impugned before the Court on the ground that the same suffers from an illegality calling for interference.

11. Learned counsel for the State has referred to a judgement rendered by the apex court in the case of ***State Bank of India and others vs. Samarendra Kishore Endow and another*** reported in ***(1994) 2 SCC 537***.

12. We have carefully gone through the judgement relied on by learned counsel for the State and we find that the judgement cited before us related to a definite charge of financial misappropriation which is not a case before us. The judgement (supra) does not lend support to the argument put forth.

13. On a close scrutiny of the material placed on record we also gather that the occasion to refer to the call details arose on account of a proceeding relating to an incident of loot having been lodged against some police officials by wife of one of the history-sheeters.

14. The opposite party had put forth his explanation of entering into an amicable settlement between police officials and the complainant and probability of such a conversation cannot be ruled out in the normal course. All these explanations were not considered by the disciplinary authority in the right perspective and there was no application of mind on such explanations at all.

15. This relevant aspect of the matter weighed in the mind of the Tribunal while appreciating the arguments put forth and the material placed on record. The reasoning assigned by the Tribunal in our considered view, does not call for any interference. We also expect that the liberty granted by the Tribunal be weighed in the light of observations made above.

16. Thus, we decline to interfere with the impugned judgement and the writ petition is accordingly rejected.

(2022) 8 ILRA 74
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.08.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ A No. 5114 of 2022

Smt. Satakshi Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anurag Shukla

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 15(3), 38, 39, 42 & 43 – Maternity Benefits Act, 1961 – Sections 5, 6 & 27 – Women's right to get maternity benefits – Application for grant of maternity leave was rejected on the ground of restriction contained in R. 153(1) of Financial Handbook – Validity challenged – Act of 1961 does not contain any such restriction – Applicability of R. 153(1), how far permissible – Held, once

1961 Act does not contain any such stipulation accordingly it is apparent that the respondents have patently erred in placing reliance on Rule 153(1) of the Financial Handbook in rejecting the application of the petitioner for grant of maternity leave more particularly when Section 27 of 1961 Act provides that it is 1961 Act which would be applicable notwithstanding anything inconsistent contained in any other law or contract of service. (Para 16)

B. Constitution of India – Article 254(2) – Accent of the President – Schedule VII, List III, Entry 24 – Concurrent list – Legislation of the St. legislation inconsistent to the legislation of the Parliament, how far enforceable – Overriding effect – Held, the Maternity Benefit Act 1961 has been enacted by the Parliament on a subject which finds mention in entry 24 of list III, and it was totally within its competence to make such an enactment. Even if the St. legislature were to make such a law, overriding the provisions contained in the Maternity Benefit Act then the said act would be reserved for accent of the President and would be enforceable only after obtaining such an accent as provided in article 254(2) of the Constitution of India. (Para 21)

C. Interpretation of Statute – Inconsistency between the enactment made by Parliament and instruction issued by Executive – Overriding effect – Held, the provision of Financial Handbook are pre-Constitutional executive instructions and would be subsidiary to the Act of Parliament and in case of any inconsistency, the statutory enactment framed by the Parliament would prevail and hence the provisions of Maternity Benefits Act, 1961 would prevail over the provisions of Financial Handbook. [Para 25(2)]

Writ petition allowed. (E-1)

List of Cases cited:-

1. Municipal Corpn. of Delhi Vs Female Workers (Muster Roll); (2000) 3 SCC 224

2. Writ A no. 3486 of 2019; Ansu Rani Vs St. of U.P and 2 others

3. Writ Petition No. 6532 (S/S) of 2020; D. Snehkiran Raghuvansi Vs V.C. King George's Medical University Gandhi Memorial & ors.

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

1. Heard Sri Anurag Shukla along with Sri Abhishek Misra and Ms. Ishit Mishra, Advocates for the petitioner and Sri Ram Pratap Singh Chauhan, learned Additional Chief Standing counsel appearing for the opposite parties.

2. The petitioner, who is working on the post of Lecturer (Hindi) in Rajkiya Balika Inter College, Hardoi, is aggrived by the impugned order dated 30.07.2019 whereby her application for maternity leave from 18.11.2018 to 16.5.2019 has been rejected on the ground that she had previously availed maternity leave which ended on 18.5.2018, which was a period less than 2 years and hence was not entitled for the same.

3. It has been submitted by the counsel for the petitioner that the petitioner after expecting a child had applied for maternity leave for a period of 174 days from 26.11.2017 to 18.5.21018 which was duly sanctioned and the petitioner gave birth to a baby boy on 29.1.2018, but unfortunately the newborn child passed away due to cardio respiratory arrest on 30.1.2018, just a day after his birth.

4. The petitioner again conceived for the second time and applied for maternity leave for a period of 24 weeks from 18.11.2018 to 16.05.2019, which has been rejected by means of the impugned order.

5. Learned counsel for the petitioner contends that the said order would run contrary to the mandatory provisions of the Maternity Benefits Act, 1961 (hereinafter referred to as the '1961 Act'). He contends that Section 3 (h) of 1961 Act defines maternity benefit as the payment referred to in sub-section (1) of Section 5 while Section 5 (3) of 1961 Act provides that the maximum period for which any woman would be entitled to maternity benefit which shall be of 26 weeks. It is also contended that Section 6(4) of 1961 Act categorically provides that on receipt of the notice for maternity leave, the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit.

6. It is contended that taking into consideration the mandatory provisions of 1961 Act once the petitioner had applied for maternity leave for the aforesaid period consequently there was no occasion for respondents have rejected her application. The maternity leave has been rejected on the ground that she had previously availed maternity leave which ended on 18.5.2018, which was a period less than 2 years and hence was not entitled for the same as per Rule 153(1) of the Financial Handbook.

7. Learned counsel for the petitioner contends that Section 27 of 1961 Act categorically provides that the provisions of 1961 Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law whether made before or after the coming into force of 1961 Act. Learned counsel for the petitioner contends that taking into consideration the aforesaid provisions of 1961 Act more particularly when Rule 153(1) of the Financial Handbook runs contrary to the mandatory provisions of 1961 Act then considering the provisions of Section 27 of 1961 Act Rule 153(1) of the Financial Handbook Vol. II to IX would have to be read down and it is the provisions of 1961 Act which would prevail.

8. Learned Standing counsel, on the other hand, has submitted that the impugned order is in conformity with the provisions of Rule 153(1) of the Financial Handbook Volume II to IV where a restriction has been placed for grant of maternity benefits prior to 2 years having lapsed from the date of expiry of the last maternity leave granted under the Rule. It has further been submitted that the provisions of Financial Handbook volume II to IV would apply to the facts of the present case rather than the provisions of the Maternity Benefits Act, 1971. It was stated that "health' being a state subject, the State Government was fully empowered to legislate with regard to the matters pertaining to "health' which was a subject mentioned in list II of the 7th Schedule of the Constitution.

9. I have heard the counsel for the parties and perused the record.

10. The relevant provisions of 1961 Act which would have a direct bearing on the present case are being reproduced below for the sake of convenience:- Section 3(h) of 1961 Act reads as under:- (h) "maternity benefit" means the payment referred to in subsection (1) of section 5. Section 5 of 1961 Act reads as under:-

"5. Right to payment of maternity benefit.-

(1) Subject to the provisions of this Act, every woman shall be entitled to,

and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day.

(2) No woman shall be entitled to maternity benefit unless she has actually worked in an establishment of the employer from whom she claims maternity benefit, for a period of not less than [eighty days] in the twelve months immediately preceding the date of her expected delivery:

Provided that the qualifying period of [eighty days] aforesaid shall not apply to a woman who has immigrated into the State of Assam and was pregnant at the time of the immigration.

(3) The maximum period for which any woman shall be entitled to maternity benefit shall be [Twenty six weeks of which not more than eight weeks] shall precede the date of her expected delivery:-

Provided that the maximum period entitled to maternity benefit by a woman having two or more than two surviving children shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery

[Provided further that] where a woman dies during this period, the maternity benefit shall be payable only for the days up to and including the day of her death: [Provided also that] where a woman, having been delivered of a child, dies during her delivery or during the period immediately following the date of her delivery for which she is entitled for the maternity benefit, leaving behind in either case the child, the employer shall be liable for the maternity benefit for that entire period but if the child also dies during the said period, then, for the days up to and including the date of the death of the child.

(4) A woman who legally adopts a child below the age of three months or a commissioning mother shall be entitled to maternity benefit for a period of twelve weeks from the date the child is handed over to the adopting mother or the commissioning mother, as the case may be]

(5) In case where the nature of work assigned to a woman is of such nature that she may work from home, the employer may allow her to do so after availing of the maternity benefit for such period an on such conditions as the employer and the woman may mutually agree]"

11. Section 6 of 1961 Act reads as under:-

"6. Notice of claim for maternity benefit and payment thereof.-

(1) Any woman employed in an establishment and entitled to maternity benefit under the provisions of this Act may give notice in writing in such form as may be prescribed, to her employer, stating that her maternity benefit and any other amount to which she may be entitled under this Act may be paid to her or to such person as she may nominate in the notice and that she will not work in any establishment during the period for which she receives maternity benefit.

(2) In the case of a woman who is pregnant, such notice shall state the date from which she will be absent from work, not being a date earlier than six weeks from the date of her expected delivery.

(3) Any woman who has not given the notice when she was pregnant may give such notice as soon as possible after the delivery. [

(4) On receipt of the notice, the employer shall permit such woman to

absent herself from the establishment during the period for which she receives the maternity benefit.

(5) The amount of maternity benefit for the period preceding the date of her expected delivery shall be paid in advance by the employer to the woman on production of such proof as may be prescribed that the woman is pregnant, and the amount due for the subsequent period shall be paid by the employer to the woman within forty-eight hours of production of such proof as may be prescribed that the woman has been delivered of a child.

(6) The failure to give notice under this section shall not disentitle a woman to maternity benefit or any other amount under this Act if she is otherwise entitled to such benefit or amount and in any such case an Inspector may either of his own motion or on an application made to him by the woman, order the payment of such benefit or amount within such period as may be specified in the order.

12. Section 27 of 1961 Act reads as under:-

27. Effect of laws and agreements inconsistent with this Act.- (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the coming into force of this Act: Provided that where under any such award, agreement, contract of service or otherwise, a woman is entitled to benefits in respect of any matter which are more favourable to her than those to which she would be entitled under this Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she is entitled to receive benefits in respect of other matters under this Act.

(2) Nothing contained in this Act shall be construed to preclude a woman from entering into an agreement with her employer for granting her rights or privileges in respect of any matter which are more favourable to her than those to which she would be entitled under this Act.

13. Section 28 of 1961 Act reads as under:-

*"**Power to make rules.-** (1) The appropriate Government may, subjected to the condition of previous publication and notification in the Official Gazette, make rules for carrying out the purposes of this Act.*

14. A perusal of Section 3(h) of 1961 Act, clearly reveals that maternity benefit means the payment referred to in sub-section (1) of Section 5 of 1961 Act. Section 5 of 1961 Act stipulates that every woman shall be entitled to and an employer shall be liable for the payment of maternity benefit at a certain rate. Sub-section (3) of Section 5 of 1961 Act provides that the maximum period for which any woman shall be entitled to maternity benefit shall be 26 weeks. Section 6 of 1961 Act provides that any woman employed in an establishment and entitled to any maternity benefit under the provisions of 1961 Act may give notice in writing to her employer stating that her maternity benefit be paid to her or to such person as she may nominate in the notice. Sub-section (4) of Section 6 of 1961 Act provides that on receipt of the notice, the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit.

15. A perusal of the aforesaid provisions of 1961 Act thus indicate that a woman would be entitled to give notice in writing for grant of maternity benefit and on receipt of notice the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit. The 1961 Act does not contain any such stipulation of the time difference between grant of maternity benefit for the first and second child as stipulated in Rule 153 (1) of the Financial Handbook. Section 27 of 1961 Act categorically provides that the provisions of 1961 Act shall have effect notwithstanding anything inconsistent therewith contained in any other law whether made before or after coming into force of 1961 Act. The proviso to Section 27 of 1961 Act provides that in case a woman is entitled to benefits in respect of any matter which are more favourable to her than those to which she would be entitled under 1961 Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she would be entitled to receive benefits in respect of other matters under 1961 Act, meaning thereby that additional benefits that a woman would be entitled in terms of agreement or contract of service would be admissible to her notwithstanding anything contained in 1961 Act. Thus, it is the additional benefits which have not been precluded but in case there is anything contrary or inconsistent to the provisions of 1961 Act pertaining to maternity benefit then it would be the 1961 Act which would be applicable.

16. In the instant case, the maternity leave so applied by the petitioner has been rejected by placing reliance on Rule 153(1) of the Financial Handbook by contending that the same contains a restriction that the second maternity leave cannot be granted where there is difference of less than two years between the end of the first maternity leave and grant of second maternity leave. Admittedly, the first maternity leave of the petitioner ended on 18.5.2018 and thus the respondents have rejected the claim of the petitioner for grant of second maternity leave. However, once 1961 Act does not contain any such stipulation accordingly it is apparent that the respondents have patently erred in placing reliance on Rule 153(1) of the Financial Handbook in rejecting the application of the petitioner for grant of maternity leave more particularly when Section 27 of 1961 Act provides that it is 1961 Act which would be applicable notwithstanding anything inconsistent contained in any other law or contract of service.

17. The provisions of Financial Handbook Volume II to IV were made by the Governor in exercise of his powers under Section 241(2)(b) of the Government of India Act, 1935 and are continuing in force on the strength of the provisions contained in Article 13 of the Constitution of India. The Financial Handbook contains rules which governed the services of the person serving in connection with the affairs of a province, and are at best in the nature of executive instructions, and are clearly not in the category of "an enactment" made by the legislature.

18. To attract the provisions of Article 254 of the constitution the first requirement is that both the laws should be enactments of the respective legislatures, that is, one of the laws should be a enactment of the Parliament while the second should be a law made by the state legislature. The Maternity Benefit Act 1961 has been

enacted by the Parliament while the provisions of the Financial Handbook Volume II to IV are at best executive instructions.

19. The Supreme Court in the case of ***Municipal Corpn. of Delhi v. Female Workers (Muster Roll), (2000) 3 SCC 224*** has looked into the various provisions of the Constitution for the finding the source and power to legislate with respect to the Maternity Benefit Act, 1961, and observed as under:-

"6.Not long ago, the place of a woman in rural areas had been traditionally her home; but the poor illiterate women forced by sheer poverty now come out to seek various jobs so as to overcome the economic hardship. They also take up jobs which involve hard physical labour. The female workers who are engaged by the Corporation on muster roll have to work at the site of construction and repairing of roads. Their services have also been utilised for digging of trenches. Since they are engaged on daily wages, they, in order to earn their daily bread, work even in an advanced stage of pregnancy and also soon after delivery, unmindful of detriment to their health or to the health of the new-born. It is in this background that we have to look to our Constitution which, in its Preamble, promises social and economic justice. We may first look at the fundamental rights contained in Part III of the Constitution. Article 14 provides that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India. Dealing with this article vis-à-vis the labour laws, this Court in Hindustan Antibiotics Ltd. v. Workmen [AIR 1967 SC 948 : (1967) 1 SCR 652 : (1967) 1 LLJ 114] has held that labour to whichever sector it may belong in a particular region and in a particular industry will be treated on equal basis. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of this article provides as under:

"15. (3) Nothing in this article shall prevent the State from making any special provision for women and children."

7. In Yusuf Abdul Aziz v. State of Bombay [AIR 1954 SC 321 : 1954 SCR 930] it was held that Article 15(3) applies both to existing and future laws.

8. From Part III, we may shift to Part IV of the Constitution containing the Directive Principles of State Policy. Article 38 provides that the State shall strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life. Sub-clause (2) of this article mandates that the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities.

9. Article 39 provides, inter alia, as under:

"39. Certain principles of policy to be followed by the State.--The State shall, in particular, direct its policy towards securing--

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

*(b)-(c)****

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

*(f) ***"*

10. Articles 42 and 43 provide as under:

"42. Provision for just and humane conditions of work and maternity relief.--The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. Living wage, etc., for workers.--The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and,

in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas."

11. It is in the background of the provisions contained in Article 39, specially in Articles 42 and 43, that the claim of the respondents for maternity benefit and the action of the petitioner in denying that benefit to its women employees has to be scrutinised so as to determine whether the denial of maternity benefit by the petitioner is justified in law or not.

12. Since Article 42 specifically speaks of "just and humane conditions of work" and "maternity relief", the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

13. Parliament has already made the Maternity Benefit Act, 1961. It is not disputed that the benefits available under this Act have been made available to a class of employees of the petitioner Corporation. But the benefit is not being made available to the women employees engaged on muster roll, on the ground that they are not regular employees of the Corporation. As we shall presently see, there is no justification for denying the benefit of this Act to casual workers or workers employed on daily-wage basis.

20. Apart from the provisions contained in the Chapter IV of the Constitution of India it is also noticed that entry 24 of List III of VII Schedule specifically provide for maternity benefits for ready reference entry 24 is as under:-

"24. welfare of labour including conditions of work, Provident fund employers liability workmen's compensation, invalidity and old age pension and maternity benefit."

21. In light of the above, this Court is of the considered opinion that the Maternity Benefit Act 1961 has been enacted by the Parliament on a subject which finds mention in entry 24 of list III, and it was totally within its competence to make such an enactment. Even if the state legislature were to make such a law, overriding the provisions contained in the Maternity Benefit Act then the said act would be reserved for accent of the President and would be enforceable only after obtaining such an accent as provided in article 254(2) of the Constitution of India.

22. Even otherwise, submissions of the learned standing counsel appearing for the State of U. P. is not convincing, considering the fact that as per Section 28 of the maternity benefits act, 1961 where it is provided that *"the appropriate government may, subject to conditions of*

previous publication and by notification in the Official Gazette, make rules for carrying out the purposes of this act". "Appropriate Government" in Section 3(a) has been defined as "means in relation to an establishment being a mine 1[or an establishment wherein persons are employed for the exhibition of equestrian acrobatic and other performances] the Central Government and in relation to any other establishment, the State Government."

23. The State of U.P. in exercise of powers granted under Section 28 has already issued a Government Order dated 08.12.2008 and 24.03.2009 adopting the provisions of the Maternity Benefits Act for the benefit of the their employees. Further, the modifications made by the Central Government were also adopted by the State of U.P. in its Government Order dated 11th April, 2011 which has been duly considered by a coordinate bench of this Court in Writ A no.3486 of 2019 in the case of ***Ansu Rani Vs State of U.P and 2 others,*** were it was held:-

"11. The aforesaid decision of the Central Government has been adopted by the State of U.P. for its employees vide Government Order dated 08.12.2008 and 24.03.2009. Subsequently, certain modifications being made by the Central Government, the same was also adopted by the State Government vide Government Order dated 11th April, 2011. The aforesaid Government Order is being reproduced hereinunder:-

''प्रेषक,
वृन्दा सरूप,
प्रमुख सचिव,
उ0प्र0 शासन।

सेवा में, समस्त विभागाध्यक्ष एवं प्रमुख कार्यालयाध्यक्ष,

उत्तर प्रदेश।

वित्त (सामान्य) अनुभाग–2 लखनऊ : दिनांक : 11 अप्रैल, 2011 विषयः– महिला सरकारी सेवको ं को बाल्य देखभाल अवकाश की अनुमन्यता।

महोदय,

उपर्युक्त विषयक कार्यालय ज्ञाप संख्या–जी–2–2017/ दस–2008–216–79, दिनांक 08–12–2008 तथा कार्यालय ज्ञाप संख्या जी–2–573/दस–2008–216–79, दिना ंक 24–3–2009 द्वारा प्रदेश की महिला सरकारी सेवकों को केन्द्र सरकार की महिला कर्मचारियों की भांति बाल्य देखभाल अवकाश की सुविधा कतिपय शर्तों के अधीन प्रदान की गयी थी। चूंकि भारत सरकार द्वारा उक्त शर्तों में कतिपय संशोधन किए गए हैं अतः सम्यक् विचारोपरान्त श्री राज्यपाल महोदय संदर्भगत शासनादेशों में उल्लिखित शर्तो को निम्नवत् संशोधित करने की सहर्ष स्वीकृति प्रदान करते हैंः–

(1) संबंधित महिला कर्मचारी के अवकाश लेखे में उपार्जित अवकाश देय होते हुए भी बाल्य देखभाल अवकाश अनुमन्य होगा।

(2) बाल्य देखभाल अवकाश को एक कलेण्डर वर्ष के दौरान तीन बार से अधिक नहीं दिया जायेगा।

(3) बाल्य देखभाल को 15 दिनों से कम के लिए नहीं दिया जायेगा।

(4) बाल्य देखभाल अवकाश को साधारणतया परिवीक्षा अवधि के दौरान नहीं दिया जायेगा, ऐसे मामलों को छोड़कर जहॉ अवकाश देने वाला प्राधिकारी परिवीक्षार्थी की बाल्य देखभाल अवकाश की आवश्यकता के बारे में पूर्ण रूप से संतुष्ट न हो। इसे भी सुनिश्चित किया जायेगा कि परिवीक्षा अवधि के दौरान अवकाश दिया जा रहा है तो इस अवकाश की अवधि कम–से–कम हो।

(5) बाल्य देखभाल अवकाश को अर्जित अवकाश के समान माना जायेगा और उसी प्रकार से स्वीकृत किया जायेगा।

2– यदि किसी महिला कर्मचारी द्वारा दिनांक 08.12.2008 के कार्यालय ज्ञाप के जारी होने के पश्चात बाल्य देखभाल के प्रयोजन हेतु अर्जित अवकाश लिया गया है तो उसके अनुरोध पर उक्त अर्जित अवकाश को बाल्य देखभाल अवकाश में समायोजित किया जा सकेगा।

3– शासनादेश संख्या जी–2–2017/दस–2008–216–79, दिनांक 08–12–2008 तथा शासनाद ेश संख्या जी–2–573/दस–2009–216– 79 दिनांक 24–03–2009 इस सीमा तक संशोधित समझे जायेंगे।

4— संगत अवकाश नियमों मे आवश्यक संशोधन यथासमय किये जायेंगे।

भवदीया,
(वृन्दा सरूप)
प्रमुख सचिव, वित्त।''

24. Once the provisions of the Maternity Benefit Act, 1961 has been adopted by the State of U.P. as held by this Court in the case of ***Anshu Rani Vs State of U. P.*** then the said Act of 1961 would apply with full force irrespective of the provisions contained in the Financial Handbook which is merely an executive instruction and would in any case be subsidiary to the legislation made by theParliament. The judgment of ***Anshu Rani (Supra)*** has been followed and approved in ***D. Snehkiran Raghuvansi Vs. V.C. King George'S Medical University Gandhi Memorial & Ors***. passed in writ petition No.6532 (S/S) of 2020.

25. In light of the above discussions, the summary of issues determined are as under:-

(1) The Maternity Benefits Act, 1961 has been enacted by the Parliament in exercise of powers under Entry 24 in List III of the Seventh Schedule of the Constitution of India and to secure the goals stated in Articles 38, 39, 42 and 43 of the Constituton of India and also to give effect to the provisions contained in Article 15 (3) of the Constitution.

(2) The provision of Financial Handbook are pre-Constitutional executive instructions and would be subsidiary to the Act of Parliament and in case of any inconsistency, the statutoy enactment framed by the Parliament would prevail and hence the provisions of Maternity Benefits Act, 1961 would prevail over the provisions of Financial Handbook and, therefore, provision of Rule 153 (1) of the Financial Handbook Volume I to IV are read down with regard to admissibility of leave to a woman with regard to second pregnancy which would be governed by Maternity Benefits Act, 1961 and not Rule 153 (1) of the Financila Handbook Volume II to IV.

(3) The State Government already having adopted the provisions of Maternity Benefits Act, 1961 as per Government Order dated 11.4.2011, as recorded by this Court in the case of ***Anshu Rani Vs. State of U.P.*** passed in Writ A No.3486 of 2019, makes it abundantly clear that the provisions of Maternity Benefits Act, 1961 would prevail over any other law.

26. In light of the above, the writ petition is **allowed** and the order dated 30.7.2019 is quashed, and the respondents are directed to grant maternity benefit to the petitioner in terms of the Maternity Benefit Act 1961. They are also directed to pass appropriate order in this regard within a period of 4 weeks from the date a certified copy of the order is produced before the competent authority.

(2022) 8 ILRA 83
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 5483 of 2022

Kallu Ali (Supervisor Retired) **...Petitioner**

Versus

State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Sri Wahaj Ahmad Siddiqui, Sri Mohd. Saeed Siddiqui

Counsel for the Respondents:
C.S.C., Sri Gaurav Dhama, Sri Ajai Singh

A. Service Law – Pension and post retiral benefits – Pensionable service – Computation – Non-adding the period of service rendered as the daily wage – Permissibility – Held, if an employee has discharged duties whether temporarily or as a daily wager or on ad hoc basis on a post for which requirement was there and services of such an employee have come to be regularized on the said post or in the same capacity, the period spent before regularization should be considered and added to pensionable services. (Para 28)

B. Constitution of India – Article 243-Q – Municipalities and Municipal Corporations, and Local Development Authority – Nature and Character – Control of the St. Government – While Municipalities and Municipal Corporations deal with wider area of public services, the Local Development Authority only deals with the planned urban development activities of notified areas and to that extent the other two Acts give way. The nature and character of these three Bodies is the same except that Municipalities and Municipal Corporations consist of members elected by people, whereas, the Local Development Authority is constituted by St. Government under the Act, 1973. However, in respect of all the three bodies, St. Government has deep pervasive administrative and financial control. The Municipalities and Municipal Corporations as conceived of under Article 243-Q enjoy larger autonomy. So these are all Local Bodies created to serve people and upgrade living standard and public life in city/ urban areas – Held, the St. Government has absolute supervisory and superintending control over the Local Development Authority. The power can be exercised both by *suo moto* and/ or on the application by a party in the matter of dispute and the provisions attached finality to the decisions taken by the St. Government. (Para 14 and 22)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Prem Singh v. St. of U.P. (2019) 10 SCC 516

2. Special Leave to Appeal (C) No. 1109 of 2022; The St. of Guj. & ors. Vs Talsibhai Dhanjibhai Patel decided on 18.02.2022

3. Special Appeal (Def.) No. 1278 of 2020; Chetram v. St. of U.P. & ors.

4. Writ A No. 5817 of 2020; Kaushal Kishore Chaubey & ors. Vs St. of U.P. & ors. decided on 08.10.2021

5. Writ A No. 2449 of 2022; Awadhesh Kumar Dubey v. St. of U.P. & ors. decided on 04.03.2022

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

1. Heard learned counsel for the petitioner and Sri Ajay Singh, learned counsel for the contesting respondent nos. 2 & 3 and learned Standing Counsel for the State respondent.

2. Amendment application is allowed, let the amendment be carried out forthwith.

3. By means of this petition filed under Article 226 of the Constitution, the petitioner has prayed for calling the records and quashing the order dated 18.11.2020 passed by respondent no. 2, impugned herein this petition.

4. Instructions obtained by Sri Ajay Singh, learned counsel for the contesting respondent nos. 2 & 3 placed before the Court, are taken on record. Since the instructions are complete and learned counsel for the respondent submits that

those were the ultimate instructions and the matter may be decided, the Court proceeds to decide the matter finally.

5. Learned counsel for the petitioner submits that petitioner has retired from Allahabad Development Authority on 28.02.2019 on attaining the age of superannuation and claims that even though he was initially engaged by the respondent Development Authority as a daily wage Supervisor but he is entitled for pensionary benefits on the ground that once his services came to be regularized by respondent Local Authority on 01.02.2011, his past services rendered as a daily-wager in the establishment w.e.f. 01.06.1989 were liable to be taken into account towards pensionable service for the purpose of making him entitled for pension.

6. It is pleaded in the writ petition that the factual position with regard to his continuance in the establishment on daily wage basis until his regularization in the year 2011, is not disputed and even if he is taken by the respondents to be in service as Supervisor on daily wage basis prior to his regularization as per order impugned passed by the respondent no. 2, the respondent has manifestly erred in rejecting the claim of the petitioner for pension by taking a stand contrary to the settled legal position emerging out from the various authorities of this Court and Supreme Court.

7. Learned counsel for the petitioner has relied upon the judgment of Supreme Court in **Prem Singh v. State of U.P. (2019) 10 SCC 516, The State of Gujarat and others v. Talsibhai Dhanjibhai Patel (Special Leave to Appeal (C) No.- 1109 of 2022)** decided on 18th February, 2022 and the judgment of this Court in **Special Appeal (Def.) No. 1278 of 2020, Chetram v. State of U.P. and 2 Others** and that of a coordinate bench of this Court in **Kaushal Kishore Chaubey and 4 Others v. State of U.P. and 2 Others (Writ-A No. 5817 of 2020)** decided on 08.10.2021 and also a judgment of this very bench in **Awadhesh Kumar Dubey v. State of U.P. and 4 others in Writ - A No. 2449 of 2022** (decided on 04.03.2022).

8. Sri Ajay Singh, learned counsel for the contesting respondents submits that as per the instructions obtained by him, the period during which the petitioner was working as work charge/ daily wage employee that could not have been taken into account for determination of pensionable service. Sri Singh argues that factual and legal position in the local development authority differs and cannot be equated with local bodies created and constituted under the Act of 1916 and 1959 and so those judgments relied upon by learned counsel for the petitioner would not be applicable.

9. Having heard learned counsel for the respective parties and having gone through the authorities cited before this court, I find that the issue is no more *res integra.* The temporary service, service spent as work charge employee, service spent on fixed pay or on day to day basis by employees, if they continued in service on the date of regularization, for the purposes of pension such period deserves to be counted to make service pensionable if otherwise pension is admissible to the employees of the establishment in question.

10. In this case, there is no dispute that petitioner has retired from establishment to which pension is admissible. However, in order to meet the

arguments advanced by learned counsel for the respondent Mr. Ajay Singh, it is necessary to have a comparative study of the relevant provisions of the U.p. Urban Planning and Development Act, 1973, U.P. Municipalities Act, 1916 and U.P. Municipal Corporation Act, 1959 under which these separate bodies like Urban Development Authority, Municipal Board and Municipal Corporation are created.

11. In order to provide organized and planned development in urban areas of the Districts in the State, the State Legislature enacted U.P. Urban Planning and Development Act, 1973 creating a local statutory authority at District level called as Urban Development Authority in the name of the district concerned.

12. This above Act has universal application to carry out planned development in the State but subject to the notification of an area of a District as "Development Area'. By virtue of notification as envisaged under Section 3 of the Act it is the municipal area already notified under the Municipalities Act, 1916 and the Municipal Corporation Act, 1959, a Local Body, is taken over by such a Local Authority created under the Act, 1973 for limited purpose of organized and planned urban development by such an authority (hereinafter called as "Local Development Authority').

13. Unlike the Local Body such as Municipal Board or Municipal Corporation, the State Government has deep pervasive administrative and financial control over and above such authority. Under Section 4 of the Act, 1973 the State Government creates and constitutes the Local Authority. Further the Secretary and Chief Accounts Officer to the Local Development Authority are also appointed by the State Government under Section 5 of the Act, 1973. Under Section 5 of the Act the State Government has the authority to create Centralized Services for such employees provided for under sub Section 4 of Section 59 of the Act, 1973. Under Section 6 the State Government has the power to constitute an Advisory Council to advice the Local Development Authority in preparing Master Plan for development of notified area. Development Plan is submitted to the State Government under Section 10 of the Act and comes into force only after the approval of the State Government. Every such land as the Authority may require shall vest in it after its compulsory acquisition by the State Government under the Land Acquisition Act, vide Section 17 of the Act, 1973 and further also such Nazul Lands as the State Government so decides may by notification shall stand transferred to the Local Development Authority and then if Government wants it back, the Local Development Authority shall replace the same at the disposal of the State Government by issuing necessary notification vide Section 19 of the Act, 1973. Section 20 of the Act, 1973 provides for creation of fund for Local Development Authority which consists of grants, advances, loan from the State Government, money received by disposal of property by Local Development Authority and rents, profits, loan, advance or debentures from other sources. Under Section 21 of the Act, 1973 budget is prepared at the time when State Government specifies and every year annual report of the activities of Local Development Authority is to be submitted to the State Government under Section 23 of the Act, 1973. Section 24 of the Act, 1973 provides for creation of pension and provident fund by the Local Development

Authority for the benefit of its members and employees but of course, subject to such conditions as State Government may specify and further State Government reserves the right to declare that Provident Fund Act, 1925 shall apply to such funds as if it were of Government Provident Fund. Section 29 of the Act, 1973 further empowers the Local Development Authority or its Vice Chairman to exercise such powers of a Local Body concerned or its Chief Executive Officer as the State Government may specify after notification. The Master Plan and Zonal Development Plan has been made operational under Section 12 of the Act, 1973 with the approval of the State Government. Under Section 34 of the Act, 1973, the State Government is empowered to reframe, to provide the consensual terms and conditions between the Local Authority and Local Development Authority for maintenance of the amenities provided by the Local Development Authority, falling in the area of Local Authority / Body. Section 41 of the Act, 1973 provides for general control upon the Local Development Authority by the State Government in following terms:

41. Control by State Government.-

(1) The [Authority),the Chairman or the (Vice-Chairman] shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of this Act.

(2) If in, or in connection with, the exercise of its powers and discharge of its functions by the [Authority, the Chairman or the Vice-Chairman) under this Act any dispute arises between the (Authority, the Chairman or the Vice-Chairman) and the State Government the decision of the State Government on such dispute shall be final.

(3) The State Government may, at any time, either on its own motion or on application made to it in this behalf, call for the records of any case disposed of or order passed by the [Authority or the Chairman) for the purpose of satisfying itself as to the legalitv or propriety of any order passed or direction issued and may pass such order or issue such direction in relation thereto as it may think fit:

Provided that the State Government shall not pass an order prejudicial to any person without affording such person a reasonable opportunity of being heard.

*(4) Every order of the State Government made in exercise of the pow*ers conferred by this Act shall be final and shall not be called in question in any court.]

14. From bare reading of the aforesaid provisions, it becomes clear that the State Government has absolute supervisory and superintending control over the Local Development Authority. The power can be exercised both by suo moto and/ or on the application by a party in the matter of dispute and the provisions attache finality to the decisions taken by the State Government.

15. Further, I find that Section 42 provides Local Development Authority to furnish reports, returns and information as the State Government may require from time to time. Under Section 51 of the Act, 1973, the State Government may delegate any of its powers to the Local Development Authority except its rule making power, prescribed for under Section 55 of the Act, 1973. The State Government also enjoys

extraordinary power under Section 53 of the Act, 1973 to accept any land or building or class of lands or buildings from operation of the provisions of the Act, 1973 by issuing notification. Under Section 56 of the Act, 1973 the Local Development Authority may frame regulations/ rules only with the previous approval of the State Government and so also byelaws are to be framed by Local Development Authority with the previous approval of the State Government. Under Section 58 of the Act, the State Government also enjoys the power to dissolve the Local Development Authority, if to its satisfaction, purpose for which such an authority was constituted, has stood satisfied. Section 59 is a very important provision that strikes balance between the power of a newly created Local Development Authority under the Act, 1973 in respect of the notified area under the said Act and the powers of the Local Body that enjoyed the authority for carrying out development activity in such area notified earlier under the Municipalities Act, 1916 and Municipal Corporation Act, 1959 respectively. While the operation of Municipalities Act, 1916 or Municipal Corporation Act, 1959, as the case may be, is suspended in respect of notified development area under the new Act, all the liabilities and responsibilities stand transferred to the newly created Local Development Authority and the provisions under the Municipalities Act, 1916, U.P. (Regulation of Building Operations) Act, 1958 and the U.P. Municipal Corporation Act, 1959, as the case may be, in so far as they are not inconsistent with the New Act, 1973, their enforcement/ application has been made to continue. Vide Section 59(3) employees of the U.P. Pradesh Palika (Centralized) Service Rules, 1956 stand transferred to the Local Development Authority, even the employees outside the centralized services cadre also stand transferred if their number would not exceed the number of posts.

16. The appreciation of various sections of the Act, 1973, thus clearly establishes that Local Development Authority called by the name of district, is a Governmental Authority to undertake planned development of a notified development area by framing zonal and Master Development Plans for such areas. State Government enjoys absolute administrative powers over and above the Authority in every of its spheres in discharge of functions. It is also funded by means of grant and state also advances, loans etc. even though it may have its own sources of revenue. Its employees are also both of centralized and non centralized services and it has its own byelaws governing the services of non centralized services cadre employees.

17. Now if we go through various provisions of the Municipalities Act, 1916 and the U.P. Municipal Corporation Act, 1959, we would find that the Municipalities were conceptualized with an idea of local self government of city areas of the districts to be notified as such. Municipalities have larger area of governance looking to the objects with which they are created. Chapter VII of the Municipalities Act, 1916 that deals with the powers of a Municipality within which buildings, public drains, streets, scavenging and water supply and under Chapter VIII dealing with markets, slaughter houses etc. are the areas to be governed under the Act, 1973 while preparing zonal development plan and Master plan. Rest of the area of operation under the Act, 1916 and Act, 1959 are still covered under the respective Acts.

18. **Municipal Board** is provided for by virtue of Section 5 of the Act, 1916 and Section 9 of the said Act provides for constitution of Board of elected Corporators. Section 10 confers power upon the State Government to vary normal composition of Board. Section 30 empowers further the Government to dissolve/ supersede the Board. Section 31-A empowers the State Government to appoint person or persons on Municipal Board. Section 31-B provides for appointment of Director of Local Bodies in the State who is to exercise powers in matters of affairs of Municipalities in the State as State Government may prescribed for and under Section 33 of the Act, 1916 government officers are empowered to do inspection of municipal wards and institutions run by it. Under Section 34 the State Government has been vested with a power to override the resolution of the municipal board and so also further administrative power under Section 35 on any representation being made or even suo moto. Further the District Magistrate is vested with the extraordinary power in case of emergency under Section 36 of the Act, 1916, a power to remove elected President of the Municipal Board. Section 69-B of the Act, 1916 provides for centralized services of Municipal officers and servants by framing rules by the State Government. Section 65 empowers the Government to appoint executive officers. Section 70 empowers a Municipal Board to appoint temporary servants to meet emergency. Under Section 71 the power of Municipalities to determine permanent staff is subject to directions by the state government. Further under Section 73 the appointment to the educational institution run by a Municipality, is governed under the rules to be framed by the State Government. Section 78 deals with provision of pension and dismissal of employees of government whose services are lent to the Municipality or transferred by Municipality to the government or who are partly employed by the government and partly by the Municipality. Under Section 79 while Municipality has the power to pay leave allowances, provident fund and pay gratuity only with previous sanction of the State Government, it also requires sanction to arrange for purchase of annuity. It is also entitled to grant city compensatory allowance to an officer or servant or the family of such officer or servant but all these powers are subject to the condition and special sanction of the State Government. Annual budget to be prepared by the Municipality is to be submitted to the State Government under Section 99 of the Act, 1916 and the government is further authorized under Section 107 to prescribe the limit of minimum closing balance at its discretion. Section 102 provides that in the condition of indebtedness of a Municipality the State Government has been vested with absolute power over the budget and so can make it subject to its sanctions. Under Section 114 the Municipal fund includes grant from the consolidated fund of the State. The power of a Municipality to borrow money, receive loans from the open market or from any financial institution but all this is subject to previous sanction of the State Government. Vide Section 114-A of the Act, 1916 the Municipal fund is kept in the government treasury or sub treasury or in the State Bank of India or with the previous sanction of the Government in the State Corporation bank or any other scheduled bank vide Section 115 of the Act, 1916. Under Section 116 of the Act, 1916 the property that vests with the Municipality is subject to such restrictions as may be prescribed by the State Government. Municipality is vested with

the power to acquire land under Section 117 through compulsory acquisition by the State Government. Section 127-C of the Act, 1916 provides for Finance Commission to study and review the financial position of the Municipality and the recommendations to the Governor as to grant. The provisions run as under::

27C. Finance Commission. *- (1) The Finance Commission shall also review the financial position of the Municipalities and make recommendations to the Governor as to, -*

(a) the principles which should govern -

(i) the distribution between the State and the Municipalities of the net proceeds of the taxes, duties, tolls and fees leviable by the State which may be divided between them and the allocation of shares of such proceeds to the Municipalities;

(ii) the determination of the taxes, duties, tolls and fees which may be assigned to, or appropriated by, the Municipalities;

(iii) the grants-in-aid to the Municipalities from the Consolidated Fund of the State;

(b) the measures needed to improve the financial position of the Municipalities;

(c) any other matter referred to the finance commission by the Governor in the interests of sound finance of the Municipalities.

(2) Every recommendation of the finance commission made under sub-section (1) shall, together with an explanatory memorandum as to the action taken thereon, be laid before both the houses of the State Legislature.

19. Now this Section stands superseded by Article 243 (I) read with Article 243 (Y) of the Constitution. Article 243 (I) and 243 (Y) of the Constitution are reproduced hereunder:

"243-I. Constitution of finance Commissions to review financial position.

(1) The Governor of a State shall, as soon as may be within one year from the commencement of the Constitution (Seventy third Amendment) Act, 1992 , and thereafter at the expiration of every fifth year, constitute a Finance Commission to review the financial position of the Panchayats and to make recommendations to the Governor as to--

(a) the principles which should govern

(i) the distribution between the State and the Panchayats of the net proceeds of the taxes, duties, tolls and fees leviable by the State, which may be divided between them under this Part and the allocation between the Panchayats at all levels of their respective shares of such proceeds;

(ii) the determination of the taxes, duties, tolls and fees which may be assigned to, or appropriated by, the Panchayats;

(iii) the grants in aid to the Panchayats from the Consolidated Fund of the State;

(b) the measures needed to improve the financial position of the Panchayats;

(c) any other matter referred to the Finance Commission by the Governor in the interests of sound finance of the Panchayats.

(2) The Legislature of a State may, by law, provide for the composition of the Commission, the qualifications which shall be requisite for appointment as members thereof and the manner in which they shall be selected

(3) The Commission shall determine their procedure and shall have such powers in the performance of their functions as the Legislature of the State may, by law, confer on them,

(4) The Governor shall cause every recommendation made by the Commission under this article together with an explanatory memorandum as to the action taken thereon to be laid before the Legislature of the State

243Y. Finance Commission.

(1) The Finance Commission constituted under article 243 I shall also review the financial position of the Municipalities and make recommendations to the Governor as to--

(a) the principles which should govern

(i) the distribution between the State and the Municipalities of the net proceeds of the taxes, duties, tolls and fees leviable by the State, which may be divided between them under this Part and the allocation between the Municipalities at all levels of their respective shares of such proceeds;

(ii) the determination of the taxes, duties, tolls and fees which may be assigned to, or appropriated by, the Municipalities;

(iii) the grants in aid to the Municipalities from the Consolidated Fund of the State;

(b) the measures needed to improve the financial position of the Municipalities;

(c) any other matter referred to the Finance Commission by the Governor in the interests of sound finance of the Municipalities

(2) The Governor shall cause every recommendation made by the Commission under this article together with an explanatory memorandum as to the action taken thereon to be laid before the Legislature of the State."

20. Under Section 128 of the Act, 1916 Municipality's power to impose tax is subject to general rules or special orders of the State Government. Under Section 130-A Government can ask a Municipality to impose any tax and is vested with the power to vary such taxes. Under Section 133 of the Act the State Government enjoys power to reject or vary proposals of the Municipality in respect of taxes under Section 128. Chapter VII and VIII of the Act, 1916 largely deal in the areas covering an urban scheme based planned development which now vests with the Local Development Authority if such an area is notified under the Act, 1973. Under Section 296 of the Act, 1916 State Government is the rule making authority that includes a very important field i.e. providing for the layout of the public streets, residential and non residential areas. This is what zonal development plan and Master Plan are meant for in respect of a notified area under the Act, 1973. Section 297 of the Act, 1916 empowers Municipality to make regulations consistent with the Act and the rules framed under section 296 by the State Government. Under Section 298 Municipality has the power to frame byelaws and where State Government so requires it is must for it to frame byelaws. General power of appeal against the order of a Municipality lies in the person appointed by the State Government or the District Magistrate if no such appointment is made.

21. **Municipal Corporations** are constituted under the U.P. Municipal Corporation Act, 1959 and it has an elected Mayor who heads the body. Section 58 provides for appointment of Municipal

Commissioner and such Addl. Municipal Commissioners as it may consider necessary. Under Section 106 Municipal Corporation can create certain posts. State Government is entitled to get any particular post created if it so directs and such a post can not abolished without prior sanction of the Government. Appointment on posts mentioned under these sections shall have to be by the Mayor in consultation with the State Public Service Commission, however, officiating and temporary appointments for a tenure less than one year, can be made on certain posts without having consultation with State Public Service Commission. Section 111 empowers State Government to make appointments in consultation with the State Public Service Commission if authority specified under Section 107 fails to make appointments. Section 112-A empowers government to provide for centralized services by making rules in that behalf and creation of one or more services of such officers and servants common to the Corporations (Nagar Panchayat, Municipal Council and Jal Sansthans of the State) and may also provide methods for recruitment and other conditions of service. Section 112-C provides that no member of essential services created under Section 112-B can resign without the permission of Municipal Commissioner. Section 112-D empowers the State Government to declare emergency so that there is no stoppage or creation of performance of any essential services. Section 112-E confers overriding power upon Municipal Commissioner to ensure services by any regular, *ad hoc* or centralized services employee of the Corporation who goes or remains on strike. State Government has been vested further with the rule making power under Section 113 of the Act, 1959, for the purposes of bringing into effect the provisions of this chapter. Section 139 provides for composition and other funds and vide section 140 firstly expenditure to be incurred on such fund will be for payment of salary and allowances to the Safai Mazdoors. It is thereafter, the expenditure will be incurred towards salary, pension, gratuity of other employees and officers. Section 140-A imposes restrictions upon expenditure from corporation for litigation etc. as permission/ sanction of Director, Local Bodies, Uttar Pradesh is a must. Borrowing power under Section 154 are subject to sanction of State Government. Chapter XII and Chapter XIII are the same areas of operation as concerned under the Act, 1973 in respect of a notified development area. Other chapters envisage some area of operation as prescribed under the Municipal Corporation Act, 1959. Chapter XXII deals with the powers of the State Government qua proceedings of Corporation, inspection of records and further administrative powers including the power to meet emergency and even supersede the Corporation by dissolving it for its incompetency, default in action and/ or abuse of its power. Chapter XXIII confers power upon the State Government a rule making power. While Section 541 empowers Corporation to frame byelaws, section 547 empowers the State Government to modify or even repeal its byelaws. Still further, Section 549 of the Act, 1959 provides that if in case corporation fails to frame byelaws on any subject enumerated under Section 541 or in the opinion of State Government byelaws framed are not adequate, State Government may itself make byelaws. Section 580 confers power upon the State Government to remove difficulties if situation so arises.

22. The reference, made above to various sections of U.P. Municipalities Act, 1916 and U.P. Municipal Corporation Act,

1959 and U.P. Urban Planning and Development Act, 1973 and their appreciation, lead to the conclusion that while Municipalities and Municipal Corporations deal with wider area of public services, the Local Development Authority only deals with the planned urban development activities of notified areas and to that extent the other two Acts give way. The nature and character of these three Bodies is the same except that Municipalities and Municipal Corporations consist of members elected by people, whereas, the Local Development Authority is constituted by State Government under the Act, 1973. However, in respect of all the three bodies, State Government has deep pervasive administrative and financial control. The Municipalities and Municipal Corporations as conceived of under Article 243-Q enjoy larger autonomy. So these are all Local Bodies created to serve people and upgrade living standard and public life in city/ urban areas.

23. Now, I proceed to refer and discuss the judgments relied upon by learned counsel for the petitioner. Supreme Court in the case of **Prem Singh v. State of U.P. (2019) 10 SCC 516,** has held that merely because an employee has worked on month to month payment basis prior to his being absorbed in permanent establishment, he cannot be denied pension provided of course he has retired from an establishment where services are pensionable. Vide paragraph nos. 33, 34 & 35 the Court has held thus:

"33. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

34. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund

employees or non- pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

35. In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook."

24. This Court in the case of **Kaushal Kishore Chaubey and 4 Others v. State of U.P. and 2 Others (Writ-A No. 5817 of 2020)** decided on 08.10.2021 has held that the employees working as Seasonal Collection Amin on different dates in the Tehsil department of the district who were regularized later on in service, the period so rendered by them prior to regularization, shall be considered for the purposes of pension. After discussing and referring to a number of decisions of this Court and Supreme Court vide paragraphs 22, 23, 24 and 25, the Court has finally held thus:

"22. From the judgments referred above, it is clear that the Courts has consistently held that the services rendered by an employee either as work charged employee or Seasonal Collection Amin are to be counted for granting the pensionary benefit to them, and the nomenclature of their appointment, be a daily wager, temporary or whatever, is not material to consider their claim for grant of pensionary and retiral benefits.

23. Further, it is also pertinent to mention that the petitioners have worked for decades as Seasonal Collection Amin discharging the same duty which has been discharged by the regular Collection Amin and have been extended same benefits which have been extended to the regular Collection Amin, therefore, in such factual scenario denying the petitioners the benefit of pension and other benefits which have been extended to Regular Collection Amin would not only be arbitrary but against the concept of the right to equality as enshrined in Article 14 of the Constitution of India.

24. In view of the above discussion and given the law elucidated by the Apex Court as well as by this Court in various pronouncements referred above, the services rendered by the petitioners as Seasonal Collection Amin cannot be ignored for extending the benefits of pension and other retiral benefits to them on the pretext that their appointment is to be treated from the date of regularization and not from the date of their engagement as work charged employee.

25. Consequently,the writ petition is allowed. A writ of mandamus is issued to the respondent to compute pensionary benefit payable to the petitioners after taking into account their entire service including the service rendered by them as Seasonal Collection Amin. The amount payable to the petitioners shall be computed within three months from the date of presentation of a copy of this order downloaded from the official website of Allahabad High Court, and the same shall be paid within the next two months. The respondents shall also continue to pay current pensionary benefits as and when the same fell due."

25. A Division Bench of this Court in the **Special Appeal (Def.) No. 1278 of 2020, Chetram v. State of U.P. and 2 Others,** has directed that local body to award pension by holding thus:

"In the light of the judgment of the Apex Court in the case of Prem Singh

(supra), the judgment of learned Single Judge cannot stand as the aforesaid has been given mainly in reference to Article 370 of Civil Service Regulation where the period spent by employee a temporary, officiating basis or in non-pensionable establishment have been excluded apart from the period of service in work-charged establishment and post paid from contingencies. The judgment of the Apex Court in the case of Prem Singh (supra) clarifies that service rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment would also be counted towards the qualifying service. Rule 3(8) of Rules of 1961 has been given interpretation by applying doctrine of reading down.

Taking aforesaid into consideration, judgment of learned Single Judge is interfered and is set aside. The writ petition is allowed to be governed it by the dictum of the Apex Court in case of Prem Singh (supra). The judgment dated 17.05.2017 is accordingly set aside."

26. In the case of **The State of Gujarat and others v. Talsibhai Dhanjibhai Patel (Special Leave to Appeal (C) No.- 1109 of 2022)** decided on 18th February, 2022, Supreme Court while dismissing the special leave to appeal of the State of Gujarat, has observed thus:

"It is unfortunate that the State continued to take the services of the respondent as an ad-hoc for 30 years and thereafter now to contend that as the services rendered by the respondent are ad-hoc, he is not entitled to pension/ pensionary benefit. The State cannot be permitted to take the benefit of its own wrong. To take the Services continuously for 30 years and thereafter to contend that an employee who has rendered 30 years continuous service shall be eligible for pension is nothing but unreasonable. As a welfare State, the State as such ought not to have taken such a stand.

In the present case, the High Court has not committed any error in directing the State to pay pensionary benefits to the respondent who has retired after rendering more than 30 yeas service.

Hence, the Special Leave Petition stands dismissed.

Pending application(s), if any, shall stand disposed of."

27. Following the judgment of Kaushal Kishore Chaubey (supra) I have also allowed writ petition on same terms of **Awadhesh Kumar Dubey v. State of U.P. and 4 others in Writ - A No. 2449 of 2022** (decided on 04.03.2022).

28. The authorities referred to herein above and those of this Court clearly hold that if an employee has discharged duties whether temporarily or as a daily wager or on ad hoc basis on a post for which requirement was there and services of such an employee have come to be regularized on the said post or in the same capacity, the period spent before regularization should be considered and added to pensionable services. The courts have not approved the act and conduct of the employer to deny pension to its employee if he has rendered a number of substantial year of continuous service in an establishment leading to his / her regularization if such an establishment holds a pensionable service. The State Government has been taken to be a model employer and a State being a welfare State, the courts have shown serious concern in the event an employee who has spent all his life in the service of such establishment, stands denied pension on his attaining the

age of superannuation and being retired as such.

29. The above discussions, and analysis lead me to conclude that rights and duties of employees of three different bodies working in the area of city development and public utility services are all alike in nature and if the employees of Municipalities and Municipal Corporations like local bodies, who had initially worked on daily wage basis, upon their regularization have been held entitled to get benefit of such period to be counted towards pension, why not such benefit be extended also to the employees of Local Development Authority created and constituted under the Act, 1973.

30. In my considered view, since the Local Development Authority is directly created by the State Government and is governed under the rule making power of the State Government and its byelaws and regulations are also subject to the approval of State Government, its employees stand on a better footing than the employees of the local self governing bodies for the purpose of counting period spent as daily wager by them for pensionable service, if such employees are retiring from establishment which is pensionable.

31. In view of the above, the argument advanced by learned counsel for the respondent does not hold merit and is hereby rejected. It is admitted to the respondent that petitioner has retired from the establishment which has retirement benefits such as pension etc. for its employees, and so the petitioner's claim for pension is liable to be upheld in the light of judgments of Supreme Court and this Court referred hereinabove to in this judgment.

32. Accordingly, writ petition succeeds and is **allowed**, the order passed by the respondent authority dated 18.11.2020 is hereby quashed. The respondents are directed to calculate the pension of the petitioner within a period of three months from the date of receipt of certified copy of this order and to pay the same to the petitioner immediately thereafter.

33. Cost made easy.

(2022) 8 ILRA 96
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 678 of 2022

Suvansh Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Kumar Nigam

Counsel for the Respondents:
C.S.C., Sri Sudhir Bharti

Civil Law -Limitation Act,1963 - Section 5 - Condonation of Delay - Petitioner was allotted abadi land –Subsequently SDM cancelled earlier approval order - Petitioner challenged it in revision - Revision was fixed for 14.05.2016 but due to absence of counsel for the petitioner revision was dismissed as default on 14.05.2016 - Petitioner came to know about the aforesaid order on 01.05.2018 - restoration application along with delay condonation was filed - respondent rejected the restoration application on the ground of delay - Held - Petitioner explained delay in filing the restoration

application, as such in the interests of justice in place of dismissing the matter on technical ground, matter should be decided on merits. (Para 7)

Allowed. (E-5)

List of Cases cited:

1. Collector, Land Acquisition Anantnag & anr. Vs Mst Kantiji; A.I.R. 1987 SC 1353

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Manish Kumar Nigam learned counsel for the petitioner, learned standing counsel for respondent Nos.1, 2, 3, 4 and 6 and Mr. Sudhir Bharti, learned counsel for the respondent No.5.Gaon Sabha.

2. With the consent of the parties, writ petition is being finally disposed of at admission stage.

3. Brief facts of the case are that petitioner was allotted abadi land of Arazi No. 225/1 in the year 1993 in accordance with rules and the same was approved by Sub-Divisional-Magistrate on 21.03.1993. Petitioner comes under first category of sub-section (3) of Section 122 of U.P.Z.A.&L.R. Act. The construction was raised by the petitioner over the land allotted to him. On an application dated 23.07.1999 under Section 115-P of U.P.Z.A. & L.R. Act filed by the Gram Pradhan after six year, proceedings were imitated against the petitioner. Petitioner filed objection in the aforesaid proceeding. The Sub-Divisional-Magistrate vide order dated 05.09.2013 cancelled the approval order dated 22.03.1993. Petitioner challenged the order dated 05.09.2013 through revision No.447 of 2013 before respondent No.3 in which interim order was granted by the respondent No.3 staying operation of the order passed by the courts below and matter was fixed for disposal. Revision was fixed for 14.05.2016 but due to absence of counsel for the petitioner revision was dismissed as default on 14.05.2016. Petitioner came to know about the order dated 14th May, 2016 on 01.05.2018 accordingly, the restoration application along with delay condonation was filed to recall the order dated 14.05.2016. The respondent No.3 vide order dated 06.10.2018 rejected the restoration application on the ground of delay. Petitioner challenged order dated 06.10.2018 by way of revision before the respondent No.4. In the revision interim order was passed, but later on, revision was rejected by impugned order dated 27.10.2021 saying that matter was rightly decided by the courts below and the revision filed by the petitioner dismissed, hence the present writ petition.

4. Learned counsel for the petitioner submitted that petitioner was allotted abadi land of the gaon sabha himself after following due procedure of law even approval was also granted by the Sub-Divisional-Magistrate but in order to harass the petitioner-proceeding of under Rule 115-P of U.P.Z.A.& L.R.Act has been initiated which was arbitrarily decided against the petitioner, against which revision was filed and the revision was dismissed on the technical ground. He submitted that in place of dismissal of the revision, on technical grounds matter should be decided on merits.

5. On the other hand, learned Standing counsel and learned counsel for the Gaon Sabha submitted that petitioner has not explained the delay satisfactorily and have not appeared on the date fixed in

the revision in order to linger on the proceeding as such, the restoration was rejected and revision has been rightly dismissed by the courts below.

6. I have considered the submission advanced by the learned counsel for the parties and perused the record.

7. There is no dispute about the fact that the petitioner is an allottee of gaon sabha land and the proceeding initiated after six years by the gaon sabha was decided arbitrarily, against which petitioner has filed the statutory revision which was dismissed on the technical ground. Petitioner has explained delay in filing the restoration application, as such in the interests of justice in view of the law laid by the Apex Court in A.I.R. 1987 SC 1353 Collector, Land Acquisition Anantnag and another Vs. Mst Kantiji and others in place of dismissing the matter on technical ground, matter should be decided on merits.

8. Para No.3 of the above mentioned Supreme Court judgment is as follows:

"The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature 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 is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

"Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

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 legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a stepmotherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinary (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides."

9. In view of the facts and circumstances of the case as mentioned above, writ petition is allowed. The impugned order dated 27.10.2021 passed by the respondent No.4 in revision No.421 of 2019 and the orders dated 14.05.2016 and 06.10.2018 passed by the respondent No.3 are hereby set aside. The matter is sent back before the respondent No.3 to decide the petitioner's revision on merit after affording opportunity of hearing to both parties expeditiously preferably within a period of six months from the date of production of certified copy of this order before him.

(2022) 8 ILRA 99
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 847 of 2022

Nishant Poonia & Ors. ...Petitioners
Versus
Board of Revenue U.P. at Allahabad & Ors. ...Respondents

Counsel for the Petitioners:
Sri D.K. Tripathi

Counsel for the Respondents:
C.S.C., Mrs. Anita Srivastava, Sri Sunil Kumar Singh

Civil Law - U.P. Revenue Code, 2006- Section 144 - Declaratory suits by tenure holders - S. 146, Provision for injunction - order of status quo - order of status quo with regard to possession as well as nature and character of the property be maintained till the disposal of suit where the triable issues have been raised - property in dispute should be remained intact if a party has raised triable issues in the declaratory suit filed u/s 144 (Para 8, 9)

Regular suit has been filed by the petitioners under Section 144 of the U.P. Revenue Code, 2006 and the application for temporary injunction was filed under Section 146 of the U.P. Revenue Code, 2006 and the trial Court has only granted injunction to the effect that the parties shall not sell the property in dispute – Revisional court set aside injunction order - Held - Impugned revisional order set aside - parties to the suit restrained from creating any third party interest on the property nor nature and character of the property be changed so that the property be remained intact during pendency of the suit (Para 8, 9)

Allowed. (E-5)

List of Cases cited:

1. Rahmullah & ors. Vs D.J., Siddhartha Nagar & ors., reported in 1999 R.D. (Vol. 90) Page-1

2. Rishi Kumar Vs St. of U.P. & ors.; Writ-C No.36341 of 2015; dated 7.7.2015

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri D.K. Tripathi, learned counsel for the petitioners, Mrs. Anita Srivastava, learned Counsel for respondent nos.4 to 6, learned Standing Counsel for respondent nos.1 to 3 and Sri Sunil Kumar Singh, learned counsel for respondent no.7-Gaon Sabha.

2. With the consent of the learned counsel for the parties the writ petition is being disposed of finally at the admission stage.

3. Brief facts of the case are that the suit under Section 144 of U.P. Revenue Code, 2006 was filed before the trial Court by the plaintiffs-petitioners in respect of the disputed Khasra No.105, 127 and 149, total area 2.6450 hectare. An application for interim relief under Section 146 of the U.P. Revenue Code, 2006 was also filed and learned trial Court granted interim order on 30th November, 2019 to the effect that the authorities shall not alienate the property in dispute, by the subsequent order dated 7.9.2020 after hearing the counsel for the parties and even considering the provisions contained under Section 146 of U.P. Revenue Code, 2006 has confirmed the interim order dated 30th November, 2019 passed earlier. Against the order dated 30th November, 2019, defendants filed a Revision before the Court of Commissioner and learned Commissioner vide order dated 18th September, 2020 allowed the Revision and set aside the order dated 7.9.2020 on the ground that the plaintiffs are not recorded in the revenue records, as such, they are not entitled to the interim injunction. Against the order of the Commissioner Court, Revision under Section 210 of the U.P. Revenue Code, 2006 was filed before the Board of Revenue. The Board of Revenue by the impugned order dismissed the Revision as not maintainable, hence this writ petition.

4. Learned counsel for the petitioner submitted that regular suit under Section 144 of U.P. Revenue Code, 2006 was filed in which triable issues have been raised and under Section 146 of the U.P. Revenue Code, 2006 application for temporary injunction was filed which was maintainable, accordingly, learned trial

Court after considering the provisions of the law has restrained the parties from creating third party interest in respect of the property in dispute and the order was even confirmed by the trial Court after hearing the counsel for both the parties but learned Commissioner has illegally entertained the Revision and set aside the interim order from creating third party interest during pendency of the suit proceeding which will cause irreparable injury to the plaintiffs-petitioners and the Board of Revenue has not considered the petitioners' case in accordance with law and dismissed the Revision filed by the petitioners. Learned counsel for the petitioners placed reliance upon the decision of this Court in ***Rahmullah and Others Vs. District Judge Siddhartha Nagar and Others,*** reported in ***1999 R.D. (Vol. 90) Page-1,*** in which it is held that order of status quo with regard to possession as well as nature and character of the property be maintained till the disposal of suit where the triable issues have been raised.

5. On the other hand, learned counsel for the respondents submitted that the petitioners have filed the suit on the baseless grounds. The petitioners are not recorded in the revenue records, even during consolidation operation they have not raised any objection, as such, petitioners are not entitled to any injunction which will cause irreparable injury to the defendants. Revision was rightly filed against the order of injunction passed by the trial Court and the Commissioner Court has rightly set aside the injunction order in the Revision filed by the defendants-respondents. Revision filed by plaintiffs-petitioners before Board of Revenue was rightly dismissed. In support thereof, learned counsel for the respondents has placed reliance upon the judgment of this Court ***dated 7.7.2015 passed in Writ-C No.36341 of 2015 (Rishi Kumar Vs. State of U.P. And 3 Others)***, in which it is held that the Revision can be maintained under Section 333 of U.P.Z.A. and L.R. Act against the interim order passed by the courts below on the application under Section 229D of U.P.Z.A. and L.R. Act.

6. Considered the submissions of learned counsel for the parties. There is no dispute about the facts that the regular suit has been filed by the petitioners under Section 144 of the U.P. Revenue Code, 2006 and the application for temporary injunction was filed under Section 146 of the U.P. Revenue Code, 2006 and the trial Court has only granted injunction to the effect that the parties shall not sell the property in dispute.

7. Section 146 of the U.P. Revenue Code, 2006 is as follows:

"146. Provision for injunction.- *If in the course of a suit under section 144 or 145, it is proved by affidavit or otherwise-*

(a) that any property, trees or crops standing on the land in dispute is in danger of being wasted, damaged or alienated by any party to the suit; or

(b) that any party to the suit threatens or intends to remove or dispose of the said property, trees or crops in order to defeat the ends of justice, the Court may grant a temporary injunction, and where necessary, also appoint a receiver."

8. Considering the provision of Section 146 of U.P. Revenue Code, 2006 as well as the ratio of law laid down by this Court in ***Rahamullah (supra)*** property in dispute should be remained intact as petitioners have raised the triable issues in

the declaratory suit filed under Section 144 of U.P. Revenue Code, 2006.

9. Considering the entire facts and circumstances, the interest of justice will be served if proceeding of the suit is expedited and parties to the suit is restrained from creating any third party interest on the property nor nature and character of the property be changed so that the property be remained intact during pendency of the suit.

10. Accordingly, the writ petition is ***allowed,*** the impugned revisional order dated 2.3.2022 passed by respondent no.1 i.e. Board of Revenue U.P. at Allahabad and order dated 18.9.2020 passed by respondent no.2 i.e. Additional Commissioner III, Meerut Region, Meerut are set aside and direction is issued to the trial Court to decide the Suit No.03321 of 2019 expeditiously preferably within a period of six months from the date of production of certified copy of this order before him without granting unnecessary adjournment to the parties and till the disposal of the suit, parties to the suit will not create any third party interest in respect of the property in dispute nor change the nature and character of the property in dispute.

11. No orders as to the costs.

(2022) 8 ILRA 102
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 1295 of 2022

Jodharam ...Petitioner
Versus
Deputy Director of Consolidation, Firozabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Chandra Solanki

Counsel for the Respondents:
C.S.C., Sri Akhilendra Yadav, Sri Raj Kamal Singh

Civil Law - U.P. Consolidation of Holdings Act , 1953 - Section 48 – Revision- Allotment of chak proceedings - Comparative hardship - revisional court is required to examine the comparative hardship of both parties in the allotment of chak proceedings, and as the last court of fact, it should do so with the utmost care and caution - Natural Justice - decision arrived at by any authority without giving any reason is a totally arbitrary decision - one of the requirements of natural justice is spelling out reasons for the order made – Held - revision u/s 48 was allowed by the D.D.C. through a cryptic order without giving any reason, which is not in line with the principles of natural justice - comparative hardship of the parties has not been considered, and the revision has been allowed in a cursory manner – Revisional court order quashed (Para 8)

Allowed. (E-9)

List of Cases cited:

1. Mahabeer Vs Deputy Director of Consolidation, Jaunpur & ors., reported in 2005(99) R.D. page 65

2. Rajendra Singh & ors. Vs Deputy Director of Consolidation & ors., reported in 2005(99) R.D. 46

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Ram Chandra Solanki, learned counsel for the petitioner, learned Standing Counsel for respondent nos. 1 to 3 & 5 and Sri Raj Kamal Singh holding brief of Sri Akhilendra Yadav, learned counsel for respondent no. 4. With the consent of

the learned counsel for the parties, writ petition is being disposed of finally at the admission stage.

2. Brief facts of the case are that petitioner is chak holder no. 114 and respondent no. 4 is chak holder no. 54. Original holdings of petitioner are plot nos. 193, 194, 195, 196, 197, 198, 1999, 200, 201, 202 total area 0.276 hectare and the petitioner was proposed chak by Asstt. Consolidation Officer on plot nos. 195, 197, 201, 202 total area 0.257 hectare which was according to the Act and Rules framed for allotment of chak. Against the proposal of Asstt. Consolidation Officer, respondent no. 4 filed belated chak objection which was decided in her favour and chak of the petitioner was disturbed without giving opportunity of hearing to the petitioner, the chak which was allotted to the petitioner was on the bank of the river and was also 'uran', accordingly, petitioner challenged the order of Consolidation Officer dated 23.6.2021 before the Settlement Officer Consolidation in appeal under Section 21(2) of the U.P. Consolidation of Holdings Act with the prayer to set aside the order dated 23.6.2021 and stage of Asstt. Consolidation Officer be maintained, in appeal prayer for condonation of delay was also made, accordingly, Settlement Officer Consolidation after condoning the delay in filing appeal, allowed the appeal on merit setting aside the order dated 23.6.2021 and the stage of Asstt. Consolidation Officer was maintained. Against the Appellate order dated 22.10.2021, Revision under Section 48 of the U.P. Consolidation of Holdings Act was filed by respondent no. 4 and the Revisional Court by impugned order dated 31.3.2022 allowed the revision filed by respondent no. 4 by giving reason that demand of respondent no. 4 appears to be correct, hence, this writ petition on behalf of the petitioner.

3. Learned counsel for the petitioner submitted that proposal made in favour of petitioner by Asstt. Consolidation Officer was on his original holding but the same was illegally set aside by Consolidation Officer while deciding the objection, the order of Consolidation Officer was rightly set aside in appeal and the stage of Asstt. Consolidation Officer was maintained but the revisional court finally allowed the revision filed by the respondent no. 4 by a cryptic order saying only that demand of respondent no. 4 appears to be correct but there is no consideration of the petitioner's case, no reason has been assigned in revisional order and there is no proper compliance of Section 48 of the U.P. Consolidation of Holdings Act by revisional court, hence, impugned revisional order be set aside and order of appellate ourt dated 22.10.2021 be restored.

4. For the appreciations of the argument of learned counsel for the petitioner, perusal of Section 48 of the U.P. Consolidation of Holdings Act will be necessary.

5. Section 48 of the U.P. Consolidation of Holdings Act reads as follows :

"48. Revision and reference. - (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order [other than an interlocutory order] passed by such authority in the case or p0roceedings, may,

after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority sub-ordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

[Explanation. - (1) For the purposes of this Section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.]

Explanation (2) - For the purposes of this section the expression 'interlocutory order' in relation to a case or proceeding, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing

[Explanation (3) - The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to reappreciate any oral or documentary evidence.]"

6. On the other hand, counsel for the respondent no. 4 submitted that both parties are co-sharers and they had been adjusted as far as possible as provided under Section 19 of the U.P. Consolidation of Holdings Act, as such, no interference is required in the matter and the petition is liable to be dismissed.

7. Considered the submissions of the counsel for the parties.

8. There is no dispute about the fact that both the parties are co-sharers. The revision under Section 48 of the U.P. Consolidation of Holdings Act has been allowed by the Deputy Director of Consolidation by passing a cryptic order, without giving any reason in support thereof. The comparative hardship of the parties have not been considered and the revision has been allowed in the cursory manner. Since the revisional court is the last court of fact as such, revisional court should examine the matter with most care and caution. On the question of comparative hardship, this Court in the case of ***Mahabeer vs. Deputy Director of Consolidation, Jaunpur & others, reported in 2005(99) R.D. page 65*** has held that revisional court should examine the comparative hardship of both parties in the allotment of chak proceedings.

9. In the present case, Deputy Director of Consolidation has failed to record reason while allowing the revision of respondent no. 4. Comparative hardship of both parties have not been considered at all which is necessary in the allotment proceeding as revisional court is the last court of fact and is exercising jurisdiction under Section 48 of the U.P. Consolidation of Holdings Act.

10. Law is settled that a decision arrived at by any authority without giving any reason is a totally arbitrary decision. This Court in the case of **Rajendra Singh & others vs. Deputy Director of**

Consolidation & others, reported in 2005(99) R.D. 46 has held that one of the requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out.

11. In view of above, the Court is of the opinion that the impugned order of the revisional court is not liable to be sustained and the same is hereby set aside.

12. The matter is remanded back to the Deputy Director of Consolidation to decide the revision afresh, after affording opportunity of hearing to both the parties, expeditiously preferably within a period of three months from the date of production of a certified copy of this order before him.

13. For a period of three months from today or till decision of the revision by the Deputy Director of Consolidation, whichever is earlier, status-quo with respect to possession be maintained by the parties on the spot.

14. The writ petition stands allowed to the aforesaid extent.

(2022) 8 ILRA 105
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 1426 of 2022

Prabhakar Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Dwivedi

Counsel for the Respondents:
C.S.C., Sri Sunil Kumar

Civil Law - U.P. Consolidation of Holdings Act,1953 - Sections 4 & 6 - Cancellation of notification u/s 4 – Effect - Village in question came under operation of Consolidation through notification dt. 05.05.1972 u/s 4 of U.P.C.H. Act – ACO passed an order for recording the name of petitioner's father on the basis of Sale-deed - Notification u/s 6 (1) of U.P.C.H. Act in respect to village took place on 07.06.2016 by which notification u/s 4 issued / published on 5.5.1972 was cancelled – G.O. dated 12.12.2014 was issued to the effect that orders which have attained finality before notification u/s 6(1) took place, the same must be recorded / implemented in the revenue records – Authorities did not recorded the name of the petitioner's father name - Held - final orders passed before publication of notification u/s 6 (1) of U.P.C.H. Act are to be incorporated / implemented in the revenue records as provided u/s 6 (2) of the U.P.C.H. Act - Rule 109A do not apply as Rule 109 A of U.P.C.H. Rules will apply for the cases covered under Section 52 (2) of U.P.C.H. Act. (Para 9)

Allowed. (E-5)

List of Cases cited:

1. Ram Deo & anr. Vs St. of U.P. & ors. dt 29.9.2021 Writ- B No.1895 of 2021

2. Desh Raj & anr. Vs St. of U.P. & ors. dt 8.10.2021 Writ- B No.1719 of 2021

3. Roshan Vs St. of U.P. & ors. dt 05.07.2022 Writ-B No.1446 of 2022

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Pramod Kumar Dwivedi, learned counsel for the petitioner, learned standing counsel for the State and Mr. Sunil

Kumar for the caveator although there is no private party in the writ petition.

2. Learned counsel for the petitioner is permitted to correct the the array of party in respect of respondent no.3 during course of the day.

3. With the consent of the parties the writ petition is being heard and decided finally at the admission stage.

4. The instant writ petition has been filed by the petitioner for following reliefs:-

"(i) Issue a writ, order or direction in the nature of mandamus directing the respondent nos.3 and 4 to make an entry and correct the recent revenue record in respect of order dated 25.08.1977 in Case No.5939 and order dated 31.05.1977 in Case No.5699 passed by the learned Assistant Consolidation officer, Oran (Majhivansi) District-Banda under the provisions of the Section 6 (2) of the U.P.consolidation Act and may also be directed to issue the copy of fresh Khatauni of the Gata No. 5809, 2225/1 & 2224/1 of Village-Oran to the petitioner.

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondent no.3 to consider and decide the representation dated 03.02.2022 submitted by petitioner before the District Magistrate, Banda.

(iii) Issue any writ, order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(iv) Award the cost of the Writ Petition."

5. Brief facts of the case are that village-Oran, Tehsail, Pargana-Atarra, District-Banda came under operation of U.P. Consolidation of Holdings Act through notification dated 05.05.1972 under Section-4 of U.P. Consolidation of Holdings Act. Assistant Consolidation Officer Banda passed an order dated 25.08.1977 in Case No.5939 with respect to plot No.5809 area 13-1/3 Bigha - 8 Biswa for recording the name of petitioner's father Bhagwati Prasad on the basis of Sale-deed. Assistant Consolidation Officer passed an order dated 31.05.1977 in Case No. 5699 with respect to Plot No.2225/1 area 15 Biswa, 2224/1 area 2 Biswa for recording the name of petitioner's father Bhagwati Prasad along with others. Copy of orders dated 25.08.1977 and 31.05.1977 have been annexed as Annexure Nos. 2 and 3 to the writ petition. In para No.7 of the writ petition it has been stated that order dated 25.08.1977 passed in Case No.5939 and order dated 31.05.1977 passed in Case No.5699 have not been challenged in any court by any party and the orders have become final. Notification under Section 6 (1) of U.P.C.H. Act in respect to village in question took place on 07.06.2016 by which notification under Section 4 of the U.P. C.H. Act, issued / published on 5.5.1972 was cancelled. Copy of notification dated 7.6.2016 has been annexed as Annexure No.1 to the Writ Petition. A government order dated 12.12.2014 has been issued by respondent no.2 to the effect that orders which have attained finality before notification under Section 6(1) took place, the same must be recorded / implemented in the revenue records. Copy of government order dated 12.12.2014 has been annexed as Annexure No.7 to the Writ Petition. Petitioner made efforts even submitted an application / representation before respondent no.3 for the implementation of the orders and recording the name of petitioner in the revenue records in compliance of the orders

which have attained finality before notification under Section 6(1) of the U.P. C.H. Act took place but authorities are sitting tight over the matter, hence this writ petition on behalf of the petitioner.

6. Petitioner submitted that in view of the publication of notification under Section 6 (1) of U.P.C.H. the final order passed in favour of petitioner be incorporated / implemented in the revenue records as provided under Section 6 (2) of the U.P.C.H. Act. For the ready reference Section 6 of U.P.C.H. Act is as follows:

"6. Cancellation of notification under Section 4 - (1) It shall be lawful for the State Government at any time to cancel the made under Section 4 in respect of the whole or any part of the area specified therein.

(2) Where a notification has been cancelled in respect of any unit under sub-section (1), such area shall, subject to the final orders relating to the correction of land records, if any, passed on or before the date of such cancellation, cease to be under consolidation operations with effect from the date of the cancellation.

He further submitted that respondent no.3 is duty bound to record the name of the petitioner forthwith as notification under Section 6(1) was published long back on 7.6.2016. Learned counsel for the petitioner placed reliance upon the judgment of this Court in the Case of **Ram Deo and Another Vs. State of U.P. and 2 Others** delivered on 29.9.2021 in Writ- B No.1895 of 2021, in the Case of **Desh Raj and Another Vs. State of U.P. and 3 Others** delivered on 8.10.2021 in Writ- B No.1719 of 2021 as well as in the case of **Roshan Vs. State of U.P. and others** delivered on 05.07.2022 in Writ-B No.1446 of 2022.

7. On the other hand, learned Standing Counsel submitted that petitioner has remedy to file application under Rule 109 A of U.P.C.H. Rules and placed reliance upon Rule 109 A, which is as follows:

109A. Section 52(2). - (1) Orders passed in cases covered by sub-section (2) of Section 52 shall be given effect to by the consolidation authorities, authorized in this behalf under sub-section (2) of Section 42. In case there be no such authority the Assistant Collector, incharge of the sub-division, the Tahsildar, the Naib-T ahsildar, the Supervisor kanungo, and the Lekhpal of the area to which the case relates shall, respectively, perform the functions and discharge the duties of the Settlement Officer, Consolidation, Consolidation Officer, the Assistant Consolidation Officer, the Consolidator and the Consolidation Lekhpal respectively for the purpose of giving effect to the orders aforesaid.

(2) If for the purpose of giving effect to any order referred to i n sub-rule (1) i t becomes necessary to reallocate affected chaks, necessary orders may be passed by the Consolidation Officer, or the Tahsildar , as the case may be, after affording proper opportunity of hearing to the parties concerned.

(3) Any person aggrieved by the order of the Consolidation Officer, or the Tahsildar, as the case may be, may, within 15 days of the order passed under sub-rule (2), file an appeal before the Settlement Officer, Consolidation, or the Assistant Collector incharge of the sub-division, as the case may be, who shall decide the

appeal after affording reasonable opportunity of being heard to the parties concerned, which shall be final.

(4) In case delivery of possession becomes necessary as a result of orders passed under sub-rule (2) or sub-rule (3), as the case may be, the provisions of Rules 55 and 56 shall, mutatis mutandis , be followed.

Perusal of Section 52 (2) of the U.P.C.H. Act will also be necessary which is as follows:

52(2) Notwithstanding anything contained in sub-section (1), any order passed by a Court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India, or in cases of proceedings pending under this Act on the date of issue of the notification under sub-section (1), shall be given effect to by such authorities, as may be prescribed and the consolidation operation shall, for that purpose, be deemed to have not been closed."

8. I have considered the submissions advanced by learned counsels for the parties and perused the records.

9. There is no dispute about the fact that notification under Section 4 published on 5.5.1972 has been cancelled by publication of notification under Section 6 of U.P.C.H. Act on 7.6.2016, as such, the final orders passed before publication of notification under Section 6 (1) of U.P.C.H.Act are to be incorporated / implemented in the revenue records as provided under Section 6 (2) of the U.P.C.H. Act.

10. The argument advanced by learned Standing Counsel that petitioner should avail remedy under Rule 109 A of U.P.C.H. Rules is misconceived. The perusal of Rule 109 A of U.P.C.H. Rules and Section 52 (2) of the U.P.C.H. Act as quoted above fully demonstrate that Rule 109 A of U.P.C.H. Rules will apply for the cases covered under Section 52 (2) of U.P.C.H. Act. In respect to the matters where notification under Section 6 (1) of the U.P.C.H. Act has been published, the consequences of the Section 6 (2) of the U.P.C.H. Act will apply and authorities are duty bound to follow the same forthwith.

11. In the present matter notification under Section 6 (1) of the U.P.C.H. Act was published on 7.6.2016 and more than six years have been passed but authorities are sitting tight over the matter.

12. Considering the entire facts and circumstances of the case as well as the ratio of law laid down by this Court in **Ram Deo (supra)**, the present writ petition is **allowed** directing the respondent no.3 District Magistrate/District Deputy Director of Consolidation, Banda to ensure compliance of the order dated 25.08.1977 passed in Case No.5939 and order dated 31.05.1977 passed by the learned Assistant Consolidation Officer, oran (Majhivansani) District Banda in Case No.5699, in the light of the provision contained under Section 6 (2) of the U.P.C.H. Act and issue fresh Khatauni with respect to the petitioner's disputed land situated in the Village- Oran, District- Banda expeditiously, preferably within a period of two months from the date of production of certified copy of this order before him. Respondents shall have liberty to file recall application before this Court if it is found that order which are to be implemented have not attained finality before publication of notification under Section 6 (1) of U.P.C.H. Act.

13. The writ petition stands **allowed.** No order as to the costs.

(2022) 8 ILRA 109
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ C No. 2255 of 2021
with
Writ C No. 760 of 2021
&
Writ C No. 18846 of 2020

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

Counsel for the Petitioners:
Sri Desh Ratan Chaudhary

Counsel for the Respondents:
C.S.C., Ms. Anjali Upadhya, Sri Ramendra Pratap Singh

A. Civil Law - U.P. Industrial Area Development Act, 1976-Petitioners applied for flat under the scheme of Greater Noida Industrial Development Authority-The Authority failed to handover the flat within stipulated period-Petitioners asked for refund of money-allotment was subject to cancellation and the entire deposited money was to be forfeited by GNIDA with penal interest at the rate of 15% on delayed payment as per conditions specified in brochure-GNIDA is required to pay the same with interest at the rate of 15% per annum compoundable quarterly.(Para 1 to 18)

The petition is partly allowed. (E-6)

List of Cases cited:

Vinod Kumar Gautam & ors. Vs St. of U.P. & 3 ors. Writ C No. 33847 of 2019

(Delivered by Hon'ble Pritinker Diwaker, J.
&
Hon'ble Ashutosh Srivastava, J.)

1. All the above referred writ petitions involve identical questions of law and facts. The Writ Petition (C) No. 2255 of 2021 is being treated as the leading writ petition and the facts pertaining to the same is being considered for deciding the controversy involved.

2. Heard Shri Desh Ratan Chaudhary, learned counsel for the petitioners, Shri Ramendra Pratap Singh, learned counsel representing the respondent Nos. 2, 3 and 4 and the learned Standing Counsel representing the respondent No. 1. Learned counsel for the parties agree that pleadings have been exchanged and the writ petitions itself may be finally decided. Accordingly, we proceed to finally decide the aforesaid writ petitions.

3. The writ petition has been filed praying for the issuance of writ of mandamus commanding the Greater Noida Industrial Development Authority to refund the entire money deposited by the petitioners towards the alleged allotted flats including registration fee and other expenses borne by the petitioners such as fee / stamp for execution of lease deeds/agreement etc., along with 15% compound interest on quarterly basis. A further prayer to quash the impugned communication / office order dated 14.8.2019 and communication / office order dated 17.9.2019 issued by the respondent No. 3- Addl. Chief Executive Officer, Greater Noida, Industrial Development Authority, District Gautam Budh Nagar (Annexure Nos. 4 & 8 to the writ petition) has also been made.

4. The writ petition (C) No. 2255 of 2021 has been filed with the allegations that the Greater Noida Industrial Development Authority (in short "GNIDA") has been established by the Government of Uttar Pradesh for industrial development and besides other functions, it also provides residential facilities to the common man by launching various schemes. GNIDA is an instrumentality of the State and its functions relating to developments of land and other schemes are governed by the provisions of U. P. Industrial Area Development Act, 1976. In the year 2013, the GNIDA launched a scheme in 3 Sectors of Greater Noida, namely, Sector Omicron-1, Omicron-1A and Sector 12 for construction and allotment of multistoried flats/ built up houses under scheme Code BHS-17/2013. For construction and for giving possession of the proposed flats, a period of 3 years was prescribed. The petitioners applied under the scheme for one flat on the basis of cash down payment and paid full amount. The petitioners in order to make the payment towards the flat had taken loan from Bank for making part payment and thereafter they paid the installments fixed by GNIDA together with 12% interest.

5. The petitioner No. 1 was allotted Flat No. 103/H, Tower-H, Sector Omicron-1A under allotment No. BHS173206 vide allotment letter dated 29.1.2014. The petitioner No. 1 paid a sum of Rs.3,89,000/- towards the registration money and further a sum of Rs.8,37,295/- after adjustment of registration money. The total admitted amount deposited by petitioner No. 1 is Rs.50,31,905/-. Likewise, the petitioner No. 2 was allotted flat No. 208/B, Tower-B, Sector Omicron-1A under allotment No. BHS172681 vide allotment letter dated 29.1.2014. The petitioner No. 2 paid a sum of Rs.2,57,000/- towards registration money and further a sum of Rs.5,53,180/- after adjustment of registration money towards allotment. The total admitted amount deposited by petitioner No. 2 is Rs.33,24,438/-.

6. It is contended by the learned counsel for the petitioners that according to the conditions and details disclosed in the brochure of the aforesaid residential scheme, the flats were required to be handed over to the allottees within a period of three years from the date of issue of the allotment letter as per the declaration made by GNIDA under the heading 'N' of the brochure. A condition was also there that the legal documentation and taking of possession is required to be done by the allottees within a period of 60 days from the date of offer of possession and the extension of time for that purpose was with penalty / administration charges. On the failure of the allottees to execute legal documentation within the extended time, the allotment was subject to cancellation and the entire deposited money was to be forfeited by GNIDA. The GNIDA is charging penal interest at the rate of 15% compound interest on quarterly basis on delayed payment as is clear from the brochure of the scheme. The GNIDA failed to give possession of the aforesaid flats within scheduled period of 3 years i.e. January, 2017.

7. Learned counsel for the petitioners submits that the petitioners approached GNIDA authorities regarding the delay in completion of the project but they could not receive any definite and proper response or assurance and were asked to wait.

8. Learned counsel for the petitioners further submits that the petitioners and other allottees approached the respondent GNIDA authorities from time to time, but

they were asked to wait for one or two months but without any definite assurance or plan. In the year 2018, the petitioners were informed by the office of the respondent No. 4 that they will get the flats ready in June, 2018 and will get the possession of the flats.

9. Learned counsel for the petitioners submits that considering the delay in getting possession of the flats the petitioners and some of the other allottees started searching for alternative accommodations and also finalized it and approached the GNIDA authorities to refund their amount deposited against the allotment of the proposed flats but the GNIDA authorities did not pay any heed for the redressal of the grievances of the petitioners and assured that possession of the flats would be given upto June, 2019.

10. Learned counsel for the petitioners submits that the Additional CEO, GNIDA issued the impugned office order dated 14.8.2019 mentioning therein that under built up housing scheme BHS-17, the possible date for possession of flats was scheduled to be handed over to the allottees of flats of Sector Omicron-1A in the month of June, 2019 but the delay is occurring in the handing over possession for unavoidable reasons and hence, they are being offered relocation of flats in other sectors of the scheme which is completely developed and is ready for possession, however, the flats in those scheme are subject to increase of value/cost and if the allottees are not ready to accept accommodations, they can surrender their allotments and take back their amount after deduction of 10% of the deposited amount without any interest. The petitioners objected to the conditions of the office order dated 14.8.2019 and made representations against the same.

11. It is next contended that GNIDA authority despite giving assurance for handing over possession of the flats allotted failed to complete the project and failed to give possession of the flats. Instead the GNIDA authority issued another office order dated 17.9.2019 with one more offer to the effect that the allottees who want to stick to their allotment/allotted flats may wait till the completion of those flats in Sector Omicron-1A subject to their acceptance in writing within 30 days. The other conditions of the order dated 14.8.2019 remained same in the office order dated 17.9.2019 issued by the respondent No. 3.

12. Learned counsel for the petitioners submits that the petitioners are now interested in refund of their entire money deposited against the flats together with interest from the date of deposit and press their prayer No. 1 only and the prayer made in the writ petition be confined to relief No. 1 only.

13. Learned counsel for the petitioners have placed reliance upon a decision of a co-ordinate Bench of this Court rendered in Writ-C No. 33847 of 2019 ***(Vinod Kumar Gautam and 4 others versus State of U.P. and 3 others)*** dated 26.11.2019 whereby the co-ordinate Bench partly allowed the writ petition with direction to the respondents to refund the entire amount of the petitioners within two months from the date of production of certified copy of the order along with 15% interest from the date of deposit. The learned counsel submits that the petitioners are equally circumstanced inasmuch as the petitioners of the Writ Petition (C) No. 33847 of 2019 were the allottees under the same scheme of GNIDA.

14. Shri Ramendra Pratap Singh, learned counsel representing the respondent Nos. 2 to 4, who has filed counter affidavit, does not dispute the fact as argued and mentioned in the writ petition. He submits that due to circumstances beyond the control of the authority, construction of the flats have been delayed and the orders dated 14.8.2019 and 17.9.2019 have been issued as per the terms of the brochure. He further submits that the money would be refunded as per the terms of the brochure of GNIDA after deduction of 10% along with interest @ 4% per annum.

15. Learned counsel for the petitioners vehemently opposed the arguments made by Shri Ramendra Pratap Singh, learned counsel for the respondent Nos. 2 to 4 and submits that as per Condition-F of the brochure of GNIDA "Mode of Payment" in case of default of payment, petitioners are required to pay the same with interest at the rate of 15% per annum compoundable quarterly, therefore, GNIDA is also liable to return the entire amount along with the same interest.

16. We have considered the rival submissions made by the learned counsels for the parties and have perused the record.

17. We have also gone through the decision dated 26.11.2019 of the co-ordinate Bench of this Court passed in Writ Petition (C) No. 33847 of 2019. The SLP against the said decision has also been dismissed by the Apex Court vide its decision dated 20.11.2020. We are of the view that the petitioners are also entitled to the same benefit as extended to the petitioners of Writ Petition (C) No. 33847 of 2019 particularly, in view of the fact that it relates to the same scheme.

18. In view of the above, considering the facts and circumstances of the case, the writ petitions are ***partly allowed*** with direction to the respondents to refund the entire amount of the petitioners deposited by them against the flats allotted within 2 months from the date of production of certified copy of this order along with 9% interest from the date of deposit. Petitioners are also entitled to costs quantified at Rs.20,000/- each.

(2022) 8 ILRA 112
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.08.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 3283 of 2022

Dr. Richa Shukla ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Prabhu Ranjan Tripathi

Counsel for the Respondents:
A.S.G.I., Shubham Tripathi

A. Civil Law -Selection/Admission in NEET SS-Petitioner was ranked at Serial No. 7, the petitioner had to await his turn subject to six candidates-the said seats were filled- candidate at Serial No. 6 subsequently resigned-petitioner expected that the said seat would be available in the mop-up round of counselling but the said seat was not included in the vacant seat as the MCC of DGHS does not allow resignation as per the policy-It is well settled that the seats should not go vacant and should be filled, only on account of the fact that there is no provision contained in the online portal to include the seats vacated on account of resignation, the said technical glitch

cannot eradicate the need for fulfilling the seat-Hence, the petitioner was granted admission.(Para 1 to 5)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Dr. Arup Mohanta Vs U.O.I. & ors. WPA/9685/2022

2. Dr. Sharada PB Vs U.O.I., WP No. 9597 of 2022

3. Anjana Chari S.N. Vs MCC & ors. Writ C No.-174 of 2022

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard the counsel for the parties.

2. This court after hearing the parties had passed the following order on 16.07.2022:

The present petition has been filed alleging that the petitioner participated in the NEET SS to various super specialty DM/MCh/DrNB Courses in the academic sessions 2021-22 and secured 7th Rank in D.M. Geriatric Mental Health Branch. It is argued that in the Branch, in which the petitioner had qualified, there were three seats available and as the petitioner was ranked at Serial No. 7, the petitioner had to await his turn subject to six candidates before him exercising their option. It is argued that the candidates at Serial Nos. 1, 2 and 3 did not participate in the counselling, as such in the next round of counselling, the same was offered to the candidates placed at Serial Nos. 4, 5 and 6.

It is stated that the second round of counselling in respect of the said seats was held and as the seats had already been taken up by the candidates placed at Serial Nos. 4, 5 and 6, the seats were not reflected in the second round of counselling. Subsequent to the second round of counselling Dr. Sumit Mukherjee, the candidate placed at Serial No. 6 tendered his resignation on 27th April, 2022, as a result whereof one seat out of the total three seats of Geriatric Mental Health Branch became vacant. It is stated that the petitioner expected that the said seat vacated by Dr. Sumit Mukharjee would be available in the mop-up round of counselling conducted by the respondents, however, the said seat was not reflected for the proposed mop up round of assessed counselling 2021, as such the petitioner preferred the present writ petition.

In the present case, it has been averred that the seat matrix for the mop-up round of counselling was released on 27.05.2022 at around 3:00 p.m., which demonstrated that 612 unfilled seats were proposed to be filled up through mop-up round of counselling, however, the said seat vacated by Dr. Sumit Mukherjee was not reflected in the said seat matrix.

The petitioner came to know of the said fact that the seat vacated by Dr. Sumit Mukherjee is not reflected in the seat matrix of mop-up round of counselling, approached respondent no. 1 by writing through e-mails and prayed that the vacant seat of D.M. Geriatric Mental Health Branch should be included in the mop-up round of counselling, which became vacant on account of resignation of the 6th rank holder namely, Dr. Sumit Mukherjee.

When the writ petition was filed, this Court passed an interim order on 31st May, 2022 to the following effect:-

"1. Sri S. B. Pandey, Senior Advocate and Additional Solicitor General of India assisted by Sri Anand Dubey appearing for the opposite parties, on the basis of instructions received from respondent No.2-Medical Counselling

Committee (MCC), Ministry of Health and Family Welfare, Government of India, Nirman Bhawan, New Delhi, has informed this Court that the seat allotted to Dr. Sumit Mukherjee, who is said to have resigned, his seat has not been declared to be vacant and still appears to have been retained by him. It is on the strength of the aforesaid facts it is stated that the seat has not fallen vacant in King Georges' Medical University, Lucknow and consequently in the aforesaid circumstances the petitioner cannot be allotted the said seat.

2. Contesting the aforesaid facts, learned counsel for the petitioner has placed reliance on the letter written by King Georges' Medical University, Lucknow to respondent No.2-Medical Counseling Committee (MCC), Ministry of Health and Family Welfare, Government of India, Nirman Bhawan, New Delhi dated 18.5.2022 informing that Dr. Sumit Mukherjee has resigned from the course of D.M. (Geriatric Medicine & Health) on 27.4.2022 and the petitioner being next in the merit list is entitled for allotment of the said seat.

3. In view of aforesaid facts, learned counsel for the opposite parties pray for and are granted three weeks' time to file counter affidavit. The petitioner shall have two weeks' time thereafter to file rejoinder affidavit.

4. List on 20.7.2022.

5. As an interim measure, it is provided that in case the said seat falls vacant on resignation of Dr. Sumit Mukherjee, the same shall not be filed up by the next date of listing."

It is argued by the petitioner that subsequent to the said order being passed by this Court, the respondents conducted yet another mop-up counselling, however, the seat in question vacated by 6th rank holder was once again not reflected merely on the ground of the interim order passed by this Court on 31st May, 2022.

In the light of the said, the learned counsel for the petitioner argues that the seat, as of now, remains vacant and was not included in the second mop-up round of counselling held in the Month of June, 2022 only on account of the fact that an interim order had been passed by this Court.

It also bears from the record and the stand taken by the respondent no. 3 to the effect that the candidate placed at Serial No. 6 namely, Dr. Sumit Mukharjee had indeed tendered his resignation on 27th April, 2022 and this fact was communicated to the respondent nos. 1 and 2. Specific assertion in this regard has been made in paragraph nos. 9 and 10 in the counter affidavit, which are quoted hereinbelow:-

"9. That at this juncture it is pertinent to mention that one candidate namely Dr. Sumit Mukherjee (AIR 06 and Roll No. 2144117440), who took admission in the course of D.M., Geriatric Mental Health, vide its letter dated 27.04.2022, tendered his resignation. A copy of the letter dated 27.04.2022 is being annexed herein as Annexure No. SCA-1.

10. That it is humbly submitted that Deen Academics, KGMU, vide its letter dated 18.05.2022 informed the Assistant Director General, Medical Counselling Committee (MCC), New Delhi, about the fact that one student namely Dr. Sumit Mukherjee has resigned from the course of D.M. (Geriatric Mental Health). It was also requested that one seat of DM (Geriatric Mental Health) may kindly be included in Mop-Up round of NEET SS-2021. A copy of letter dated 18.05.2022 sent by the Deen Academics, KGMU is being annexed herein as Annexure No. SCA-2."

Learned counsel for the petitioner argues that in similar circumstances, in a writ petition filed before the Calcutta High Court with a prayer for inclusion of two surrendered/vacant seats of M.Ch. (Urology) in the mop-up counselling, the Calcutta High Court vide its judgment dated 09.06.2022 passed in WPA/9685/20222 (Dr. Arup Mohanta Vs. Union of India and Ors.), directed the respondents to include the vacant seats in the mop-up round of counselling. He further draws my attention to the judgment of the Kerala High Court, which had issued similar directions for including the vacant seats in the mop-up counselling vide order dated 25th May, 2022 passed in WP (C) No. 16404 of 2022 (A). He also relies upon the similar order passed by Karnataka High Court passed on 17.05.2022 in WP No. 9597 of 2022 (Dr. Sharada PB Vs. Union of India).

In the light of the said, learned counsel for the petitioner argues that undisputed fact remains that the candidate placed at Serial No. 6 namely, Dr. Sumit Mukherjee has tendered his resignation and this fact was duly communicated by the respondent no. 3 to the respondent nos. 1 and 2 well within time and prior to the mop-up round of counselling held by the respondents and thus it was incumbent upon the respondents to have included the said seat as vacated by the candidate placed at Serial No. 6 for the mop-up round of counselling, which was not done for the reasons best known to the respondents. He argues that in the second mop-up round of counselling held in June, 2022, the said seat was once again not included probably because of the order passed by this Court on 31st May, 2022. He, thus, argues that in view of the undisputed facts that one seat remained vacant, entire purpose of selection cannot be frustrated and keep the seat vacant on technical grounds and thus prays that suitable orders be passed and the respondents be directed to conduct special mop-up round of counselling to fill the seat vacated by the candidate placed at Serial No. 6 namely, Dr. Sumit Mukherjee.

Learned counsel for the respondent no. 3 argues that the facts, as narrated by the petitioner, are not disputed. He argues that the fact regarding resignation tendered by Dr. Sumit Mukherjee, the person selected at Serial No. 6, was duly intimated to respondent nos. 1 and 2. He argues that the respondent no. 3 has no role to play in respect of the counselling.

Learned counsel for the respondent nos. 1 and 2 Shri Anand Dwivedi, argues that on the basis of the instructions produced before me that the complete counselling is conducted in an online mode, wherein allotment and admission takes place through the online portal, the colleges themselves filled the admission status of the allotted candidates on the common online portal between the colleges and the M.C.C., however, as there was no option to fill the facts pertaining to the resignation, the intimation given by the respondent no. 3 was not accepted being contrary to the 'no resignation policy' of the M.C.C., as such the seat vacated by Dr. Sumit Mukherjee was not shown as vacant and still appears to be taken by Dr. Sumit Mukherjee. The further stand taken by the respondent nos. 1 and 2 is that if Dr. Sumit Mukherjee at any point of time wishes to join the said seat, he may join the same within a reasonable period of time, as he is shown to be holding the said seat in the Database of the M.C.C. of DGHS. A further stand has been taken based upon the directions given by the Supreme Court in Writ Petition No. 316 of 2022 to the following effect:-

"10. However, in regard to the alternative prayer, since a second round of counselling has been held at the end of which 940 seats still remain vacant, the Additional Solicitor General has informed the Court that a mop up round of counselling shall be held for those seats including for the stray vacancies, while maintaining the eligibility percentile at 50 for the year 2021-2022."

It has further argued that in terms of the directions given by the Supreme Court in Writ Petition (C) No. 174 of 2022 in the case of Anjana Chari S. N. v/s MCC & Ors., the following directions have been issued:-

"(v) In line with the regulations which have been notified on 5 April 2018, students who have joined in round 2 of the state quota or round 2 of the AIQ shall not be eligible to participate in the mop-up round for All India Quota."

In sum and substances, the argument is that in the record of the MCC of DGHS, Dr. Sumit Mukherjee is still shown to be holding seats of D.M. Geriatric Mental Health in King George's Medical University UP, Lucknow, as such the seat was never included in the mop-up round of counselling either the first or the second round of mop-up counselling, held in the Month of June, 2022.

A stand has also been taken in the subsequent instructions received by the learned counsel for the respondent on 25.06.2022 to the effect that the petitioner could have participated in the mop-up round as well the special mop-up round of counselling and the petitioner did not participate in either of the said rounds. It has been reiterated that MCC of DGHS does not allow resignation as per the policy.

In the light of the said submissions, learned counsel for the respondents Shri Anand Dwivedi argues that the petition is liable to be dismissed.

On the basis of the arguments placed at the bar, the facts which emerge and are undisputed at the bar are that the petitioner was placed at Serial No. 7 in the merit list prepared, the candidate at Serial No. 6 namely, Dr. Sumit Mukherjee had taken admission and had subsequently resigned after the second round of counselling, vide his resignation dated 27.04.2022. The fact with regard to the resignation of the said candidate was duly intimated by the respondent no. 3 to the respondent nos. 1 and 2, thus the seat which has allotted to Dr. Sumit Mukherjee continues to be remained vacant. The said seat was not included in the vacant seat as there is no facility of including the vacancy arising out of resignation on the portal of the respondents which shows vacancy.

Considering the fact that it is well settled that the seats should not go vacant and should be filled, only on account of the fact that there is no provision contained in the online portal to include the seats vacated on account of resignation, the said technical glitch cannot eradicate the need for fulfilling the seat, which has arisen and remains vacant only on account of technical glitch, the seat has not been filled.

Considering the fact that the seat is clearly vacant, the respondent nos. 1 and 2 are directed to hold special mop-up round of counselling for the said seat vacated by Dr. Sumit Mukherjee in respect of the D.M. Geriatric Mental Health at King George's Medical University UP, Lucknow. The said exercise is to be carried out in respect of the said seat, as directed above, with all expedition, preferably within a fortnight from today.

The learned counsel for respondent nos. 1 and 2 Shri Anand

Dwivedi shall inform the respondents about this order. The petitioner shall also be at liberty to inform the respondents by moving an application in that regard.

The petition is adjourned to 02.08.2022.

The parties shall inform the fate of the order passed today to this Court on the next date.

3. It is informed at the bar that in compliance of the said order, the petitioner has been granted admission.

4. In view of the statement as given at the bar, nothing further survives in the matter.

5. The petition stands disposed off in view of the order passed by this Court as extracted above.

(2022) 8 ILRA 117
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.08.2022

BEFORE

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

Writ C No. 5217 of 2022

M/S Omaxe Ltd. ...Petitioner
Versus
L.D.A. & Anr. ...Respondents

Counsel for the Petitioner:
Lalta Prasad Misra, Prafulla Tiwari, Vineet Kumar Singh Bisen

Counsel for the Respondents:
Ratnesh Chandra

A. Civil Law-U.P. Urban and Planning Development Act, 1973-Sections 4 & 56 - Lucknow Development Authority(Powers and Duties of the Secretary and Chief Accounts Officer) Regulations, 1983-Regulation 2(8)-Agreement-Show cause notice to cancel concessional agreement-the concessional agreement was entered into between the parties in relation to developing the township which will be covered within the meaning of developmental activities undertaken by LDA-Secretary does have power and he is possessed with necessary authority to issue show cause notice in relation to developmental activities as he exercises not only general administration and supervision but overall control over developmental activities as well.(Para 12)

The petition is dismissed. (E-6)

List of Cases cited:

1. Dy Commr, Central Excise & anr. Vs Sushil & Co. (2016) 13 SCC 223

2. U.O.I. & anr. Vs Vicco Laboratories (2007) 13 SCC 270

3. Siemens Ltd. Vs St. of Mah. & ors. (2006) 12 SCC 33

4. U.O.I. & anr. Vs Kunisetty Satyanarayana (2006) 12 SCC 28 and

5. St. of U.P. & anr. Vs Anil Kumar Ramesh Chandra Glass Works & anr. (2005) 11 SCC 451

6. Manmohan Nanda Vs United India Assr. Co. Ltd & anr. (2022) 4 SCC 272

7. Wellington Asso. Ltd. Vs Kirti Mehta (2000) 4 SCC 272

8. AFCONS Infra. Ltd. Vs Nagpur Metro Rail Corp. Ltd. (2016) 16 SCC 818

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

1. Arguments in this writ petition were concluded on 08.08.2022 and judgment was reserved to be pronounced by us on 10.08.2022. On 10.08.2022 before the judgment could be pronounced, a mention was made by the learned counsel for the petitioner in the morning session of the Court that the matter may be re-heard and accordingly an application for further hearing was moved.

2. On the said prayer made on behalf of the petitioner, further arguments were heard on 10.08.2022, on which date the following order was passed:

"This matter was heard on 08.08.2022 and judgment was reserved.

Judgment has been readied, however, before its pronouncement, in the first half of the day, learned counsel for the petitioner has made a request for re-hearing by moving an application.

Accordingly, we have heard the learned counsel for the petitioner today again, however, he remains inconclusive.

List/put up tomorrow i.e.11.08.2022.

The draft judgment dated 10.08.2022 which was to be pronounced today, shall be kept on record.

Interim protection granted earlier shall continue to operate till tomorrow."

3. The matter was again heard on 11.08.2022. On both these dates i.e. 10.08.2022 and 11.08.2022, learned counsel for the petitioner as also the learned counsel representing LDA made their submissions. The judgment was reserved to be pronounced on 17.08.2022.

4. On 10.08.2022, when an application for rehearing of the writ petition was made by the learned counsel for the petitioner, we not only heard the learned counsel representing the respective parties but also provided that the matter to be listed on 11.08.2022 and further directed that the draft judgment dated 10.08.2022 shall be kept on record. The draft judgment, which was to be pronounced on 10.08.2022, shall form part of this judgment and the same is extracted herein below:

"1. By filing this petition, jurisdiction of this Court has been invoked under Article 226 of the Constitution of India assailing the validity of a show cause notice dated 25.07.2022, issued by the Secretary of Lucknow Development Authority (hereinafter referred to as "LDA") whereby the petitioner has been required to submit its explanation as to why the Concession Agreement entered into between the parties may not be cancelled and further as to why the Performance Security may not be forfeited.

2. Heard Dr. L. P. Misra and Shri Prafulla Tiwari, learned counsel for the petitioner and Shri Ratnesh Chandra, learned counsel representing the respondents.

3. Opposing the maintainability of the writ petition, it has been submitted by Shri Ratnesh Chandra, learned counsel representing the respondents that petition has been filed challenging only a show cause notice and since the petitioner has ample opportunity to submits its reply to the said show cause notice and further that since no final decision in the matter has been taken, as such the petition at this premature stage may not be entertained. It has also been argued that the show cause notice, which is under challenge herein, has been issued pursuant to a contract

entered into between the parties, as such in a contractual matter interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India is not warranted.

4. Learned counsel for the petitioner, however, has submitted that it is not that jurisdiction of this Court under Article 226 of the Constitution of India where a show cause notice challenged is absolutely barred and that under certain circumstances writ petition can be entertained. It has been stated that if the show cause notice is without jurisdiction or has been issued with premeditation or if only legal issue is to be decided, the writ petition can be entertained. In this regard, he has placed reliance on the judgments of Hon'ble Supreme Court in the case of (i) Deputy Commissioner, Central Excise and another vs. Sushil and Company, reported in (2016) 13 SCC 223, (ii) Union of India and another vs. Vicco Laboratories, reported in (2007) 13 SCC 270, (iii) Siemens Ltd. vs. State of Maharashtra and others, reported in (2006) 12 SCC 33, (iv) Union of India and another vs. Kunisetty Satyanarayana, reported in (2006) 12 SCC 28 and (v) State of U.P. and another vs. Anil Kumar Ramesh Chandra Glass Works and another, reported in (2005) 11 SCC 451.

5. On behalf of the petitioner, it has thus been urged that since the impugned show cause notice has been issued in mala fide exercise of power and is laced with premeditated mind to cancel the agreement, instant writ petition ought to be entertained. Shri Misra, learned counsel representing the petitioner has further argued that while issuing the impugned show cause notice various clauses of Request for Proposal (RFP) and Instructions to Bidders have wrongly been interpreted and accordingly such a show cause notice having been issued with premeditation deserves to be quashed.

6. Before considering the rival submissions made by the learned counsel representing the respective parties, certain facts need to be noted by the Court for appropriate adjudication of the issues raised before us.

7. A decision was taken by LDA to develop "Mohan Road Avasiya Yojna, Lucknow" through Public Private Partnership (PPP) Mode and accordingly notice of Invitation for Selection of Developer for Development, Marketing and Sale of Integrated Real Estate was published along with RFP which included instructions for Bidders. Pursuant to the said notice, the petitioner which is a limited company incorporated under the Companies Act, 1956 and is engaged in construction and infrastructure development related business, submitted its bid. The technical bids of the participating bidders were opened on 15.02.2019 and financial bid was opened on 28.02.2019. As per RFP, Letter of Award (LOA) was to be issued within ten days of opening of the financial bid and

8. The petitioner having been declared to be successful bidder was issued LOA on 29.12.2021 whereby the petitioner was required to present the stamp papers etc. so that Concession Agreement may be executed within 20 days. On 06.01.2022 the Concession Agreement was executed between LDA and the petitioner. Thereafter in the month of March, 2022 the petitioner submitted a Detailed Project Report and lay out of the first phase of the Project to LDA. Possession of land of two villages where Project is to be executed has also been handed over to the petitioner on 22.04.2022.

9. Now the impugned show cause notice has been issued requiring the petitioner to show cause as to why the Concession Agreement may not be

cancelled and the Performance Security money may be forfeited.

10. The reason for issuing the impugned show cause notice which is reflected from a perusal of the same is that, according to LDA the petitioner had participated in the bid as a single entity and as per the RFP, it was required to form Special Purpose Vehicle (SPV) to be incorporated under the Indian Companies Act, 2013 to execute the Concession Agreement and implement the Project and that the petitioner did not form the SPV and executed the Concession Agreement itself which is in violation of the conditions of RFP and as such in terms of the provisions contained in clause 2.12.4 of RFP the Concession Agreement is liable to be terminated and LDA shall be entitled to forfeit the Performance Security.

11. Certain clauses of RFP, which are relevant for adjudication of the issues raised in this writ petition, are extracted herein below:

"Clause 2.2.1.1. The Bidder for qualification and selection may be a single entity or a group of entities together with their Associates (the "Consortium"), coming together to implement the Project. However, no Bidder applying individually or as a Member of a Consortium, as the case may be, can be Member of another Bidder Consortium. The term Biddere used herein would apply to both a single entity and a Consortium."

Clause 2.2.1.2. The Bidder may only be a private entity (required to be a company incorporated under the Companies Act, 1956/2013 or a consortium of companies which undertakes to incorporate a SPV), government-owned entity incorporated under the Indian Companies Act, 2013 or similar entity under applicable laws of foreign countries or any combination of them with a formal intent to enter into an agreement or under an existing agreement to form a Consortium. A consortium shall be eligible for consideration subject to the conditions set out in Clause 2.5.5. below.

Clause 2.5.5. Where the Bidder is a single entity, it may be required to form an appropriate special Purpose vehicle, incorporated under the Indian Companies act, 2013 (the "SPV"), to execute the Concession Agreement and implement the Project. In case the Bidder is a Consortium, it shall, in addition to forming an SPV, comply with the following additional requirements:

.....

"Clause 2.12.4. In case it is found during the evaluation or at any time before signing of the Concession Agreement or after its execution and during the period of subsistence thereof, including the Development Rights thereby grated by the Authority, that one or more of the qualification conditions have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the Developer either by issue of the LOA or entering into of the Concession Agreement, and if the Selected Bidder has already been issued the LOA or has entered into the Concession Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the authority to the Selected Bidder or the Developer, as the case may be without the Authority being liable in any manner whatsoever to the Selected Bidder or. In such an event, the Authority

shall be entitled to forfeit and appropriate the Bid security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/or the Concession Agreement, or otherwise."

12. Clauses 'D', 'E' and 'F' of the recital part of the Concession Agreement are also relevant, which are quoted hereunder:-

D. The Selected Bidder/Consortium has since promoted and incorporated the Developer as a limited liability company under the Companies Act 2013 and has requested the Authority to accept the Developer as the entity which shall undertake and perform the obligations and exercise the rights of the selected Bidder/Consortium under the LOA, including the obligation to enter into this Agreement pursuant to the LOA for undertaking the Project.

E. By its letter dated 25 Nov 2021, the Developer has also joined in the said request of the Selected Bidder/consortium to the Authority to accept it as the entity which shall undertake and perform the obligations and exercise the rights of the Selected Bidder/Consortium including the obligation to enter into this Agreement pursuant to the LOA. The Developer has further represented to the effect that it has been promoted by the Selected Bidder/Consortium for the purposes hereof.

F. The Authority has accepted the said request of the Developer and has accordingly agreed to enter into this Agreement with the Developer for implementation of the Project, subject to and on the terms and conditions set forth hereinafter.

13. Definition of 'Selected Bidder' and 'Developer' as occurring in the Concession Agreement are also quoted hereunder:

"Selected Bidder" shall have the meaning ascribed to it in Recital C;

"Developer" shall have the meaning attributed thereto in the array of Parties.

14. Laying emphasis on clause 2.2.1.1 of RFP, it has been argued by the learned counsel for the petitioner that for qualification and selection in the bid process, a bidder may be a single entity or a group of entities together with their Associates (the "Consortium"). Our attention has also been drawn to clause 2.2.1.2 of RFP by the learned counsel for the petitioner by submitting that a private entity which was required to be a company incorporated under the Companies Act or a consortium of companies which undertakes to incorporate a SPV, could be bidders.

15. Much emphasis has been laid by the learned counsel for the petitioner on clause 2.5.5 of RFP and according to him where bidder is a single entity, it was not mandatory for such a single entity bidder to form SPV, however, where the bidder is a consortium it was mandatory to form SPV to execute Concession Agreement. It has been urged by the learned counsel for the petitioner that in clause 2.5.5 the occurrence of the words "may" and "shall" and the placement of these words are relevant to be noticed and accordingly if the natural meaning of these words are given at the place where these words occur in the said clause, what comes out is that in case of single entity bidder formation of SPV was not mandatory. However, in case the bidder was a consortium, then on account of the placement of the word "shall" in clause 2.5.5 it was mandatory to form SPV for executing Concession Agreement.

16. Apart from laying emphasis on the provisions contained in clause 2.5.5 of RFP, it has also been contended on behalf of the petitioner that at every stage of the tender process and even after acceptance of bid and issuance of LOA, the petitioner and authorities of LDA have been interacting with each other and before signing the Concession Agreement if in the opinion of LDA, SPV was needed to be formed even in case of single entity bidder, the petitioner could have been instructed by the LDA and the petitioner would have formed the SPV to execute the Concession Agreement in place of executing the Concession Agreement itself. In this view, submission is that the entire action on the part of the LDA which has precipitated in issuing the impugned show cause notice is not only premeditated but is mala fide as well.

17. It has been argued by the learned counsel for the petitioner on the strength of a judgment of Hon'ble Supreme Court in the case of Manmohan Nanda vs. United India Assurance Company Limited and another, reported in (2022) 4 SCC 272 that if any prescription in an instrument is open to two interpretations or meaning, the interpretation against the person issuing document on proforma is to be taken into account. On behalf of the petitioner, the judgment of Hon'ble Apex Court in the case of Wellington Associates Ltd. vs. Kirit Mehta, reported in (2000) 4 SCC 272 has also been relied upon to submit that where a document uses "may" and "shall" to cover different situations, these words are to be accorded their natural meaning.

18. Per contra Shri Ratnesh Chandra, learned counsel representing the respondents has emphatically submitted that the writ petition is premature and is not maintainable not only because it only challenges a show cause notice but also because it has arisen out of contractual relationship, not involving any public law element and as such interference by this Court under Article 226 of the Constitution of India has to be very limited. It has further been argued by the learned counsel representing the LDA that in terms of the provisions contained in clause 2.5.5 of RFP it was mandatory, both for the single bidder as also for consortium to form Special Purpose Vehicle to execute the Concession Agreement. He has also stated that as per the law laid down by Hon'ble Supreme Court in the case of AFCONS Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and another, reported in (2016) 16 SCC 818, it is the employer of the Project having authored the tender document who is the best person to understand and appreciate its requirements and interpret its document. In this view, submission is that interpretation being sought to be given to clause 2.5.5 by the learned counsel for the petitioner is not tenable.

19. We have already noticed the rival submissions made by the learned counsel representing the respective parties and have also extracted the relevant provisions of RFP. Apart from the aforequoted provisions of RFP, clauses D, E and F of the recital part of the Concession Agreement also need to be noticed and taken note of. Clause D of the Concession Agreement recites that "the Selected Bidders/Consortium has since promoted and incorporated the Developer as a limited liability company under the Companies Act and has requested the Authority (LDA) to accept the Developer as the entity which shall perform the obligations of the selected Bidder/Consortium under the LOA.....".

Clause E recites that "by letter dated 25 Nov 2021, the Developer has also joined the Authority (LDA) in the request of the Selected Bidder/Consortium to accept it (Developer) as the entity which shall undertake and perform the obligations and exercise rights of the Selected Bidder". Clause F recites that "the Authority has accepted the request of the Developer and has accordingly agreed to enter into this agreement (Concession Agreement) with the Developer for implementation of the Project.

It is also to be noticed that "Selected Bidder" and "Developer" are two separate entities in terms of the definitions of these two terms available in the Concession Agreement.

20. Clause 2.12.4 of RFP permits (i) disqualification of bidder before the bidder is appointed as Developer either by issuing LOA or by entering into Concession Agreement, and (ii) termination of Concession Agreement if the Selected Bidder has been issued LOA or has entered into the Concession Agreement. The grounds for disqualifying as bidder and terminating Concession Agreement are misrepresentation or furnishing any materially incorrect or false information. Another ground available for disqualifying the bidder is a situation where one or more qualification conditions have not been met by the bidder.

21. In the instant case, what appears from the submissions made on behalf of the respective parties and on perusal of the records available before us is that the petitioner had participated in the bid process as a single entity and admittedly it had not formed the Special Purpose Vehicle. Whether it was mandatory for a single entity bidder, as per the provisions of RFP to form SPV, is an issue which emerges in this case. Another issue is as to why recitals in clauses, D, E and F of the Concession Agreement have been made which suggest that the bidder has since promoted and incorporated the Developer though no incorporation of SPV in this case has been made by the bidder (petitioner).

22. The aforesaid issues though arise in the matter, however, there is no decision as yet on these issues and the LDA has issued a show cause notice only on a prima facie opinion requiring the petitioner to submit its explanation. We find it appropriate to observe that the relationship between the petitioner and LDA in this case is primarily contractual. If the impugned notice has been issued by the Secretary of Lucknow Development Authority on noticing alleged flaws and non-fulfillment of conditions of RFP to the petitioner for submitting its reply and stating its case, we do not find any illegality in such a notice. It is not that the impugned notice does not disclose the grounds on the basis of which the LDA proposes to proceed against the petitioner. From the material available on record including the contents of notice, at this stage we are unable to agree with the submissions of the learned counsel for the petitioner that the notice is premeditated or has been issued with malice.

23. We may also observe that merely because the impugned show cause notice recites certain facts including the perception of LDA about the interpretation of certain clauses of RFP and Concession Agreement, it cannot be said that the entire issue has been pre-judged by LDA and notice is premeditated for the reason that the contents of the notice are based only on prima facie opinion.

24. The petitioner will have the amplest opportunity to put forth its case and make its submission in reply to the show cause notice and accordingly we do

not find it appropriate to interfere in this petition for the reason that, in our considered opinion, no interference is warranted. The writ petition is, thus, dismissed.

25. However, we provide fifteen days further time from today to the petitioner to submit its reply to the impugned show cause notice. It will be open to the petitioner to take all the pleas which may be available to it under law and to enclose all the documents on which it intends to rely. We specifically direct that once reply to the impugned show cause notice is furnished by the petitioner, appropriate authority of the Lucknow Development Authority shall provide opportunity of personal hearing to the authorized representative of the petitioner before taking final decision in the matter.

26. There will be no order as to costs."

5. Most of the further submissions made by the learned counsel for the parties on 10.08.2022 and 11.08.2022 was reiteration of the arguments made earlier which have already been considered in the aforementioned draft judgment and the same, as observed above, forms part of this judgment.

6. Dr. L. P. Misra, learned counsel representing the petitioner has submitted that the impugned show cause notice has been issued by the Secretary of Lucknow Development Authority whereas the contract was entered into between the petitioner and the "Authority" created under section 4 of Uttar Pradesh Urban and Planning Development Act, 1973 (hereinafter referred to as "the Act, 1973") and as such the impugned notice is without jurisdiction. It has further been argued that the impugned show cause notice has travelled beyond the contract. Shri Misra has reiterated that in terms of various clauses of RFP, there could be two separate entities, which were entitled to participate in the bid process, namely, (i) individual entity and (ii) consortium and that the provisions of RFP for issuing the impugned show cause notice relate to consortium and not to an individual entity. Shri Misra also reiterated the arguments raised earlier that the impugned show cause notice can always be challenged by filing the writ petition if it is without jurisdiction or has been issued arbitrarily or is based on non-existent and baseless allegations. All other arguments raised on behalf of the petitioner have already been dealt with in our draft judgment dated 10.08.2022 which forms part of this judgment except the ground taken by the petitioner that the impugned show cause notice is without jurisdiction.

7. It has been stated that "Development Authority" is a body corporate in terms of the provisions contained in section 4 of the Act,1973 which comprises of various officials, including a Chairman and Vice-Chairman to be appointed by the State Government and accordingly the notice ought to have been issued by the said body corporate or by its approval. It is, thus, stated that it is not the "Development Authority" which has issued the show cause notice; rather the Secretary of Lucknow Development Authority, who has issued the notice, which renders it to be without jurisdiction.

8. The aforesaid submission advanced by the learned counsel for the petitioner is not tenable for the reason that authority of the Secretary, Lucknow Development Authority to issue the show cause notice is traceable to the provisions contained in Regulation 2 (8) of **"The Lucknow**

Development Authority (Powers and Duties of the Secretary and Chief Accounts Officer) Regulations, 1983". The said Regulations are statutory in nature having been framed by the LDA in terms of the power vested in it under section 56 read with section 5 of the Act, 1973. Section 5 is quoted hereunder:-

"5. Staff of the Authority:-(1) The State Government may appoint two suitable persons respectively as the Secretary and the Chief Accounts Officer of the Authority who shall exercise such powers and perform such duties as may be prescribed by regulations or delegated to them by the Authority or its Vice-Chairman.

(2) Subject to such control and restrictions as may be determined by general or special order of the State Government, the Authority may appoint such number of other officer and employees as may be necessary for the efficient performance of its functions and may determine their designations and grades.

(3) The Secretary, the Chief Accounts Officer and other Officers and employees of the Authority shall be entitled to receive from the funds of the Authority such salaries and allowances and shall be governed by such other conditions of service as may be determined by regulations made in that behalf."

9. From a perusal of the aforequoted section 5 of the Act, 1973, it is clear that the Secretary of the Development Authority is to be appointed by the State Government who shall exercise such powers and perform such duties as may be, (i) prescribed by Regulations, or (ii) delegated to him by the Authority or its Vice-Chairman. Section 56 of the Act, 1973 vests power in an Authority to make regulations for administration of affairs of the Authority which includes regulations regarding the powers and duties of the Secretary and Chief Accounts Officer of the Authority. Relevant portion of section 56 of the Act, 1973 is quoted hereunder:

"56.Power to make regulations.- (1) An Authority may, with the previous approval of the State Government, make regulations not inconsistent with this Act and the rule made there under for the administration of the affairs of the Authority.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely-

(a) .....

(b) the powers and duties of the Secretary and Chief Accounts Officer of the Authority;

(c) .....

(d).....

(e) .....

(f).....

(g) .....

(h) .....

(i) .....

(3)......"

10. Regulation 2(8) of the Regulations 1983 is quoted hereunder:-

"2. The Secretary of the Authority shall, subject to the provisions of the Act and the rules framed thereunder, exercise the powers and perform the duties prescribed hereunder.

(1).....

(2).....

(3).....

(4) .....
(5).....
(6).....
(7).....
(8) Subject to the decision of the Authority, the Chairman and the Vice-Chairman, general administration, supervision and overall control over the administrative and developmental activities and personnel administration of the Authority;"

11. Accordingly, Regulation 2(8) of the aforequoted Regulations, which as observed above, are statutory in nature provides that the Secretary of "Development Authority" shall exercise powers and perform duties in relation to general administration, supervision and overall control over the administrative and **developmental activities.**

12. The Concession Agreement in the instant case was entered into between the parties in relation to developing the township which, in our considered opinion, will be covered within the meaning of developmental activities undertaken by the LDA and as such the Secretary does have the power and he is possessed with necessary authority to issue the show cause notice in relation to developmental activities as he exercises not only general administration and supervision but overall control over the **developmental activities** as well. This exercise of power, however, is subject only to decision of the Authority or that of the Chairman and the Vice-Chairman. In view of the provisions contained in Regulation 2(8) of the Regulations, 1983, we do not have any ambiguity in our mind that the impugned show cause notice cannot be termed to be without jurisdiction.

13. For the reasons aforesaid and also for the reasons indicated in the draft judgment dated 10.08.2022 which is part of this judgment as well, we are not inclined to interfere in this writ petition which is hereby **dismissed.**

14. However, we provide fifteen days further time to the petitioner to submit its reply to the impugned show cause notice and make it open to the petitioner to take all the pleas which may be available to it under law and to furnish all such documents on which it intends to rely.

15. It is further directed that once reply is received within the time being stipulated herein, the appropriate authority of Lucknow Development Authority shall provide opportunity of personal hearing to the authorized representative of the petitioner before taking final decision in the matter.

16. Parties to bear their own costs.

(2022) 8 ILRA 126
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.08.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE RAJAN ROY, J.
THE HON'BLE VIVEK CHAUDHARY, J.

Writ C No. 8870 of 2020

Prayas Buildcon Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mr. Ravi Gupta, Senior Advocate, Mr. Palash Banerjee, Mr. Aviral Raj Singh

Counsel for the Respondents:
Mr. Ratnesh Chandra, Advocate for respondent Nos. 2 and 3

A. Civil Law-Constitution of India, 1950-Article 226-petitioner had applied for getting certain nazul land converting into freehold land-petitioner filed first petition for directing the respondents to consider the application for grant of free hold right- The same was directed in accordance with the policy as is in existence at the time of passing of the order-respondents failed to comply the order-A subsequent writ petition was filed for execution of an order passed earlier by the Court-It was held that the subsequent writ petition was barred by principles of res judicata/constructive res judicata, hence, not maintainable-the issue regarding wrong rejection of the prayer of the petitioner for conversion of leasehold right to freehold rights was very well considered in the earlier writ petition-The subsequent petition is an abuse of process of law.(Para 1 to 46)

The writ petition is disposed of. (E-6)

List of Cases cited:

1. Anand Kumar Sharma Vs St. of U.P. & ors. (2014) AIR Alld. 106

2. Omprakash Verma & ors. Vs St. of A.P. & ors. (2010) 13 SCC 158

3. St. of A.P. Vs Audikesava Reddy (2002) 1 SCC 227

4. Construction Co. Vs Prabhat Mandal (1986) 1 SCC 100

5. Hoystead Vs Taxation Commr. (1926) AC 155

6. Dr. O.P. Gupta Vs St. of U.P. (2009) 4 AWC 4038

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. On account of difference of opinion between two Judges constituting the Division Bench and on the larger issues sought to be raised by Dinesh Kumar Singh, J. in his opinion, the matter was directed to be placed before the larger Bench by the then Chief Justice vide administrative order passed on January 12, 2021.

2. The issues, on which the opinion is sought, are as under:

"i) Whether the subsequent Writ Petition No.8870 (MB) of 2020 filed by the petitioner after final judgment dated 17.05.2019 passed in Writ Petition No.12081 (MB) of 2009 is an abuse of process of the Court, as before filing the Writ Petition No.8870 (MB) of 2020, the petitioner has filed Civil Misc. Application No. 87559 of 2019 for further direction and issuance of certificate for leave to appeal before the Supreme Court under Article 134 of the Constitution and during the pendency of the said application, the present writ petition has been filed?

ii) Whether the second Writ Petition No.8870 (MB) of 2020 filed by the petitioner is maintainable in view of the fact that the petitioner is seeking implementation of the judgment and order dated 17.05.2019 passed in Writ Petition No.12081 (MB) of 2009? and,

iii) Whether the second Writ Petition No.8870 (MB) of 2020 is barred by the principle of *res judicata*/constructive *res judicata* in view of the fact that while allowing Writ Petition No.12081 (MB) of 2009 vide judgment and order dated 17.05.2019, the respondents have been directed to process the application of the petitioner for conversion of lease-hold-rights into free-hold, in accordance with law laid down by the Full Bench in **Anand Kumar Sharma's case (supra)** and, thus, the issue regarding the relevant date for

conversion charges was very much involved in Writ Petition No.12081 (MB) of 2009?"

FACTS OF THE CASE

3. Brief facts giving rise to the dispute are that the petitioner filed present writ petition praying for a direction to the respondents to proceed with conversion of leasehold rights to freehold rights in accordance with the order dated May 17, 2019 passed in earlier Writ Petition No.12081 (MB) of 2009 filed by it and issue demand letter accordingly. The matter came up for hearing before the Division Bench consisting of Pankaj Kumar Jaiswal and Dinesh Kumar Singh, JJ. Pankaj Kumar Jaiswal, J. allowed the writ petition and issued direction, as prayed for. Having not agreed with the views expressed by Pankaj Kumar Jaiswal, J., Dinesh Kumar Singh, J., in his separate order, was of the opinion that the writ petition deserved to be dismissed, accordingly he dismissed the writ petition with exemplary cost of ₹10,00,000/-. He opined that in view of difference of opinion, the matter is required to be placed before a larger Bench for consideration of the issues as noticed above. This is how the matter is placed before this Bench.

ARGUMENTS

4. Learned counsel for the petitioner, while addressing the Court on the issues required to be considered, admitted that earlier Writ Petition No.12081 (MB) of 2009 was filed by the petitioner herein. However, the reliefs prayed therein were different than those claimed in the present writ petition. Hence, it cannot be said to be not maintainable or barred on account of *res judicata* or constructive *res judicata*. The directions already issued by Division Bench of this Court in the earlier writ petition filed by the petitioner were not complied with. An application bearing Civil Misc. Application No.87559 of 2019 filed by the petitioner seeking clarification is also pending. However, he will not press the same, as substantive reliefs have been claimed in the present writ petition. He further submitted that filing of the present writ petition was in terms of legal advice available to the petitioner. There was no effort to overreach the Court for claiming the reliefs prayed for. The respondents were not even complying with the earlier order passed by this Court in favour of the petitioner. He further submitted that in case it was found that the writ petition filed by the petitioner was not maintainable, nothing should have been stated on the merits of the controversy and the writ petition could be dismissed as such. However, still one of the Judge constituting the Bench has expressed opinion even on merits of the controversy.

5. On the other hand, learned counsel for the respondents submitted that the writ petition in question was filed concealing material facts. The prayers made therein shows that it was merely a writ petition filed by the petitioner praying for execution of an order passed in the earlier writ petition, which was not maintainable. The efforts were also made to address argument to review the earlier order. It was further submitted that earlier writ petition filed by the petitioner was allowed in terms of the order dated May 23, 2008 passed by the Division Bench of this Court in Writ Petition No.9360 (MB) of 2007 and the ratio laid down in Full Bench judgment of this Court in Anand Kumar Sharma v. State of U.P. and others, AIR 2014 Allahabad 106. In case, anyone was aggrieved, he

could have availed of his appropriate remedy. In the case in hand, the effort of the petitioner was to mislead the Court. Firstly, an application was filed by the petitioner for clarification of the order. Prayer was also made therein for grant of leave to file appeal before Hon'ble the Supreme Court. However, during the pendency thereof, the present writ petition was filed.

6. Heard learned counsel for the parties and perused the paper book.

QUESTION NO.I

Whether the subsequent Writ Petition No.8870 (MB) of 2020 filed by the petitioner after final judgment dated 17.05.2019 passed in Writ Petition No.12081 (MB) of 2009 is an abuse of process of the Court, as before filing the Writ Petition No.8870 (MB) of 2019, the petitioner has filed Civil Misc. Application No. 87559 of 2019 for further direction and issuance of certificate for leave to appeal before the Supreme Court under Article 134 of the Constitution and during the pendency of the said application, the present writ petition has been filed?

7. The facts of the case are that the petitioner had applied for getting certain nazul land converting into freehold land. The said application was rejected by the Vice-Chairman, Lucknow Development authority, Lucknow by his order dated May 20, 2009, which was communicated by the Nazul Officer by his letter dated October 1, 2009. Challenging the same, the petitioner earlier filed Writ Petition No.12081 (MB) of 2009 with the following prayers:

"i) Issue an appropriate Writ, direction or order in the nature of certiorari quashing the impugned order dated 20.05.2009 passed by the Vice Chairman, Lucknow Development Authority, the Opposite Party No.3 as conveyed through the letter dated 01.10.2009 after summoning the original in this Hon'ble Court.

ii) Issue appropriate Writ, Order or direction in the nature of mandamus directing the Opposite Parties more particularly, the State of Uttar Pradesh, the Opposite Party No.1, the Vice Chairman, Lucknow Development Authority, Opposite party No.3 and the Nazul Officer, Lucknow Development Authority, Lucknhow the Opposite Party No.2 to perform their statutory obligations so as to proceed and complete the process of conversion of lease hold rights in respect of the land in question into free hold in favour of the Petitioner by requiring the Petitioner to deposit the balance amount within such day and time to be fixed after indicating it through demand letter and complete it by the execution and registration of free hold Deed in respect of the same in favour of the Petitioner according to law and as per policy within a time framed to be fixed by this Hon'ble Court.

iii) Issue appropriate Writ, order or direction including in the nature of mandamus commanding the Opposite parties for not to interfere in the peaceful possession and enjoyment of the land in question as mentioned in Paragraphs No.1 to 3 above of the Petition or dispossessing the Petitioner therefrom by acting illegally or pursuant to the impugned action as contained in Paragraph Nos.15 to 18 of the Writ Petition."

8. The aforesaid writ petition was allowed vide judgment dated May 17, 2019. The operative part of the order reads as under:

"39. For the above-mentioned reasons the orders dated 20.05.2009 and 01.10.2009 are quashed. The respondents no. 2 and 3 shall proceed for conversion of property to freehold expeditiously in accordance with law in term of the order dated 23.05.2018 passed in Writ Petition No.9360 (MB) of 2007 and the ratio laid down by Full Bench in the case of ***Anand Kumar Sharma Vs. State of U.P. and others*** (Supra).*"*

9. A perusal of the aforesaid direction issued by the Division Bench of this Court in the earlier writ petition filed by the petitioner shows that needful was to be done in terms of the order dated May 23, 2008 passed by the Division Bench of this Court in Writ Petition No.9360 (MB) of 2007 and the ratio laid down in Full Bench judgment of this Court in **Anand Kumar Sharma's case (supra).** The relevant date for calculation of the commercial charges is well settled. In **Anand Kumar Sharma's case (supra),** the issue under consideration before the Full Bench of this Court was whether an application filed for conversion from nazul land to freehold land was required to be considered in accordance with the policy of the Government as was in existence on the date of application or when the same was being decided. The Full Bench answered that the application was required to be considered in accordance with the policy as is in existence at the time of passing of the order. Para 47 of the Full Bench judgement is reproduced as under:

"In view of the foregoing discussions, our answer to the abovenoted two questions are:

(1) The application of the petitioner dated 25/7/2005 submitted for grant of free hold right on the basis of the Government Orders dated 01/12/1998 and 10/12/2002 was entitled to be considered in accordance with the government's policy as was in existence at the time of passing of the order. The Government Order dated 04/8/2006 was rightly relied on by the Collector while rejecting the application on 18/12/2006.

(2) The Division Bench judgment in Dr. O.P. Gupta's case (supra) does not lay down the correct law insofar as it holds that the application for grant of freehold right is to be considered as per the government policy as was in existence on the date of making application for grant of freehold right."

(emphasis supplied)

10. Against the aforesaid order, Lucknow Development Authority filed Special Leave Petition (Civil) Diary No.34417 of 2019 before the Supreme Court titled as Lucknow Development Authority and another v. Prayas Buildcon (P) Ltd. and another. The same was dismissed vide order dated October 25, 2019.

11. The petitioner though did not prefer any Special Leave Petition against the judgment of this Court dated May 17, 2019, but filed Civil Misc. Application No.87559 of 2019 praying for the following reliefs :

"(A) Direct the Respondent no.2/3 to issue Demand Letter specifying therein the balance amount payable towards conversion after adjusting the deposit of sum of Rs.6,46,87,500/-, as per the valuation as of 20.05.2009 for the land falling in Purwa Imam Baksh Mohalla Hasanganj Par, Lucknow (now ward Nishatganj), Mohalla Baba Ka Purwa) within such time as this Hon'ble Court may deem just and necessary.

(B) Issue a certificate under Article 134A of the Constitution read with Article 133(1) of the Constitution by invoking power and jurisdiction conferred

by the Constitution granting leave to appeal before the Hon'ble Supreme Court on the aforesaid substantial question of law of general importance stated in Para 5 of the accompanying affidavit."

12. A perusal of the aforesaid prayers shows that direction was sought to respondent Nos.2 and 3 to issue demand letter as per the amount calculated by the petitioner taking the date as May 20, 2009 and further for grant of leave under Article 134A of the Constitution of India read with Article 133(1) thereof to file appeal before Hon'ble the Supreme Court. The aforesaid prayers are self-contradictory as the petitioner on the one hand, has shown his desire to challenge the aforesaid judgment while on the other hand, he is asking for depositing of amount in furtherance of the said judgment. The aforesaid prayers were totally in contradiction to the reliefs granted to the petitioner in the earlier writ petition, which was decided in terms of Full Bench Judgment of this Court in **Anand Kumar Sharma's case (supra)**. In terms thereof, the charges are to be calculated as applicable on the date of decision on the application. Though at the time of hearing, learned counsel for the petitioner submitted that the petitioner does not wish to press the aforesaid application, however, we are not entering into that controversy. We have to decide the issues referred to us.

13. The stand taken by the Lucknow Development Authority to the aforesaid application was that under the garb of aforesaid application, in fact, the petitioner was seeking review of the order dated May 17, 2019, whereby the earlier writ petition filed by the petitioner was decided in terms of law laid down by the Full Bench of this Court in **Anand Kumar Sharma's case (supra)**.

14. The aforesaid application was taken up for hearing on August 22, 2019 and in absence of the counsel for the applicant as well Lucknow Development Authority, the hearing of the application was adjourned. Subsequent order passed by this Court on October 17, 2019 records the statement made by the learned counsel appearing for the LDA that a Special Leave Petition against the judgment of this Court dated May 17, 2019 was filed and is likely to be listed. The application was directed to be listed after four weeks. Subsequently, when the application was listed on February 14, 2020, the same was again adjourned.

15. During the pendency of the aforesaid application, the petitioner preferred the present writ petition praying for the following reliefs:

"A. Issue a Writ, order or direction in the nature of Mandamus, directing the Respondents to proceed forthwith, with the conversion of the concerned property situated at Purwa Imam Baksh Mohalla Hasanganj Par, Lucknow (now Ward Nishatganj, Mohalla Baba ka Purwa) admeasuring 75,000 sq.mts. from leasehold to freehold in favour of the Petitioner in a time bound manner in accordance with the spirit and directions as enumerated by this Hon'ble Court in its Final Order and Judgment dated 17.05.2019 passed in W.P. No.12081 (MB) of 2009;

B. Issue a Writ, order or direction in the nature of Mandamus, directing the Respondents to issue a Demand Letter to the Petitioner forthwith, in furtherance of such conversion process, seeking deposit of the remaining 75% amount as per the valuation rates as applicable on 20.05.2009, after: (i) duly adjusting/ deducting the

amount of INR 6,46,87,500/- (which already stands deposited by the Petitioner with the Respondents), and also (ii) duly adjusting/ deducting interest on the amount of INR 6,46,87,500/- (to be calculated from the date of deposit until the date of raising the Demand Letter)."

16. The grounds as raised by the petitioner for claiming the reliefs prayed for in the present writ petition are quite relevant. To put the record straight and appreciate the arguments, we deem it appropriate to reproduce the grounds as under:

"A. Because the Respondent Authorities have failed to act in accordance with the Final Order and Judgment dated 17.05.2019 passed by this Hon'ble Court in W.P. No. 12081 (MB) of 2009 which directed the Respondents to expeditiously proceed with the completion of conversion of property from leasehold to freehold;

B. Because the Respondent Authorities are bound by the ratio of this Hon'ble Court in Anand Sharma v. State of U.P. Thru Principal Secretary & Ors [AIR 2014 Allahabad 106] which clearly provides that an application for grant of freehold right must be considered in accordance with the Government's policy as was in existence on the date of passing the order in that regard;

C. Because the Respondent Authorities are barred from revisiting the issue of determining the rate at which demand letter must be issued especially when a part payment of INR 6,46,87,500/- was already made by the Petitioner and duly admitted by the Respondents in the year 2007;

D. Because the Respondent authorities have been adopting dilatory tactics to circumvent and not fulfil their obligations as per the Final Order and Judgment dated 17.05.2019 passed by this Hon'ble Court;

E. Because the Respondent Authorities' blatant disregard for Final Order and Judgment dated 17.05.2019 passed by this Hon'ble Court, a contemptuous act and should be severely punished;

F. Because the Respondent Authorities are public institutions performing functions of public importance. Their blatant disregard for complying with the Final Order and Judgment dated 17.05.2019 passed by this Hon'ble Court is causing severe prejudice to the Petitioner and hampering the progress of the proposed construction activities to be undertaken by the Petitioner;

G. Because the actions of the Respondent Authorities are causing severe financial hardship to the Petitioner as it is impeded from proceeding with the construction activities;

H. Because the Petitioner is required to pay the remaining deposit of 75% in relation to the conversion process in accordance with the applicable valuation rates as prevalent 2009, which is the relevant date as far as the final order in W.P. No. 12081 (MB) of 2009 is concerned;

I. Because the Petitioner is required to comply with the ratio of a Full Bench of this Hon'ble Court in Anand Sharma v. State of U.P Thru Principal Secretary & Ors [AIR 2014 Allahabad 106], in keeping with principles of judicial propriety;

J. Because the Petitioner is a bona fide and law abiding builder who has deposited a sum of INR 6,46,87,500/- with the Respondent Authorities since 2007 in order to seek the requisite conversion of property from leasehold to freehold;

K. Because the above mentioned sum of INR 6,46,87,500/- was deposited by the Petitioner with the Respondent authorities in 2007. However, despite passage of over 13 years, the Petitioner has not been granted the requisite approval;

L. Because the Respondent authorities being public functionaries have abdicated their responsibility by delaying the process of completing the conversion process so as to enable the Petitioner to undertake the desired construction;

M. Because the Respondent Authorities perform a public function and are amenable to the Writ jurisdiction of this Hon'ble Court under Article 226 of Constitution of India."

17. A perusal of the aforesaid grounds clearly shows that the present writ petition was filed raising a grievance that order passed by this Court in earlier writ petition on May 17, 2019 has not been complied with, which is causing great prejudice to the petitioner. It further claims inaction on the part of the authorities is nothing else but contemptuous, for which they need to be punished. It is worthwhile to note that before the present writ petition was filed, an application bearing C.M. Application No.87559 of 2019 was already filed by the petitioner in the earlier writ petition praying for the same relief as Prayer No.B in the present writ petition while also seeking certificate to challenge the judgment of the earlier writ petition in SLP.

18. To appreciate the issues required to be considered, firstly, we need to go into little detail of the pleadings and the reliefs prayed for in both the writ petitions.

19. The perusal of the relief (A), as claimed in the application, shows that it was nothing else but seeking review of the earlier order wherein the direction was issued for calculation of conversion charges. For dealing with the application filed by the petitioner for conversion of the property to freehold in terms of Full Bench judgment of this Court in **Anand Kumar Sharma's case (supra)**, the conversion charges are payable as on the date of decision on the application. Hence, the claim of the petitioner that for valuation, the date should be taken as May 20, 2009, was in contravention to the direction already issued in the writ petition.

20. A perusal of two prayers made in the writ petition in question shows that the first one is for a direction to the respondents to proceed with the conversion of property as freehold in a time bound manner in terms of direction issued by this Court on May 17, 2019 in the earlier Writ Petition No.12081 of 2009. Second prayer is for a direction to the respondents to issue demand letter in furtherance of such conversion process as per valuation rate applicable on May 20, 2009, after adjusting the amount already deposited by the petitioner along with interest thereon. Second prayer was nothing else but was in continuation of first prayer made in the writ petition which substantively is for execution of the order passed in favour of the petitioner in the earlier writ petition filed by it. But again seeking calculation of conversion charges as applicable on the date of filing of application.

21. At this stage, reference can be made to an order passed by this Court on August 9, 2019 on C.M. Application No.87559 of 2019 filed in Writ Petition No.12081 of 2009, in which the stand of the learned counsel for the applicant (petitioner herein) was that he was not seeking review/modification/clarification

of the order dated May 17, 2019 disposing of the earlier writ petition finally rather submission was made that despite specific direction the matter had still not been decided by the Lucknow Development Authority. The aforesaid order dated August 9, 2019 is reproduced below:

"Heard Sri Sujay Kantawala alongwith Sri Ritwick Rai, learned Counsel for the applicants/petitioners, Sri Pradeep Raje, learned Counsel for the respondents-State and Sri Shobhit Mohan Shukla, learned Counsel for respondent Nos.2 and 3.

Objection filed by the Lucknow Development Authority is taken on record.

Sri Sujay Kantawala, learned counsel for the applicants/petitioners has submitted that he is not seeking any review/modification/clarification of the order dated 17.5.2019 passed by this Bench. However, he has submitted that in spite of specific direction given in para - 39 of the order, till date the matter has not been decided nor any demand has been issued by the respondents-Lucknow Development Authority.

Sri Shobhit Mohan Shukla, learned Counsel for Lucknow Development Authority prays for and is granted ten days' time to take instructions in the matter.

List on 22.8.2019."

22. Another fact which transpired at the time of hearing is that a review application filed by the Lucknow Development Authority against the order dated May 17, 2019 passed in the earlier writ petition filed by the petitioner is still pending.

23. From the perusal of aforesaid reliefs claimed in the present writ petition filed by the petitioner, it is evident that the same are nothing but an attempt for review earlier judgment of this Court dated 17.05.2019 in the garb of seeking implementation of the order passed by this Court in favour of the petitioner while at the same time, an application seeking a certificate for leave to appeal was kept pending.

24. From the facts as noticed above and the pleadings in the earlier writ petition, application and the present writ petition filed by the petitioner, it is clear that filing of the present writ petition is nothing else but an abuse of process of the Court. Earlier writ petition was filed by the petitioner challenging the order dated May 20, 2009 and communication dated October 1, 2009 from the LDA vide which the claim of the petitioner for conversion of leasehold right to freehold rights was rejected. It was pleaded in the earlier writ petition that the petitioner had deposited a sum of ₹6,46,87,500/- on the basis of self assessment. Considering the issues raised by the parties, the earlier writ petition was allowed vide order dated May 17, 2019. The order dated May 20, 2009 and communication dated October 1, 2009 were set aside and a direction was issued to the LDA for proceeding afresh for conversion of property to freehold rights, expeditiously in terms of the ratio laid down by the Full Bench in **Anand Kumar Sharma's case (supra)**.

25. No issue was raised by the petitioner that the direction was not time bound, however, the fact remains that for issuance of further direction subsequent to the order passed by this Court in the earlier writ petition, the petitioner filed a Civil Misc Application No.87559 of 2019 praying that the LDA be directed to issue demand letter specifying the balance

amount payable for conversion, after adjusting the amount already deposited by the petitioner as per valuation as on May 20, 2009. Another prayer was for issuance of a certificate under Article 134A read with Article 133(1) of the Constitution of India for grant of leave to appeal before Hon'ble the Supreme Court for decision on substantial question of law of general importance as stated in para 7 of the affidavit accompanying the application. The aforesaid para 7 reads as under :-

"7. That the petitioner-applicant submits that while the amount computed as payable would be deposited (under protest) as per the Demand Letter towards conversion as per the valuation as of 20.05.2009, the petitioner-applicant would like to seek leave to appeal for approaching the Hon'ble Supreme Court on the aforesaid substantial question of law of general importance, and prays for issuance of a certificate under Article 134A read with Article 133(1) of the Constitution by invoking power and jurisdiction conferred upon this Hon'ble Court by the Constitution."

26. The fact remains that application seeking Leave to Appeal to Hon'ble the Supreme Court was filed by the petitioner just for the sake of it, as neither the petitioner took steps to file any application for leave to appeal before Hon'ble the Supreme Court, in case the application was not being decided nor it took any steps to raise an issue when the Special Leave Petition filed by the Lucknow Development Authority was listed on October 25, 2019. It is evident from the record that the petitioner was well aware of the fact that the Lucknow Development Authority had filed Special Leave Petition before Hon'ble the Supreme Court, which was likely to be listed and the same was listed and was dismissed on October 25, 2019.

27. As far as prayer (A) of the application is concerned, the same is in two parts. Firstly, for issuance of a demand letter for payment of balance conversion charges after adjusting the amount already paid as per the valuation as on May 20, 2009 and secondly for completing the aforesaid process within such time as the Court may deem just and necessary. As far as second part of the prayer (A) is concerned, in our opinion, an application could be filed as in the order passed by this Court in earlier writ petition filed by the petitioner, time bound direction was not there. Hence, the petitioner could have sought further direction to make the authority time bound for compliance. However, as far as first part of the prayer (A) is concerned, regarding the valuation as on May 20, 2009, it was nothing else but seeking further relief which was either claimed in the earlier writ petition or deemed to be rejected as the same was available to the petitioner but was not claimed. In anyway, it was a review of the earlier order passed by this Court. The prayer to that extent was totally misconceived. However, during the course of hearing of the aforesaid application on August 9, 2019, a specific stand was taken by the petitioner itself that it is not seeking review of the earlier order passed by this Court.

28. As far as prayer (B) in the application is concerned, in our opinion, the same was nothing but misjoinder of reliefs claimed in the application. The first relief claimed in the application was for compliance of the earlier order passed by this Court in the earlier writ petition filed by the petitioner whereas the second was

for grant of a certificate to file an appeal before Hon'ble the Supreme Court, as if the petitioner was not satisfied with the judgment. The aforesaid application was filed on July 30, 2019.

29. A bare perusal of Article 134A of the Constitution provides that a certificate of appeal can be granted by the High Court while deciding the case either on its own motion or on an oral application filed by the party aggrieved, immediately after passing or making of such judgment, decree and final order or sentence. Certification by the High Court has to be in terms of Article 133(1) of the Constitution that the case involves substantial question of law as to the interpretation of the Constitution. In the alternate, Supreme Court has been empowered under Article 136 of the Constitution to grant Special Leave to Appeal from a judgment, decree, determination, sentence or order passed by any Court or Tribunal in the territory of India.

30. Firstly, as per the plain language of Article 134-A of the Constitution, such a prayer has to be made immediately after the judgment is pronounced. In the case in hand, it is not the case of the petitioner that any such prayer was made. It was nearly two months after delivery of the judgment that in the present application such a prayer was made which otherwise was also totally misconceived if seen in the light of the issue sought to be raised as referred to in para 7 of the application. A perusal of the para 7 of the affidavit accompanying the aforesaid application, as already reproduced above in paragraph No.25, does not show that the same are issues of general importance, rather it is merely with reference to compliance of earlier order or having relation with the first prayer made in the application.

31. It is a fact that the aforesaid application was still pending when the present petition was filed. It was listed on several occasions on August 9, August 22, October 14 and October 17, 2019 and was last listed on February 14, 2020. It is not the case of the petitioner that any effort was made by it to get the same listed expeditiously.

32. Now coming to the present petition, during pendency of the application seeking further direction in the earlier writ petition filed by the petitioner after final disposal thereof, the present writ petition was filed. The prayers made therein have already been extracted in para no.15 of the present order. The first relief claimed is simplicitor for a direction to the respondents to proceed with conversion of leasehold rights to free hold rights of the land in question in terms of the order dated May 17, 2019 passed by this Court in the earlier writ petition bearing Writ Petition No.12081 (MB) of 2009 filed by the petitioner. It was for execution of the order passed by this Court in the earlier writ petition. The second prayer was in furtherance to the first prayer stating that the calculation of the conversion charges be made as per the rates applicable on May 20, 2009 and demand letter be issued after adjusting the amount already deposited by the petitioner. Both the prayers are nothing else but are in terms of the prayer (A) made by the petitioner in the aforesaid application, which was already pending consideration before this Court, when the writ petition in question was filed.

33. In the light of aforesaid facts, in our opinion, first question needs to be answered in positive by holding that filing of the present writ petition was an abuse of process of Court, when an application seeking same prayer, namely, for further direction in terms of order passed by this Court in earlier petition filed by the petitioner on July 30, 2019, was already pending consideration and the issue was drawing attention.

QUESTION NO.II

Whether the second Writ Petition No.8870 (MB) of 2020 filed by the petitioner is maintainable in view of the fact that the petitioner is seeking implementation of the judgment and order dated 17.05.2019 passed in Writ Petition No.12081 (MB) of 2009?

34. A perusal of prayer (A) made in the writ petition in question shows that it was for a direction to the respondents to proceed with the conversion of property from leasehold to freehold in terms of earlier order passed by this Court on May 17, 2019 in the earlier writ petition filed by the petitioner. The same can be termed to be in the form of execution of earlier order passed by this Court.

35. Here, we are faced with a situation where no remedy as such has been provided in case the order passed by the Writ Court or an appeal arising therefrom is not complied with. Though, the aggrieved person can file an application for initiating contempt proceedings against the guilty person, however, that cannot be said to be a remedy for execution of the order as in the contempt proceedings, which are quasi criminal in nature for non compliance of any order, the person guilty can be punished with imprisonment and/or fine. The person in whose favour order has been passed cannot be left remediless, in case the same is not complied with in its true letter and spirit. He cannot be deprived of the fruits of litigation. In the circumstances, in our view, a writ petition seeking a direction to the authority concerned for compliance of the earlier order may be maintainable. In case, any alternative remedy is provided that may or may not be a complete bar for entertainment of such a writ petition in view of the settled position of law. In the case in hand, the fact remains that in Rule 11 of Chapter XXII of the High Court Rules, execution is provided only for recovery of cost and not for any substantive relief granted to the party concerned. The same is extracted below:

"**11. Transmission of order of costs for execution.-** Where costs have been awarded by the Court in a Writ Petition or in a special appeal from an order passed on a writ petition, but have not been paid the person entitled to them may apply to the Court for execution of the order. The application shall be accompanied by an affidavit stating the amount of costs awarded and the amount remaining unpaid. The Court may direct the order to be send to the District Court of the district in which the order is to be executed. The order may be executed by such Court as it is a decree for costs passed by itself or be transferred for execution to any subordinate Court."

36. The aforesaid issue has relation with the first prayer made in the present writ petition, which has already been extracted in para 15 of the judgment. In terms thereof, a direction is sought to be issued to the respondents to comply with the judgment of this Court passed in the case of the petitioner on May 17, 2019 in

the earlier writ petition filed by the petitioner. As already discussed above in para 35, though a fresh writ petition praying for execution of earlier order passed by Writ Court or special appeal arising therefrom may be maintainable, however, in the case in hand the fact remains that an application filed by the petitioner bearing C.M. Application No.87559 of 2019 in the earlier writ petition seeking further direction in the aforesaid case was already pending when the present writ petition was filed praying for execution of earlier order passed by this Court in earlier writ petition in favour of the petitioner.

37. From a perusal of the order passed on August 9, 2019 in the C.M. Application No.87559 of 2019, it is evident that the matter with regard to compliance of the order dated May 17, 2019 passed by Writ Court in favour of the petitioner was being considered by this Court, hence, the question needs to be answered in negative holding that the writ petition was not maintainable in the facts and circumstances of the case in hand.

QUESTION NO.III

Whether the second Writ Petition No.8870 (MB) of 2020 is barred by the principle of *res judicata*/constructive *res judicata* in view of the fact that while allowing Writ Petition No.12081 (MB) of 2009 vide judgment and order dated 17.05.2019, the respondents have been directed to process the application of the petitioner for conversion of lease-hold-rights into free-hold, in accordance with law laid down by the Full Bench in Anand Kumar Sharma's case (supra) and, thus, the issue regarding the relevant date for conversion charges was very much involved in Writ Petition No.12081 (MB) of 2009.

38. The principle of *res judicata* was considered by Hon'ble the Supreme Court in **Omprakash Verma and others v. State of A.P. and others, (2010) 13 SCC 158** and it was opined that no litigant can be permitted to file any subsequent litigation or raise any issue which could have been raised in the earlier writ petition and adjudication is conclusive and binding not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated. Paras 75-77 thereof are extracted below:

"75. As pointed out by the learned Attorney General, the matter can be looked at from another angle. The proceedings in the instant case are barred by the principle of constructive *res judicata*. The validity of the ULC Act was squarely in issue. The effect of allowing the State appeals in State of A.P. v. N. Audikesava Reddy, (2002) 1 SCC 227 is that all contentions which parties might and ought to have litigated in the previous litigation cannot be permitted to be raised in subsequent litigations.

76. In forward Construction Co. v. Prabhat Mandal, (1986) 1 SCC 100 this Court held that an adjudication is conclusive and binding not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided. The following portion of the judgement is relevant which reads as under: (SCC p. 112, para 20)

"20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as *res judicata* as one of the grounds taken in the present petition was conspicuous by its absence in

the earlier petition. Explanation IV to Section 11 CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matter of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually head and decided. It could only be deemed to have been heard and decided."

77. In Hoystead v. Taxation Commr.:1926 AC 155 the Privy Council observed : (AC pp. 165-66)

"..... Parties are not permitted to begin fresh litigations because of new views that they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the wieght of certain circumstances. If this were permitted, ligation would have no end, except when legal ingenuity is exhausted. It is principle of law that this cannot be permitted, and there is abundant authority reiterating that principle."

39. Rule 7 of Chapter XXII of the Allahabad High Court Rules, 1952 (hereinafter referred to as "the Rules') provides that no second application is maintainable on the same facts. The same reads as under :

"7. **No second application on same facts.-** Where an application has been rejected, it shall not be competent for the applicant to make a second application on the same facts."

40. A perusal of para 3.10 of the present writ petition shows that the grievance raised by the petitioner was that the application filed by it in earlier writ petition seeking further direction had not been listed. Further pleadings in the writ petition in question show that the the grievance was sought to be raised regarding illegal rejection of the application filed by the petitioner for conversion of leasehold rights to freehold rights in the year 2009, which was subject matter of consideration before this Court in the earlier writ petition filed by it and had been adjudicated upon. The issue sought to be raised in the writ petition in question is that the conversion charges are required to be calculated in terms of the policy of the Government as was in existence in the year 2009 when the order dated October 1, 2009 was passed, which was subject matter of challenge before this Court in earlier writ petition and was set aside. The aforesaid issue was available and could have very well been raised by the petitioner in the earlier writ petition but there is nothing on record pointed out by the petitioner that the same was raised. In absence thereof, it shall be deemed to be raised and rejected.

41. Issue regarding wrong rejection of the prayer of the petitioner for conversion of leasehold right to freehold rights in the year 2009 was very well considered in the

earlier writ petition filed by the petitioner and the same stood adjudicated upon with the setting aside of the order dated May 20, 2009 and communication dated October 1, 2009, vide order dated May 17, 2019 and the matter was remitted to the authority concerned for passing fresh order. Hence, the same could not possibly be raised in the present writ petition.

42. Lot of stress is sought to be laid by the petitioner regarding deposit of sum of ₹6,46,87,500/- claimed to be 25% of the total conversion fee, however, the fact remains, as is evident from para 6 of the earlier writ petition, that it was deposited by the petitioner on its own, after self assessment of the amount to be deposited. There was no direction or demand notice issued by the authority concerned.

43. The issue raised in the present question has relation with the second prayer made in the present writ petition filed by the petitioner, which is in continuance of the first prayer where the relief claimed is for execution of an earlier order dated May 17, 2019 passed by this Court in earlier writ petition filed by the petitioner. The only addition being that the calculation of conversion charges be made as per the rates applicable on May 20, 2009.

44. A perusal of the prayers made in the present writ petition filed by the petitioner shows that direction was sought for issuance of a demand letter for payment of balance amount of conversion fee within such time as may be indicated in the demand letter. It was further mentioned therein that it should be in accordance with law and the policy applicable. At the time the petitioner filed the earlier writ petition, the judgment of this Court in **Dr. O.P. Gupta vs. State of U.P., (2009) 4 AWC 4038** was prevalent in terms of which the policy prevalent at the time when a party applies for conversion of land to freehold was to be applicable. As the Bench hearing the writ petition in **Anand Kumar Sharma's case (supra)** had reservation about the view expressed in **Dr. O.P. Gupta's case (supra),** the matter was referred for consideration by a larger Bench. The issue was considered by the Full Bench in **Anand Kumar Sharma's case (supra)** vide judgment dated February 13, 2014 answering the question referred that the prayer for conversion for grant of freehold rights is to be considered in accordance with the policy in existence at the time of passing of the order. Earlier writ petition filed by the petitioner was disposed of on May 17, 2019, specifically noticing the aforesaid Full Bench judgment of this Court, but still there is nothing evident from the arguments addressed that the petitioner ever thought of raising the issue regarding the cut off date in terms of which the conversion charges are to be calculated, though such plea was available to the petitioner at that juncture.

45. Therefore, the question needs to be answered in positive holding that the Writ-C No.8870 of 2020 is barred by principle of *res judicata*/constructive *res judicata*.

ANSWERS TO QUESTIONS

46. **Question No.I** is answered in positive holding that filing of the present writ petition was an abuse of process of Court.

Question No.II - Though a writ petition can be entertained for execution of an order passed earlier by the Court,

however, the writ petition filed by the petitioner in the facts and circumstances of the case was not maintainable.

Question No.III is answered in positive holding that present writ petition filed by the petitioner was barred by principles of *res judicata*/ constructive *res judicata*.

47. While answering the questions referred to by the larger Bench, let the present writ petition be now placed before the Division Bench as per roster on August 29, 2022.

(2022) 8 ILRA 141
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ C No. 8923 of 2022

Logix Buildwell Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prakash Tripathi, Sri Lalan Singh

Counsel for the Respondents:
C.S.C., Ms. Anjali Upadhyay, Sri Kaushalendra Nath Singh, Sri M.C. Chaturvedi (Senior Counsel)

A. Civil Law-Allotment of Commercial plot-New Okhala Industrial Development Authority invited tenders for allotment of commercial plot on lease-The authority cancelled the allotment of plot in favour of petitioner and forfeited the entire money-petitioner deposited the balance allotment money and requested the Authority to issue check list for land registration-Authority paid no heed for registration while the petitioner was facing difficulty to get the bank loan without registration-Forfeiture of amount of allotment money is nothing but an unjust enrichment on part of the Authority-Hence, the Authority is directed to refund entire amount deposited by petitioner.(Para 1 to 21)

B. The Public Trust Doctrine is a part of the law of the land. the doctrine has grown from Article 21 of the Consitution. Action/Order of the State would stand vitiated if it lacks bondafides, as it would only be a case of colourable exercise of power. Public Authorities cannot play fast and loose with the powers vested in them. A decision taken in arbitrary manner contradicts the principle of legitimate expectation. The rule of law is the foundation of the democratic society. (Para 14)

The petition is allowed. (E-6)

List of Cases cited:

1. Noida Entrepreneurs Assn. Vs Noida & ors. (2011) 6 SCC 508

2. Aharwas Singh@ Atarwas Singh Vs LDA, Lko (2015) 108 ALR 181

3. Indian Council for Enviro Legal Action Vs U.O.I. (2011) 8 SCC 161

4. Basti Ram Vs Nagar Nigam, Ghaziabad & anr. 1999 SCC OnLine All 1850

(Delivered by Hon'ble Pritinker Diwaker, J.
&
Hon'ble Ashutosh Srivastava, J.)

1. The writ petitioner which is a company incorporated and registered under the provisions of the Companies Act, 1956, a group company of the Logix Group of Companies a leading name in the field of real estate development in the National Capital Region of India has approached this Court invoking its extraordinary

jurisdiction under Article 226 of the Constitution of India claiming inter-alia the following reliefs:

"i) to issue a writ, order or direction in the nature of certiorari calling the records and quashing the impugned order dated 12.3.2021 passed by respondent No. 3 (Annexure No. 16 to the writ petition).

ii) to issue a writ, order or direction in the nature of mandamus commanding the respondent authority to refund the allotment money of Rs.62,09,59,254/- to the petitioner along with interest @ 14% per annum from the date of deposit till the date of realization."

2. It is contended that in the year 2011 the respondent No. 2 i.e. the New Okhla Industrial Development Authority (hereinafter referred to as the Development Authority) invited sealed tenders in two bid system for allotment of commercial plots on lease for a period of 90 years on as is where is basis. The petitioner submitted its bid under the scheme for allotment of the plot and deposited a sum of Rs. Ten Crores (Rs.10,00,00,000/-) as earnest money. The bid / tender for allotment of commercial Plot No. 4, Block-CC, Sector 32, Scheme No. 2010-11, (Commercial Builders Plot-VI) was accepted the petitioner being the highest bidder @ Rs. 1,11,250 per square meters. The total area of the plot was 50,000 square meter and as such, the total premium of the plot allotted to the petitioner at the rate accepted worked out to Rs.556,25,00,000/-. As per the scheme, the petitioner was required to deposit 10% of the total premium amount of the plot within 90 days of the issuance of the allotment order after adjusting the 10% earnest money already deposited by the petitioner. The balance 90% of the premium was payable in 16 equal half yearly installments. The allotment letter further provided that the lease deed in respect of the plot would be executed within 180 days and the possession of the plot would also be given within 180 days.

3. It is submitted that the petitioner sought extension of time by 120 days under Clause H-1 of the scheme to submit the balance amount of Rs.45,62,50,000/-. The said extension was granted by the respondent / Development Authority vide its letter dated 30.6.2011. However, the authority informed the petitioner that the area allotted to it was in excess of 50,000 square meters and was actually 50,050.75 square meters and as such, the petitioner was liable to pay the excess area premium of Rs.56,45,937.50. The petitioner prayed for further time extension under Clause H (2) for 3 months for the payment of the allotment money and excess area premium which was granted vide letter dated 18.1.2012. The petitioner thereafter deposited the balance allotment money along with interest thereon totaling Rs.51,47,83,377/- as also the excess area premium along with interest totaling Rs.61,75,877/- on 21.1.2012 and requested the respondent / Development Authority to process the papers for the execution of lease and its registration at the earliest. Thereafter, the petitioner requested the Development Authority to issue the check list for land registration vide letters dated 23.1.2012 and 16.3.2012 and again on 6.4.2012. The respondent / Development Authority instead of responding to the request of the petitioner to proceed for executing the lease deed / registration issued a Notice dated 13.6.2012 requiring the petitioner to deposit a sum of Rs.59,02,92,796/- towards the 1st and 2nd installments along with penal interest

payable under the allotment letter. The petitioner yet again in response to the demand raised by the respondent / Development Authority informed it about the urgency in getting the lease deed and its registration done as in the absence of the same it was difficult to get the bank loan approvals to initiate the project in time. The petitioner accordingly sought extension of time of six months to pay the installments due. The Development Authority, however, did not respond to the above request of the petitioner and further raised a demand of Rs.92,73,04,316/- being the 1st, 2nd and 3rd installments payable along with penal interest failing which the allotment of the plot would be cancelled. The petitioner was constrained to file Writ Petition (C) No. 4835 of 2013 (Logix Buildwell Pvt. Ltd. versus State of U.P. and others). The writ petition was entertained and an interim order was passed in favour of the petitioner restraining the respondent / Development Authority from creating any third party rights in respect of the plot in question. Even during the pendency of the aforesaid writ petition, the petitioner requested the Development Authority to provide the check list for executing the lease deed, but to no avail.

4. On account of the inaction of the respondent / Development Authority to provide the land to the petitioner, the entire project of the petitioner turned unviable and the petitioner was constrained to amend the writ petition by deleting the prayer for execution of the lease deed and incorporating the prayer for refund of the amount of Rs.62,09,59,254/- along with interest @ 14% per annum from the date of deposit and till the date of realization. During the pendency of the writ petition, the respondent / Development Authority proceeded to pass an order dated 12.3.2021 whereby the plot allotted to the petitioner was cancelled on failure of the petitioner to get the lease deed of the plot executed within 180 days of the issuance of the allotment letter and the entire amount deposited against the plot was forfeited. The petitioner on receipt of the order dated 12.3.2021 prayed for withdrawal of the writ petition No. 4835 of 2013 with liberty to file fresh petition which liberty was duly accorded.

5. It is further contended by the petitioner that the petitioner deposited entire due amount and prayed for execution of the lease deed and its registration within 180 days of the allotment letter, but the respondent Development Authority failed to get the lease deed of the plot executed in favour of the petitioner and never handed over the possession of the plot to the petitioner so that it could carry out it's project. The respondent / Development Authority carried on to demand money from the petitioner without performing the part and ultimately cancelled the plot allotted and also forfeited the money deposited by the petitioner against the plot allotted which cannot be justified and in such circumstances, the petitioner has been constrained to approach this Court by means of the instant writ petition for the reliefs stated here-in-before. The writ petition is liable to be allowed as prayed with cost imposed upon the respondent / Development Authority.

6. At the time of entertaining the writ petition on 7.9.2022, the Court passed the following orders:-

"Sri Prakash Tripathi, learned counsel for the petitioner. Sri Kaushalendra Nath Singh, learned counsel for respondent nos. 2, 3 & 4.

According to the petitioner, the respondent Development Authority had allotted a commercial plot on 28.3.2011 and the petitioner was required to make deposit of requisite allotment money. The petitioner has since deposited the entire allotment money but yet the Development Authority has failed to handover the possession of the plot to the petitioner and has also not executed the lease deed in its favour.

Learned counsel for the petitioner submits that more than 10 years have elapsed but yet the Development Authority has not carried out its responsibility as a result of which the petitioner has suffered heavy financial loss. He submits that had the possession of the plot, in question, been handed over to the petitioner in time and the lease deed could have been executed at the earliest, the petitioner would have achieved its goal.

Further case of the petitioner is that now they are no more interested in the land in question because the project is not viable for the company and therefore, direction be issued to the Development Authority to refund the allotment money to the petitioner along with up to date interest. Further case of the petitioner is that on one hand, the respondent Development Authority has failed to discharge its duties and on the other hand, the order impugned has been passed cancelling its allotment and forfeiting the huge amount deposited.

Sri Kaushalendra Nath Singh, learned counsel for the Development Authority prays for time to seek instructions as to whether the Development Authority is willing to refund the allotment money to the petitioner. Considering this aspect, a week's time is granted to him to seek instructions in the matter.

List on 19 April, 2022.

As an interim measure, effect and operation of the order dated 12.3.2021 (annexure-16 to the writ petition) passed by the respondent no. 3 shall remain stayed till the next date of listing."

7. Shri M. C. Chaturvedi, learned Senior Counsel assisted by Shri Kaushalendra Nath Singh, learned counsel for the respondent / Development Authority has filed counter affidavit. Shri Lalan Sinha and Shri Prakash Tripathi, learned counsels for the petitioner have filed rejoinder affidavit and as such, the pleadings between the parties are complete. With the consent of the parties the writ petition is being finally decided.

8. In the counter affidavit filed by the respondent Nos. 2, 3 and 4 certain clauses highlighting the terms and conditions mentioned in the scheme have been stated which are being reproduced here-under:-

"Clause G-

2. Successful tenders shall be issued allotment letter by registered post. The allotment will have to deposit 10% of the letter tendered amount, after adjustment of earnest money, through bank draft favour of NOIDA PAYABLE at Noida/ New Delhi// within 90 days from the date of issue of allotment letter, through prescribed challan available in the banks mentioned in the allotment letter and submit the copy of the deposited challan (s) In Commercial Department of NOIDA. In case of failure to deposit this amount within time, the allotment will stand cancelled and the entire earnest money deposited shall be forfeited in favour of NOIDA.

3. The allottee shall also deposit due stamp duty (Stamp duty calculation should also be got verified, from the

concerned Sub-Registrar, Gautam Budh Nagar by the allottee himself/themselves) for lessee deed in treasury of District/Guatam Budh Nagar and should produce a certificate to that effect in Commercial Department Noida within 180 days from the issue of allotment letter.

H. EXTENSION OF TIME

1. Normally extension or depositing the allotment money shall not be allowed. However on receipt of request from the allottee in within and on being satisfied with the reasons mentioned, the NOIDA may grant a maximum of 120 days extension to deposit reservation/allotment money, subject to the payment of interest @ (11% normal interest + 3% penal interest) per annum compounded half early on pro-rata basis. Thereafter, ordinary no extension of time will be granted and the allotment will be cancelled along with the forfeiture of the earnest money.

2. In exceptional circumstances the time for the payment of balance due amount may be extended the Chief Executive Officer of the Authority.

N. EXECUTION OF LEASE DEED & POSSESSION

The allotee will be required to execute the lease deed of the plot within 180 days from the date of issue allotment later. In case of failure to do so, the allotment of plot may be cancelled and 30% of the premium (tendered amount) f the plot may be forfeited. Amount deposited towards the extension charges, interest and other penalties etc. may also be forfeited. However, in exceptional circumstances, the extension of time for the execution of the lease deed and taking over possession may be permitted. The extension will be subject to the payment of charges 5% .p.a. of the total premium of the plot the tendered rate, which will be calculated on day to pay basis. After execution of lease deed the allottee will take over the possession of plot as the date of taking over of physical possession and no plea contrary to this shall be entered.

The cost and expenses of preparation, stamping and registering the legal documents and its copies and all other incidental expenses will be borne by the allotte, who will also pay the stamp duty levied on transfer of immovable property, o any other duty or charge that may be levied by any Authority empowered in this behalf.

X. CANCELATION OF THE LEASE DEED

In addition to the other specific clauses relating to cancellation/determination, NOIDA/the lessor, will its be free to right cancellation/determination of the allotment/the lessee of this commercial plot in as of the following:

i. Allotment having been obtained through misrepresentation, by suppression of material facts, false-statement and/or fraud.

ii. Any violation of the directions issued or of the rules and regulation framed by NOIDA or by any other statutory body.

iii. In case of default on the part of tender/allotee/sub lessee(s) or any breach/ violation of the terms and conditions of the tender, allotment, lease and/or non-deposit of the allotment amount, installments or any other dues.

If the allotment is cancelled on the grounds mentioned in para (1) above, the entire amount deposited by the tender, alottee, lessee and sub-lessee (s) till the date of cancelation/ determination, shall be forfeited by NOIDA and no claim, whatsoever, shall be entertained in this regard.

If the allotment is cancelled on the grounds mentioned in paras (ii) or

(iii) above, 30% of the total premium of the plot shall be forfeited and the balance, if any, shall be refunded without any interest and no separate notice shall be given in this regard.

After forfeiture of the amount as stated above, possession of the plot will be resumed by NOIDA, along with the structures there upon, if any and the tenderer, allottee, lessee and sub-lessees will have no right to claim any compensation thereon."

9. On the strength of the aforesaid clauses, it is contended that the petitioner was required to deposit the 10% amount within 90 days from the date of issuance of allotment letter else the earnest money would stand forfeited; the petitioner failed to submit the stamp duty certificate which was required to be deposited with the authority within 180 days of the allotment letter; as per Clause-H, the petitioner failed to deposit the amount even after 120 days further time prayed; the petitioner failed to comply and deposit the outstanding amount in terms of the allotment letter and consequently, the authority could not proceed to execute the lease deed; Clause-L sub-clause 2 clearly provided that if the petitioner wanted to surrender the plot, it ought to have done so within 30 days of the allotment and if it chooses to do so now the total amount or 30% of the total premium whichever is less, will be forfeited and remaining amount will be refunded to the petitioner. In the case at hand, the petitioner has deposited only 10% of the allotment money and as such, the entire amount stands forfeited and the petitioner cannot claim refund after 10 years of the allotment.

10. In the rejoinder affidavit, the petitioner denying the averments made in the counter affidavit has submitted that despite repeated requests that the balance allotment money along with interest and excess area premium along with interest had been deposited and a check list be issued, the Authority failed to respond and consequently the lease deed was not got executed and now on account of the fault of the Authority itself, the allotment has been cancelled and the amount deposited has been forfeited. It has been specifically stated that the Authority granted extension of time till January 31st, 2012 subject to deposit of balance allotment money of Rs.45,62,50,000/- along with interest thereon of Rs.6,40,68,210/- and excess premium of Rs.56,45,937.50 along with interest thereon Rs.5,61,261.50. The petitioner deposited the amount vide HDFC Bank Ltd., Challan No. 30056 dated 21.1.2012 and Challan No. 30057 dated 21.1.2012 and requested the respondent authority to execute the lease deed but the authority did not respond.

11. A perusal of the respective stand of the parties, as borne out from their pleadings, reveals that the moot question for consideration of this Court is whether the respondent Noida Authority is justified in cancelling the allotment of plot in favour of the petitioner and forfeiting the entire allotment money to the tune of Rs.62 crores and odd and further requiring the petitioner to hand over the possession of the plot on considering the conduct of the respondent Corporation.

12. Having gone through the facts of the case, pleadings of the parties and perusal of the record, the Court finds that the respondent Authority failed to perform and discharge its reciprocal contractual obligation listed on the anvil of reasonableness and rationality. The

Authority blatantly ignored the difficulties faced by a developer such as the petitioner to arrange for the finance after the deposit of the initial bid money/ performance security/allotment money etc., with the Authority. Such finances are usually arranged from banking institutions investors and the market. In the absence of bare minimum requirement of lease registration in favour of the developer arrangement of finances are next to impossible and the entire project of the developer is jeopardized. The Authority has nothing to loose but the developer looses everything i.e., the project and above all his reputation in the market.

13. We find that the respondent Authority is guilty of fulfillment of its contractual obligations inasmuch as it failed to provide the checklist necessary for execution of the lease deed in favour of the petitioner even after the petitioner deposited the entire allotment money. The petitioner legitimately expected the Authority to carry out its obligations in the letter and spirit.

14. The doctrine of legitimate expectations has been judicially recognized by the Apex Court as also by this Court in a catena of judgments. In ***Noida Entrepreneurs Association versus Noida and others*** reported in 2011 (6) SCC 508, the Apex Court observed as under:-

"38. The State or the public authority which holds the property for the public or which has been assigned the duty of grant of largesse etc., acts as a trustee and, therefore, has to act fairly and reasonably. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. Every holder of a public office is a trustee.

40. The Public Trust Doctrine is a part of the law of the land. The doctrine has grown from Article 21 of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides, as it would only be a case of colourable exercise of power. The Rule of Law is the foundation of a democratic society. (Vide: M/s. Erusian Equipment & Chemicals Ltd. v. State of West Bengal & Anr., AIR 1975 SC 266;Ramana Dayaram Shetty v. The International Airport Authority of India & Ors., AIR 1979 SC 1628; Haji T.M. Hassan Rawther v. Kerala Financial Corporation, AIR 1988 SC 157; Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. & Ors., AIR 1991 SC 537; and M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu & Ors., AIR 1999 SC 2468).

41. Power vested by the State in a Public Authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact-situation of a case. "Public Authorities cannot play fast and loose with the powers vested in them". A decision taken in arbitrary manner contradicts the principle of legitimate expectation. An Authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other. (Vide: Commissioner of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16; Sirsi Municipality v. Ceceila Kom

Francis Tellis, AIR 1973 SC 855; The State of Punjab & Anr. v. Gurdial Singh & Ors., AIR 1980 SC 319; The Collector (Distt.Magistrate) Allahabad & Anr. v. Raja Ram Jaiswal, AIR 1985 SC 1622;Delhi Administration (Now NCT of Delhi) v. Manohar Lal, (2002) 7 SCC 222; and N.D. Jayal & Anr. v. Union of India & Ors., AIR 2004 SC 867)."

15. Further, we find that the order of cancellation of allotment of plot in favour of the writ petitioner and the forfeiture of the amount of the allotment money is nothing, but an unjust enrichment on the part of the Noida Authority which is not liable to be permitted in the facts and circumstances that stand attracted to the case of the petitioner.

16. This Court in the case of ***Aharwas Singh @ Atarwas Singh versus Lucknow Development Authority, Lucknow*** reported in (2015) 108 ALR 181, while considering a case in which the Lucknow Development Authority after advertising a scheme for allotment of plots in Gomti Nagar Extension Scheme after making allotment and taking deposit of the entire amount from the public, failed to deliver possession and execute sale deed even after a lapse of more than 7 years while keeping the money in its account and earning interest or utilizing it in other schemes, then it shall be incumbent upon the Authority to pay reasonable interest to the allottes on the cost of the land or plot deposited.

17. The Apex Court in ***Indian Council for Enviro Legal Action versus Union of India reported in 2011 (8) SCC 161*** has defined the "Unjust Enrichment", as under:-

"UNJUST ENRICHMENT "

152. 'Unjust enrichment' has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

153. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, A.2d, 232-33).

159. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. It is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another."

18. Thus, from the above, we find that the conduct of the respondent Nos. 2, 3 and 5 in not facilitating the execution of the lease deed in favour of the petitioner cannot be approved. There was thus total failure on the part of the said respondents and they were certainly deficient in rendering service in terms of the obligations, they were expected to perform.

19. The endeavour of a Constitutional Court must always be to ensure that everyone gets just and fair treatment. Constitutional Courts while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation must be ordered to discourage dishonest action. In the case at hand, we find that the petitioner had deposited a sum of Rs.62,09,59,254/- towards the entire allotment money way back in the year 2011-12, but the respondent-Authority did not execute the lease deed of the plot allotted to the petitioner nor handed over possession of the same and now have proceeded to cancel the allotment and forfeit the amount entirety.

20. We are, thus, of the view that in the given set of facts that stand attracted to the case of the petitioner, the petitioner is entitled to the refund of the entire amount of the allotment money deposited with the respondents-Authority.

21. Accordingly, the writ petition is ***allowed.*** The order dated 12.3.2021 passed by the respondent No. 3-Deputy General Manager (Commercial), New Okhla Industrial Development Authority, NOIDA, so far as it forfeits the amount deposited by the petitioners in respect of the plot No. CC-4, Sector-32, NOIDA, is set aside. The respondent No. 2- New Okhla Industrial Development Authority, NOIDA is directed to refund the amount of Rs.62,09,59,254/- within 45 days from the date of service of certified copy of this order before it.

22. So far as the interest part is concerned, at this stage, we are not passing any order, leaving it open to the petitioner to prefer an appropriate application before the competent authority of the respondent. In the eventuality of such an application being filed, it is expected from the authority to pass appropriate orders after considering all aspects of the matter strictly, in accordance with law.

(2022) 8 ILRA 149
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Writ C No. 10374 of 2022

C/M, Imambara Qadeem, Manauri, Prayagraj & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri V.M. Zaidi (Senior Adv.), Sri S.M.A. Iqbal Hasan, Sri M.J. Akhtar

Counsel for the Respondents:
Sri Manish Goel (Addl. A.G.), Ms. Akansha, Sharma (S.C.), Sri Pranjal Mehrotra

A. Civil Law-Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950-Sections 9 & 117(6)-Quashing of notification –Petitioner's case is that the State wish to illegally and arbitrarily take possession of the 1500 square meters of land by invoking powers of resumption u/s 117(6) of the Act-Petitioners claim to

be a hundred years old Imambara was in existence on the date of vesting that was settled with the petitioners u/s 9 of the Act, cannot be resumed u/s 117(6) of the Act-Petitioners failed to produce any evidence to show that on the date of vesting, the said Imambara was in existence-Hence, the petitioners are not entitled to claim benefit of Section 9 of the Act-Moreso, Petitioners challenged the notification for the delay of 10 years-delay condone not acceptable as a clearly entry of the impugned notification issued by the State Government is shown in the Khatauni relating to property in dispute-Once the impugned notification has been published in the Gazette, constructive knowledge of its contents has to be imputed to one in all, including the petitioners-Thus, the petitioners cannot plead ignorance about the existence of notification.(Para 1 to 15)

The writ petition is dismissed. (E-6)

List of Cases cited:

Basti Ram Vs Nagar Nigam, Ghaziabad & anr.(1999) SCC OnLine All 1850

(Delivered by Hon'ble Rajesh Bindal, C.J.
&
Hon'ble J.J. Munir, J.)

1. The petitioners, who are the Committee of Management of the *Imambara Qadeem*, Manauri and its Secretary, have moved this Court to quash the notification dated 28.06.2012, issued by the Government of U.P., insofar as it resumes the petitioner's land, situate in Plot No. 146, admeasuring 1500 square meters, Village Manauri, District Prayagraj.

2. The aforesaid notification has been issued by the State Government in exercise of their powers under Section 117(6) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (for short, 'the Act') to the extent it adversely affects the petitioners. The said notification shall be referred to hereinafter as the 'impugned notification'.

3. The petitioners' case in brief is that the second petitioner is a native of Village Manauri, *Tehsil* Sadar, District Prayagraj. He and his forefathers have lived in the said village since a very long time. The second petitioner's father constructed a building known as *Imambara Qadeem* over an area 1500 square meters, situate on Plot No.146. The aforesaid *Imambara* is said to be more than 100 years old. The aforesaid property has now come down to the second petitioner from his forefathers. He is now managing the affairs of the *Imambara* along with some members of the religious community, to which he belongs. The second petitioner and other members of the community formed a Committee of Management, which this Court gathers to be a society of sorts. The pleadings about the precise legal character of the body that manages the affairs of the *Imambara* are vague and non-descript.

4. The short case of the petitioners is that the State wish to illegally and arbitrarily take possession of the 1500 square meters of land in Plot No.146, and for the purpose, have invoked their powers of resumption under Section 117(6) of the Act. This they have done through the impugned notification. The petitioners had earlier moved this Court through Writ - C No.30758 of 2021 without laying any challenge to the impugned notification or any reference to it. The case taken in the aforesaid writ petition was that the State and the respondent Authorities may be forbidden from taking possession of Plot No.146, above described (for short, 'the property in dispute'), which the respondents

were moving to take possession of for the purpose of Railways, without proceedings for acquisition or requisition. The second petitioner, therefore, sought the following material reliefs in Writ - C No.30758 of 2021:

(A). Issue a writ, order or direction in the nature of mandamus commanding and directing the respondent authorities to not to acquire and taken possession of the land Gata No.146 measuring area 1500 sq.meter approximately the structure constructed on the land.

(B). Issue a writ, order or direction in the nature of mandamus commanding and directing the respondent authorities not to take any coercive measure against the petitioner.

5. It is the petitioners' case that it was through the counter affidavit dated 18.12.2021 filed in Writ - C No.30758 of 2021 on behalf of the Union of India and the Mukhya Pariyojna Prabandhak, Dedicated Freight Corridor Corporation of India, Prayagraj that the petitioners came to know about the impugned notification issued by the State Government resuming the property in dispute. Accordingly, they have instituted the present writ petition challenging the said notification.

6. Writ - C No.30758 of 2021 has also come up today along with this writ petition and in view of the fact that the petitioners have now challenged the impugned notification, the aforesaid writ petition was withdrawn, which we have permitted to be withdrawn by an order of date passed in the said writ petition.

7. Assailing the impugned notification, Mr. V.M. Zaidi, learned Senior Advocate assisted by Mr. S.M.A. Iqbal Hasan, learned Counsel for the petitioners submits that the property in dispute is recorded as *abadi* and being a building, would be deemed to be settled with the petitioners under Section 9 of the Act. According to the learned Counsel, *abadi* sites, particularly, buildings do not vest in the *Gaon Sabha*, so as to be amenable to the State's power of resumption under sub-Section (6) of Section 117 of the Act. It is argued that the second petitioner and his forefathers have been in occupation of the property in dispute for the past 100 years and more, and they have constructed the building, where the *Imambara* is situate, also more than 100 years ago. In the circumstances, on the date of vesting, that is to say, 7th July, 1949, the *Imambara* being a building held by the second petitioner and his forefathers, it shall be deemed to have been settled with them by the State Government. According to the learned Senior Advocate appearing for the petitioners, the property in dispute being a building and not any of the 'things' specified under Clauses (i) to (vi) of sub-Section (1) of Section 117 of the Act, cannot be held to have ever vested in the State, and by a declaration of the State, in the *Gaon Sabha*. As such, the property in dispute, that is settled under Section 9 of the Act with the second petitioner and his forefathers, cannot be resumed under sub-Section (6) of Section 117 of the Act.

8. Mr. Manish Goel, learned Additional Advocate General assisted by Ms. Akansha Sharma, learned Standing Counsel, appearing for respondent nos.2, 4, 5 and 6 and Mr. Pranjal Mehrotra, Advocate appearing on behalf of respondent nos.1 and 3, have opposed the motion to admit this petition to hearing.

9. Mr. Goel has submitted that for one the petition is highly belated with an

enormous laches to confront. It ought to be dismissed on that ground alone. It is further argued that upon merits, the petitioners have *prima facie* not produced any evidence to show that on the date of vesting, the building, that is said to house the *Imambara*, was in existence. As such, according to the learned Additional Advocate General, the petitioners are not entitled to claim benefit of Section 9 of the Act.

10. We have considered the submissions advanced on both sides and carefully perused the record. We find that the impugned notification being one of the year 2012, a challenge to it 10 years later, would require the petitioners to explain why they did not come up earlier assailing it. All that we find for an explanation is a rather unconvincing case set out in Paragraph No.18 of the writ petition, where it is said that prior to filing the earlier writ petition (Writ - C No.30758 of 2021), petitioner no.2 had no knowledge about the impugned notification. He came to know of the same when the respondents filed a counter affidavit in the last mentioned writ petition. It is said that from the aforesaid facts, we should infer a case of circumstances beyond the petitioners' control in the matter of delay and condone the laches. The petitioners' explanation is stated to be rejected.

11. Once the impugned notification has been published in the Gazette, constructive knowledge of its contents has to be imputed to one in all, including the petitioners. After all, the purpose of publication in the Official Gazette is information to the public at large. Even if the rigour of the law about constructive notice of a gazetted document is to be ignored in the interest of judging by a more equitable hand, we find that on facts, the petitioners cannot plead ignorance about the existence of the impugned notification.

12. A copy of the extract of the Six Yearly *Khatauni* relating to *Khata* No. 00119, that includes amongst others, the property in dispute (Plot No.146), has been annexed as Annexure No.3 to the writ petition. It is a *Khatauni* for the *Fasli* Year 1423-1428. There is, in the remarks column, a clear entry of the impugned notification issued by the State Government resuming the property in dispute. This entry was made on 15.05.2013. The extract of the *Khatauni* is one that is available on the website of the Government. In any case, it is a *Khatauni* that relates to the property in dispute, wherein the petitioners claim their right, title and possession. It is, therefore, very difficult to believe that the petitioners would not know about the impugned notification, that was entered in the relative *Khatauni* way back on 15.05.2013. There is absolutely no reason, therefore, to accept the petitioners' explanation offered for the delay of 10 years in challenging the impugned notification. We, therefore, do not find it to be a case where the petitioners' laches can or ought to be condoned.

13. Nevertheless, since the learned Counsel for parties have addressed us on the merits of the matter also, we propose to examine the petitioners' contentions advanced to assail the impugned notification. The thrust of the petitioners' contention is that the property in dispute never vested in the *Gaon Sabha* under Section 117(1) of the Act so as to be amenable to resumption under Section 117(6) of the Act. Being a building, it vested in the second petitioner's forefathers under Section 9 of the Act on the date of

vesting. The building of the *Imambara* is claimed to be 100 years old. We must remark that it is the petitioners' burden to establish that the building is 100 years' old or may be younger, but that it was in existence on the date of vesting, that is to say, 7th July, 1949. The benefit of Section 9 of the Act can be claimed only in respect of such buildings as were in existence on the date of vesting. A building, constructed later on, cannot be held to be settled with its owner, occupier etc. In this regard, reference may be made to the decision of this Court in **Basti Ram vs. Nagar Nigam, Ghaziabad and another, 1999 SCC OnLine All 1850. In Basti Ram** *(supra),* it has been held:

"9. Learned counsel for the appellant has argued that the land vested in the plaintiff/appellant under Section 9 of the U.P. Zamindari Abolition and Land Reforms Act Section 9 reads as follows:

"9. Private wells, trees in abadi and buildings to be settled with the existing owners or occupiers thereof.-- (All wells), trees in *abadi* and all buildings situate within the limits of estate belonging to or held by an intermediary or tenant or other person whether residing in the village or not, shall continue to belong to or be held by such intermediary tenant or person, as the case may be, and the site of the wells or the buildings within the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed."

10. Provisions of Section 9 are applicable only when there is evidence and proof of the factum that there existed well or building on the land in question on the date of vesting. There is no averment in the plaint nor there is any finding of fact in this regard. Therefore, the finding of the lower appellate court that the land cannot be said to have been settled with the plaintiff is correct. ....."

(emphasis by Court)

14. Here, the petitioners have annexed no more, by way of evidence about the existence of the *abadi* in Plot No.146, than the extract of the Six Yearly *Khatauni* for the *Fasli* Year 1423-1428, that would correspond to the Calendar Years 2015-16 to 2020-21. There is absolutely no evidence on record, by even as much as a hint, to show that the building that the petitioners claim to be a hundred years old *Imambara* was in existence on the date of vesting. No doubt, there is an averment to that effect, but it is sans evidence. It is difficult, therefore, to accept the petitioners' contention that there was an *Imambara* or a building, by whatever name called, belonging to the petitioners in existence on the date of vesting that could be held to be settled with the petitioners under Section 9 of the Act.

15. In the circumstances, we do not find any force in this petition. It is, accordingly, **dismissed**. No costs.

(2022) 8 ILRA 153
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

Writ C No. 10825 of 2022

Navi Hasan ...Petitioner
Versus
Pachhimanchal Vidyut Vitran Nigam Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Surya Narayan

Counsel for the Respondents:
Sri Rajesh Yadav, Sri Pranjal Mehrotra

A. Civil Law-Electricity-Demand order-Legality of –Respondent No. 2 deliberately ignored the direction and passed the impugned order-Impugned order is a pre-printed order- there is no consideration of the objection filed by the petitioner-respondent no. 2 violated the principles of natural justice-Impugned order is quashed.(Para 1 to 16)

B. The first and foremost principle of natural justice is commonly known as audi alterm partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.(Para 9 to 13)

The petition is allowed. (E-6)

List of Cases cited:

Uma Nath Pandey & ors. Vs St. of U.P. & anr. (2009) 12 SCC 40

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Surya Narayan, learned counsel for the petitioner and Sri Pranjal Mehrotra, learned counsel for the respondents.

2. This writ petition has been filed praying for following reliefs:-

"I) Issue a writ, order or direction in the nature of certiorari quashing the demand order dated 21.03.2022 passed by the Executive Engineer/Prescribed Authority Electricity Distribution Division II, Moradabad filed as Annexure No.1 to this writ petition.

II) Issue a writ, order or direction in the nature of mandamus for summing the opposite party no.2 Executive Engineer/Prescribed Authority Electricity Distribution Division II, Moradabad and punishing him for non compliance of the order dated 22.10.2021 passed by the Division Bench of this Hon'ble Court in Writ -C No. 26241 of 2021 as well as order dated order dated 18.02.2022 passed in Criminal Misc. Application No. 482 Cr. P.C. No. 25367 of 2021 and relating file of the petitioner may kindly be summoned for considering real controversy"

3. The petitioner has earlier filed Writ-C No. 26241 of 2021 (Navi Hasan Versus U.P. Power Corporation Limited and 2 others), which was disposed of by this Court vide order dated 22.10.2021, the operative portion of aforesaid order is reproduced below:-

*".....Accordingly, the writ petition is **disposed of** with the following directions:*

(i) subject to the petitioner depositing a sum of Rs. 25,000/- within a period of one month from today not later than 30 November 2021, the respondent no. 2 shall make available to the petitioner all adverse material that is being relied in support of the communication dated 07.08.2021 (annexed as Annexure No. 1 to the petition);

(ii) upon being thus confronted with the adverse material, the petitioner shall have a right to file a detailed objection within a further period of two weeks therefrom annexing therewith all material as the petitioner may seek to rely on;

(iii) upon receipt of such objection, the said respondent no. 2 shall fix a date for hearing in the matter within a period of two weeks therefrom and pass appropriate and reasoned order, strictly in accordance with law, after hearing the parties within a period of one month therefrom.

For a period of three months from today or till disposal of the aforesaid objection, whichever is earlier, no coercive measure shall be adopted against the petitioner, subject to his complying with the terms of this order.

All further recovery shall abide by the decision to be made by the respondent no. 2.

Failing such objection being filed by the petitioner, for any reasons, the only remedy that may remain open to him may be to contest the matter in appeal....."

4. Despite the aforesaid order, the respondent no.2 has passed the impugned order dated 21.03.2022 in complete disregard to the directions issued by this Court vide aforequoted order dated 22.10.2021 in Writ-C No. 26241 of 202.

5. On 12.07.2022, this Court has passed a detail order and observed as under:-

".....We have perused ***the impugned order and we find that it is pre printed in which merely the name and address of the petitioner, date of notice and amount have been filled up. The conclusion itself are pre printed.*** *Direction of this Court as given in the aforenoted order has been completely ignored consciously. This, prima facie shows gross misconduct on the part of the respondent no.2.*

In view of aforesaid, we direct the respondent nos. 1 and 2 to file counter affidavit by means of their personal affidavit within a week, failing which the respondent no.2 shall remain personally present before this Court....."

6. Today, personal affidavit of the respondent no.1 and counter affidavit by means of personal affidavit of respondent no.2 have been filed by Sri Pranjal Mehrotra, Advocate. In paragraph nos. 4,5, and 6 of the personal affidavit/counter affidavit, the respondent no. 2 has stated as under:-

"4. That it is respectfully submitted that the respondent no.2 has issued the office Memorandum No. 2951 dated 13.07.2022 cancelling the earlier order No. 10503 dated 21.03.2022 (Annexure No.1 to the writ petition). Copy of the aforesaid office memorandum No. 2951 dated 13.07.2022 has also been sent to the petitioner.

5. That it is further respectfully submitted that in compliance of the above quoted directions passed by this Hon'ble Court vide judgment and order dated 22.10.2021, the respondent no.2 has issued letter No. 2983 dated 14.07.2022 to the petitioner, inter-alia, informing the petitioner about the aforesaid office memorandum No. 2951 dated 13.07.2022 and further providing him copy of the checking report and further giving him two weeks time to reply alongwith evidence.

6. That the respondent no.2 tenders the unconditional and unqualified apology for the omission on his part in issuing the earlier order no.10503 dated 21.03.2022 and for the inconvenience caused to this Hon'ble Court and begs for acceptance of the same and to be pardoned. The respondent no.2 being a responsible Government Officer, has the highest regard for the majesty and order passed by this

Hon'ble Court of any court of law. The respondent no.2 has no intention to flout the orders passed by this Hon'ble Court in any manner whatsoever".

7. **The impugned order dated 21.03.2022** passed by the respondent no.2 **is a pre-printed order in which the respondent no.2 has merely filled by pen the name of the petitioner, checking report number and date, notice number and date and the amount of Rs. 5,19,525.00.** At the top of the order, the respondent no.2 has mentioned by pen as under:-

"रिट संख्या 26241/2021 मा0 उव्व न्यायालय के आदेश दिनांक 22.10.2021 के अनुपालन मे उपभोक्ता के द्वारा रूपया 25,000.00 जमा करा दिये गये हैं कुल राजस्व 5,44,525. 25,000त्र5,19,525.00".

8. The fact as aforementioned leaves no manner of doubt that the respondent no.2 while passing the impugned order was very much aware of the order dated 22.10.2021 passed by this Court in Writ-C No. 26241 of 2021 and yet he deliberately ignored the direction and passed the impugned order arbitrary, illegally and in breach of principle of natural justice. The impugned order is pre-printed order in which merely the name and address of the petitioner, checking report number and date, notice number and date and a sum of Rs. 5,19,525/- has been filled by pen. There is absolutely no consideration of the objection filed by the petitioner. Thus, the respondent no.2 has violated the principles of natural justice and acted arbitrarily and illegally. The impugned order has been issued with pre-conceived mind. Since the impugned is in pre-printed format, therefore, it appears that the respondent no.2 is habitual of passing assessment orders in the manner as aforesaid and even has no respect to the orders passed by this Court.

Law of Natural Justice

9. In the case of Uma Nath Pandey & Ors. vs State of U.P.& Anr. [(2009) 12 SCC page 40 para 3], the Hon'ble Supreme Court noted the concept of natural justice and observed that it is another name of common sense justice. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue.

10. **The first** and foremost principle of natural justice is commonly known as **audi alteram partem rule.** It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. **In the absence of a notice of the kind and reasonable opportunity, the order passed becomes wholly vitiated.** Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. It is an approved rule of fair play.

11. **The principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making**

an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Even **an administrative order which involves civil consequences must be consistent with the rules of natural justice.**

12. Expression **`civil consequences'** encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

13. **Natural justice** has been variously defined by different Judges, for instance a duty to act fairly, the substantial requirements of justice, the natural sense of what is right and wrong, fundamental justice and fair-play in action. Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The **first rule** is `nemo judex in causa sua' or `nemo debet esse judex in propria causa sua' that is no man shall be a judge in his own cause. The **second rule** is `audi alteram partem', that is, `hear the other side'. **A corollary has been deduced from the above two rules and particularly the audi alteram partem rule i.e. 'he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right' or in other words, as it is now expressed, `justice should not only be done but should manifestly be seen to be done'. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.**

14. Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated.

15. In his personal affidavit/counter affidavit, the respondent no.2 has stated that he has withdrawn the impugned order dated 21.03.2022 by order dated 13.07.2022 without disclosing in his counter affidavit, the power conferred upon him either under the Electricity Act or under U.P. Electricity Supply Code, 2005 to recall/review the order. The impugned order has been withdrawn by the respondent no.2 during pendency of the writ petition and without leave of the court. This itself prima facie shows misconduct on the part of the respondent no.2.

16. For all the reasons aforestated, the impugned order dated 21.03.2022 is ***quashed***. The respondent no.2 is directed to confront the petitioner with all adverse material within ten days from today. Thereafter, the petitioner may submit his objection before the respondent no.2 within next three weeks. Thereafter, the respondent no.2 shall pass a reasoned and speaking assessment order in accordance with law within next four weeks after affording reasonable opportunity of hearing to the petitioner.

17. The writ petition is ***allowed with cost of Rs. 1,00,000/-,*** which the

respondent no.2 shall pay to the petitioner by account payee cheque or bank draft.

(2022) 8 ILRA 158
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ C No. 15854 of 2022

Komal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kr. Srivastava

Counsel for the Respondents:
C.S.C.

A. Civil Law-Employment-fair price shop agent-compassionate appointment-rejection-challenged-petitioners claims dependency on her grandfather, during his lifetime-she claims entitlement to compassionate appointment to the fair price shop agency held by the deceased-As per definition of family in Clause IV (10) of the Government Order, petitioner is neither included under any of the specific relationship nor she pleaded any special fact either before the authority or the Court-Also the G.O. dated 05.08.2019 has not been challenged-Once, policy is not shown to include a grandchild in definition of family of a fair price shop agent, that rule may never arise on strength of indulgence granted by Court-Hence, no substance in claim of the petitioner.(Para 1 to 14)

The petition is dismissed. (E-6)

List of Cases cited:

1. Ashok Kumar Vs St. of U.P. & ors. Misc. Single No. 2899 of 2015

2. Sunil Kumar Yadav Vs St. of U.P. & ors. Misc. Single No. 13015 of 2020

3. Akansha Singh Vs St. of U.P. & ors.Writ C No. 32296 of 2021

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Shri Sanjay Kumar Srivastava, learned counsel for the petitioner and Shri Rajesh Khanna, learned Standing Counsel.

2. Present writ petition has been filed to quash the order dated 8.4.2022 passed by respondent no.3/ District Supply Officer, Prayagraj, rejecting the petitioner's application to grant her compassionate appointment, as fair price shop agent at Prakhand-1, Nayapura, Stanley Road, Prayagraj.

3. Undisputedly, the petitioner's grand father namely Ram Naresh was the fair price shop agent at the above described location. It is the petitioner's case that the said Ram Naresh ran the fair price shop without any complaint till his death on 23.3.2019. He was survived by his three sons - Uma Shanker (petitioner's father), Shiv Shanker and Roop Chand and, two married daughters - Smt. Abhilasha and Smt. Kamlesh. According to the petitioner, she has two brothers namely - Vishal and Avinash and, one sister namely Smt. Ruchi.

4. In these circumstances, the petitioner claims dependency on her grand father, during his lifetime. Accordingly, she claims entitlement to compassionate appointment re the fair price shop agency held by the deceased Ram Naresh, in his place. Reliance has been placed on three decisions of this Court in **Ashok Kumar**

Vs. State of U.P. & Ors., Misc. Single No. 2899 of 2015, decided on 20.7.2016; **Sunil Kumar Yadav Vs. State of U.P. & Ors., Misc. Single No. 13015 of 2020,** decided on 3.9.2020 and; **Akansha Singh Vs. State of U.P. & Ors., Writ - C No. 32296 of 2021,** decided on 4.12.2021.

5. On the other hand, learned Standing Counsel has vehemently opposed the writ petition. He would submit, family of a fair price dealer has been described in Clause IV(10) of the Government Order dated 5.8.2019. It reads:

7. Relying on that definition, it has been submitted, petitioner is a grand-daughter of the deceased fair price shop agent Ram Naresh. She is neither included under any of the specific relationships included (as noted above), nor she has shown herself to be wholly dependent on the deceased Ram Naresh as would entitle her to claim grant of compassionate appointment.

"यदि किसी नगरीय क्षेत्र का उचित दर विक्रेता अथवा उसके परिवार के सदस्य, सभासद या अध्यक्ष का चुनाव जीत जाता है तो उसके अथवा उसके परिवार के सदस्य के नाम चल रही उचित दर दुकान का अनुबन्ध उसे तत्काल समर्पित करना होना अन्यथा प्रश्नगत अनुबन्ध निरस्त घोषित कर दिया जायेगा। परिवार की परिभाषा वही होगी, जो उ०प्र० आवश्यकवस्तु (वितरण के विनियमन का नियंत्रण) आदेश 2016 में दी गयी है-

- *परिवार का मुखिया।*
- *पति/पत्नी विधिक रूप से अपनाये गये दत्तक सन्तान सहित.*
- *सन्तान जो परिवार के मुखिया पर पूर्ण रूप से आश्रित हो।*
- *अविवाहित, विधिक रूप से पृथक और विधवा बेटी, और*
- *परिवार के मुखिया पर पूर्ण रूप से आश्रित माता/पिता।"*

8. With respect to the decisions relied by learned counsel for the petitioner, it has been submitted, those are decisions on facts. They do not lay down the law. Therefore, they have no binding efficacy.

9. Having heard learned counsel for the parties and having perused the record, the facts are undisputed. The petitioner is the grand-daughter of the deceased fair price shop agent Ram Naresh. The petitioner's father Uma Shankar is alive. Therefore, considering societal practice and behaviour, that fortunate circumstance itself strongly suggests existence of dependency of the petitioner on her father, if at all. It is especially so- in view of inclusion of unmarried or legally separated or widowed daughter as a dependent of her father (not grandfather) under Clause IV(10) of the Government Order dated 5.8.2019. Also, the definition of the family given in Clause IV(10) of the Government Order dated 5.8.2019 has not been challenged. Beyond that relations - at one level up and below are included in the definition of family along with spouse of the fair price shop agent. No special fact was pleaded either before the authority or before this Court, by the petitioner, to claim her dependency on her grand-father Ram Naresh, during the lifetime of her father.

10. What survives for consideration is whether the petitioner is entitled to grant of fair price shop agency on the strength of three decisions of this Court, referred to above. Here, it may be noted, in **Ashok Kumar** (supra), fair price shop agent died

on 12.3.2014. Petitioner **Ashok Kumar** was his grandson. However, it was his specific case noted in paragraph 3 (of the order dated 20.7.2016 passed in that case), that the father of **Ashok Kumar** had pre-deceased his father. Similarly, in **Sunil Kumar Yadav (supra)**, in paragraph 3 of the order dated 3.9.2020, it was specifically recorded, Hausila Prasad (father of that petitioner) had pre-deceased his father Sitaram Yadav, the duly appointed fair price shop agent in that case. In **Akansha Singh (supra)**, again, father of that petitioner had pre-deceased his father. In paragraph 3 of that report, it has been noted, the grand father of the petitioner Dharam Pal Singh died on 31.12.2020. He was survived by that petitioner's grand mother, mother and sister (but not father).

11. Thus, in all cases, relied upon by learned counsel for the petitioner, father of all those petitioners had pre-deceased their father, who happened to be the deceased fair price shop agent. Thus, the question whether those petitioners were dependent on their respective father, on the date of their claim being made, did not arise. In fact, each of those petitioners claimed to be wholly dependent on their grand father, for the reason of prior death of their own father.

12. Even otherwise, it is not for the Court to legislate or frame policy decisions. Once, the policy is not shown to include a grandchild in the definition of family of a fair price shop agent, that rule (in law) may never arise on the strength of indulgence granted by the Court in individual facts of a case.

13. On account of the above, the decisions relied are found to be wholly distinguishable.There is no substance in the claim of the petitioner. The same has been rightly rejected.

14. Writ petition lacks merit and is accordingly **dismissed**. No order as to costs.

(2022) 8 ILRA 160
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2022

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ C No. 18359 of 2022

Raje Lal Uttam ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Himanshu Raghav Pandey, Sri Ram Kishore Pandey

Counsel for the Respondents:
C.S.C., Sri Hari Narayan Singh, Sri S.K. Pandey, Sri S.N. Pandey

A. Civil Law-U.P. Revenue Code, 2006-Sections 67& 67(A)- Encroachment of public land-petitioner was found to be illegal encroachment over the disputed parcels of land-Petitioner invoked the protection of 67(A) of the Code on the footing that his residential house was erected 55 years ago and that a residential patta was granted to his predecessors.-Court below neglected to consider the facts-Courts in proceedings under section 67 of Code are under obligation of law to decide the eligibility of the notice for protection under Section 67(A) of the Code-Failure of courts below to enquire into the validity of the defence of the petitioner has resulted into a miscarriage of justice-Impugned order set aside.(Para 1 to 22)

B. Section 67(A) of the Code confers rights on certain people who have encroached upon public land. The person who seeks protection of

Section 67(A) of the Code should be in the category of persons referred to in Section 63 of the Code. The house of such persons should be existing in the disputed parcels of land on or before 29 November 2012.(Para 13)

The petition is allowed. (E-6)

(Delivered by Hon'ble Prakash Padia, J.)

1. Today when the matter is taken up, Sri S.K. Pandey Advocate along with Sri S.N. Pandey, Advocate filed Vakalatnama on behalf of Reetesh Kumar Uttam along with impleadment application for him impleadment as respondent No.5 in the petition.

2. The impleadment application is supported by an affidavit. Cause shown is sufficient.

3. The impleadment application is allowed.

4. Learned counsel for the applicants is permitted to implead Reetesh Kumar Uttam as respondent No.5 in the petition during the course of the day.

Order on the Petition:-

5. Heard Sri Ram Kishore Pandey, learned counsel for the petitioner, learned Standing Counsel for the respondents No.1 to 3-State, Sri Hari Narayan Singh, learned counsel for the respondent No.4-Gaon Sabha and Sri S.K. Pandey Advocate along with Sri S.N. Pandey, learned counsel for respondent No.5

6. By the impugned order dated 22.01.2021 passed by the respondent No.3-Tehsildar (Judicial)/Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar rendered in proceedings registered as Suit No.03062 of 2019, Computerized Suit No.T201903410403062 (State of U.P. Vs. Raje Lal) under Section 67 of the Uttar Pradesh Revenue Code, 2006 (hereinafter referred to as the 'Code'), the petitioner was found to be illegal encroachment over the disputed parcels of land. The learned appellate court/Additional District Magistrate (Judicial), Kanpur Nagar by the impugned order dated 20.07.2021 agreed with the findings of the learned trial court/Tehsildar (Judicial)/Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar, and affirmed its judgement dated 22.01.2021.

7. Learned counsel for the petitioner contends that the ancestors of the petitioner were allotted a residential patta over the disputed parcels of land. The predecessors in interest of the petitioner had erected a residential house on the disputed parcels of land almost 55 years ago. This fact was confirmed in the report submitted by the Lekhpal which is appended as annexure 4 to the writ petition. The learned courts below erred in law and entered perverse findings by failing to consider the aforesaid defence as well as corroborative evidence in that regard. The petitioner is entitled to the protection of Section 67(A) of the Code.

8. A perusal of the impugned order dated 22.01.2021 and the order dated 20.07.2021 corroborates the submission of learned counsel for the petitioner.

9. The aforesaid facts could not be disputed by the learned Standing Counsel for the respondents No.1 to 3-State, Sri Hari Narayan Singh, learned counsel for the respondent No.4-Gaon Sabha and Sri

S.K. Pandey Advocate along with Sri S.N. Pandey, learned counsel for respondent No.5.

10. The petitioner had clearly invoked the protection of 67(A) of the Code on the footing that his residential house was erected 55 years ago and that a residential patta was granted to his predecessors. The learned courts below neglected to consider the aforesaid facts and defences raised by the petitioner. This reflects non application of mind.

11. Adverting to the eligibility of the petitioner for protection under Section 67(A) of the Code and the rights purportedly accruing to him thereunder, the appellate court held that it was open to the petitioner to take out proceedings under Section 67(A) of the Code for grant of appropriate relief as claimed by him. After noticing the aforesaid facts, the appellate court agreed with the judgment of the trial court and dismissed the appeal. The trial court did not return any finding on this issue.

12. Section 67 as well as Section 67(A) of the Code reflect the composite intent of legislature. The legislature by enacting the aforesaid provision has recognized the vulnerability of the State land to illegal encroachment and the need for urgent corrective measures. Simultaneously the legislature has also acknowledged the reality of a large number of persons who have erected dwelling units on lands which are not reserved for any public purposes. The legislature has protected their rights in the manner prescribed in the provision. For ease of reference the provisions are extracted hereunder:

"67 Power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property.- (1) Where any property entrusted or deemed to be entrusted under the provisions of this Code to a Gram Panchayat or other local authority is damaged or misappropriated, or where any Gram Panchayat or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or 34 misappropriation of the property or for wrongful occupation, as the case may be, be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is

not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the Assistant Collector under sub-section (3) or sub-section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provision of this Code, and subject to the provisions of this section every order of the Assistant Collector under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation. - For the purposes of this section, the word 'land' shall include the trees and buildings standing thereon

67-A Certain house sites to be settled with existing owners thereof.- (1) If any person referred to in sub-section (1) of section 64 has built a house on any land referred to in section 63 of this Code, not being land reserved for any public purpose, and such house exits on the November 29, 2012, the site of such house shall be held by the owner of the house on such terms and conditions as may be prescribed.

(2) Where any person referred to in sub-section (1) of section 64, has built a house on any land held by a tenure holder (not being a government lessee) and such house exits on November 29, 2000, the site of such house, notwithstanding anything contained in this Code, be deemed to be settled with the owner of such house by the tenure holder on such terms and conditions as may be prescribed.

Explanation. - For the purpose of sub-section (2), a house existing on November 29, 2000, on any land held by a tenure holder, shall, unless the 35 contrary is proved, be presumed to have been built by the occupant thereof and where the occupants are members of one family by the head of that family. "

13. Section 67(A) of the Code confers rights on certain people who have encroached upon public land. The prerequisite conditions for invoking the protection of Section 67(A) of the Code are these. The person against whom proceedings are taken out has built his house on any land referred to in Section 63 of the Code, the person who seeks protection of Section 67(A) of the Code should be in the category of persons referred to in Section 63 of the Code. The land should not be reserved for any public purpose. The date of the construction of the house should be prior to 29 November, 2012. The house of such persons should be existing in the disputed parcels of land on or before 29 November 2012.

14. In many instances, as indeed in the present case, the noticee under Section 67 of the Code may invoke the protection of Section 67(A) of the Code to resist the proceedings under Section 67 of the Code.

15. The authority/ court having jurisdiction to decide the proceedings taken out under Section 67 of the Code or Section 67(A) of the Code is the same. When the defence of Section 67(A) of the Code is taken in proceedings of Section 67 of the Code, the same issues will be directly and substantially in issue in both the proceedings. Usually in such matters pleadings, defence, and evidence of the parties are same in both the proceedings. In case proceedings under Section 67 and 67(A) of the Code are conducted separately and in isolation to one another, it would lead to multiplicity of litigation and

inconsistent judgments. There will also be an avoidable delay in decision of the controversy and may even result in miscarriage of justice.

16. The courts in proceedings under Section 67 of the Code are under obligation of law to decide the eligibility of the noticee for protection under Section 67(A) of the Code. In case defence under Section 67(A) of the Code is taken by the noticee, the said proceedings shall be registered separately. But both cases will be consolidated and heard and decided together.

17. This procedure would faithfully implement the legislative intent and also serve the interest of justice.

18. In the facts and circumstances of this case, the failure of the learned courts below to enquire into the validity of the defence of the petitioner under Section 67(A) of the Code has resulted into a miscarriage of justice.

19. In the wake of preceding discussion, the impugned order dated 22.01.2021 and the order dated 20.07.2021 are vitiated and contrary to law.

20. The order dated 22.01.2021 passed by the respondent No.3-Tehsildar (Judicial)/Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar and the order dated 20.07.2021 passed by the learned appellate court/Additional District Magistrate (Judicial), Kanpur Nagar, are liable to be set aside and are set aside.

21. The matter is thus remitted to the respondent No.3-Tehsildar (Judicial)/ Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar for a fresh determination consistent with the observation made in this judgment.

22. The following directions are being passed to serve the interest of justice in this case:

(1) The petitioner shall file a fresh application under Section 67(A) of the Code before the respondent No.3-Tehsildar (Judicial)/Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar within a period of one month from the date of production of a certified copy of this order.

(2) The respondent No.3-Tehsildar (Judicial)/Assistant Collector 1st Class, Tehsil-Narwal, District-Kanpur Nagar, shall register the proceedings under Section 67(A) of the Code upon submission of such application.

23. The writ petition is allowed to the extent indicated above.

(2022) 8 ILRA 164
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 20356 of 2022

Hariraj Singh Choudhary ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajendra Prasad Singh, Sri Nirankar Singh

Counsel for the Respondents:
C.S.C., Sri Bal Mukund Singh, Sri Brajendra Kumar Pandey, Sri Nikhil Kumar, Sri Mohd. Afzal.

A. Civil Law-UP Cooperative Societies Act, 1965-UP Cooperative Societies Rules 1968-Rules 457, 458, 459, 464 & 465-Petitioner elected as Chairman of the Committee of Management of the District Cooperative Bank Limited-elected members of the committee presented a notice for no confidence motion-meeting was adjourned by the Presiding Officer on the first occasion for administrative reasons and on the second event on account of being Corona positive-21 days prior notice to be given for holding a meeting for purpose of consideration of proposed no confidence motion against a cooperative society-Giving of adequate time as provided in second proviso of Rule 458 is necessary because members of Cooperative Society can make due arrangements for attending meeting. (Para 1 to 14)

The petition is dismissed. (E-6)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
& Hon'ble Jayant Banerji, J.)

1. Heard Shri Nirankar Singh, learned counsel for the petitioner, Shri Satyam Singh, learned Standing Counsel for the respondent nos. 1, 2, 3, Shri Bal Mukund Singh, learned counsel for the respondent no. 4 and Shri Nikhil Kumar, learned counsel for the respondent no. 4.

2. This writ petition has been filed praying for the following relief:

"I Issue a writ, order or direction in the nature of certiorari quashing the notice/order dated 22/06/22 issued by the opposite party no 2, in the interest of justice;

II Issue a writ order or direction in the nature of mandamus commanding the opposite parties especially the opposite party nos. 3 and 4 herein not to give effect to the order dated 20/06/22, issued by the opposite party no. 2 herein, in the interest of justice;

III Issue a writ order or direction in the nature of mandamus commanding the opposite parties to strictly adhere to the provisions as contained in the UP Cooperative Societies Act 1965 and the UP Cooperative Societies Rules 1968, in the interest of justice

IV Issue any other order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case, in favour of the petitioner, in the interest of Justice."

3. Briefly stated facts of the present case are that the petitioner was elected as Chairman of the Committee of Management of the District Cooperative Bank Limited, Ghaziabad in the election held on 10th-11th May, 2018. There are total 12 members of the Committee of Management. Learned counsel for the petitioner has stated that these 12 members have elected the petitioner as Chairman in the election held on 11th May, 2018. The respondent nos. 5 to 11 are elected members of the Committee of Management, who presented a notice for no confident motion in terms of Rule 455, 456 and 457 of the Uttar Pradesh Co-operative Societies Rules, 1968 (hereinafter referred to as the 'Rules, 1968') on 17.6.2022. Pursuant to the aforesaid notice for no confidence motion, the respondent no. 2 fixed the date, time and place of meeting and nominated the Additional District Magistrate (City), Ghaziabad as Presiding Officer for the meeting. However, on the date fixed i.e. 20.7.2022 the meeting could

not be held by the Presiding Officer for administrative reasons as reflected in his order dated 19.7.2022 adjourning the meeting for 3.8.2022.

4. Today, Shri Nimai Das, learned Additional Chief Standing Counsel and Shri Satyam Singh, learned Standing Counsel representing the State-respondents have stated on instructions that today's meeting of no confidence motion cannot be held since the Presiding Officer has tested Corona positive and is in quarantine. They further informed that under the circumstances, a notice in terms of sub-rule (1) and sub-rule(2) of Rule 458 of the Rules, 1968 shall be issued by the District Magistrate, Ghaziabad within three days and on the date fixed the meeting shall be held.

Submissions

5. Learned counsel for the petitioner submits as under:

(i) Under Rule 457 of the Uttar Pradesh Co-operative Societies Rules, 1968, notice of no-confidence motion shall personally be presented by at least three members to the specified authority i.e. District Magistrate, whereas in the present case, the notice for no-confidence motion was not presented personally before the District Magistrate i.e. respondent no.2. Since the notice for no-confidence motion itself is defective, therefore, the impugned notice for no-confidence motion dated 22.6.2022 is invalid.

(ii) In the impugned notice of no-confidence motion dated 22.6.2022, there is no compliance of sub-Rule (2) of Rule 458 and, therefore, the notice is defective.

(iii) Since, 35 days period for meeting as provided in the first proviso to sub-rule (1) of Rule 458 has expired, therefore, the meeting for no confidence cannot be held by the respondent no. 2 i.e. District Magistrate.

6. Learned Standing Counsel and learned Counsel for the respondent no. 4 and 7 support the impugned order.

Reasons and Findings

7. We have carefully considered the submission of the learned counsel for the parties.

8. The facts as aforementioned have not been disputed by the learned counsel for the petitioner and the learned counsel for the aforenoted respondents. We have confronted learned counsel for the petitioner with paragraph 15 of the counter affidavit with respect to the submissions as recorded in sub-rule (1). After perusal of paragraph 15 of the personal counter affidavit of the respondent no. 2 dated 28.7.2022, learned counsel for the petitioner has stated that the facts stated in paragraph 15 of the aforesaid personal affidavit with regard to the presentation of no confidence motion by the members mentioned therein, is not disputed.

9. In the aforesaid paragraph 15 of the personal affidavit, the respondent no. 2 has stated as under:

"15. That the contents of paragraph no.21 of the writ petition are incorrect as stated hence denied. It is further stated that **on 17-06-2022 Sri Govind Tyagi, Sri Rajiv Lochan Sharma,**

Sri Kunwar Pal, Sri Rajiv Kumar, Smt. Chetna Yadav, Km. Chhavi Yadav and Sri Sitaram (Members of Committee of Management District Cooperative Bank Ltd. Ghaziabad) were personally present before respondent no.2, i.e. District Magistrate Ghaziabad and submitted their application 17-06-2022 for no confidence motion against Hariraj Singh (Petitioner) (Chairman District Cooperative Bank Ltd. Ghazaiabad) and also submitted their affidavit which were 7 in number out of 12 members of committee of Management Ghaziabad District Cooperative Bank Ghaziabad and as such their application accepted in accordance with the provisions of Rule 456 and 457 of U.P. Cooperative Societies Rules 1968. It is further stated that the District Magistrate Ghaziabad nominated the Additional District Magistrate Nagar (Ghaziabad) as a Presiding officer of the meeting in which the resolution for no confidence shall be considered as provided under Rule 459(1) of U.P. Cooperative Societies Rules 1968 by the impugned order dated 22-06-2022. The Photocopy of order dated 22-06-2022 is being filed herewith and marked as Annexure no.2 to this affidavit. From perusal of order dated 22-06-2022, it is clear that the District Magistrate (specified authority) nominated the Additional District Magistrate (City Ghaziabad) as a Presiding Officer of the meeting in which the resolution for no confidence shall be considered as provided in Rules 459(1) of Rules 1968. It is further stated that the Additional District Magistrate (City Ghaziabad)/Presiding Officer issued notices to the entire members of Committee of Management of District Cooperative Bank Ltd. Ghaziabad through Secretary dated 25-06-2022, 19-07-2022, 22-07-2022 and 23-07-2022 for consideration of the proposal of no confidence motion, in accordance with the Rules 456, 457, 458 and 459 of U.P. Cooperative Societies Rules 1968. The photocopy of letter dated 25-06-2022, 19-07-2022, 22-07-2022 and 23-07-2022 are being filed herewith and marked as Annexure no.3 to this affidavit. And as such there is no illegality or irregularity in the impugned order and the writ petition filed by the petitioner is based upon misrepresentation of facts, the same is liable to be dismissed."

10. In view of the undisputed position as stated in the aforenoted highlighted portion of paragraph 15 of the personal affidavit of the respondent no. 2 dated 27/28.8.2022, the first submission deserves to be rejected and we hold that the notice for no confidence motion has been presented by the respondent nos. 5 to 11 in accordance with rules. To consider the aforenoted submissions (ii) and (iii) of the learned counsel for the petitioner, it would be appropriate to first refer to provisions of Rule 458, 459, 464 and 465 of the Rules, 1968, as under:

"**458.** (1) On receipt of the notice of no confidence as provided in Rules 456 and 457, the specified authority shall fix such-time, date and place as, he may consider suitable for holding a meeting for the purpose of consideration of the proposed no confidence motion:

Provided that such meeting shall be held within thirty-five days of the receipt of the notice of no confidence:

Provided further that at least twenty-one day's notice shall be given for holding such meeting.]

(2) The notice for meeting under sub-rule (1), shall also provide that in the event of the no confidence motion being

duly carried, election of the new Chairman or Vice-Chairman, as the case may be, shall also be held in the same meeting.

459. (1) The specified authority shall also nominate any Gazetted Government servant (other than an Officer of Department which is concerned with the supervision and administration of the Society concerned) to act as a Presiding Officer of the meeting in which the resolution for no confidence shall be considered.

(2) The quorum for such a meeting of the Committee of Management shall be '[more than] half of the total number of members of the Committee.

464. If the motion for no confidence fails for want of quorum or lack of requisite majority at the meeting, no subsequent meeting for considering the motion of no confidence shall be held within six months of the date of the previous meeting.

465. The specified authority referred to in the rules of this part shall be District Magistrate of the district where the headquarters of the society is situated."

11. In the present writ petition only the order dated 22.6.2022 has been prayed to be quashed. We have perused the order dated 22.6.2022 issued by the respondent no. 2 i.e. District Magistrate, Ghaziabad and we find that it is an order fixing date, time and place of the meeting for no confidence in terms of Rule 458(1) of the Rules and nomination of a Gazetted Officer as Presiding Officer in terms of Rule 459(1). and 465 of the Rules, 1968. Thereafter, notice was required to be issued, which has been issued to the members by the Presiding Officer and not by the respondent no. 2.

12. Therefore, under the circumstance, neither the notice of no confidence nor the impugned order under Rule 458(1) of the Rules, 1968 can be said to suffer from any legal infirmity.

13. The first proviso to sub-rule (1) of Rule 458 provides that meeting shall be held within 35 days from the receipt of the notice of no confidence motion and there must at at least 21 days notice. The first proviso providing the meeting to be held within 35 days, in our considered view, was enacted with the object of holding the meeting for the purpose of consideration of the proposed no confidence motion expeditiously. However, where the notice for no confidence motion as moved by the members for convening the meeting does not suffer from any infirmity then any lapse on the part of the authority in convening the meeting to consider no confidence motion, cannot render the notice for no confidence infructuous. If the first proviso to sub-rule (1) of Rule 458 is interpreted strictly, in the manner as suggested by the learned counsel for the petitioner, the result would be that notice of no confidence motion moved by the members, without being tested at the floor of the house, can be easily defeated by collusion, negligence/lapses. Thus, such strict interpretation would be against the basic principles of democracy and would affect the survival of democratic institutions. Therefore, the first proviso to sub-rule (1) of Rule 458, in our considered view, is directory, and it means that normally the meeting shall be held within 35 days of the receipt of notice of no confidence. But in extenuating circumstances, this limitation of 35 days would be viewed as directory. In the present set of facts, as already noticed above, the meeting has been adjourned, not because of any circumstances created or because of any fault on the part of the members who moved the notice for no confidence motion, instead the meeting was

adjourned by the Presiding Officer on the first occasion for administrative reasons and on the second event, i.e. today, on account of his being tested Corona positive and therefore, it is not possible for the Presiding Officer to hold the meeting.

However, considering the second proviso to sub-rule (1) of Rule 458 that provides for at least 21 days notice to be given for holding a meeting for the purpose of consideration of the proposed no confidence motion, it stands to reason that adequate time ought to be afforded to the members of Cooperative Bank to attend that meeting. Giving of adequate time as provided in the second proviso aforesaid is necessary because the members of the Cooperative Society/Bank can make due arrangements for attending the meeting. Therefore, the second proviso aforesaid is required to be compulsorily followed.

14. For all the reasons aforestated, we do not find any merit in this writ petition, the writ petition is **dismissed** with the following directions:

(i) The respondent no. 2 shall himself give at least 21 days clear notice of the meeting to all the members within a week from today. The notice shall strictly comply with the provisions of sub-rule (1) and sub-rule (2) of Rule 458 of the Rules, 1968.

(ii) On the date fixed, the meeting shall be certainly held either by the respondent no. 2 i.e. District Magistrate or by his nominee nominated under Rule 459 of the Rules, 1968.

15. Learned Additional Chief Standing counsel shall inform this order in writing to the respondent no. 2 i.e. District Magistrate, Ghaziabad within 48 hours for strict compliance.

(2022) 8 ILRA 169
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.08.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 21692 of 2021

Drs Wood Products ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Alok Singh, Suyash Agarwal

Counsel for the Respondents:
C.S.C., Digvijay Nath Dubey

A. Civil Law-U.P. Goods and Service Tax Act, 2017-Sections 29 & 30 -Central Goods and Service Tax Act 2017-Section 29 & Central Goods and Services Tax Rules, 2017-Rule 22(1) – Cancellation of GST registration-validity- Registration cancelled on a vague show cause notice without any allegation or proposed evidence against the petitioner-Principles of administrative justice violated-Cancellation of registration erroneous as the allegations were only to the ground that tax payer found non-functioning at the principal place of business-the order rejecting the application for revocation of cancellation takes the matter to the height of arbitrariness as no reasons recorded-The authorities failed to act in the light of the spirit of the GST Act as it discloses absence of application of mind-the orders cannot be sustained as they are contrary to the mandate of Section 29 and 30 of the Act as well as the principles of adjudication by the quasi-judicial authorities. (Para 1 to 25)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Oryx Fisheries Pvt Ltd Vs U.O.I. & ors. (2010) 13 SCC 427

2. Commr of Central Excise, Bangalore Vs Brindavan Beverages (P) Ltd & ors. (2007) 5 SCC 338

3. Apparent Mkt Pvt. Ltd. Vs St. of U.P. ors. Writ Tax No. 348 of 2021

4. M/s Ansari Cons. Vs Addl Commr CGST (Appeals) & ors. Writ Tax No. 626 of 2020

5. M/s S.S. Traders Vs St. of U.P. & ors. Writ Tax No. 651 of 2021

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Shri Suyash Agarwal and Shri Alok Singh, learned counsel for the petitioner, learned Standing Counsel for the State and Shri Digvijay Nath Dubey, learned counsel for respondent no.4.

2. The present petition has been filed 18.01.2021 whereby the appeal preferred by the petitioner has been rejected. The said appeal was preferred against the order dated 15.07.2020 whereby the application for revocation of the cancellation of the registration was rejected.

3. The facts, in brief, are that the petitioner is a partnership firm carrying on business of manufacture and trading of Veneer and was granted the registration number under CGST Act 2017. It is also claimed that prior to the enforcement of the GST, the petitioner was registered under the UPVAT Act and the CST Act also. It is also claimed that the assessments were carried out in respect of the petitioner establishment under the VAT Act and the CST Act for the assessment year 2017-18. The petitioner claims to be carrying out the business from the registered place of business as registered with the GST Authorities and are paying taxes. A show-cause notice dated 08.05.2020 was issued to the petitioner under Rule 22(1) of the GST Rules whereby it was alleged that on the basis of the information which has come to the notice of the Assistant Commissioner it appears that your registration is liable to be cancelled for the following reasons:

"1. Taxpayer found Non-functioning/Not Existing at the Principal Place of Business"

4. Subsequent thereto, an order came to passed on 22.05.2020 (Annexure - 12) wherein the following has been recorded:

"This has reference to your reply dated 17/05/2020 in response to the notice to show cause dated 08/05/2020

Whereas no reply to notice to show cause has been submitted.

The effective date of cancellation of your registration is 22/05/2020."

5. The petitioner while trying to upload his E-Way Bill came to know that the registration of the petitioner - firm has been cancelled on 08.05.2020, as such, the petitioner moved an application for revocation of the order dated 08.05.2020 in terms of the provisions contained in Section 30 of the U.P. GST Act, 2017 (hereinafter referred to as 'the Act'). The said application specifically stated that the fact with regard to cancellation came to the knowledge of the petitioner in the month of June, 2020. In any case, the said application was within the time prescribed under Section 30 of the Act. In response to

the said application filed by the petitioner, a show-cause notice was again issued on 13.06.2020 stating that the application for revocation is liable to be rejected for the following reason:

"firm was properly issued show cause notice vide ref number ZA090520010436Y, no satisfactory explanation was received within prescribed time."

6. In response to the said show-cause notice, the petitioner moved an application seeking 15 days extension of time to give a reply in view of the marriage of the daughter of the petitioner scheduled on 24.06.2020. Without considering the said application, an order came to be passed on 15.07.2020 rejecting the application for revocation of cancellation of the registration on the reasons as recorded in the show cause notice that no satisfactory explanation was received within the prescribed time. The order is quoted hereinbelow:

"This has reference to your reply filed vide ARN AA0906203362399 dated 13/06/2020. The reply has been examined and same has not been found to be satisfactory for the following reasons:

1. Any Supporting Document - Others (Please specify) - firm was properly issued show cause notice vide ref number ZA090520010436Y. no satisfactory explanation was received within prescribed time.

Therefore, your application is rejected in accordance with the provisions of the Act."

7. Aggrieved against the said order, an appeal was filed under Section 107 of the Act before the Appellate Authority constituted under the Act. In the grounds of appeal, which are on record as Annexure - 17, the petitioner demonstrated by means of averments that the firm of the petitioner was running from the premises in question. During the pendency of the appeal, the petitioner also filed written submission before the Appellate Authority in which all the documents as deemed fit by the petitioner were presented before the Appellate Authority. The Appellate Authority dismissed the appeal recording that an inspection was carried out on 20.05.2020 in respect of the premises of the petitioner and on the site in question, the committee comprising of three persons did not find any activity pertaining to the firm over the property in question. It also records that the partner of the firm Shri Arun Jindal was called on phone but he could not give any clear reply. It was also recorded that in the said inspection at the given place of interest, no stocks or commercial activity was found and the partners of the firm did not co-operate in the inspection. It also records that in the inspection report another firm in the name of M/s Star Enterprises, 24 Gandhi Nagar, Sitapur with another GST number was found working and on the spot, the owner of the firm Mr. Imran was found and on the said place the said firm M/s Star Enterprises was found to be working. The said report, which was relied upon, also referred to the license from the Forest Department. It was also recorded that in the inspection report there was a mention that over the property bearing Gata No.56, BKT, Lucknow, the said firm M/s Star Enterprises had taken the property on lease from one Shri Arun Jindal and nothing was found in respect of the petitioner firm over the property in question. It was also recorded that even earlier in a search carried out on 15.05.2018 by SIB, it has

come to the knowledge that on the place in question, no activity of manufacturing or selling was being carried out and no commercial activities were found and based upon the said report, he formed an opinion that the firm was got registered only with a view to help in evasion of taxation.

8. Learned counsel for the petitioner has placed on record a show-cause notice dated 28.05.2021 issued to the petitioner - firm by the CGST alleging that on the basis of inspection carried out at the petitioner premises, goods found in the premises were stored contrary to the rules and thus, were liable to be confiscated. He also argues that on 20.06.2020, the goods of the petitioner were seized on the ground that the goods were being carried on the basis of expired E-Way bill.

9. On the basis of the facts as narrated above, learned counsel for the petitioner argues that the show-cause notice is bereft of any facts on the basis of which the petitioner was called upon to file a reply. He argues that the show-cause notice is meant to put the assessee on guard and to give a reply in respect of alleged charges against him, whereas in the present case the show-cause notice is totally silent with regard to the averments contained or reply to be made against the petitioner.

10. Learned counsel for the petitioner further argues that the show-cause notice which led to the initial cancellation of the registration was never served upon the petitioner and in any case, if the petitioner had applied for revocation of cancellation of registration in terms of the mandate of Section 30 of the Act, it was incumbent upon the Assessing Authority to have passed an order considering the larger mandate of Section 30 of the Act, which has not been done. He further argues that the Appellate Authority has erred in dismissing the appeal on the grounds, which are totally extraneous to the proceedings as the inquiry of the year 2018 or inspection report dated 20.03.2020 were neither the basis of the show-cause notice nor were ever supplied to the petitioner nor was the petitioner ever confronted to give reply and response to the said inquiry. He further argued that in any event, on the one hand the allegations against the petitioner are that no commercial activities were being carried out at the place of registration on the other hand the CGST as well as the UP GST Authorities have alleged shortage of finished goods and seizure of the goods on account of expired E-Way bill respectively. He draws my attention to Section 29 of the Act, which provides for cancellation of registration and on the grounds on which the same can be done.

Section 29 of the Act is being quoted hereinbelow:

*"**Section 29: Cancellation or Suspension of Registration.**- (1) The proper officer may, either on his own motion or on an application filed by the registered person or by his legal heirs, in case of death of such person, cancel the registration, in such manner and within such period as may be prescribed, having regard to the circumstances where, -*

(a) the business has been discontinued, transferred fully for any reason including death of the proprietor, amalgamated with other legal entity, demerged or otherwise disposed of; or

(b) there is any change in the constitution of the business; or

(c) the taxable person is no longer liable to be registered under Section 22 or Section 24 or intends to opt out of the

registration voluntarily made under sub-section (3) of Section 25:

Provided that during pendency of the proceedings relating to cancellation of registration filed by the registered person, the registration may be suspended for such period and in such manner as may be prescribed.

(2) The proper officer may cancel the registration of a person from such date, including any retrospective date, as he may deem fit, where,-

(a) a registered person has contravened such provisions of the Act or the rules made thereunder as may be prescribed; or

(b) a person paying tax under section 10 has not furnished returns for three consecutive tax periods; or

(c) any registered person, other than a person specified in clause (b), has not furnished returns for a continuous period of six months; or

(d) any person who has taken voluntary registration under sub-section (3) of section 25 has not commenced business within six months from the date of registration; or

(e) registration has been obtained by means of fraud, wilful misstatement or suppression of facts:

Provided that the proper officer shall not cancel the registration without giving the person an opportunity of being heard:

Provided further that during pendency of the proceedings relating to cancellation of registration, the proper officer may suspend the registration for such period and in such manner as may be prescribed.

(3) The cancellation of registration under this section shall not affect the liability of the person to pay tax and other dues under this Act or to discharge any obligation under this Act or the rules made thereunder for any period prior to the date of cancellation whether or not such tax and other dues are determined before or after the date of cancellation.

(4) The cancellation of registration under the Central Goods and Service Tax Act, 2017 (12 of 2017) shall be deemed to be a cancellation of registration under this Act.

(5) Every registered person whose registration is cancelled shall pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger, equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi- finished or finished goods held in stock or capital goods or plant and machinery on the day immediately preceding the date of such cancellation or the output tax payable on such goods, whichever is higher, calculated in such manner as may be prescribed:

Provided that in case of capital goods or plant and machinery, the taxable person shall pay an amount equal to the input tax credit taken on the said capital goods or plant and machinery, reduced by such percentage points as may be prescribed or the tax on the transaction value of such capital goods or plant and machinery under section 15, whichever is higher.

(6) The amount payable under sub-section (5) shall be calculated in such manner as may be prescribed."

11. Learned counsel for the petitioner argues that none of the grounds as contained in Section 29 of the Act were alleged or established against the petitioner. He has drawn my attention to the judgment of the Hon'ble Supreme Court in the case of ***Oryx Fisheries Private Limited v. Union of India and Ors. - (2010) 13 SCC 427***

wherein the requirements and reasoning of a show-cause notice have been explained in detail by the Hon'ble Supreme Court.

12. He next relies upon the judgment of the Hon'ble Supreme Court in the case of ***Commissioner of Central Excise, Bangalore v. Brindavan Beverages (P) Ltd. and Ors. - (2007) 5 SCC 338*** wherein the Hon'ble Supreme court has noticed the manner in which the show-cause notice was passed.

13. He also relies upon three judgments of this Court i.e ***Writ Tax No.348 of 2021 (Apparent Marketing Private Limited v. State of U.P. & Ors.)*** decided on ***05.03.2022, Writ Tax No.626 of 2020 (M/s Ansari Construction v. Additional Commissioner Central Goods and Services Tax (Appeals) and Ors.) decided on 24.11.2020 & Writ Tax No.651 of 2021 (M/s S.S. Traders v. State of U.P. & Ors.)*** decided on ***02.11.2021,*** wherein almost identical issues were considered by the High Court.

14. In the light of the said learned counsel for the petitioner argues that the petition is liable to be allowed.

15. Learned Standing Counsel on the other hand justifies the order on the ground that on an investigation being carried out on 20.03.2020 by a committee at the main place of business of the firm neither any business activity was found nor any stock of goods or any employee was found and on the contrary, the unit of another firm M/s Star Enterprises was found working on the same declared business site. No books of account were available at the time of investigation at the place of business. It is further argued that when the partner of the firm was trying to be contacted on telephone, he did not co-operate in the investigation and despite notice, no books of account/entries were produced before the Investigating Officer. He further argues that the petitioner did not even submit a reply to the show-cause notice and thus, justifies the impugned order and states that the petition is liable to be dismissed.

16. Shri Digvijay Nath Dubey, learned counsel appearing for respondent no.4 argues that on the date of investigation, no goods were found and accordingly, the registration was cancelled and it appears that after the cancellation of the registration, some goods might have been placed by the petitioner at the place. He argues that in terms of the show-cause notice issued by the DGGI as contained on Page - 141 and 142, on 03.12.2020 a search was carried out and a panchnama of the goods were prepared, which indicated various goods as were seized in terms of the said *panchnama*, which is recorded as RUD - 1 to the show-cause notice dated 28.05.2021, to this he argues that after the cancellation of the registration, the petitioner might have kept the goods there.

17. In the light of the submissions made at the Bar, this Court is to consider whether the action taken against the petitioner in respect of cancellation satisfies the test of the requirement of Section 29 of the Act or not?

18. A perusal of the show-cause notice at the first instance, clearly depicts the opaqueness of the allegations levelled against the petitioner, which were only to the ground that "tax payer found non-functioning/non-existing at the principal place of business'. The said show-cause notice did not propose to rely upon any report or any inquiry conducted to form the

opinion and on what basis was the allegation levelled that the tax payer was found non-functioning; it does not indicate as to when the inspection was carried. A vague show-cause notice without any allegation or proposed evidence against the petitioner, clearly is violative of principles of administrative justice. Cancellation of registration is a serious consequence affecting the fundamental rights of carrying business and in a casual manner in which the show-cause notice has been issued clearly demonstrates the need for the State to give the quasi-adjudicatory function to persons who have judicially trained mind, which on the face of it absent in the present case. The order of cancellation of the registration on the ground that no reply was given is equally lacking in terms of a quasi-judicial fervor as the same does not contain any reasoning whatsoever. The show-cause notice issued after the petitioner had filed an application for revoking the cancellation of registration also smacks of lack of judicial training by the quasi-adjudicatory authorities under the GST Act as it merely shows that no satisfactory explanation was received within the prescribed time.

19. The order rejecting the application for revocation of cancellation of registration takes the matter to the height of arbitrariness inasmuch as no reasons are recorded as to why the request for revocation of cancellation of registration could not be accepted and discloses absence of application of mind with regard to the averments contained in the application filed by the petitioner for revocation of cancellation of registration. It is also not clear as to why the request of the petitioner to adjourn the matter because of the marriage of his daughter was not even considered prior to passing of the rejection order dated 15.07.2020.

20. The petitioner in the ground of appeal and in the written argument filed in support of the appeal had extensively stated and produced evidence to support and contend that the commercial activity was being carried out by the petitioner, however, the same have not been touched upon by the Appellate Authority while deciding the appeal. The Appellate Authority has gone on a further tangent by placing reliance upon a report of the year 2018, which was neither confronted to the petitioner nor was ever part of the record based upon which the orders have been passed. This case clearly highlights the manner in which the quasi-judicial authorities and the appellate authorities are working under the GST Act. The manner of disposal as is present in the present case can neither be appreciated nor accepted.

21. I have no hesitation in recording that the said authorities while passing the order impugned have miserably failed to act in the light of the spirit of the GST Act. The stand of the Central Government before this Court is equally not appreciable as on the one hand they are alleging that excess goods were found for which the petitioner is liable to pay duty and on the other hand there is justification to the order passed and impugned in the present petition.

22. Finding the orders contrary to the mandate of Section 29 and 30 of the Act as well as the principles of adjudication by the quasi-judicial authorities, the orders impugned dated 18.01.2021 (Annexure - 19) and 15.07.2020 (Annexure - 16) cannot be sustained and are set aside.

23. The registration of the petitioner shall be renewed forthwith.

24. In the present case, the arbitrary exercise of power cancelling the registration in the manner in which it has been done has not only adversely affected the petitioner, but has also adversely affected the revenues that could have flown to the coffers of GST in case the petitioner was permitted to carry out the commercial activities. The actions are clearly not in consonance with the ease of doing business, which is being promoted at all levels. For the manner in which the petitioner has been harassed since 20.05.2020, the State Government is liable to pay a cost of Rs.50,000/- to the petitioner. The said cost of Rs.50,000/- shall be paid to the petitioner within a period of two months, failing with the petitioner shall be entitled to file a contempt petition.

25. The writ petition is ***allowed*** in above terms.

(2022) 8 ILRA 176
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.07.2022

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ C No. 1000840 of 2015
along with
other connected cases

The Oriental Insurance Company Ltd. ...Petitioner

Versus

Abhishek Kumar & Ors. ...Respondents

Counsel for the Petitioner:
Vaibhav Raj

Counsel for the Respondents:
C.S.C., Naresh Singh Chauhan

A. Civil Law-Insurance Claim-Clause 4 & 22(b) of the Agreement-rejection of claim on the ground of non-furnishing of the computerized khatauni being as required under Clause 4 of the agreement-genuineness of the khatauni on the record as provided by the private respondent under clause 2 of the agreement had never been disputed-thus, the claim shall not be rejected or repudiated on mere technicalities-non-furnishing of computerized khatauni alone will not come in the way of the claim of farmers claimants, as this would be against the spirit of beneficial agreement-rejection of claim on the said ground is wholly illegal-having regard to the facts and circumstances of the case as well as the resultant delay would quantify the amount of penalty at Rupees 75000/- and to this extent, the judgments are modified.(Para 1 to 21)

The petitions are partly allowed. (E-6)

List of Cases cited:

1. O.I.C Ltd. Thru Div. Mgr. Vs Chote Singh & ors. WP No. 20736 of (M/S) of 2018

2. O.I.C Ltd. Thru Div. Mgr. VsSmt. Ramkali @Rajkumari & ors. 5324 of (M/S) 2015

3. Gurmel Singh Vs Branch Mgr., National Ins. Co. Ltd. (Civil Appeal No. 4071 of 2022

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

1. Heard learned counsel for the petitioner and learned counsel for the private respondents.

2. All the above-noted writ petitions involve common questions for consideration raised by the petitioner praying for rejection of the claim of the claimants on the ground their non-furnishing of the computerized *khatauni* being as required under Clause 4 of the agreement and about imposition of penalty upon the petitioner under Clause 22(b) of the agreement. Hence, all the above said

petitions have been heard in a bunch and they are being disposed of by means of this common judgment to be applicable to all the writ petitions. The petitioner-Oriental Insurance Company *(hereinafter referred to as 'Petitioner Insurance Company')* has preferred these writ petitions against the orders passed by the Permanent Lok Adalat, Lucknow allowing the insurance claim of the claimants and imposing penalty upon the petitioner under Clause 22(b) of the agreement.

(i) The writ petition i.e. Writ C No. 1000840 of 2015 has been preferred for quashing of the impugned judgment and order dated 29.09.2014 passed by the Permanent Lok Adalat, Lucknow in P.L.A. Case No. 52 of 2014 (Abhishek Kumar and another Vs. O.I.C. Ltd. and others).

(ii) The writ petition i.e. Writ C No. 1005294 of 2014 has been preferred for quashing of the impugned judgment and order dated 19.03.2014 passed by the Permanent Lok Adalat, Lucknow in P.L.A. Case No. 134 of 2013 (Smt. Kusum Kali Vs. O.I.C. Ltd. and others).

(iii) The writ petition i.e. Writ C No. 1003370 of 2014 has been preferred for quashing of the impugned judgment and order dated 15.04.2014 passed by the Permanent Lok Adalat, Lucknow in P.L.A. Case No. 07 of 2014 (Smt. Sushila Devi Vs. O.I.C. Ltd. and others).

(iv) The writ petition i.e. Writ C No. 1007020 of 2014 has been preferred for quashing of the impugned judgment and order dated 25.08.2014 passed by the Permanent Lok Adalat, Lucknow in P.L.A. Case No. 51 of 2014 (Smt. Durgawati @ Shiv Devi Vs. O.I.C. Ltd. and others).

(v) The writ petition i.e. Writ C No. 1007019 of 2014 has been preferred for quashing of the impugned judgment and order dated 26.07.2014 passed by the Permanent Lok Adalat, Lucknow in P.L.A. Case No. 66 of 2014 (Smt. Madhuri and others Vs. O.I.C. Ltd. and others).

3. Learned counsel for the petitioner-Insurance Company have submitted that the judgments passed by the Permanent Lok Adalat are against Clause 4 of Agreement dated 19.11.2009 entered into between the Government of Uttar Pradesh and the petitioner-Insurance Company. It is further submitted that as per Clause 4 of the Agreement, the documents mentioned in said clause are required to be produced to the petitioner- Insurance Company for claim process which includes computerized *khatauni* but the claimants had failed to provide the computerized *khatauni* to the petitioner-Insurance Company therefore, their claims were liable to be rejected.

4. It is further submitted that the petitioner-Insurance Company had acted on the basis of Clause 4 of the Agreement which is quoted hereunder for ready reference:-

*"**Scope of Cover:-** Oriental Insurance Company Limited hereby agrees, subject to the terms, conditions and exclusions contained or otherwise expressed in the policy document, to pay to the insured a sum not exceeding the sum insured during the tenure of the policy, if any of the insured Person dies due to or suffers disability as mentioned in the benefit table due to sustaining any bodily injury resulting from accident, caused by external, violent and visible means, to the extent and in the manner hereinafter provided. The accident will included death due to snake bite, drowning in River, Tank, Pond or well, collapse of roof or falling of tree, falling from roof or tree, vehicle (including tractor/trolley and tempo)*

accident, dacoity, riot, scuffle. Enmity, violence, terrorist activities, fire, flood, lightning thunder & electric shock etc.

Necessary documents will be required to establish the cause of death. The following documents will be required to be produced to Oriental Insurance Company Limited for claim processing.

(1) Fully complete claim Form

(2) Computerized Khatauni

(3) Age proof in following order of priority-

(a) Matriculation Certificate/High School Certificate

(b)Parivar Register

(c) Ration Card

(d) Voter ID card/Voter List

(e) Any other age proof

(4) Post Mortem Report

(5) Copy of FIR/GD (in case of death due to snake bite)

(6) Death Certificate

(7) Police panchnama

(8) CMO Certificate in cases of disability

Postmortem report will not be insisted upon where body is irrecoverable, say due to flood or body is in such a shape after accident the post mortem is not possible. Also in case of drowning and snakebite, FSL/CA report will not be insisted upon to establish the cause of death. Disablement, to the extent mentioned in the benefit table, caused due to an accident defined above, shall be covered. The Policy covers accidental death and disability/arising out of an accident only as elaborated in the policy document."

5. The second submission raised by the learned counsel for the petitioner-Insurance Company is that imposition of maximum penalty as provided under Clause 22(b) of the Agreement is illegal and exorbitant as there was no fault on the part of petitioner-Insurance Company while rejecting claim of the claimants. It is further submitted that in the almost identical matters wherein also the judgments of the Permanent Lok Adalat were under challenge pertaining to dispute for rejection of claims of the claimants under the Agreement dated 19.11.2009 have been decided by this Court in Writ Petition Nos. 20736 of (M/S) of 2018 (The Oriental Insurance Company Limited Thru. Divisional Mgr. Vs. Chote Singh & Ors.) and 5324 of (M/S) 2015 (Oriental Insurance Company Ltd. Thru its Divisional Manager Vs. Smt. Ramkali @ Rajkumari and others) wherein this Court has quantified and reduced the penalty from Rs. 1,50,000/- to Rs. 50,000/- and Rs. 75,000/- respectively. The relevant portion of the judgment passed in the case of Chote Singh (supra) is reproduced hereunder for ready reference:-

"Insofar as the quantum of penalty questioned in the present petition is concerned, it is true that the imposition of penalty in a situation of denial of claim is Rs. One Lakh Fifty Thousand but the present case in a situation of repudiation letter dated 7.4.2011 not being final, can only be treated to be a case of delayed payment, therefore, the quantification of penalty to the tune of Rs. One Lakh Fifty Thousand is clearly illegal and arbitrary and beyond the scope of clause 22(b) of the agreement. This Court would also note that every Permanent Lok Adalat is under a bounden duty to undertake the process of conciliation before advancing to adjudicate a claim on merit. This aspect of the matter has also not been dealt with by the Permanent Lok Adalat in a manner prescribed under law, therefore, the imposition of maximum penalty, in my humble view, is exorbitant.

This Court having regard to the facts and circumstances of the present case as well as the resultant delay would quantify the amount of penalty at Rs. Fifty Thousand and to this extent, the impugned award deserves to be modified.

The amount of penalty modified to the aforesaid extent is thus affirmed. The award is accordingly modified. The petitioner is directed to discharge the liability not later than a period of one month from today."

6. The relevant part of the judgment passed in the case of Smt. Ramkali @ Rajkumari and others (supra) is reproduced hereunder for ready reference:-

"7. However, considering the fact that the present case is almost identical to that one of the subject matter of judgement dated 13.8.2018 passed in Writ Petition No.20736 (MS) of 2018, interest of justice would meet if the present writ petition is also disposed of with direction to the petitioner-Insurance Company to pay the insured amount of Rs.1 Lakh with interest @9% per annum from the date of the order passed by the Permanent Lok Adalat. The amount of penalty is reduced from Rs.1,50,000/- to Rs.75,000/- to be deposited within a period of six weeks from today. The amount of Rs.1 Lakh along with interest @9% per annum from the date of the order of the Permanent Lok Adalat as well as the amount of penalty of Rs.75,000/- to be deposited before the Permanent Lok Adalat, shall be released in favour of the opposite parties forthwith after due verification of their identities. Any amount deposited in pursuance of the interim order dated 11.9.2015, shall be adjusted against the total amount to be paid by the petitioner-Insurance company in pursuance of the order passed today. "

7. On the other hand, learned counsel for the private respondents have submitted that there is no illegality in the judgments impugned herein passed by the Permanent Lok Adalat. It is further submitted that as per the Clause 2 of the Agreement, there is no such requirement of providing the computerized *khatauni*. It is further submitted that Clause 17 of the Agreement deals with exclusion even in that clause the computerized *khatauni* is not a ground for rejecting the claim.

8. Learned counsel for the private respondents have relied upon the Clause 24 of the Agreement wherein it has been provided that the claims will be accepted as rule and would be rejected as an exception and if there is any shortcoming or deficiency in the documents filed, the petitioner-Insurance Company would itself make an inspection for confirming the cause of death and shall make the payment accordingly thus, the claims shall not be rejected on mere technicalities.

9. It is further submitted that denying the claim of the private respondents on the ground of not providing copy of computerized *khatauni* is against the Agreement particularly, when the reason that due to consolidation proceedings, the computerized *khatauni* was not available with the private respondents.

10. It is further submitted that the Hon'ble Supreme Court in the case of **Gurmel Singh Vs. Branch Manager, National Insurance Co. Ltd. (Civil Appeal No. 4071 of 2022), judgment dated 20.05.2022)** has held that the claim shall not be denied on the ground of non providing the documents which were beyond the control of the person to procure and furnish. It is lastly submitted that the

penalty imposed under Clause 22(b) of the Agreement has rightly been imposed.

11. After hearing learned counsel for the respective parties and going through the record, the position which emerges out is that the Agreement has been entered into between the State of UP and the petitioner-Insurance Company on 19.11.2009 with an object to insure the farmers of Uttar Pradesh for Rs. 1 lakh aged between 12 to 70 years whose names were in the revenue records of the State of Uttar Pradesh as the owner of the agricultural land under the Janta Personal Accident Policy.

12. Undisputedly, Clause 4 of the Agreement deals with scope of cover and it has been provided therein that the documents mentioned in the said clause are required to be produced to the petitioner-Insurance Company for claim processing including the computerized *khatauni*. Clause 4 is to be read in totality with other clauses of the Agreement like Clause 2 of the Agreement which talks about the farmers whose names were in the *Khatauni* records of the State of Uttar Pradesh as the owner of the agricultural land shall be covered by the agreement. For convenience, the Clause 2 of the Agreement is quoted hereunder:-

"This is an unnamed policy and all farmers in the age group of 12 to 70 years, both inclusive, whose names appear in the Khatauni records of the state of Uttar Pradesh as the owner of agricultural land in the State of Uttar Pradesh shall be covered under this policy, without any selection, If a farmer attains 12 years of age on any date during the currency of policy period, he/she will be deemed to be covered from such date. But if a farmer crosses 70 years of age during the tenure of this policy, he/she will also remain covered till the end of the policy period."

13. Similarly, Clause 17 of the Agreement deals with exclusion, where the petitioner-Insurance Company shall not be liable under this policy. The Clause 17 is reproduced hereunder for ready reference:-

"17. Exclusions:

Oriental Insurance Company Limited shall not be liable under this Policy for:-

(i) Compensation under more than one of the categories specified in the Basis of Assessment of the JPA Policy document in respect of the same period of disablement of the Insured Person under this Policy.

(ii) Any other payment to the same person under this policy after a claim under one of the categories I & II as specified in the Basis of Assessment of the JPA policy document of claims he has been admitted and become payable. However, this exclusion shall apply only to this policy and shall in no way affect benefits derived by the Insured Person or his/her legal heir(s) under any other Insurance Policy or Scheme.

(iii) Any payment in case if more than one claim in respect of such Insured person, under this policy during any one period of insurance by which the sum payable as per the Basis of Assessment of Claims of this Policy to such insured person exceeds the maximum liability of Oriental Insurance Company Limited as applicable to such insured person.

(iv) Payment of compensation in respect of death, injury or disablement of insured person.

(a) From intentional self-injury, suicide or attempted suicide.

(b) Whilst under the influence of intoxication of liquor or psychotropic drugs.

(c) Whilst engaging in aviation or ballooning or whilst mounting into, or dismounting form or traveling in any balloon or aircraft other than as a passenger (fare paying or otherwise) in any duly licensed standard type of aircraft anywhere in the world. Standard type of aircraft means any aircraft duly licensed to carry passengers (for hire or otherwise) by appropriate authority irrespective of whether such an aircraft is privately owned or chartered or operated by a regular airline or whether such a aircraft has a single engine or multi engine.

(v) Payment of compensation in respect of death, injury of disablement of the Insured Person due to, or arising but of, or directly or indirectly connected with or traceable to war, invasion, act of foreign enemy, hostilities (where war be declared or not) civil war, rebellion, revolution, insurrection, mutiny military or usurped power, seizure, capture arrests, restrains and detainment of all kinds.

Payment of compensation in respect of death or bodily injury on any disease or illness to the Insured Persons:-

(a) Directly or indirectly caused by or contributed to by or arising from ionizing radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel. For the purpose of this exception, combustion shall include any self sustaining process of nuclear fission.

(b) Directly or indirectly caused by or contributed to by or arising from nuclear weapon materials.

(vi) Death or disablement directly or indirectly caused by an/or contributed to and/or aggravated or prolonged by child birth or pregnancy or in consequence thereof.

(vii) Payment of compensation in respect of injury or disablement directly or indirectly arising out of or contributed by or traceable to any disability existing on the date of issue of this policy."

14. Clause 24 of the Agreement provides that, the claim shall not be rejected or repudiated on mere technicalities. The said clause 24 of the agreement is quoted hereunder:-

"This Agreement shall be implemented by following a procedure so that the claims are accepted as a rule and are rejected as an exception, in case the farmer dies of accidental death and when this fact comes in the knowledge of Oriental Insurance Company Limited as per this Agreement, and if there is nay shortcoming or deficiency in the documents filed, the Oriental Insurance Company Limited would itself make an inspection for confirming the cause of death and shall make the payment accordingly. The claims shall not be rejected or repudiated on mere technicalities."

15. From the conjoint reading of the aforesaid clauses of the agreement, the position which emerges out is that by not providing the computerized *khatauni* will not take away the right of the claimants to get insurance amount as per the agreement. More particularly, in the present case, there is a specific finding regarding non providing of the computerized *khatauni* as the letter of the Board of Revenue dated 30.06.2010, wherein it has been informed that the consolidation proceedings were going on and computerized *Khatauni* could not be provided. The said findings have neither been disputed in the pleadings of the writ petitions nor urged as erroneous.

16. The genuineness of the *khatauni* on the record as provided by the private

respondents under Clause 2 of the agreement had never been disputed. In the above circumstances, rejection of the claim would only be a technicality, which is not to be resorted to while dealing with such claims as in hand. Non furnishing of computerized Khautauni alone will not come in the way of the claim of farmers claimants, as this would be against the spirit of the beneficial agreement and reading of Clause 4 with other clauses of the agreement.

17. As per the judgment of Hon'ble the Supreme Court in the case of ***Gurmel Singh (supra)***, wherein the truck of the appellant was stolen and he was unable to provide certified duplicate copy of the registration certificate which was denied by the RTO as after receiving the information of theft, the details regarding registration certificate on the computer of the RTO was locked and due to not providing the duplicate certified copy of the registration certificate, the insurance company denied the claim of the claimant. In this case, Hon'ble the Supreme Court has held that the insurance company has become too technical while settling the claim. The relevant extract of the judgment in the case of ***Gurmel Singh (supra)*** is reproduced hereinbelow, for ready reference:-

"4.1 In the present case, the insurance company has become too technical while settling the claim and has acted arbitrarily. The appellant has been asked to furnish the documents which were beyond the control of the appellant to procure and furnish. Once, there was a valid insurance on payment of huge sum by way of premium and the Truck was stolen, the insurance company ought not to have become too technical and ought not to have refused to settle the claim on non-submission of the duplicate certified copy of certificate of registration, which the appellant could not produce due to the circumstances beyond his control. In many cases, it is found that the insurance companies are refusing the claim on flimsy grounds and/or technical grounds. While settling the claims, the insurance company should not be too technical and ask for the documents, which the insured is not in a position to produce due to circumstances beyond his control. "

18. In view of the discussions made above, it is found that there is no illegality and perversity in the impugned judgments passed by the Permanent Lok Adalat as far as accepting the insurance claims of the private respondents and hence, no interference is called for in the judgments impugned.

19. From the above discussion made hereinabove, the position with regard to the applicability of Clause 22(b) of the Agreement which emerges out is that as per Clause 4 of the agreement, the computerized *khatauni* was required for the purpose of the claim and hence it cannot be said that rejection of claim on the said ground is wholly illegal. As the judgments relied by the learned counsel for the petitioner with regard to the quantifying the penalty by this Court in Writ Petition Nos. 20736 of (M/S) 2018 and 5324 of (M/S) 2015 , this Court has held that the penalty imposed as per Clause 22(b) of the Agreement is exorbitant and quantified the amount of penalty as Rs. 50,000/- and 75,000/- respectively.

20. This Court having regard to the facts and circumstances of the case as well as the resultant delay would quantify the amount of penalty at Rs. 75,000/- and to this extent,

the impugned judgments are modified. The amount of Rs.1 Lakh along with interest @9% per annum from the date of the order of the Permanent Lok Adalat as well as the amount of penalty of Rs.75,000/- to be deposited before the Permanent Lok Adalat within a period of six weeks and shall be released in favour of the opposite parties forthwith after due verification of their identities. If any amount was deposited earlier that shall be adjusted against the total amount to be paid by the petitioner-Insurance company in pursuance of the order passed today.

21. For the foregoing reasons, as mentioned above, the petitions are ***partly allowed*** in so far, it relates to reduction of amount of penalty imposed under Clause 22(b) of the agreement only.

22. Let a copy of this judgment/order be placed in the records of Writ-C Nos. 1005294 of 2014, 1003370 of 2014, 1007020 of 2014 & 1007019 of 2014.

23. The petitions are therefore, disposed of in the manner as indicated above.

(2022) 8 ILRA 183
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 723 of 2022

SR Cold Storage, Kanpur U.P. ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhinav Mehrotra, Sri Satya Vrata Mehrotra

Counsel for the Respondents:
A.S.G.I., Sri Gaurav Mahajan, Sri Anant Kumar Tiwari

A. Tax Law – Income Tax Act, 1961 - Sections 147/148, 142(1) & 246A - The words "reason to believe" suggest that the belief must be bona fide and must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. His vague feeling that there might have been some escapement of income from assessment is not sufficient. In other words, such material on which the assessing Authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant. **If the grounds for formation of "reason to believe" are of an extraneous character, the same would not warrant initiation of proceedings u/s 147 of the Act, 1961.** (Para 21)

Reassessment of income u/s 147 cannot be made on change of opinion - If the 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. (Para 21)

As per own admitted case of the respondents, the cash deposit of Rs. 3,41,81,000/- was made by the petitioner in its bank account with UBI and there was absolutely no cash deposit by the petitioner in Bank of Baroda whereas the entire reassessment proceedings u/s 147/148 of the Act, 1961 against the petitioner, was initiated on the alleged information of cash deposit of Rs. 13,67,24,000/- by the petitioner in its bank account with Bank of Baroda. Thus, the reason to believe for initiating proceedings u/s 147/148 was totally unfounded and false. In fact initiation of proceedings and passing the impugned reassessment order dated 31.03.2022 is a glaring example of highhandedness, arbitrary actions and abuse of power by the respondents on the one hand and on the other

hand, flagrant violation of principles of natural justice by them. (Para 20)

B. Natural Justice – The principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. (Para 26)

Audi alteram partem – The first rule is 'nemo judex in causa sua' or 'nemo debet esse judex in propria causa sua' that is no man shall be a judge in his own cause. The second rule is 'audi alteram partem', that is, 'hear the other side'. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule i.e. 'he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right' or in other words, as it is now expressed, 'justice should not only be done but should manifestly be seen to be done'. **Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.** (Para 28)

The show cause notice was issued by the respondent No. 4 on 25.03.2022, the assessee submitted its reply on 25.03.2022 itself and requested for hearing on 26.03.2022. Therefore, by no stretch of imagination, the respondent No. 4 can be permitted to take the stand that it denied the opportunity of personal hearing through video conferencing for reason that the limitation was going on to expire on 31.03.2022. In fact, the approach of the respondent No. 4 itself proves arbitrary exercise of powers and denial of principles of natural justice by him. (Para 23)

In the absence of a notice of the kind and reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. It is an approved rule of fair play. (Para 25)

C. Order is unsustainable without valid reasons - Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. **Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Non recording of reasons, non consideration of admissible evidence or consideration of inadmissible evidence renders the order to be unsustainable.** (Para 32, 33)

In the present set of facts, we find that despite that material disclosed by the assessee before the respondent Nos. 2 and 4 and despite specific stand taken by him that he has not deposited any cash amount in his bank account with Bank of Baroda what to say of Rs. 13,67,24,000/-, the aforesaid respondents have neither considered the objection/reply nor recorded any reasons for its rejection. Thus, right to reason which is an indispensable part of a judicial system, has been deliberately violated by the respondents. (Para 34)

D. Alternative remedy-when not bar - Article 226 of the Constitution of India confers very vide powers on High Courts to issue writs but this power is discretionary and the High Court may refuse to exercise the discretion if it is satisfied that the aggrieved person has adequate or suitable remedy elsewhere. **It is a rule of discretion and not rule of compulsion or the rule of law. Even though there may be an alternative remedy, yet the High Court may entertain a writ petition depending upon the facts of each case.** It is neither possible nor desirable to lay down inflexible rule to be applied rigidly for entertaining a writ petition. (Para 36)

If gross injustice is done and it can be shown that for good reason the court should interfere, then notwithstanding the alternative remedy which may be

available..., a writ court can in an appropriate case exercise its jurisdiction to do substantive justice. Normally of course the provisions of the Act would have to be complied with, but the availability of the writ jurisdiction should dispel any doubt which a citizen has against a high-handed or palpable illegal order which may be passed by the assessing authority. (Para 38)

Objection regarding maintainability of the writ petition on the ground of alternative remedy, is not tenable on the facts of the present case. In the present set of facts, in the absence of any valid information for invoking jurisdiction u/s 147/148 of the Act, 1961, the entire proceedings are without jurisdiction. (Para 35)

E. Abuse of Power - 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. (Para 40)

From the stands taken by the respondent No. 1 in the counter affidavit, it is evident that all settled principles of law, duty to discharge quasi-judicial function and observance of statutory provisions of the Act, 1961 have been given complete go-bye and participation of assessees in proceedings u/s 148A or 148 or 147 of the Act, 1961 would remain an empty formality, inasmuch as the Assessing Officer would create liability on assessees only on the basis of data fed in the data base/portal of the department and would not like to adjudicate the matter in accordance with law so as to take risk of initiation of disciplinary proceedings against himself. (Para 45)

F. An order passed by quasi-judicial authorities on the dictates of the higher authority is illegal and being without jurisdiction, is a nullity. An Income Tax Officer while passing an order of assessment, performs a quasi-judicial function. It is one thing to say that while making the orders of assessment the Assessing Officer shall be bound by the statutory circulars issued by CBDT but it is another thing to say that the assessing authority exercising quasi-judicial function keeping in view the scheme contained in the Act, would lose its independence to pass an independent order of assessment. **If the Assessing Officer passes an order at the instance or dictate of the higher authority, it shall be illegal.** (Para 51)

Quasi-Judicial Function - A quasi-judicial function has been termed to be one which stands midway a judicial and an administrative function. The primary test is as to whether the authority alleged to be a quasi-judicial, has any express statutory duty to act judicially in arriving at the decision in question. If the reply is in affirmative, the authority would be deemed to be quasi-judicial, and if the reply is in the negative, it would not be. Therefore, an authority is described as a quasi-judicial when it has some of the attributes or trappings of judicial functions, but not all. (Para 47)

The stand so taken by the respondent No. 1 in the counter affidavit is hereby rejected and it is directed that the respondent No. 1 or other authorities under the Act, 1961 shall not interfere with the quasi-judicial function and discharge of statutory duties by the Assessing Officers unless permitted by the Act, 1961. (Para 52)

G. Accountability - 'Sovereignty' and "acts of State" are two different concepts. The former vests in a person or body which is independent and supreme both externally and internally whereas latter may be act done by a delegate of sovereign within the limits of power vested in him. **No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State.** The need of the State to have extraordinary powers cannot be doubted. But with the conceptual

change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent. **Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken.** (Para 56)

Prevailing state of affairs clearly reflects that in the absence of any effective system of accountability of the erring officers, the harassment of the assessees and breach of principles of natural justice by the Officers is resulting in uncontrolled situation. The practice of frequently violating principles of natural justice, non consideration of replies of assessees under one pretext or the other or rejecting it with one or two lines orders without recording reasons for rejection, is gradually increasing which needs to be taken care of immediately by the respondents at the highest level, otherwise prevailing situation of arbitrary approach and breach of principles of natural justice may not only adversely affect the assessees who pay revenue to the Government, but also may develop a perception amongst people/assessees that it is difficult to get justice from the authorities in statutory proceedings. (Para 57)

H. Imposition of Cost - When a case is decided in favour of a party, the Court can award cost as well in his favour. Such **cost should be in real and compensatory terms and not merely symbolic. There can be exemplary costs as well when the appeal is completely devoid of any merit. Time has come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals, even after knowing well that these are totally vexatious and uncalled for appeals.** Such an order of recovery of cost from the officer concerned be passed only in those cases where appeal is found to be ex-facie frivolous and the decision to file the appeal is also found to be palpably irrational and uncalled for. (Para 58)

It is evident that **the respondents have acted arbitrarily, without jurisdiction, in breach of principles of natural justice and abused the power** conferred under the Act, 1961 and thus created a huge demand of income tax of Rs. 16,90,61,731/-. **The reassessment proceedings were without jurisdiction.** The information on the basis of which the reassessment proceeding was initiated against the petitioner, has been admitted by the respondent to be incorrect. Despite every effort made by the petitioner and the evidences filed by it to establish that there has been no escapement of income to tax and the information on the basis of which reassessment proceeding has been initiated is unfounded, **respondents have not even looked into the reply and evidences filed by the petitioner and even his request for personal hearing through video conferencing was denied. Only a day's time was granted to the petitioner to submit reply to the show cause notice in reassessment proceedings which the petitioner submitted within time and yet his request for hearing through video conferencing was declined** by the respondent No. 4. This shows a complete failure to the observance of rule of law on the part of the respondents. **A huge demand of Rs. 16,90,61,731/- has been created by the respondents against the petitioner on totally non-existent and baseless ground and that too without any fault or breach by the petitioner.** (Para 58)

The respondents have acted arbitrarily, illegally without jurisdiction, caused harassment to the petitioner and abused power conferred under the Act, 1961, which resulted in creation of illegal demand of income Tax of Rs. 16,90,61,731/-. In result, the writ petition is allowed with cost of Rs. 50,00,000/- on the respondents, which shall be deposited in Prime Minister National Relief Fund within three weeks from today. The impugned notice dated 31.03.2021 u/s 148, the impugned order dated 24.03.2022 and the impugned reassessment order dated 31.03.2022 for the Assessment Year 2017-18 u/s 147 r/w Section 144B of the Act, 1961 and all consequential proceedings are hereby quashed and directions are issued. (Para 60, 61)

I. Words and Phrases - *'civil consequences'* – It encompasses infraction of

not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life. (Para 27)

Writ petition allowed with cost of Rs.50,00,000/- on the respondents. (E-4)

Precedent followed:

1. Uphill Farms Pvt. Ltd. Vs U.O.I. & anr., Writ Tax No. 518 of 2022, decided on 25.04.2022 (Para 21)

2. Uma Nath Pandey & ors. Vs St. of U.P. & anr., (2009) 12 SCC 40 (Para 24)

3. M/s Hindustan Steels Ltd. Rourkela Vs A.K. Roy & ors., (1969) 3 SCC 513 (Para 29)

4. Omar Salay Mohd. Sait Vs Commissioner of Income Tax, Madras, AIR 1959 SC 1238 (Para 30)

5. Udhav Das Kewat Ram Vs CIT, 1967 (66) ITR 462 (Para 31)

6. The Secretary and Curator, Victoria Memorial Vs Howrah Ganatantrik Nagrik Samity & ors., JT 2010(2) SC 566 (Para 32)

7. Chandana Impex Pvt. Ltd. Vs Commissioner of Customs, New Delhi, 2011 (269) E.L.T. 433 (S.C.) (Para 33)

8. Himmatlal Harilal Mehta Vs St. of M. P., AIR 1954 SC 403 (Para 37)

9. Collector of Customs Vs Ramchand Sobhraj Wadhwani, AIR 1961 SC 1506 (Para 37)

10. Collector Of Customs & Excise ,Cochin & Ors. Vs A. S. Bava, AIR 1968 SC 13 (Para 37)

11. Dr. Smt. Kuntesh Gupta Vs Management Of Hindu Kanya Mahavidyalaya, 1988 AWC 347; 1987 EC 334

12. L.K. Verma Vs HMT Ltd. & anr., (2006) 2 SCC 269 (Para 37)

13. M.P. State Agro Industries Development Corp. Ltd. & anr. Vs Jahan Khan, (2007) 10 SCC 88 (Para 37)

14. Dhampur Sugar Mills Ltd. Vs St. of U.P. & ors., (2007) 8 SCC 338 (Para 37)

15. BCPP Mazdoor Sangh Vs NTPC, (2007) 14 SCC 234 (Para 37)

16. Rajasthan State Electricity Board Vs U.O.I., (2008) 5 SCC 632 (Para 37)

17. Mumtaz Post Graduate Degree College Vs University of Lucknow, (2009) 2 SCC 630 (Para 37)

18. Godrej Sara Lee Ltd. Vs Assistant Commissioner (AA), (2009) 14 SCC 338 (Para 37)

19. U.O.I. Vs Mangal Textile Mills (I) (P) Ltd., (2010) 14 SCC 553 (Para 37)

20. U.O.I. Vs Tantia Construction (P) Ltd., (2011) 5 SCC 697 (Para 37)

21. Southern Electricity Supply Co. of Orissa Ltd. Vs Sri Seetaram Rice Mill, (2012) 2 SCC 108 (Para 37)

22. St. of M.P. Vs Sanjay Nagaich, (2013) 7 SCC 25 (Para 37)

23. St. of H.P. Vs Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499 (Para 37)

24. Star Paper Mills Ltd. Vs St. of U.P. & ors., JT (2006) 12 SC 92 (Para 37)

25. St. of Tripura Vs Manoranjan Chakraborty, (2001) 10 SCC 740 (Para 37)

26. Paradip Port Trust Vs Sales Tax Officer & ors. (1998) 4 SCC 90 (Para 37)

27. Feldohf Auto & Gas Industries Ltd. Vs U.O.I. (1998) 9 SCC 710 (Para 37)

28. Isha Beebi Vs Tax Recovery Officer (1976) 1 SCC 70 (Para 37)

29. Whirlpool Corp. Vs Registrar of Trademarks (1998) 8 SCC 1 (Para 37)

30. Guruvayur Devasworn Managing Committee Vs C.K. Rajan (2003) 7 SCC 546 (Para 37)

31. St. of Tripura Vs Manoranjan Chakraborty, (2001) 10 SCC 740 (Para 38)

32. St. of H.P. Vs Raja Mahendra Pal & ors., (1999) 4 SCC 43 (Para 47)

33. Province of Bombay Vs Khusaldas S. Advani, AIR 1950 SC 222 (Para 47)

34. R. Vs Electricity Commissioners, (1924) 1 KB 171; (1924) 130 LT 164 (Para 47)

35. Orient Paper Mills Ltd. Vs U.O.I., (1970) 3 SCC 76 (Para 48)

36. Nareshbhai Bhagubhai & ors. Vs U.O.I. & ors., (2019) 15 SCC 1 (Para 49)

37. U.O.I. & ors. Vs Karvy Stock Broking Ltd., (2019) 11 SCC 631 (Para 50)

38. Commissioner of Income Tax, Shimla Vs Greenworld Corporation Parwanoo, (2009) 7 SCC 69 (Para 51)

39. Lucknow Development Authority Vs M.K. Gupta, 1994 SCC (1) 243 (Para 54)

40. N. Nagendra Rao & Co. Vs St. of A.P., AIR 1994 SC 2663 (Para 56)

41. Nabco Products Pvt. Ltd.Vs U.O.I. & ors., Writ Tax No.997 of 2022, Judgment dated 03.08.2022 (Para 57)

42. Punjab State Power Corp. Ltd. Vs Atma Singh Grewal, (2014) 13 SCC 666 (Para 58)

43. Assistant Commissioner (ST) & others Vs M/s Satyam Shivam Papers Pvt. Ltd. & anr., Special Leave to Appeal (C) No.21132 of 2021 (Para 59)

<u>Precedent cited by respondents</u>:

1. Katiyar Cold Storage Pvt. Ltd. Vs U.O.I. & ors., Writ Tax No. 202 of 2022 (Para 7)

Present petition assails notice dated 31.03.2021 issued u/s 148, by Income Tax Officer, Ward-1(2)(3), Kanpur; re-assessment order dated 31.03.2022 and order dated 30.03.2021.

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

1. Heard Sri Abhinav Mehrotra, learned counsel for the petitioner, Sri S.P. Singh, learned Additional Solicitor General of India, assisted by Sri Anant Kuma Tiwari, learned counsel for the respondent no.1 and Sri Gaurav Mahajan, learned Senior Standing Counsel for the Income Tax Department- Respondent Nos. 2,3, and 4.

2. This writ petition has been filed praying for the following relief:

"I. To issue a writ, order or direction in the nature of CERTIORARI quashing the Impugned Notice issued under Section 148 of the Income Tax Act Dated 31.03.2021 [Annexure No. 2 (coll)] r/w Order Dt. 24.03.2022 [Annexure No. 9] issued by the Respondent No.2 and the connected proceedings for Reassessment of Income for A.Y. 2017-18.

II. To issue a writ, order or direction in the nature of Certiorari Quashing the Re-Assessment Order for the Assessment Year 2017-18, Dt. 31.03.2022 [Annexure No.13] which is made in gross violation of law and principles of Natural justice.

III. To issue a writ, order or direction in the nature of MANDAMUS declaring that Amendment caused to the Income Tax Act, 1961, vide Section 42 of the Finance Act, 2022, OMITTING Sub-Section 9 of Section 144B of the Income

Tax Act, is wholly unconstitutional and bad in law.

IV. To issue a writ, order or direction in the nature of CERTIORARI quashing the Order Dt. 30.03.2021 issued under Section 151 of the Income Tax Act, by Respondent No.3 [Annexure No.2 (coll)] and the connected proceedings for Reassessment of Income for A.Y. 2017-18."

3. By order dated 26.05.2022, the relief No.III has been deleted on the statement made by the petitioner's counsel that the Relief No.III is not being pressed.

4. This writ petition was heard at length on 18.05.2022, 26.05.2022, 30.05.2022, 05.07.2022, 14.07.2022 and 05.08.2022 and the judgment was reserved on 05.08.2022.

Submissions on behalf of the petitioner:-

5. Learned counsel for the petitioner submits that according to own admission of the respondents, information on the basis of which proceeding under Sections 147/148 of the Income Tax Act, 1961 was sought to be initiated was totally unfounded and yet the misleading counter affidavits have been filed by them. The assessee has been harassed continuously by the respondents. The National Faceless Assessment Center is total failure and insight portal of the department has been made to cause harassment to the assessees. The information collected on the insight portal of the department is not correct. Even reply of the assessee has not been considered at all by the Assessing Officer. In the re-assessment order, despite every material placed by the assessee before the Assessing Officer-respondent no.4, there is no whisper in the re-assessment order about consideration of the reply. The entire proceedings under Sections 147/148 of the Income Tax Act, 1961 against the assessee is wholly without jurisdiction and the result of arbitrary exercise of power and gross abuse of power. In fact the initation of the proceedings and passing of the impugned reassessment order, is a glaring example of conscious and deliberate abuse of the powers by the respondents in the name of faceless assessment procedure. Practically the assessees are not being heard at all and they are not in a position to place and demonstrate their stand and to support it by documentary evidences, as available with them. This Court passed a detailed order dated 26.05.2022 and yet the respondents-authorities have no fear of law and are still trying to justify their action while at the same time admitting the information to be not correct. By order dated 30.05.2022 this Court required the respondents to show cause as to why exemplary cost may not be imposed upon them and yet no cause has been shown in their respective counter affidavits filed before this Court. He submits that the writ petition may be allowed with exemplary cost and accountability of the officer may be fixed so that there may be some check on arbitrary exercise of power and abuse of power by the respondents and transparency in the assessment process may be ensured.

6. Learned counsel for the petitioner has referred paragraph Nos. 6,7,8,9, and 10 of the counter affidavit dated 24.07.2022 filed on behalf of the respondent no.1 and submits that the averments made therein show complete collapse of the system in the Income Tax Department. The deponent of the counter affidavit dated 24.07.2022 filed on behalf of Union of India-respondent no.1 is the Principal Chief Commissioner and he does even know

basic principles of assessment and quasi judicial function of the assessing officer. If the averments made in paragraph Nos. 6,7,8,9, and 10 of the counter affidavit filed on behalf of the respondent no.1 are accepted, then entire assessment process would be an empty formality. From the state of affairs as are prevailing presently as reflected from the paragraph Nos. 6,7,8,9, and 10 of the counter affidavit filed on behalf of the respondent no.1, it is evident that even basic principles of Rule of law have been given complete goby and assessing officer are under threat of the top level or higher authorities that if they want to do justice or want to discharge quasi judicial function, they may face disciplinary action.

Submissions on behalf of respondent Nos.2, 3 and 4:-

7. Sri Gaurav Mahajan, learned Senior Standing Counsel for the respondent Nos. 2,3 and 4-Income Tax Department submits that against the impugned reassessment order, appeal lie under Section 246A of the Income Tax Act, 1961 and therefore, writ petition may be dismissed on the ground of alternative remedy. He relied upon judgment dated 09.05.2022 in Writ Tax No. 202 of 2022 (Katiyar Cold Storage Private Limited Versus Union of India and 2 others). He referred to paragraph nos. 4 and 5 of the counter affidavit dated 25.07.2022 filed on behalf of the respondent Nos. 2 and 3 and submits that in insight portal the **cash deposited by the petitioner was shown as Rs.13,67,24,000/- in the bank account of the Bank of Baroda, Kanpur,** which was 4 times of the actual cash deposit of Rs.3,41,81,000/- in Union Bank of India. In Insight portal it was shown as Rs. 13,67,24,000/-, which information was uploaded by the Deputy Director Income Tax (Inv.), Unit-III, Kanpur.

Submissions on behalf of Respondent No.1:-

8. Learned Additional Solicitor General of India submits that the information received and used against the assessee which was made basis to initiate reassessment proceeding and to pass the impugned reassessment order was the result of mistake on the part of the respondents. He referred to paragraph Nos.6,7,8,9 and 10 of the counter affidavit dated 24.07.2022 filed on behalf of the respondent no.1 and sworn by Shishir Jha, Principal Chief Commissioner of Income Tax, U.P (West) and Uttarakhand Region at Kanpur.

Discussion and Findings:-

9. Briefly stated facts of the present case are that the petitioner is a partnership firm engaged in the business of running a cold-storage. It filed its return of income on 17.10.2017 for the **Assessment Year 2017-18** declaring a total income of Rs.11,55,016/-. The assessment of the petitioner was completed by **the Assessing Officer under Section 143(3)** of the Income Tax Act, 1961 (hereinafter referred to as 'the Act, 1961') accepting the total income as declared by the petitioner. On 31.03.2021, the Assessing officer issued a notice to initiate proceedings under Section 147/148 of the Act, 1961 alleging that **an information has been received that the petitioner has deposited a sum of Rs.13,67,24,000/- in its bank account which is undisclosed income and escaped assessment to tax.** The petitioner repeatedly requested the Assessing Officer to supply the reasons recorded but instead of supplying the reasons the respondent

No.2 issued notice dated 11.11.2021 under Section 143(2) read with Section 147 of the Act, 1961 which was followed by his letter dated 18.11.2021. In paragraphs 4 and 6 in the aforesaid letter dated 18.11.2021, the respondent No.2 has stated as under:

*"**4. Enquiries made by the A.O. as sequel to information collected/received:***

Information uploaded by the DDIT(Inv.), Unit-3, Kanpur regarding unexplained cash deposits of Rs.13,67,24,000/- in this case, has been examined.

Necessary verification was made from the entire details available in the ITR, on the database of ITBA and ITD and therefore, I have sufficient form of "Reason to believe' to frame my opinion. The Information available with this office has been analyzed and I have framed my opinion after due application of all the facts and mind.

*6. **Basis of forming reason to believe escapement of Income:***

In light of the details available on records and on the basis of above facts and findings, I have reason to believe that income of Rs.13,67,24,000/- which is chargeable to tax, has escaped the assessment. Thus, I have reasons to believe that this is a fit case for reopening and there is an escapement of income within the meaning of Explanation 2(a) to Section 147 of the Income Tax Act, 1961."

10. The petitioner filed its detailed objections before the respondent No.2 vide letter dated 26.11.2021 in which it submitted that the reasons recorded are neither correct nor proper nor honest which may give jurisdiction to the Assessing Officer to issue notice under Section 148 of the Act, 1961. However, without disposing of the objection of the petitioner, the respondent No.4 (National Faceless Assessment Centre, New Delhi) issued a notice under Section 142(1) of the Act, 1961. Subsequently, the objection dated 26.11.2021 filed by the petitioner was rejected by the respondent No.4 by order dated 24.03.2022 and a show cause notice/ draft assessment order dated 25.03.2022 was issued requiring the petitioner as to why addition of Rs.13,67,24,000/- be not made. **Paragraph 4.1 and 5 of the show cause notice/ draft assessment order, is reproduceced below:**

*"4.1 As per record / information available with the Department it is seen that during the financial year 2016-17 relevant to A.Y. 2017-18 **there are cash deposits of Rs.13,67,24,000/- made by the assessee firm at Bank of Baroda, Kanpur,** which is not commensurate with turnover and return of income filed by the assessee, firm. Hence cash deposits of Rs. 13,67,24,000/- made by the assessee is added to the total income of the assessee as income u/s. 68 of the Income lax Act, 1961 as unexplained cash credit. Penalty u/s 271AAC(1) of the I.T. Act, 1961 is initiated in respect of certain income.*

[Addition: Rs. 13,67,24,000/-]

5. Subject to the above discussion, total income of the assessee is computed as under:

Total Income declared as per return : Rs. 11,55,020

*As discussed in para 4.1 : Rs. **13,67,24,000/-***

Total Assessed Income: Rs. 13,78,79,020/-"

11. The petitioner submitted a reply to the aforesaid show cause notice dated

25.03.2022. **In paragraphs 2, 3 and 4 of his reply, the petitioner has stated as under:**

"2.That regards cash deposited in bank amounting to Rs. 13,67,24,000/- in Bank of Baroda during the year under consideration, we would like to inform you that ***we have not deposited any amount in cash in Bank of Baroda. The allegation levied by your honour regarding deposit of cash with Bank of Baroda is totally baseless and against the facts hence all the proceedings on the basis of this issue are illegal, unconstitutional and unjustified.***

3. That ***the assesse has deposited following sums in cash*** *with other banks:*

(I) Union Bank of India Rs. 3,41,81,000/-

(ii) State Bank of India Rs. 24,000/-

The figure of deposit of ***Rs. 3,41,81,000/- is shown in 26AS and insight portal of the department. 26AS is attached as ANNEXURE-F. Hence the story of deposit of Rs.13,67,24,000/-*** *is baseless and incorrect and all the proceedings on the basis of this information are liable to be quashed.*

Datewise details of cash deposited with Union Bank of India is attached as ANNEXURE-G.

In this connection ***it is humbly requested that the source and details of cash deposit as per insight postal as referred to in the reasons recorded for initiating the proceedings U/S 148 should be provided to the assesse along with the documentary evidence.***

4. That during the year under consideration the assesse has received following cash from different sources:

(I) Storage Rent Rs. 1,51,35,495/-

(ii) Refund of loan from farmers Rs. 3,15,75,650/-

(iii) Interest on farmers loan Rs. 18,94,539/-

TOTAL ***Rs. 4,86,05,684/-***

Against the total receipt of cash amounting to Rs.4,86,05,684/- the assesse has deposited an amount of Rs.3,42,05,000/- only in different bank accounts."

12. Thereafter, **without any whisper as to consideration of the reply** of the petitioner and the documentary evidences filed along with the aforesaid reply, **the respondent No.4 passed the impunged reassessment order dated 31.03.2022** under Section 147 read with Section 144B of the Act, 1961 for the Assessment Year 2017-18, **as under:-**

"Return of Income for the Assessment Year 2017-18 was filed by the assessee, firm on 17.10.2017 u/s. 139 declaring total income of Rs. 11,55,016/-

2. Subsequently, the case was re-opened after obtaining prior approval of competent authority by issuing notice u/s.148 dated 31.03.2021 which was duly served after recording reasons to believe that Income had escaped assessment on account of non-disclosure of fully and truly all material facts available on record.

3. In response, the assessee filed return of income u/s. 148 on 28.04.2021 declaring total income of Rs. 11,55,020/-. Subsequently notice u/s. 143(2) and 142(1) of the Income-tax Act, 1961 is issued and duly served upon the assessee.

4. The assessee furnished details and submitted explanation which are considered.

4. FACTS OF THE CASE:

4.1 As per record / information available with the Department it is seen that during the financial year 2016-17 relevant to A.Y. 2017-18 there are cash deposits of Rs13,67,24,000/- made by the assessee firm at Bank of Baroda, Kanpur, which is not commensurate with turnover and return of income filed by the assessee, firm. Hence cash deposits of Rs13,67,24,000/- made by the assessee is added to the total income of the assessee as income u/s. 68 of the Income Tax Act, 1961 as unexplained cash credit.

Penalty u/s 271AAC(1) of the I.T. Act, 1961 is initiated in respect of certain income.

[Addition: Rs. 13,67,24,000/-]

5. Subject to the above discussion, total income of the assessee is computed as under:

Total Income declared as per return : Rs. 11,55,020

As discussed in para 4.1:

Rs. ***13,67,24,000/-***

Total Assessed Income :

Rs. 13,78,79,020/-

6. Subject to the above, the total income of the assessee for the assessment year 2017-18 and tax liability thereon are computed on ITBA module. Copy of calculation sheet and notice of demand are annexed herewith forms part of this order.

Penalty u/s 271AAC of the I.T. Act, 1961 is initiated for penalty in respect of certain income.

7. The Assessment is hereby made u/s. 147 read with Sec. 144B of the Income-tax Act, 1961 as above and the sum payable or refund of any amount on the basis of the assessment is determined as per the notice of demand.

Copy of Assessment Order along with Income Tax Computation sheet from ITBA module, Penalty Notices and Notice of Demand u/s. 156 of the Income-tax Act, 1961 being issued to the assessee."

13. **Aggrieved with notice under Section 148 dated 31.03.2021, the order dated 24.03.2022 rejecting the objection and the reassessment order dated 31.03.2022, the petitioner has filed the present writ petition on the ground that these are wholly without jurisdiction.**

14. It is undisputed that the figure of cash deposit by the petitioner in its bank account with Union Bank of India is shown in Form 26AS to be Rs.3,41,81,000/-. It had made cash deposit of Rs.24,000/- in its bank account with State Bank of India. Thus, total cash deposit made by the petitioner in its bank-accounts was Rs.3,42,05,000/-. Along with his reply dated 25.03.2022**, the petitioner has filed various documents as Annexures A, B, C, D, E, F, G and H including its copy of Form 26AS, details of cash deposit in Union Bank of India and copy of statement of bank account with Bank of Baroda etc. for the Financial Year 2016-17.** However, perusal of the aforequoted impugned reassessment order dated 31.03.2022 and rejection of objection of the petitioner by order dated 24.03.2022 shows that there is not a word of consideration of the reply or objections submitted by the petitioner.

15. On these facts, this Court passed a detailed order dated 26.05.2022. Paragraphs 7 and 8 of the **order of this Court dated 26.05.2022** is reproduced below:

"7. From the show cause notice and the reply to it by the petitioner, it prima facie appears that the assessee has completely denied deposit of any cash in Bank of Baroda. He has disclosed information about cash deposit in his bank account in Union Bank of India and State

Bank of India. ***Prima facie, it appears that the respondent No.4 has very casually made addition without any discussion or without reference to any evidence in respect of the alleged cash deposit of of Rs.13,67,24,000/- of the assessee in his bank account in Bank of Baroda.***

8.Learned ASGI and learned counsel for the respondent Nos.2, 3 and 4 pray for and are granted three days time to obtain instructions. ***The petitioner shall also file a supplementary affidavit annexing therewith copy of his bank account in Bank of Baroda for the Financial Year 2016-17."***

16. The aforesaid order passed by this Court dated 26.05.2022 was followed by order dated 30.05.2022, as under:-

"Heard Sri Abhinav Mehrotra, learned counsel for the petitioner, Sri S.P. Singh, learned Additional Solicitor General of India, learned counsel for the respondent no.1 and Sri Manu Ghildiyal, learned counsel for the respondent nos. 2, 3 and 4.

Learned counsel for the petitioner has filed today supplementary affidavit, which is taken on record.

This case prima facie shows high handedness and arbitrary exercises of powers by the respondents including the National Faceless Assessment Centre who are not ready to adhere to the basic principles of law and justice. An addition of Rs.13,67,24,000/- has been made in the income of the petitioner for the A.Y. 2017-18 without there being any material disclosing escapement of income by the petitioner. The petitioner has been continuously bringing it to the notice of the respondents that he has not deposited any amount in his bank account i.e. Bank of Baroda and also filed copy of the bank account, a copy of which has also been filed along with supplementary affidavit; and yet the respondents have made addition of Rs. 13,67,24,000/-.

Basic principles of rule of law and justice has been deliberately denied to the assessee by the respondents. *This prima facie shows conscious attempt to cause serious harassment to the assessee for reasons best known to the respondents.*

We are frequently coming across orders passed by the respondents including the National Faceless Assessment Centre which show that the respondents have made up their mind to act arbitrarily and not to adhere to the settled principles of law including natural justice and are passing reassessment orders in a whimsical manner. *Such prevailing situation causing serious prejudice to the assessees and flagrant violation of basic principles of law by the respondents, needs to be arrested at the earliest.*

Under the circumstances ***we direct the respondents to file a counter affidavit and show cause as to why exemplary cost*** *in view of the law laid down by the Hon'ble Supreme Court in the case of* ***Assistant Commissioner (ST) & Ors. vs. M/s Satyam Shivam Papers Pvt. Limited & Anr. (Special Leave to Appeal No.21132 of 2021, decided on 12.01.2022,*** *be not imposed. The respondent no.1 shall also file counter affidavit by means of his personal affidavit within three weeks. All the respondents, besides submitting reply to paragraph of the writ petition, shall also submit reply within one week with respect to the facts noted and the observations made in the order dated 26.05.2022, passed by this Court.*

Put up as a fresh case for further hearing at 10 AM. on 05.07.2022.

Considering the facts and circumstances, as an interim measure, it is

provided that no coercive action shall be taken against the petitioner pursuant to the impugned reassessment order/demand, till the next date fixed.

This order shall be informed by learned counsels to the respondents within 48 hours, for compliance."

17. **Despite the aforequoted two orders dated 26.05.2022 and 30.05.2022, the respondents have merely filed a short-counter affidavit and not a detailed counter affiadvit. Therefore, on 14.07.2022, this Court passed a detailed order granting ten days and no more time to the respondent Nos.1, 2, 3 and 4 to file counter affidavit and further directed the respondent No.1 to state the action it proposes to take against the respondent Nos.2, 3 and 4 in case, he finds that there was absolutely no valid material before the Assessing Officer** for reason to believe that income of the petitioner has escaped assessment to tax. **Paragraphs 5 to 13 of the order dated 14.07.2022 passed by this Court, is reproduced below:**

"5. The sole ground of the respondent nos. 2,3 and 4 for initiation of the proceeding under Sections 148 and for passing order under section 147 of the Income Tax Act, 1961 making addition in income of Rs. 13,67,24,000/- is that the petitioner has deposited cash in the Bank account with Bank of Baroda, Shivrajpur Branch, Kanpur. Despite clear denial of the petitioner that no such cash deposit was made by him in the aforesaid Bank, the respondents have not even taken pain to examine his stand and in a most arbitrary and illegal manner, the reassessment order dated 31.03.2022 was passed making addition to Rs. 13,67,24,000/- in the income of the petitioner. The petitioner has filed copy of his Bank account with the Bank of Baroda, Shivrajpur Branch, Kanpur for the F.Y. 2016-17 relevant to the A.Y. 2017-18 which shows that there is no such cash deposit in the aforesaid Bank. Copy of the bank account has already been filed along with certificate of Chartered Accountant with supplementary affidavit dated 30.05.2022, yet the respondents have neither replied the contents of the writ petition nor the contents of the supplementary affidavit.

6. A short counter affidavit has been filed by the respondents. Even in the short counter affidavit, the respondents have not filed any evidences which may even indicate remotely that any cash was deposit by the petitioner in his Bank account with Bank of Baroda, Shivrajpur Branch, Kanpur. Thus, the initiation of re assessment proceedings and the impugned assessment order are not only without jurisdiction and perverse but also, the impugned reassessment order and re assessment proceeding violate fundamental right of the petitioner guaranteed under Article 14 and 21 of the Constitution of India.

7. Since despite time granted for the last more than one month, no counter affidavit has been filed by the respondent nos. 2,3 and 4, therefore, we direct the respondent no.1 to file counter affidavit by means of his personal affidavit along with copies of the evidences of cash deposit of Rs.13,67,24,000/- by the petitioner in his bank account. The respondent no.1. shall also clearly state in his affidavit justification, if any, for initiation of the reassessment proceedings against the petitioner under the facts and circumstances of the case. Respondent No.1 shall further state the action he proposes to take against the respondent Nos. 2, 3 and 4 in case he finds that there was absolutely

no valid material before the Assessing Officer for reason to believe that income of the petitioner has escaped assessment to tax.

8. The respondent Nos.2, 3 and 4 shall also file a detailed counter affidavit annexing therewith the evidence of cash deposit by the petitioner in his bank account.

9. The counter affidavit shall be filed by the respondent Nos.1, 2, 3 and 4, as directed above, within ten days and no more time.

10. On the next date fixed, the respondents shall also produce records before this court relating to the petitioner showing cash deposit of Rs. 13,67,24,000/- by the petitioner in his bank account.

11. In the event the counter affidavit is not filed, the respondent Nos.2 and 3 personally and the respondent No.4 through a responsible officer, shall remain present before this Court.

*12. P**ut up on 26.07.2022 for further hearing at 10:00 A.M.***

13. Interim order shall continue till the next date fixed."

18. **Thereafter, the respondent No.1 has filed a notarized counter affidavit dated 24.07.2022** sworn by Shishir Jha, Principal Chief Commissioner of Income Tax, U.P. (West) and Uttarkhand Region at Kanpur. Contents of paragraph-1 sworn on personal knowledge and contents of paragraphs-3, 4, 5, 6, 7, 8, 10 and 13 sworn on the basis of records, are reproduced below:

*"3. That in light of the above it is respectfully submitted that the amount of **Rs.13,67,24,000/-** was reported in Insight Portal of the Department, which uses Data Analytics to collate information gathered in the data- base using various algorithms, **and this information was inter alia the basis for reopening the assessment, issuance of notice u/s 148, and re-assessment of the case of the petitioner for Assessment Year 2017-18.***

4. That it is further most respectfully submitted that in the case of the petitioner, the amount showing in Insight portal was Rs.13,67,24,000/, which was reported as "Cash Deposits in one or more accounts (other than a current accounts or time deposit) of a person" and does not specify the Bank name. This clearly indicated that cash deposits had been detected by the algorithm in the various accounts of the petitioner, and other linked entities, totalling the aforesaid amount.

5. That it is further most respectfully submitted that the amount of Rs.3,41,81,000/- appears to have been taken as Rs.13,67,24,000/-, which is exactly four times the said amount, as there is reporting error in the PAN of the account relations, the aggregation for the same value of Rs.3,41,81,000/- is happening multiple times because the account relations are having same reported PAN.

*6. That it is further most respectfully submitted that **this possibility was not known to any officers of the Department and they proceeded in good faith and without any malafide intention or otherwise that the data reported on Insight Portal was correct. This has now been detected subsequent to the observations made by this Hon'ble Court in its order dated 14.07.2022 by the Directorate of Income Tax,** Systems, New Delhi and necessary and immediate steps have been initiated to rectify the mistake by refining the data further.*

*7. That it is most respectfully submitted that the officers of the **Department are bound by the information provided on the data-base / portal of the***

Department and it is not for them to question its authenticity and veracity. *In case they ignore this data, there will be initiation of revision action u/s 263 of the Act by the Principal Commissioner of Income Tax, either on own motion or based on internal audit of the Department, or external audit by Comptroller & Auditor General of India who subjects each scrutiny assessment to its audit.*

8. That it is further most respectfully submitted that the ***officers found to omit or ignore such data are also liable to explain the reasons and may be subjected to Departmental action.*** *The Parliamentary Committees on Accounts, and the Department-Related Parliamentary Committee on Finance, keep raising the issue of action taken against the* ***officers found to commit omissions detected by receipt audits conducted by C&AG, and monitor the action taken by the Government.***

10. That it is further most respectfully submitted that the Faceless Assessment Scheme and the Faceless Appeal Scheme introduced recently is in its evolution stage and all possible steps, checks and balances are being put in place so that the situation faced by the present petitioner is not repeated and the deponent with all humility at his command submits that the higher authorities and the Board are taking all remedial measures / steps so that similar situation does not reoccur and a mechanism is being put in place in consultation with all the stake holders.

13 That on the one hand the petitioner assessee has shown receipts at Rs. 1,73,09,104/- in his Profit and Loss Account while on the other hand the petitioner assessee in response to the Show Cause Notice dated 25.03.2022 has admitted cash deposits of Rs. 3,41,81,000/ which reflects in Form 26-AS of the petitioner also. ***Thus, this admission of the petitioner reflects that there was escapement of income to the tune of Rs. 1,68,71,896/- which was required to be examined."***

19. A counter affidavit on behalf of the respondent Nos.2 and 3 sworn by Arun Kumar Bhatia, Joint Commissioner of Income Tax, Range-1(1), Kanpur dated 25.07.2022 has been filed in which in paragraphs 10, 28 and 31, he stated on the basis of records, as under:-

"10. That in order to examine the issue of cash deposit of Rs. 13,67,24,000/- in the bank account maintained with ***Bank of Baroda, Kanpur, the JDIT*** *(Inv.), Unit-III, Kanpur,* ***from where the information pertaining to the said cash deposit was first originated,*** *was requested to furnish detailed/complete investigation report in the matter. The JDIT (Inv.), Unit-1, Kanpur vide letter dated 31.05.2022 has submitted his report in this regard. As per report of the JDIT (Inv.),* ***a Tax Evasion Petition in this case was received which was allotted a Unique Identification Number after categorization as per guidelines of the CBDT. Subsequently, enquiries were conducted in this case after obtaining approval from the prescribed authority. The Departmental database in this case was perused and from the information profile of the assessee [SFT-04] it was found that there are cash deposits amounting to Rs. 13,67,24,000/- [other than in current account] in F/Y - 2016-17 relevant to AY 2017-18.*** *A photocopy of the report submitted by the Jt.DIT (Inv.), Unit-III, Kanpur is enclosed herewith as Annexure CA-2.*

28. That the contents of paragraph nos. 14, 15, 16, 17 and 18 of the Writ Petition in the manner as stated

therein are not admitted and hence denied. In reply it is respectfully submitted that the proceedings u/s 147 of the Act were initiated in the instant case on the basis of the information available on Insight Portal of the department under High Risk CRIU/VRU uploaded by DDIT (Inv.) Unit-III, Kanpur after obtaining prior approval of the competent authority u/s 151 of the Act and accordingly notice u/s 148 of the Act, was issued to the petitioner on 31.03.2021 through e-mail/ by speed post on same day vide speed post no. EUO72169125IN. ***The information uploaded on the Insight Portal is based on the inquiry conducted by the then Deputy Director of Income Tax (Inv.), Unit-3, Kanpur now Joint Director of Income Tax (Inv), Unit-3, Kanpur after getting prior approval of the Joint Director of Income Tax (Inv.) on two separate Tax Evasion Petitions*** *bearing Unique Identification Number (UIN): 180980823-B and 18057074-B respectively. Thus the proceedings u/s 147 was initiated after recording reasonable belief.*

31.That in reply to the contents of paragraph no. 26 of the Writ Petition in the manner as stated therein, it is respectfully submitted that the cash deposit in Bank was supported by the data of Central Information Branch (CIB), Income Tax Department. Normally, the assessment is done to check and ascertain assessee's income after proper verification and enquiries and after obtaining details/documents/ clarifications from the assessee. However in the present case the assessee failed to produce the evidences and did not cooperate in providing or making available the details called for since December, 2021.

It is further most respectfully submitted that it transpired that the assessee had cash deposit of Rs.13,67,24,000/- during the financial year 2016-17 relevant to A.Y. 2017-18 which is not commensurate with the gross receipts shown by the petitioner in its return of Income [ITR-5] filed for A.Y. 2017-18...Thereafter, the assessee/petitioner was asked to explain the source of cash deposit of Rs.13,67,24,000/- and the same was added to the income of the assessee under section 68 of the Act, as unexplained cash credits vide order passed u/s.147 r.w.s. 144B of the Act by the NaFAC."

20. In the aforesaid paragraph-10 of the counter affidavit, the respondent Nos.2 and 3 has admitted that information of cash deposit of Rs.13,67,24,000/- was with respect to bank account of the petitioner with Bank of Baroda which first originated from the Joint Director of Income Tax (Inv.) Unit-III, Kanpur who, on request, submitted a verification report vide letter dated 31.05.2022 informing the said cash deposit. In paragrphs 5 and 6 of his counter affidavit, the respondent No.1 has admitted that the information of cash deposit of Rs.13,67,24,000/- is incorrect and the correct figure is Rs.3,41,81,000/-. He stated in paragraph-13 of the counter affidavit that cash deposit of Rs.3,41,81,000/- is reflected in Form 26AS of the petitioner. Perusal of the aforesaid Form 26AS appearing at page-124 of the writ petition, shows that cash deposit by the petitioner is Rs.3,41,81,000/- in the Union Bank of India. **Thus, as per own admitted case of the respondents, the cash deposit of Rs.3,41,81,000/- was made by the petitioner in its bank account with Union Bank of India and there was absolutely no cash deposit by the petitioner in Bank of Baroda whereas the entire reassessment proceedings under Section 147/148 of the Act, 1961 against the**

petitioner, was initiated on the alleged information of cash deposit of Rs.13,67,24,000/- by the petitioner in its bank account with Bank of Baroda. Thus, the reason to believe for initiating proceedings under Section 147/148 was totally unfounded and false. In fact initiation of proceedings and passing the impugned reassessment order dated 31.03.2022 is a glaring example of highhandedness, arbitrary actions and abuse of power by the respondents on the one hand and on the other hand, flagrant violation of principles of natural justice by them.

21. In **WRIT TAX No. - 518 of 2022 (Uphill Farms Private Limited vs. Union Of India And Another), decided on 25.04.2022,** this Court referred various judgments of Hon'ble Supreme Court and summarized the law of limitations and exercise of powers by the Income Tax authorities under Section 147/148 of the Act, 1961 in paragraph-15 of the judgment as under:

"(a) The assessing officer under Section 147 of the Act, 1961 has the power to re-assess any income which escaped assessment to tax for any assessment year subject to the provisions of Sections 148 to 153. The power to reassess under ***Section 147 of the Act, 1961 has been incorporated so as to empower the Assessing Authorities to re-assess any income on the ground which escaped his knowledge.***

(b) Reassessment of income under Section 147 of the Act, 1961 cannot be made on ***change of opinion.*** *The words "change of opinion" implies formulation of opinion and then a change thereof. If the Assessing Officer has earlier made assessment for the same Assessment Year expressing an opinion of a matter either expressly or by necessary implication then on the same matter, a reassessment proceedings for the alleged escapement of income from assessment to tax, cannot be initiated as it would be a case of "change of opinion". If the assessment order is non-speaking, cryptic or perfunctory in nature, then it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. 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 the 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.*

(c) The words ***"reason to believe"*** *suggest that the* ***belief must be bona fide and must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. His vague feeling that there might have been some escapement of income from assessment is not sufficient.*** *The reasons for the formation of the belief* ***must be based on tangible material*** *and must be based on a rational connection with or relevant bearing on the formation of the belief.* ***Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer*** *and the formation of his belief that there has been escapement of the income of the assessee from assessment*

in the particular assessment year. ***In other words, such material on which the assessing Authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant. If the grounds for formation of "reason to believe" are of an extraneous character, the same would not warrant initiation of proceedings under Section 147 of the Act, 1961.***

(d) If, there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of income of the assessee has escaped assessment, it can take action under Section 147 of the Act, 1961. If the grounds taken for initiating reassessment proceedings under Section 147 of the Act, 1961 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. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. The belief must be held in good faith and should not be a mere pretence.

(e) The question as to whether the material on the basis of which the assessing authority has formed the belief for "reason to believe" is sufficient, for making assessment or reassessment under Section 47 of the Act, 1961, would be gone into after the notice is issued to the assessee and he is heard or given an opportunity for that purpose. The assessing authority would then decide the matter in the light of material already in his possession as well as fresh material procured as a result of inquiry, if any, which may be considered necessary."

(Emphasis supplied by us)

22. On the facts admitted by the respondents in their counter affidavit as quoted above and for the reasons given in preceding paragraphs of this judgment, the impugned notice under Section 148 and the reassessment order under Section 147 of the Act, 1961 is completely in conflict with the aforequoted principles, powers and limitations on exercise of powers under Section 147/148 by Income Tax Officers/ Authorities under the Act, 1961. The impugned reassessment order has been passed by the respondent No.4 in complete breach of principles of natural justice.

Natural Justice:-

23. In paragraphs 27 and 28 of the writ petition, the petitioner has specifically stated that it exercised its right to be heard in the matter by requesting for a hearing through video conferencing within the time stipulated by the respondents-authorities yet even opportunity of hearing through video conferencing was denied. In support of its submissions, it also filed a screen shot asking for hearing through video conferencing which has been annexed as Annexure 12 of the writ petition. **The respondent No.4 has not denied the contents of paragraphs 27 and 28 while replying it in paragraph 15 of his counter affidavit dated 23.07.2022.** The reasons assigned by him is that the limitation was going to expire on 31.03.2022. **The show cause notice was issued by the respondent No.4 on 25.03.2022, the assessee submitted its reply on 25.03.2022 itself and requested for hearing on 26.03.2022. Therefore, by no stretch of imagination, the respondent No.4 can be permitted to take the stand that it denied the opportunity of**

personal hearing through video conferencing for reason that the limitation was going on to expire on 31.03.2022. In fact, the approach of the respondent No.4 itself proves arbitrary exercise of powers and denial of principles of natural justice by him.

24. In the case of **Uma Nath Pandey & Ors. vs State of U.P.& Anr. [(2009) 12 SCC page 40 para 3]**, Hon'ble Supreme Court noted the concept of natural justice and observed that it is another name of common sense justice. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when **a quasi-judicial body** embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue.

25. **The first** and foremost principle of natural justice is commonly known as **audi alteram partem rule.** It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. **In the absence of a notice of the kind and reasonable opportunity, the order passed becomes wholly vitiated.** Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. It is an approved rule of fair play.

26. The principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice.

27. Expression **`civil consequences'** encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

28. **Natural justice** has been variously defined by different Judges, for instance a duty to act fairly, the substantial requirements of justice, the natural sense of what is right and wrong, fundamental justice and fair-play in action. Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The **first rule** is `nemo judex in causa sua' or `nemo debet esse judex in propria causa sua' that is no man shall be a judge in his own cause. The **second rule** is `audi alteram partem', that is, `hear the other side'. **A corollary has been deduced from the above two rules and particularly the audi alteram partem rule i.e. 'he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right' or in other words, as**

it is now expressed, `justice should not only be done but should manifestly be seen to be done'. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

Order without valid reasons - unsustainable:-

29. In the case of **M/s. Hindustan Steels Ltd. Rourkela Vs. A.K. Roy and others, (1969) 3 SCC 513**, Hon'ble Supreme Court held in para 16 as under :

"12. On a consideration of all the circumstances, the present case, in our view, was one such case. The Tribunal exercised its discretion mechanically without weighing the circumstances of the case. That was no exercise of discretion -at all. There is ample authority to the effect that ***if a statutory tribunal exercises its discretion on the basis of irrelevant considerations or without regard to relevant considerations, certiorari may properly issue to quash its order.*** *[See S.A. de Smith, Judicial Review of Administrative Action, (2nd ed.) 324-325]. One such relevant consideration, the disregard of which would render its order amenable to interference, would be the well- settled principles laid down in decisions binding on the tribunal to whom the discretion is entrusted. The refusal by the High Court to interfere was equally mechanical and amounted to refusal to exercise, its jurisdiction. Its order, therefore, becomes liable to interference."*

(Emphasis supplied by us)

30. In the case of **Omar Salay Mohd. Sait Vs. Commissioner of Income Tax, Madras, AIR 1959 SC 1238,** Hon'ble Supreme Court held in para 42 as under :

"42. We are aware that the Income-tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were was the reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this court."

31. In the case of ***Udhav Das Kewat Ram Vs. CIT 1967 (66) ITR 462,*** Hon'ble Supreme Court held that Tribunal must consider with due care all material facts and record its findings on all contentions raised before it and the relevant law.

32. **An order without valid reasons cannot be sustained.** To give reasons is the rule of natural justice. Highlighting this rule, Hon'ble Supreme Court held in the case of **The Secretary & Curator, Victoria Memorial v. Howrah Ganatantrik Nagrik Samity and ors., JT 2010(2)SC 566** para 31 to 33 as under :

"31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. ***Thus, while deciding an issue, the Court is bound to give reasons for its conclusion.*** *It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice - delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice.* ***The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind.*** *" " [Vide State of Orissa Vs. Dhaniram Luhar (JT 2004(2) SC 172 and State of Rajasthan Vs. Sohan Lal & Ors. JT 2004 (5) SCC 338:2004 (5) SCC 573].*

32. ***Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless.*** *Reasons substitute subjectivity by objectivity.* ***Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum.*** *[Vide Raj Kishore Jha Vs. State of Bihar & Ors. AIR 2003 SC 4664; Vishnu Dev Sharma Vs. State of Uttar Pradesh & Ors. (2008) 3 SCC 172; Steel Authority of India Ltd. Vs. Sales Tax Officer, Rourkela I Circle & Ors. (2008) 9 SCC 407; State of Uttaranchal & Anr. Vs. Sunil Kumar Singh Negi AIR 2008 SC 2026; U.P.S.R.T.C. Vs. Jagdish Prasad Gupta AIR 2009 SC 2328; Ram Phal Vs. State of Haryana & Ors. (2009) 3 SCC 258; Mohammed Yusuf Vs. Faij Mohammad & Ors. (2009) 3 SCC 513; and State of Himachal Pradesh Vs. Sada Ram & Anr. (2009) 4 SCC 422].*

33. Thus, it is evident that the ***recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing.*** *It ensures transparency and fairness in decision making. The person 23 who is adversely affected may know, as why his application has been rejected."*

(Emphasis supplied by us)

33. Non recording of reasons, non consideration of admissible evidence or consideration of inadmissible evidence renders the order to be unsustainable. Hon'ble Supreme Court in the case of **Chandana Impex Pvt. Ltd. Vs. Commissioner of Customs, New Delhi , 2011(269)E.L.T. 433 (S.C.)(para 8)** held as under :

"8. Having bestowed our anxious consideration on the facts at hand, we are of the opinion that there is some merit in the submission of learned counsel for the appellant that while dealing with an appeal under Section 130 of the Act, the High Court should have examined each question formulated in the appeal with reference to the material taken into consideration by the Tribunal in support of its finding thereon

and given its reasons for holding that question is not a substantial question of law. It needs to be emphasised that ***every litigant, who approaches the court for relief is entitled to know the reason for acceptance or rejection of his prayer,*** *particularly when either of the parties to the lis has a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the court in denying him the relief prayed for, the remedy of appeal will not be meaningful. It is that reasoning, which can be subjected to examination at the higher forums. In State of Orissa Vs. Dhaniram Luhar2 this Court, while reiterating that reason is the heart beat of every conclusion and without the same, it becomes lifeless, observed thus :*

*"8.....****Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court.*** *Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;....." (Emphasis supplied by us)*

34. In the present set of facts, we find that despite that material disclosed by the assessee before the respondent Nos.2 and 4 and despite specific stand taken by him that he has not deposited any cash amount in his bank account with Bank of Baroda what to say of Rs.13,67,24,000/-, the aforesaid respondents have neither considered the objection/ reply nor recorded any reasons for its rejection. Thus, right to reason which is an indispensable part of a judicial system, has been deliberately violated by the respondents.

Objection as to alternative remedy of appeal:-

35. Objection raised by the learned senior standing counsel for the respondent Nos.2, 3 and 4 regarding maintainability of the writ petition on the ground of alternative remedy, is not tenable on the facts of the present case. In the present set of facts, in the absence of any valid information for invoking jurisdiction under Section 147/ 148 of **the Act, 1961, the entire proceedings are without jurisdiction.**

Alternative remedy - when not bar:-

36. Article 226 of the Constitution of India confers very vide powers on High Courts to issue writs but this power is discretionary and the High Court may refuse to exercise the discretion if it is satisfied that the aggrieved person has adequate or suitable remedy elsewhere. It is a rule of discretion and not rule of compulsion or the rule of law. Even though there may be an alternative remedy, yet the High Court may entertain a writ petition depending upon the facts of each case. It is neither possible nor desirable to lay down inflexible rule to be applied rigidly for entertaining a writ petition. Some exceptions to the rule of alternative remedy as settled by Hon'ble Supreme Court are as under:-

"(i) Where there is complete lack of jurisdiction in the officer or authority to take the action or to pass the order impugned.

(ii) Where vires of an Act, Rules, Notification or any of its provisions has been challenged.

(iii) Where an order prejudicial to the writ petitioner has been passed in violation of principles of natural justice.

(iv) Where enforcement of any fundamental right is sought by the petitioner.

(v) Where procedure required for decision has not been adopted.

(vi) Where Tax is levied without authority of law.

(vii) Where decision is an abuse of process of law.

(viii) Where palpable injustice shall be caused to the petitioner, if he is forced to adopt remedies under the statute for enforcement of any fundamental rights guaranteed under the Constitution of India.

(ix) Where a decision or policy decision has already been taken by the Government rendering the remedy of appeal to be an empty formality or futile attempt.

(x) Where there is no factual dispute but merely a pure question of law or interpretation is involved."

37. The above principles are supported by law laid down by Hon'ble Supreme Court in the case of **Himmatlal Harilal Mehta v. State of Madhya Pradesh, AIR 1954 SC 403, Collector of Customs v. Ramchand Sobhraj Wadhwani, AIR 1961 SC 1506, Collector Of Customs & Excise ,Cochin & Ors. vs A. S. Bava, AIR 1968 SC 13, Dr. Smt. Kuntesh Gupta vs Management Of Hindu Kanya Mahavidyalaya, L.K. Verma v. HMT Ltd. and anr., (2006) 2 SCC 269, Paras 13 and 20, M.P. State Agro Industries Development Corpn. Ltd. & Anr. vs. Jahan Khan (2007) 10 SCC 88 para 12, Dhampur Sugar Mills Ltd. v. State of U.P. and others (2007) 8 SCC 338, BCPP Mazdoor Sangh Vs. NTPC (2007) 14 SCC 234 (para 19), Rajasthan State Electricity Board v. Union of India, (2008) 5 SCC 632 (para 3), Mumtaz Post Graduate Degree College Vs. University of Lucknow,(2009) 2 SCC 630 (para 22 and 23), Godrej Sara Lee Limited v. Assistant Commissioner (AA), (2009) 14 SCC 338. 14, Union of India v. Mangal Textile Mills (I) (P) Ltd., (2010) 14 SCC 553 (paras 6,7,10 and 12), Union of India v. Tantia Construction (P) Ltd., (2011) 5 SCC 697, Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill, (2012) 2 SCC 108 (paras 79,80,81,82,86,87 and 88), State of M.P. Vs. Sanjay Nagaich (2013) 7 SCC 25 (para 34,35,38,39), State of H.P. vs. Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499 (para 11 to 19), Star Paper Mills Ltd. Vs. State of U.P. and others, JT (2006) 12 SC 92, State of Tripura vs. Manoranjan Chakraborty, (2001) 10 SCC 740 para 4; Paradip Port Trust vs Sales Tax Officer and Ors. (1998) 4 SCC 90, Feldohf Auto & Gas Industries Ltd. Vs. Union of India (1998) 9 SCC 710; Isha Beebi Vs. Tax Recovery Officer (1976) 1 SCC 70 (para 5); Whirlpool Corporation Vs. Registrar of Trademarks (1998) 8 SCC 1; Guruvayur Devasworn Managing Committee Vs C.K. Rajan (2003) 7 SCC 546 (para 67,68) .**

38. In the case of **State of Tripura vs. Manoranjan Chakraborty, (2001) 10 SCC 740,** Hon'ble Supreme Court held as under:

"4. For the reasons contained in the said decisions, we hold that the impugned provisions are valid. It is, of course, clear that if gross injustice is done and it can be shown that for good reason the court should interfere, then notwithstanding the alternative remedy which may be available by way of an appeal under Section 20 or revision under

Section 21, ***a writ court can in an appropriate case exercise its jurisdiction to do substantive justice.*** *Normally of course the provisions of the Act would have to be complied with, but the* ***availability of the writ jurisdiction should dispel any doubt which a citizen has against a high-handed or palpable illegal order which may be passed by the assessing authority."***

(Emphasis supplied by us)

No Factual Dispute:-

39. That apart, we find that there is no factual dispute involved in the present writ petition that the information which was made basis for recording reasons to believe for escapement of income of the petitioner to tax, was unfounded and the cash deposit which has been shown by the petitioner in its bank account with Union Bank of India has not been disputed at all. That apart, the original assessment of the petitioner was made under Section 143(3) of the Act, 1961 in which Form 26AS as it existed at all relevant point of time, reflects the cash deposit by the petitioner in the Union Bank of India amounting to Rs.3,41,81,000/- which the petitioner assessee has always admitted and has shown in its books of accounts and a copy of statement of deposit was also filed by the petitioner before the respnodent No.4 during reassessment proceedings but arbitrarily the respondent No.4 baselessly assumed cash deposit in the bank account with Bank of Baroda amounting to Rs.13,67,24,000/- whereas as per bank statement of Bank of Baroda, there was no cash deposit.

Abuse of Power:-

40. 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.

41. In a recent judgment dated 03.08.2022 in Writ Tax No.997 of 2022, this Court noticing **increasing tendency amongst Assessing Officers, particularly the respondent No.4, i.e. National Faceless Assessment Centre to violate principles of natural justice, non-consideration of replies of assessees under one pretext or the other or rejecting it without recording reasons for rejection and thus expressed the need for evolving an effective system of accountability of erreing officers** and held in paragraphs 6 and 7, as under:

"6. We are frequently coming across cases where Income Tax Authorities are giving complete go by to the principles of natural justice. The excuse orally being set up usually by the departmental counsels is that there is some problem in the computerisation system which is solely controlled by the respondent no.1 i.e. the Central Board of Direct Taxes, New Delhi, and they can not, at their own, correct the system.

7. Be as it may, ***the system has been introduced and is being implemented by the respondents and, therefore, it is their primary duty to immediately remove short comings, if any, in the system. For own wrongs of the respondents, the assessee can not be allowed to suffer and put to harassment. Prevailing state of affairs clearly reflects that in the absence***

of any effective system of accountability of the erring officers, the harassment of the assessees and breach of principles of natural justice by the Officers is resulting in uncontrolled situation. *The practice of frequently violating principles of natural justice, non consideration of replies of assessees under one pretext or the other or rejecting it with one or two lines orders without recording reasons for rejection, is gradually increasing which* ***needs to be taken care of immediately by the respondents at the highest level, otherwise prevailing situation of arbitrary approach and breach of principles of natural justice may not only adversely affect the assessees who pay revenue to the Government, but also may develop a perception amongst people/assessees that it is difficult to get justice from the authorities in statutory proceedings."***

(Emphasis supplied by us)

Respondents' Stand - Whether complete go-bye to Quashi-Judicial Function provided under the Act, 1961:-

42. The respondent No.1 has filed the counter affiavit dated 24.07.2022. In paragraph-1 sworn on personal knowledge, it has been stated that the deponent of the counter affiavit has stated that he has read the writ petition, its annexures, stay application, affidavit and the orders dated 18.05.2022, 26.05.2022, 30.05.2022 and the order dated 14.07.2022 passed by this Court and is acquianted with the facts deposed and has been authrorised by the Central Board of Direct Taxes, New Delhi to file the counter affidavit on behalf of the respondent No.1. Paragraphs-7, 8 and 9 of the counter affiadvit filed on behalf of the respondent No.1, i.e. Union of India have been sworn on the basis of records. Paragraphs-7, 8 and 9 of the aforesaid counter affidavit has been quoted above in paragraph-18 of this judgment. **In the aforequoted paragraphs-7, 8 and 9 of the counter affidavit, the respondent No.1 has taken a clear stand that the officers of the department are bound by the information provided on the data-base/ portal of the department and it is not for them to question its authencity and varacity. In case they ignore this data, there will be initiation of revision action under Section 263 of the Act** by the Principal Commissioner of Income Tax either on own ommission or based on internal audit of the Department, or external audit by Comptroller & Autditor General of India subject to each scruitiny assessment to its audit and **if the officers are found to omit or ignore such data, they shall be liable to explain the reasons and may be subjected to Departmental action**. It has further been stated that the Parliamentary Committees on Accounts and the Department-Related Parliamentary Committee on Finance, **keep raising issue on action taken against the officers found to comit omission detected by receipt audits conducted by C&AG, and monitor the action taken by the Government.**

43. These clear stands taken by the reaspondent No.1 may leave nothing in the hands of the Assessing Officer and the authorities under the Act, 1961 to adjudicate issue except to impose tax on the basis of information fed on the data-base/ portal of the department. Such a situation is indicative of creation of a chaos in discharge of quasi judicial function by the Assessing officers and other authorities under the Act, 1961.

44. In view of the aforequoted averments of paragraphs 7 and 8 of the counter affidavit of the respondent No.1,

i.e. Union of India, no Assessing Officer would take the risk to discharge his quasi-judicial function and to adjudicate cases/ show cause notices in accordance with the provisions of Section 148A, 148 and 147 of the Act, 1961 as they would not like to take risk of initiation of disciplinary proceedings against them.

45. Thus, from the stands taken by the respondent No.1 in the aforequoted paragraphs 7, 8 and 9 of the counter affidavit, **it is evident that all settled principles of law, duty to discharge quasi-judicial function and observance of statutory provisions of the Act, 1961 have been given complete go-bye and participation of assessees in proceedings under Section 148A or 148 or 147 of the Act, 1961 would remain an empty formality, inasmuch as the Assessing Officer would create liability on assessees only on the basis of data fed in the data base/ portal of the department and would not like to adjudicate the matter in accordance with law so as to take risk of initiation of disciplinary proceedings against himself.**

46. **By no stretch of imagination or the provisions of the Constitution or the law evolved so far by judicial decisions, the stand so taken by the respondent No.1 in paragraphs 7 and 8 of the counter affidavit can be justified or conceived. It appears that either** the deponent of the aforesaid counter affidavit namely Sri Shishir Kuamr Jha, **Principal Chief Commissioner of Income Tax, U.P. (West) and Uttarakhand Region at Kanpur has stated the real state of affairs prevailing in the income tax department or has shown extreme negligence while making statement on oath on record in paragraphs 7 and 8 of the aforeaid counter affidavit.**

Quasi-Judicial Function:-

47. In **State of H.P. vs. Raja Mahendra Pal and others, (1999) 4 SCC 43 (Paras-8 and 9)**, Hon'ble Supreme Court explained the quasi-judicial acts and observed that these acts are such acts which mandate an officer the duty of looking into certain facts not in a way which it specially directs but after a discretion, in its nature justicial. **The exercise of power by such tribunal** or authority contemplates the adjudication of rival claims of the persons by an act of the mind or judgment upon the proposed course of official action. **A quasi-judicial function has been termed to be one which stands midway a judicial and an administrative function.** The primary test is as to whether the authority alleged to be a quasi-judicial, has any express statutory duty to act judicially in arriving at the decision in question. If the reply is in affirmative, the authority would be deemed to be quasi-judicial, and if the reply is in the negative, it would not be. Therefore, an authority is described as a quasi-judicial when it has some of the attributes or trappings of judicial functions, but not all. In **Province of Bombay vs. Khusaldas S. Advani, AIR 1950 SC 222,** Hon'ble Supreme Court dealt with the actions of the statutory body and laid down tests for ascertaining whether the action taken by such body was a quasi-judicial act or an administrative act. The Court approved the celebrated definition of the quasi-judicial body given by Atkin L.J,, as he then was in **R. Vs. Electricity Commissioners (1924) 1 KB 171 : (1924) 130 LT 164.** The principles deducible from the various judicial decisions considered by the Hon'ble Supreme Court were summarized in the case of **Raja Mahendra Pal (supra)**, as under:-

"(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other there is a lis and prima fade and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi judicial act; and

(ii) that if a statutory authority has power to do any act, which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi judicial act provided the authority is required by the statute to act judicially."

48. In the case of **Orient Paper Mills Ltd. vs. Union of India, (1970) 3 SCC 76 (paras-4 and 5)**, Hon'ble Supreme Court explained the duty cast upon an authority while exercising quasi-judicial function and held as under:

"It is apparent from the judgment referred to above and numerous other decisions of this Court delivered in respect of various taxation laws that the ***assessing authorities*** *exercise quasi-judicial function and they have duty cast on them* ***to act in a judicial and independent manner.*** *If their judgment is controlled by the directions given by the Collector it cannot be said to be their independent judgment in any sense of the word. ....."*

(Emphasis supplied by us)

49. In the case of **Nareshbhai Bhagubhai and others vs. Union of India and others, (2019) 15 SCC 1**, Hon'ble Supreme Court held that necessary requirement of quasi-judicial function is to pass a reasoned order after due application of mind. It further held as under:

"21. In the present case, it is the undisputed position that no order as contemplated in the eyes of law was passed by the Competent Authority in deciding the objections raised by the Appellants. A statutory authority discharging a quasi-judicial function is required to pass a reasoned order after due application of mind. In ***Laxmi Devi v. State of Bihar, (2015) 10 SCC 241****, this Court held that:*

"9. The importance of Section 5-A cannot be overemphasised. It is conceived from natural justice and has matured into manhood in the maxim of audi alteram partem i.e. every person likely to be adversely affected by a decision must be granted a meaningful opportunity of being heard. This right cannot be taken away by a side wind, as so powerfully and pellucidly stated in ***Nandeshwar Prasad v. State of U.P. [AIR 1964 SC 1217]****. So stringent is this right that it mandates that the person who heard and considered the objections can alone decide them; and not even his successor is competent to do so even on the basis of the materials collected by his predecessor. Furthermore, the decision on the objections should be available in a self-contained, speaking and reasoned order; reasons cannot be added to it later as that would be akin to putting old wine in new bottles. We can do no better than commend a careful perusal of* ***Union of India v. Shiv Raj, (2014) 6 SCC 564****, on these as well as cognate considerations."*

50. In **Union of India and others vs. Karvy Stock Broking Limited, (2019) 11 SCC 631,** Hon'ble Supreme Court held as under:-

"2. This Circular dated 5-11-2003 has been set aside by the High Court in the impugned judgment, Karvy Securities Ltd. v. Union of India, 2004 SCC OnLine AP 1313 on the ground that it amounts to foreclosing discretion or judgment that may be exercised by the quasi-judicial authority while deciding a particular lis under particular circumstances. The High Court referred to the proviso to Section 37-B of the Central Excise Act, 1944, which categorically states that such kind of circulars cannot be issued. We, thus, do not find any error in the impugned judgment. This appeal is accordingly dismissed."

51. In **Commissioner of Income Tax, Shimla vs. Greenworld Corporation Parwanoo, (2009) 7 SCC 69,** Hon'ble Supreme Court held that an order passed by quasi-judicial authorities on the dictates of the higher authority is illegal and being without jurisdiction, is a nullity. Hon'ble Supreme Court further held that an Income Tax Officer while passing an order of assessment, performs a quasi-judicial function. Hon'ble Supreme Court further held that it is one thing to say that while making the orders of assessment the Assessing Officer shall be bound by the statutory circulars issued by CBDT but it is another thing to say that the assessing authority exercising quasi-judicial function keeping in view the scheme contained in the Act, would lose its independence to pass an independent order of assessment. If the Assessing Officer passes an order at the instance or dictate of the higher authority, it shall be illegal.

52. For all the reasons aforestated, the stand so taken by the respondent No.1 in paragraphs-7 and 8 of the counter affidavit deserves to be rejected and is hereby rejected and **it is directed that the respondent No.1 or other authorities under the Act, 1961 shall not interfere with the quasi-judicial function and discharge of statutory duties by the Assessing Officers unless permitted by the Act, 1961. Let a circular be issued by the rspondent No.1 forthwith clarifying the position.**

53. In view of the statement made by the respondent No.1 in paragraph-10 of the counter affidavit, we direct as under:

(i) The respondent No.1 shall ensure that all necessary steps are taken within one month and a mechanism is developed and is put in place within one month so that assessees may not be harassed and may not suffer on account of own fault of the department in its data-base/ portal.

(ii) The Respondent No.1 shall provide a mechanism and put it in place within one month from today that the information fed on data-base/ portal is verified in reality and not as an empty formality as has been done in this case by the Deputy Director of Income Tax (Inv.), Unit-III, Kanpur, before initiating proceedings under Section 148A/ 148/147 of the Act, 1961 so that on one hand bona fide assessees may not face harassment and on the other hand tax evadors may not escape due to lapses of departmental officers.

(iii) The respondent No.1 shall consider to develop a mechanism of accountability of the officers who either do not observe the stautory provisions under the Act, 1961 or fail to discharge their quasi-judicial function or act in complete breach of principles of natural justice.

Accountability:-

54. In the case of **Lucknow Development Authority vs M.K. Gupta, 1994 SCC (1) 243 (para-8)**, Hon'ble Supreme Court observed that:

*"The administrative law of accountability of public authorities for their arbitrary and even ultra vires actions has taken many strides. It is now accepted both by this Court and English Courts that the State is liable to compensate for loss or in' jury suffered by a citizen due to arbitrary actions of its employees. ..... **Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented.** No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. **Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour** before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law.*

(Emphasis supplied by us)

55. In the aforesaid judgment in the case of **Lucknow Development Authority (supra), vide Paragraph-10 and 11,** Hon'ble Supreme Court considered the question of **abuse of power by public authorities** and held as under:-

*"10. ..... The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in Cassell & Co. Ltd. v. Broome13 on the principle that, an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. **An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities.** That is provided by the rule of law. It acts as a check on arbitrary and capricious exercise of power. In Rookes v. Barnard14 it was observed by Lord Devlin, **'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and bona fide. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance.***

Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. .....

*11. ..... **In a modem society no authority can arrogate to itself the power to act in a manner which is***

arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. *Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority.* ***But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover.*** *When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today when even social obligations are regulated by grant of statutory powers.* ***The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society.*** *When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man.* ***It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law.*** *It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly,* ***then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries."***

(Emphasis supplied by us)

56. 'Sovereignty' and "acts of State" are two different concepts. The former vests in a person or body which is independent and supreme both externally and internally whereas latter may be act done by a delegate of sovereign within the limits of power vested in him. **No civilised system can permit an executive to play with the people of its country** and claim that it is entitled to act in any manner as it is sovereign. **No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State.** The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people **the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent.** Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken. Principles as stated finds support from the law laid down by Hon'ble Surpeme Court in **N. Nagendra Rao & Co. vs. State of A.P., AIR 1994 SC 2663.**

57. In a recent **judgment dated 03.08.2022 in Writ Tax No.997 of 2022 (Nabco Products Private Limited vs.**

Union of India and 2 others), this Court considered the prevailing state of affairs in assessment matters and in Paragraphs 6 and 7 obsrved that **prevailing state of affairs clearly reflects that in the absence of any effective system of accountability of the erring officers, the harassment of the assessees and breach of principles of natural justice by the Officers is resulting in uncontrolled situation. The practice of frequently violating principles of natural justice, non consideration of replies of assessees under one pretext or the other or rejecting it with one or two lines orders without recording reasons for rejection, is gradually increasing which needs to be taken care of immediately by the respondents at the highest level, otherwise prevailing situation of arbitrary approach and breach of principles of natural justice may not only adversely affect the assessees who pay revenue to the Government, but also may develop a perception amongst people/assessees that it is difficult to get justice from the authorities in statutory proceedings.**

Imposition of Cost:-

58. By the impugned reassessment order, the income of the petitioner has been assessed under Section 147/148 of the Act, 1961 at Rs.13,78,79,020/- by making an **addition of Rs.13,67,24,000/- on account of alleged cash deposit** by the petitioner in bank account with the Bank of Baroda representing unexplained cash credit under Section 68 of the Act, 1961 and **thus created a demand to the tune of Rs.16,90,61,731/-** and initiated penalty proceedings under Section 271AAC(1) of the Act, 1961. For detailed reasons recorded by us in forgoing paragraphs of this judgment, it is evident that the respondents have acted arbitrarily, without jurisdiction, in breach of principles of natural justice and abused the power conferred under the Act, 1961 and thus created a huge demand of income tax of Rs.16,90,61,731/-. We have also found that the reassessment proceedings were without jurisdiction. The information on the basis of which the reassessment proceeding was initiated against the petitioner, has been admitted by the respondent to be incorrect. Despite every effort made by the petitioner and the evidences filed by it to establish that there has been no escapement of income to tax and the information on the basis of which reassessment proceeding has been initiated is unfounded, respondents have not even looked into the reply and evidences filed by the petitioner and even his request for personal hearing through video conferencing was denied. Only a day's time was granted to the petitioner to submit reply to the show cause notice in reassessment proceedings which the petitioner submitted within time and yet his request for hearing through video conferencing was declined by the respondent No.4. **This shows a complete failure to the observance of rule of law on the part of the respondents.** A huge demand of Rs.16,90,61,731/- has been created by the resopndents against the petitioner on totally non-existent and baseless ground and that too without any fault or breach by the petitioner. In the case of **Punjab State Power Corporation Ltd. vs. Atma Singh Grewal, (2014) 13 SCC 666 (para 14)**, Hon'ble Supreme Court stressed that cost should be in real and compensatory terms and not mrely symbolic. It further expressed the need to recover the cost from erring officers. Paragraph-14 of the Punjab State Power Corporation Ltd. (supra) is reproducecd below:

"14. No doubt, when a case is decided in favour of a party, the Court can award cost as well in his favour. ***It is***

stressed by this Court that such cost should be in real and compensatory terms and not merely symbolic*. There can be exemplary costs as well when the appeal is completely devoid of any merit. [See Rameshwari Devi v. Nirmala Devi (2011) 8 SCC 249]. However, the moot question is as to whether imposition of costs alone will prove deterrent? We do not think so.* ***We are of the firm opinion that imposition of cost on the State/PSU's alone is not going to make much difference as the officers taking such irresponsible decisions to file appeals are not personally affected because of the reason that cost, if imposed, comes from the government's coffers. Time has, therefore, come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals, even after knowing well that these are totally vexatious and uncalled for appeals.*** *We clarify that such an order of recovery of cost from the officer concerned be passed only in those cases where appeal is found to be ex-facie frivolous and the decision to file the appeal is also found to be palpably irrational and uncalled for."*

(Emphasis supplied by us)

59. In a recent judgment dated 12.01.2022 in **Special Leave to Appeal (C) No.21132 of 2021 {Assistant Commissioner (ST) & others vs. M/s Satyam Shivam Papers Pvt. Limited & another}**, Hon'ble Supreme Court, in the matter of Goods and Services tax; **imposed cost upon the authority by enhancing the cost equivalent to the tax and penalty levied.** Relevent portion of the aforesaid judgment of Hon'ble Supreme Court is reproduced below:

"The analysis and reasoning of the High Court commends to us, when it is noticed that the High Court has meticulously examined and correctly found that no fault or intent to evade tax could have been inferred against the writ petitioner. However, as commented at the outset, the amount of costs as awarded by the High Court in this matter is rather on the lower side. Considering the overall conduct of the petitioner No.2 and the corresponding harassment faced by the writ petitioner we find it rather necessary to enhance the amount of costs.

Upon our having made these observations, learned counsel for the petitioners has attempted to submit that the questions of law in this case, as regards the operation and effect of Section 129 of Telangana Goods and Services Tax Act, 2017 and violation by the writ petitioner, may be kept open. The submissions sought to be made do not give rise to even a question of fact what to say of a question of law. As noticed hereinabove, on the facts of this case, it has precisely been found that there was no intent on the part of the writ petitioner to evade tax and rather, the goods in question could not be taken to the destination within time for the reasons beyond the control of the writ petitioner. When the undeniable facts, including the traffic blockage due to agitation, are taken into consideration, the State alone remains responsible for not providing smooth passage of traffic.

Having said so; having found no question of law being involved; and having found this petition itself being rather mis-conceived , we are constrained to enhance the amount of costs imposed in this matter by the High Court.

The High Court has awarded costs to the writ petitioner in the sum of Rs. 10,000/- (Rupees Ten Thousand) in relation to tax and penalty of Rs.69,000/- (Rupees Sixty-nine Thousand) that was

sought to be imposed by the petitioner No.2. In the given circumstances, a further sum of Rs. 59,000/- (Rupees Fifty-nine Thousand) is imposed on the petitioners toward costs, which shall be payable to the writ petitioner within four weeks from today. *This would be over and above the sum of Rs. 10,000/- (Rupees Ten Thousand) already awarded by the High Court.*

Having regard to the circumstances, we also make it clear that the State would be entitled to recover the amount of costs, after making payment to the writ petitioner, directly from the person/s responsible for this entirely unnecessary litigation.

This petition stands dismissed, subject to the requirements foregoing.

Compliance to be reported by the petitioners."

(Emphasis supplied by us)

60. In view of the detailed findings recorded by us in forgoing paragraphs of this judgment and our conclusion that the respondents have acted arbitrarily, illegally without jurisdiction, caused harrassment to the petitioner and abused power conferred under the Act, 1961, which resulted in creation of illegal demand of income Tax of Rs.16,90,61,731/-, we find it a fit case to impose cost of Rs.50,00,000/- (Rupees Fifty Lakhs) upon the respondents which shall be deposited by the respondents in the Prime Minister National Relief Fund within three weeks from today.

61. In result, **the writ petition is allowed with cost of Rs.50,00,000/- on the respondents, which shall be disposited in** Prime Minister National Relief Fund **within three weeks from today.** The impugned notice dated 31.03.2021 under Section 148, the impugned order dated 24.03.2022 and the impugned reassessment order dated 31.03.2022 for the Assessment Year 2017-18 under Section 147 read with Section 144B of the Act, 1961 and all consequential proceedings are hereby quashed and following directions are issued:-

(i) The respondent No.1 shall ensure that all necessary steps are taken within one month and a mechanism is developed and is put in place within one month so that assessees may not be harassed and may not suffer on account of own fault of the department in its data-base/ portal.

(ii) The Respondent No.1 shall provide a mechanism and put it in place within one month from today that the information fed on data-base/ portal is verified in reality and not as an empty formality as has been done in this case by the Deputy Director of Income Tax (Inv.), Unit-III, Kanpur, before initiating proceedings under Section 148A/ 148/147 of the Act, 1961 so that on one hand bona fide assessees may not face harassment and on the other hand tax evaders may not escape due to lapses of departmental officers.

(iii) The respondent No.1 shall consider to develop a mechanism of the accountability of the officers who either do not observe stautory provisions of the Act, 1961 or fail to discharge their quasi-judicial function or act in complete breach of principles of natural justice.

(iv) A circular be issued forthwith by the respondent No.1 in the light of the direction given in paragraph-52 above.

62. Let a copy of this order be sent by the Registrar General of this Court to the Finance Secretary to the Government of India for compliance.

63. After this judgment was delivered in open court, the learned Additional Solicitor General of India and the learned Senior Standing Counsel requested that the cost may be deferred today and **they may be heard only on the question of quantum of cost.**

Request is accepted. Payment of cost is deferred till the next date. Let the matter be **put up on 01.09.2022 at 02:00 P.M. for arguments only on the quantum of costs.**

(2022) 8 ILRA 216
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2022

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Misc. Application U/S 482 No. 1621 of 2022

Mohan Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Gaurav Kakkar, Sri Rishab Agrawal

Counsel for the Opposite Parties:
G.A., Sri Amit Singh

A. Criminal Law - Criminal Procedure Code,1973 – Sections 233, 313 & 482 – DNA Test – Permissibility – Use of scientific knowledge to unearth the truth – Held, rejection of the application for DNA test and granted an opportunity to adduce documentary or oral evidence in respect of his innocence by the court below is nothing but an old aged practice inspite of availability of scientific methods available before it – Scientific method must be used to unearth the truth because justice is best served by truth – To arrive at just decision of the case and to avoid any suspicion or doubt in the prosecution case, it would be in the interest of justice that DNA test may be conducted – High court set aside the impugned order of trial court holding it illegal. (Para 11 and 16)

B. Constitution of India – Article 21 – Right to life and privacy – DNA test, how far affect the right – Importance in proving the innocence of applicant-accused in criminal case – Held, DNA test has not been asked to be conducted to establish the relationship between the applicant and informant rather the same has been requested to prove the innocence of the applicant, therefore, there would be no impinge on his personal liberty and his right to privacy of the informant or his family members. (Para 14)

Application allowed. (E-1)

List of Cases cited:-

1. Sharda Vs Dharmpal; AIR 2003 SC 3450

2. Bhabani Prasad Jena Vs Convenor Secretary Orissa St. Commission for Women; AIR 2010 SC 2851

3. Civil Appeal No. 6153 of 2021; Ashok Kumar Vs Raj Gupta & ors.

4. Regina (Quantavalle) Vs Secretary of St. for Health [2003] 2 A.C. 687

5. Narayan Dutt Tiwari Vs Rohit Shekhar; 2012 (12) SCC 554,

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Sri Gaurav Kakkar, learned counsel for the applicant, Sri Amit Singh, learned counsel for the opposite party no.2, Sri Rajeshwar Singh and Sri Rakesh Chandra, learned A.G.A. for the State and perused the material on record.

2. Brief facts of the case are that a first information report was lodged by Hardeo Singh with the averments that on

Thursday i.e. 21.06.2012 due to opening of city market, his mother had gone to market to purchase some articles, on the way some quarrel was going on between Mohan Singh (applicant) and Tikki both sons of Hariya, whereupon his mother intervened in order to pacify them and had asked them to finish the quarrel, due to which, Mohan Singh accused-applicant abused and shot her, who later on died. With regard to aforesaid incident dated 21.06.2012, a first information report was lodged by the opposite party no.2 on 21.06.2012 in Case Crime No. 368 of 2012 under Section 302 I.P.C. Police Station Kosi Kalan, District Mathura. Thereafter, matter was entrusted for investigation which culminated in filing of charge sheet. Thereafter, the case was committed to the Court of Sessions, which was registered as Sessions Trial No. 573 of 2012 (State Vs. Mohan Singh) under Section 302 I.P.C. in which, statements of the witnesses were recorded, thereafter statement of the accused was recorded under Section 313 Cr.P.C. and during the pendency of the trial, the accused applicant moved an application dated 16.08.2021 under Section 233 Cr.P.C. stating therein that the prosecution may be directed to provide the blood sample of the family members of victim and be sent to Forensic Laboratory for conducting the DNA test of the blood collected from earth to ensure as to whether both are same or not, upon which objection was filed and thereafter, said application has been rejected vide order dated 11.10.2021, it is this order which is under challenge before this Court.

3. Learned counsel for the applicant submits that an application under Section 233 Cr.P.C. dated 16.01.2018 was filed by the applicant stating therein that on the day of incident the applicant had gone to Delhi with regard to payment of loan taken from S.R.E.I. Equipment Finance Private Limited whereafter, he had gone to Bijnor and purchased a mobile phone from CEC Computers. It has also been stated that the deceased had died somewhere else as such, the Investigating Officer had prepared wrong Naksha Nazari of the place of incident. The Investigating Officer did not send the samples of Blood stained earth (mud) with the blood stained clothes of deceased for DNA test before the Forensic Laboratory and thus prayer was made for DNA test of blood stained earth (mud) and the wearing clothes of the deceased, which application was partly allowed to the effect that the SREL Equipment Finance Private Limited shall be present along with record as well as owner of C.E.C. Computers, Nagina Road, Bijnor was summoned but so far as grievance of the applicant with respect to DNA test, the same has been rejected vide order dated 16.07.2018, which order was challenged by the applicant by way of filing Application U/s 482 No. 33291 of 2018 and the co-ordinate Bench of this Court vide order dated 05.10.2018 had quashed the order dated 16.07.2020 to the extent it denies the permission of DNA test. Pursuant to the order dated 05.10.2018, the learned Court below ordered for DNA test of the blood stained earth with blood stained clothes of the deceased but the same could not be done as the incident is of the year 2012 and the clothes of the deceased was not possible to be traced as the same has been misplaced from Malkhana, as such the application was disposed of vide order dated 20.07.2021 with further direction to initiate proceedings against the concerned erring police officials. Learned counsel further submits that thereafter another application dated 16.08.2021 was moved by the applicant to direct the prosecution to provide the blood sample of family

members of the victim and be sent to Forensic Laboratory for conducting the DNA test of blood stained earth to ensure that the blood of the stained earth and the blood of the family members of the victim are same, to arrive at just decision of the case and to prove the innocence of the aplicant, which application has been rejected on the ground that the prosecution has not been able to provide the blood sample of the family members of the deceased as they have denied to provide the same and further directed that the applicant may adduce any documentary or oral evidence with respect to his innocence. Learned counsel for the applicant submits that since the deceased had died somewhere else and false Naksha Nazari was prepared, thus it was absolutely necesary in the interest of justice of justice to arrive a just conclusion of the trial that the blood of the earth collected from the place of incident, as alleged, and the blood of the family members of the victim are matched, which can be ascertained by way of DNA test only.

4. Learned counsel for the applicant submits that although the DNA test cannot be conducted where there is a violation of right to life, or privacy of a person and the same should be exercised after weighing all pros and cons and satisfying that the test is of eminent need, whereas in the instant case by no stretch of imagination violation of right to life or any stigma would be put to privacy of the family members of the deceased and therefore in the instant case, there is eminent need of DNA test to prove the innocence of the applicant. He further submits that there would be no adversity for the informant, in case, this Court directs for DNA test of the family members of the victim with the blood stained earth, thus the informant would not face any adverse consequences. In support of his contention, learned counsel for the applicant has relied upon a decision reported in ***AIR 2003 SC 3450*** in the matter of ***Sharda Vs. Dharmpal as well as AIR 2010 SC 2851*** in the matter of ***Bhabani Prasad Jena Vs. Convenor Secretary Orissa State Commission for Women*** in support of his contention.

5. Per contra, Sri Amit Singh, learned counsel for the opposite party no.2 has submitted that the incident is of the year 2012 and we are in the year 2022, thus nothing remains in the blood stained earth and in case DNA test would be permitted, no concrete results may be aserctained due to passage of time, due to which the accused-applicant may be benefited from the same and thus the learned Court below has rightly rejected the application of the accused-applicant. He further submits that if a person refuses to undergo for DNA test, then he cannot be forced/compelled to undergo for the same as such the informant or his family members also cannot be forced to undergo for DNA test as it relates to their privacy. Learned counsel has placed reliance upon a reported Judgement of Hon'ble Apex Court in the matter of ***Ashok Kumar Vs. Raj Gupta and others*** passed in Civil Appeal No. 6153 of 2021 and has relied upon paragraph nos. 4, 5, 15, 16 and 17, which is quoted below:-

"4. In course of the proceedings before the learned Addl. Civil Judge (Sr. Division), Kalka, on closure of the plaintiff's evidence, when the suit was slated for the other side's evidence, the defendants filed an application on 19.4.2017 seeking direction from the Court to conduct a Deoxyribonucleic Acid Test (for short "DNA test") of the plaintiff and either of the defendants, to establish a

biological link of the plaintiff to the defendants parents i.e. late Trilok Chand Gupta and Smt. Sona Devi.This application was opposed by the plaintiff with the projection that the defendants' application is an abuse of the process of law and that there are adequate evidences placed before the Court by the plaintiff to show that he is the son of Trilok Chand Gupta and Sona Devi. The plaintiff in his opposition had specifically pleaded that the mother of the plaintiff and the defendants had submitted sworn affidavit before the Municipal Committee, Kalka to transfer the Property No. 496, Pahari Bazar, Kalka in her name, mentioning the name of the plaintiff as her son. The copy of the concerned affidavit was duly placed on record in the suit proceedings. Similarly, sworn affidavits of the three defendants regarding transfer of the property No. 496, Pahari Bazar, Kalka, where again the plaintiff was admitted to be the son of late Trilok Chand Gupta and late Smt. Sona Devi, were also brought on record in the suit. With such projection of admission on his linkage to the defendants' parents, the plaintiff opposed the DNA test suggested in the defendants' application and offered to rely on the already adduced evidence to prove his case.

5. The defendants' application for conducting the DNA test for the plaintiff (at the cost of the defendants) was disposed of by the Court by referring to the fact that the CS No. 53/2013 is for declaration of ownership of property left behind by late Trilok Chand Gupta and late Sona Devi where the defendants have denied that the plaintiff is their brother or the son of their parents. The learned Judge noted that the evidence was already led by the plaintiff to prove his case and the application of the defendants was filed at that stage of the Suit when it was their turn to lay their evidence. Taking these aspects into account, the Court opined that onus is on the plaintiff to prove that he is a coparcener amongst the defendants by way of his birth in their family and such burden does not shift to the defendants. Since the plaintiff had refused to give the DNA sample, the view taken was that the Court cannot force the plaintiff to provide DNA sample and accordingly the defendants' application came to be dismissed by the order dated 28.11.2017 by the learned Trial Judge.

15. Having answered these questions, additional issue to be resolved is whether refusal to undergo DNA Testing amounts to "other evidence' or in other words, can an adverse inference be drawn in such situation. In Sharda vs. Dharmpal a three judges bench in the opinion written by Justice S.B. Sinha rightly observed in paragraph 79 that "if despite an order passed by the court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference" can be made out against the person within the ambit of Section 114 of the Evidence Act. The plaintiff here has adduced his documentary evidence and is disinclined to produce further evidence. He is conscious of the adverse consequences of his refusal but is standing firm in refusing to undergo the DNA Test. His suit eventually will be decided on the nature and quality of the evidence adduced. The issue of drawing adverse inference may also arise based on the refusal. The Court is to weigh both side's evidence with all attendant circumstances and then reach a verdict in the Suit and this is not the kind of case where a DNA test of the plaintiff is without exception.

16. The respondent cannot compel the plaintiff to adduce further evidence in support of the defendants' case. In any case, it is the burden on a litigating

party to prove his case adducing evidence in support of his plea and the court should not compel the party to prove his case in the manner, suggested by the contesting party.

17. The appellant (plaintiff) as noted earlier, has brought on record the evidence in his support which in his assessment adequately establishes his case. His suit will succeed or fall with those evidence, subject of course to the evidence adduced by the other side. When the plaintiff is unwilling to subject himself to the DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy. Seen from this perspective, the impugned judgment merits interference and is set aside. In consequence thereof, the order passed by the learned Trial Court on 28.11.2017 is restored. The suit is ordered to proceed accordingly."

6. He lastly submits that the stage of 313 Cr.P.C. stage is over and thus the application has been moved at a belated stage with intention to linger on the trial. Apart from the same, the learned Court below has rightly recorded reasons while rejecting the application vide order dated 11.10.2021, thus there is no illegality or infirmity in the impugned order which may call for any interference by this Court in exercise of powers conferred under 482 Cr.P.C. jurisdiction.

7. Lerned A.G.A. has supported the arguments advanced by learned counsel for the opposite party no.2.

8. After hearing the learned counsel for the parties and after perusing the averments made in the present application, this Court has to examine firstly whether the scientific knowledge to unearth the truth can be used ? Secondly, what would be the effect in case, DNA is directed to be conducted, thirdly whether the right to life or privacy of the informant can be violated?

9. Dealing with the first issue as to whether scientific knowledge can be used to unearth the truth, relevant to our discussion is the decision of the Hon'ble Apex Court in the matter of ***Regina (Quantavalle) Vs. Secretary of State for Health [2003] 2 A.C. 687*** wherein it has been held that the laws have to be construed in the light of contemporary scientific knowledge and in order to give effect to a plain parliamentaly purpose, the statute may be held to cover a scientific development not known when the statute was passed. Notice may be taken of the amendment of the year 1976 to Section 75 of the CPC enabling the Court to issue commissions to hold a scientific techinical or expert investigation. The same is indicative of legislative intent to keep pace with scientific advancements in the matter of judicial adjudication.

10. Hon'ble Apex Court in the matter of ***Narayan Dutt Tiwari Vs. Rohit Shekhar 2012 (12) SCC 554***, has held in paragraph no. 24 and 25 as under:-

24. Even the Constitution of India, while laying down the Fundamental Duties by Article 51-A (h) and (j) declares it to be the duty of every citizen of India to develop a scientific temper and the spirit of inquiry and reform and to strive towards excellence, to reach higher levels of achivement. What we wonder is that when modern tools of adjudication are at hand must the Courts refuse to step out of their dogmas and insist upon the long route to be followed at the cost of misery to the litigants. The answer obviously has to be

no., The Courts are doing for justice by adjudicating rival claims and unearthing the truth and not for following the age old practices and procedures when new, better methods are available.

25. We, in the contest find the judgement of the Court of Appeal (Civil Division) in Re G. (Parentage Blood Sample) [1977] 1 F.L.R. 360 holding that the Court should find proven forensically what the person by his refusal had prevented from being established scientifically to be apposite. It was further held therein:-

"Justice is to be best served by truth. Justice is not served by impeding the establishgment of truth. No injustice is done to him by conclusively establishing paternity. If he is the father, his position is put beyond doubt by the testing, and the justice of his position is entrenched by the destruction of the mother's doubts and aspersions. If he is not the father, no injustice is done by acknowledging him to be a devoted step father to a child of the family. Justrice to the child, a factor not to be ignored, demands that the truth be known when truth can be established, as it undoubetely can. Whilst, therefore, I do not in any way wish to undermine the sincerity of the father's belieg that contact is of a continuing good to the child and that it will be reduced if the mother's beliefs prevail, that contact is the best when taking place against the reality fact, and fact can be established by these tests being undertaken;

Thorpe LJ in his opinion, agreeing with Waite LJ that the appeal should be allowed, said:

"A putative father may seek to avoid his paternity which science could prove; alternativel to cling on to a status that science could disprove. In both cases selfish motives or emotional anxieties and needs may drive the refusal to co-operate in the scientific tests which the court directed."

11. In view of the aforesaid, the rejection of the application for DNA test and granted an opportunity to adduce documentary or oral evidence in respect of his innocence by the court below is nothing but an old aged practice inspite of availability of scientific methods available before it and therefore scientific method must be used to unearth the truth because justice is best served by truth.

12. Secondly what would be the effect in case, DNA is directed to be conducted. This Court is of the opinion that at the most, the following result may be obtained:-

(A) D.N.A. may match.
(B) D.N.A. may not match.
(C) Disintegrated eroded test.

13. In case, the DNA is directed to be conducted and DNA matched, then the accused may be convicted. In case, DNA does not match, then to arrive at just and fair decision of the case, following the settled and basic principles that no innocent be convicted else, ten culprits are left free. The contention that the applicant is innocent would be proved if the DNA samples are not matched and he is being falsely roped in the present case. Thirdly, in case, the opinion comes to the disintegraded eroded test, then the report would again be against the applicant.

14. Now the third question before this Court is that whether right to life or privacy of the informant is violated in case DNA is directed? The reliance of the learned counsel for the opposite party no.2 upon paragraph nos 4, 5, 15, 16 and 17 in the

matter of ***Ashok Kumar Vs. Raj Gupta and others*** (supra) pertains to dispute between the parties with regard to parentage, whereas in the instant case, the DNA test has not been asked to be conducted to establish the relationship between the applicant and informant rather the same has been requested to prove the innocence of the applicant, therefore, there would be no impinge on his personal liberty and his right to privacy of the informant or his family members.

15. It is the case of the applicant that false naksha najri has been prepared to implicate him as the incident has taken place somewhere else and is shown to have occurred at the place mentioned in the FIR, it would be primary to ascertain the place of incident first so as to gain faith in the prosecution story as narrated in the FIR. The said requirement can be best served by obtaining DNA result of the blood sample of the informant or his relative with the blood stained earth recovered from the alleged place of occurrence. While making such observation, **this Court is mindful of the fact that DNA test is not to be directed as a matter of routine and in only deserving cases where strong prima facie case is made out**, such direction may be given. Since the life of the applicant is stake as he is accused of offence under Section 302 IPC, it is must to ascertain and test the truthfulness of the prosecution case.

16. Considering the facts and circumstances in entirety, this Court is of the opinion that to arrive at just decision of the case and to avoid any suspicion or doubt in the prosecution case, it would be in the interest of justice that DNA test may be conducted and thus the learned Court below has committed an illegallity in passing the impugned order, therefore the same is liable to be set aside.

17. Accordingly, the impugned order dated 11.10.2021 passed by learned Additional District Judge, Court No.8, District Mathura in Sessions Trial No. 573 of 2012 arising out of Case Crime No. 368 of 2012 under Section 302 I.P.C. Police Station Kosi Kalan, District Mathura, is set aside and the blood sample of informant or any of his family members be taken for conducting the DNA test with the blood stained earth collected from the alleged place of occurrence to unearth the truthfulness of the prosecution case.

18. The aforesaid exercise may be completed within a period of one month from the date of production of a certified copy of the order before the concerned court below.

19. The instant application is allowed.

(2022) 8 ILRA 222
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.07.2022

BEFORE

THE HON'BLE SAMEER JAIN, J.

Criminal Misc. Application U/S 482 No. 3041 of 2022

Om Prakash & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Satyendra Narayan Singh, Sri Pankaj Kumar Mishra

Counsel for the Respondents:
G.A.

A. Criminal Law - Criminal Procedure Code,1973 – Section 482 – Scope – Charge-sheet – Quashing of – If FIR and other material on record collected by the Investigating Officer during investigation discloses prima facie offence then, proceedings pending against the accused persons cannot be quashed under Section 482 Cr.P.C. – Veracity of the allegation made in the FIR and in the St.ments of witnesses cannot be adjudicated at this stage and the same can only be adjudicated by the trial court during the course of trial. (Para 11)

B. Criminal Procedure Code – S. 482 – Cognizance by Magistrate, how far reasoned order need to be passed – Held, if cognizance was taken on police report, then there is no need to pass a fully reasoned order, if from the perusal of cognizance order it appears that court below has applied its mind to the materials on record – Afroz Mohammad Hasanfatta's case and Pradeep S. Wodeyar's case relied upon. (Para 18)

Application dismissed. (E-1)

List of Cases cited:-

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

2. M/s. Neeharika Inrastructure Pvt. Ltd. Vs St. of Mah. & ors.; AIR 2021 Supreme Court 1918

3. St. of Guj. Vs Afroz Mohammad Hasanfatta; (2019) 20 SCC 539

4. Pradeep S. Wodeyar Vs The St. of Karn.; 2021 SCC OnLine SC 1140

(Delivered by Hon'ble Sameer Jain, J.)

1. Heard Sri S.N. Singh, learned counsel for the applicants, Sri Arvind Kumar, learned AGA for the State and perused the record of the case.

2. By way of present application, applicants made prayer to quash the charge-sheet no. 1 of 2020 dated 01.01.2020 as well as cognizance/summoning order dated 20.03.2020 and the proceedings of Case No.232 of 2020 (State V.s Om Prakash and another) arising out of Case Crime No. 212 of 2019, under Sections 323, 504, 506, 308 IPC, Police Station Usrahar, District Etawah pending in the court of Additional Chief Judicial Magistrate-IV, Etawah.

3. According to the FIR of the present case, on 09.11.2019 at about 9.00 AM in the morning, applicants assaulted opposite party no.2 and others through wooden sticks while they were working in the field and due to their assault, Ravindra Kumar sustained serious injuries and he was referred to Etawah for treatment. FIR of the present case was lodged on 28.11.2019 under Sections 323, 504, 506 IPC and during investigation, it revealed that actually two persons sustained injuries, namely Anoop Kumar and Ravindra Kumar and both were medically examined. During investigation, it further revealed that in the incident skull bone of Ravindra Kumar fractured and during investigation, the Investigation Officer also recorded the statements of injured witnesses and other eye witnesses and submitted charge-sheet on 01.01.2020 against the applicants under Sections 323, 504, 506, 308 IPC. After submission of charge-sheet, court below on 20.03.2020 took the cognizance and issued summons to the applicants.

4. Learned counsel for the applicants submitted that applicants have been falsely implicated in the present matter and the FIR of the present case was lodged after about 20 days of the incident and this fact itself shows that FIR is totally false and baseless. He further submitted that out of two persons who sustained injuries, one person namely, Anoop Kumar sustained simple injuries and other injured person,

namely Ravindra Kumar, who also alleged to sustained injuries, but his injury report is not on record and only his X-ray report is on record. However, his X-ray report shows that his parietal bone was fractured but as there is no injury report of Ravindra Kumar on record, therefore, merely on the basis of X-ray report, charge-sheet under Section 308 IPC cannot be filed. He further submitted that earlier a day before i.e. 08.11.2019, the side of opposite party no.2 assaulted the applicants side and due to their assault from the side of applicants several persons sustained injuries and FIR was also lodged from applicant side. He further submitted that after lodging the FIR from applicants side, the opposite party no.2 with intention to save skin, lodged the FIR of the present case on false allegations and without any proper investigation charge-sheet was filed against the applicants in the present matter.

5. He next submitted that the cognizance order of the present case is bad as it is cryptic in nature and passed in printed proforma and from the perusal of the cognizance order, it reveals that it was passed without any application of mind. He placed reliance on the following judgments.

(i) Application under Section 482 Cr.P.C. No. 19647 of 2009 (Ankit Vs. State of U.P. and another) decided on 15.10.2009.

(ii) Application under Section 482 Cr.P.C. No. 17364 of 2020 (Emmanuel Masih and others Vs. State of U.P. and another) decided on 04.01.2021.

(iii) Application under Section 482 Cr.P.C. No. 683 of 2021 (Ved Krishna Vs. State of U.P. and another) decided on 11.02.2021.

(iv) Application under Section 482 Cr.P.C. No. 11334 of 2021 (Pankaj Jaiswal Vs. State of U.P. and another) decided on 09.08.2021.

(v) Application under Section 482 Cr.P.C. No.41617 of 2019 (Vishnu Kumar Gupta and another Vs. State of U.P. and another) decided on 11.11.2020.

6. Per contra, learned AGA submitted that there is specific allegations against the applicants in the FIR as well in the statements of injured persons that they assaulted and caused injuries and injury report of one injured is also on record and if injury report shows that the injuries are simple in nature then on that basis the proceedings of the present case cannot be quashed. Learned AGA further submitted that as X-ray report of one injured, namely Ravindra Kumar is on record, which shows that his parietal bone was fractured, therefore, charge-sheet was rightly filed against the applicants under Section 308 IPC.

7. He further submitted that present matter is a State case, therefore, there is no need to pass a detailed cognizance order and perusal of the cognizance order reveals that while passing the same, the court below perused the case diary and other documents and evidences collected by the Investigating Officer during investigation, therefore, there is no illegality in the cognizance order dated 20.03.2020 and the present application is liable to be dismissed.

8. I have heard both the parties and perused the record of the case.

9. The scope of Section 482 Cr.P.C. has been very elaborately discussed by Hon'ble Supreme Court in case of **State of Haryana and others Vs. Bhajan Lal and others reported in [1992 Supp (1) SCC**

335] and in paragraph 102 enumearated 7 categories of the cases where power under Section 482 Cr.P.C. can be exercised which is quoted as follows:-

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

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

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

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

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

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

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

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

10. Recently the three Judge Bench of the Hon'ble Apex Court in **M/s. Neeharika Inrastructure Pvt. Ltd. Vs. State of Maharashtra and others reported in [AIR 2021 Supreme Court 1918]** also discussed the scope of Section 482 Cr.P.C. and Article 226 of Constitution of India in very detail manner and in paragraph-23 arrived at final conclusion as under:

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained

in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the "rarest of rare cases (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power 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;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) The aforesaid parameters would be applicable and/or the aforesaid

aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

xviii) Whenever an interim order is passed by the High Court of "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied.

11. Therefore, law is settled that if FIR and other material on record collected by the Investigating Officer during investigation discloses prima facie offence then, proceedings pending against the accused persons cannot be quashed under Section 482 Cr.P.C. and veracity of the allegation made in the FIR and in the statements of witnesses cannot be adjudicated at this stage and the same can only be adjudicated by the trial court during the course of trial.

12. Perusal of the FIR and statements of the injured persons, namely Anoop Kumar and Ravindra Kumar shows that there was specific allegation against the applicants that they assaulted through wooden stick and due to their assault two persons sustained injuries. Both the injured persons Anoop Kumar and Ravindra Kumar were medically examined and their statements were also recorded by the Investigating Officer under Section 161 Cr.P.C. Perusal of injury report of Anoop Kumar shows that he sustained two injuries. One abrasion and one contusion and X-ray report of another injured person Ravindra Kumar shows that his parietal bone was fractured, therefore, their injury report substantiated the allegation made in the FIR as well as their statements recorded during investigation. Therefore, it cannot be said that prima facie no cognizable offence against the applicants is made out. The argument of learned counsel for the applicants is that actually a day before

applicants side was assaulted by the side of opposite party no.2 and applicants side also sustained injuries and in this regard FIR was also lodged from the side of applicants, therefore, only due to this reason, the FIR of the present case was lodged, but this argument cannot be appreciated at this stage as, in case at hand, two persons sustained injuries, therefore, on the ground of enmity proceeding pending against the applicants cannot be quashed. As, from the perusal of the charge-sheet and other documents on record, prima facie offence under Section 323, 504, 506 and 308 IPC is made out against the applicants, therefore, there is no illegality in the charge-sheet dated 01.01.2020 filed against the applicants.

13. The next argument advanced by learned counsel for the applicants is that cognizance order was passed by the court below on printed proforma in cryptic manner, which reflects non-application of judicial mind.

14. The present case is a State case, in which, after investigation charge-sheet has been submitted and court below took cognizance on the basis of police report.

15. The Apex Court in case of **State of Gujarat Vs. Afroz Mohammad Hasanfatta (2019) 20 SCC 539** observed as:-

"23. Insofar as taking cognizance based on the police report is concerned, the Magistrate has the advantage of the charge-sheet, statement of witnesses and other evidence collected by the police during the investigation. Investigating officer/SHO collects the necessary evidence during the investigation conducted in compliance with the provisions of the Code of Criminal Procedure and in accordance with the rules of investigation. Evidence and materials so collected are sifted at the level of the investigating officer and thereafter, charge-sheet was filed. In appropriate cases, opinion of the Public Prosecutor is also obtained before filing the charge- sheet. The court thus has the advantage of the police report along with the materials placed before it by the police. Under Section 190(1)(b) Code of Criminal Procedure, where the Magistrate has taken cognizance of an offence upon a police report and the Magistrate is satisfied that there is sufficient ground for proceeding, the Magistrate directs issuance of process.

In case of taking cognizance of an offence based upon the police report, the Magistrate is not required to record reasons for issuing the process. In cases instituted on a police report, the Magistrate is only required to pass an order issuing summons to the Accused. Such an order of issuing summons to the Accused is based upon satisfaction of the Magistrate considering the police report and other documents and satisfying himself that there is sufficient ground for proceeding against the Accused. In a case based upon the police report, at the stage of issuing the summons to the Accused, the Magistrate is not required to record any reason. In case, if the charge-sheet is barred by law or where there is lack of jurisdiction or when the charge-sheet is rejected or not taken on file, then the Magistrate is required to record his reasons for rejection of the charge-sheet and for not taking it on file."

16. Recently, three judge Bench of the Apex Court in the case of **Pradeep S. Wodeyar Vs. The State of Karnataka 2021 SCC OnLine SC 1140** after considering the matter in detail observed in paragraph no. 75 as:-

"75. The Special Judge, it must be noted, took cognizance on the basis of a report submitted under Section 173 Code of Criminal Procedure and not on the basis of a private complaint. Therefore, the case is squarely covered by the decision in Afroz Mohammed Hasanfatta (supra). The Special Judge took note of the FIR, the witness statements, and connected documents before taking cognizance of the offence. In this backdrop, it would be far-fetched to fault the order of the Special Judge on the ground that it does not adduce detailed reasons for taking cognizance or that it does not indicate that an application of mind. In the facts of this case, therefore, the order taking cognizance is not erroneous."

17. Further, the Apex Court in para 85 (viii) summarised as:-

"85 (viii) Since cognizance was taken by the Special Judge based on a police report and not a private complaint, it is not obligatory for the Special Judge to issue a fully reasoned order if it otherwise appears that the Special Judge has applied his mind to the material;"

18. Therefore, from the perusal of the judgment of Afroz Mohammad Hasanfatta (supra) and Pradeep S. Wodeyar (supra) it is clear that if cognizance was taken on police report, then there is no need to pass a fully reasoned order, if from the perusal of cognizance order it appears that court below has applied its mind to the materials on record.

19. In the present case, cognizance order dated 20.03.2020 shows that while passing it, the court below perused the charge-sheet, case diary and other documents, which were collected by the Investigating Officer during investigation and thereafter court was of the view that prima facie ground for taking cognizance is sufficient, therefore, it cannot be said that without perusing the materials on record, court below took the cognizance. It cannot be said that as cognizance order was passed on printed proforma, therefore, court below did not apply its judicial mind. Therefore, I find no illegality in the cognizance order dated 20.03.2020. The cases relied by the counsel for the applicants are of this Court and as Afroz Mohammad Hasanfatta (supra) and Pradeep S. Wodeyar (supra) are the judgments of the Apex Court, therefore, judgments relied by counsel for the applicants would not help him.

20. The Apex Court in case of Pradeep S. Wodeyar (supra) also discussed the scope of Section 465 Cr.P.C. and observed in paragraph no. 53 as:-

"53. In order to prove that the irregularity vitiates the proceeding, the accused must prove a "failure of justice' as prescribed under Section 465 Code of Criminal Procedure. In view of the discussion in the previous section on the applicability of Section 465 Code of Criminal Procedure (and the inability to prove failure of justice) to the cognizance order, the irregularity would not vitiate the proceedings. Moreover, bearing in mind the objective behind prescribing that cognizance has to be taken of the offence and not the offender, a mere change in the form of the cognizance order would not alter the effect of the order for any injustice to be meted out."

21. Further, the Apex Court in paragraph no. 85(ii) summarised as:-

"85(ii) The objective of Section 465 is to prevent the delay in the

commencement and completion of trial. Section 465 Code of Criminal Procedure is applicable to interlocutory orders such as an order taking cognizance and summons order as well. Therefore, even if the order taking cognizance is irregular, it would not vitiate the proceedings in view of Section 465 Code of Criminal Procedure;"

22. Therefore, as per Pradeep S. Wodeyar (supra) even if there is an irregularity in cognizance order then also on that ground proceedings in view of Section 465 Cr.P.C. cannot be vitiated.

23. Therefore, from the above discussion, it is clear that although there is no illegality in the cognizance order dated 20.03.2020 as before taking cognizance court below perused the case diary and other documents and charge-sheet but even if there was an irregularity in the cognizance order, then also on the basis of it proceedings of the present case cannot be quashed as order of taking cognizance are interlocutory in nature and as per Section 465 Cr.P.C. proceedings on the basis of that irregularity cannot be vitiated.

24. Therefore, from the above discussion, I find no merit in the present application.

25. Accordingly, the present application is hereby **dismissed**.

(2022) 8 ILRA 230
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.08.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application U/S 482 No. 4432 of 2021, 4433 of 2021 & 4441 of 2021

Awadhesh Pratap Singh ...Applicant

Versus

State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Satya Prakash, Abhishek Vishwakarma, Ravi Singh, Shikhar Srivastava

Counsel for the Opposite Parties:
G.A., Praveen Tripathi, Sushil Kumar Singh

A. Criminal Law - Criminal Procedure Code,1973 – Section 482 – Charge-sheet – Quashing of – FIR u/s 420, 467, 468, 471, 120-B IPC – FIR by a member of society against the society itself leveling charge of indulging in construction of flats on Nazul land – Violation of lease deed, how far constitute offence – Held, it is for the St. Government to take action if there was any violation/infraction of the lease deed executed in favour of the Original Lessee who sold the land in favour of the Housing Society but for this fact the FIR could not have been registered against the Society or its Members on behalf of the opposite party No. 3 who himself claims to be the member of the Society – High Court quashed the Charge-sheet for being wholly untenable. (Para 36, 38 and 39)

Application allowed. (E-1)

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

1. Present petitions under Section 482 Cr.P.C. have been filed for quashing of the charge-sheet dated 24.09.2021 in FIR No.0085 of 2021 under Sections 420, 467, 468, 471, 120B IPC registered at Police Station Wazirganj, District Lucknow as well as summoning order/cognizance order dated 05.10.2021 passed by leaned Special Additional Chief Judicial Magistrate (CBI AP), Lucknow in Criminal Case No.NIL and entire proceedings of FIR No.0085 of 2021 under Sections 420, 467, 468, 471, 120B IPC, Police Station Wazirganj, District Lucknow.

2. The Bank of India Karamchari Sahkari Avas Samiti Ltd., Lucknow (hereinafter referred to as "Society") was constituted and registered on 24.05.1983. This Society constituted by serving employees of the Bank of India. The object of the Society is to provide affordable houses to the employees of the Bank of India. It is said that only employees of the Bank of India, who applied for membership of the Society, were enrolled as members on payment of membership fee. All members were issued Share Certificates. By laws of the Society do not permit "Nominal Membership".

3. The Society purchased land on 02.08.1985. In pursuance to the demand notice, the petitioners and other members paid their contribution. Society constructed 20 Flats over the land purchased by it on 02.08.1985. These Flats were allotted to its members on 01.04.1990. Each member paid cost of a Flat of Rs.1.41 Lakh.

4. It is further stated that membership of the Society was restricted to employees of the Bank of India. The petitioners started living in their respective Flats after their allotment since 1990. However, sale deeds of the Flats allotted to the petitioners were executed by then Secretary of the Society on 04.05.2007.

5. One of the 20 Flats, Flat No.D-1 (initially 2/1) was allotted by the Society to one of its founder member, Mr. Sudarsh Awasthi. Mr. Kailash Nath Singh (Retd. Deputy Superintendent of Police), opposite party No.3 in petition No.4432 of 2021 started residing in the said flat as a licensee. The complainant and his family members have been occupying the said Flat for about two decades. Mr. Sudarsh Awasthi had given Flat on rent in the name of Mrs. Maya Singh w/o Mr. Kailash Nath Singh which is evident from the affidavit given by Mr. Sudarsh Awasthi for electricity connection in the name of Ms. Maya Singh.

6. The complainant, Mr. Kailash Nath Singh approached the petitioners, Mr. Awadhesh Pratap Singh (President), Mr. Anil Kumar Agarwal (Vice President) and Mr. Ajai Kumar Gupta (then Secretary), who were office bearers of the Society, and tried to pressurize them to register the Flat No.D-1 in his name. Since the Flat No.D-1 was allotted to Mr. Sudarsh Awasthi, a founder member, the Society refused to accede to the request of Mr. Kailash Nath Singh. Mr. Kailash Nath Singh was not even eligible to be the member of the Society as he was not an employee of the Bank of India.

7. Mr. Kailash Nath Singh, (opposite party No.3) approached U.P. Avas & Vikas Parishad, Lucknow with a request for direction to the Society to register Flat No.D-1 in his name. Avas Vikas Parishad did not grant any relief to him.

8. Mr. Kailash Nath Singh, thereafter, approached U.P. Real Estate Regulatory Authority (UP RERA). However, he could not get any relief from UP RERA. He failed to show proof of any payment and membership details before the UP RERA in the society.

9. The complainant, Kailash Nath Singh, then approached District Consumer Forum, Jaunpur, U.P. in November, 2020 and obtained an ex parte order dated 01.02.2021 within 3 months from its filing directing the Society to register Flat No.D-1 in his name within a period of one month else the registration of Flat would be done by the Forum through their own Agency.

The District Consumer Forum also issued non bailable warrant against the Secretary of the Society on 31.05.2021 for non compliance of the order dated 01.02.2021. It is submitted that no cause of action even partly arose within the jurisdiction of District Forum Jaunpur and order passed by the District Forum, Jaunpur is perverse and void ab initio inasmuch as the District Forum, Jaunpur had no territorial jurisdiction to entertain and decide the complaint.

10. The Society filed an appeal against the said order before the State Consumer Redressal Commission (State Commission), Lucknow and State Commission has stayed the order of the District Forum. The dispute is still pending before the State Commission.

11. While the dispute is still at large before the Consumer Forum/Commission, Mr. Kailash Nath Singh lodged a complaint in Police Station Wazirganj, Lucknow against the petitioners alleging that allotment of the Flats to the petitioners were made by the Society on 29.01.1986 whereas the land was purchased by the Society on 28.06.1986. It was further alleged that the sale-deed executed by the Secretary of the Society in favour of the petitioners on 04.05.2007 was on the basis of fabricated and forged documents. On the basis of aforesaid complaint, FIR No.85 of 2021 came to be registered under Sections 420, 467, 468, 471, 120B IPC dated 21.02.2021 against the petitioners. It is said that the petitioners despite submitting documentary proof to the police authorities that the land was purchased on 02.08.1985, demand cum provisional allotment was made on 29.01.1986 and possession was handed over in 1990, ignoring all these facts and documents, the FIR in question came to be registered against the petitioners as the complainant is an ex-police officer.

12. The petitioners filed Writ Petition No.19773 (MB) of 2021, 19795 (MB) of 2021 and 19799(MB) of 2021 for quashing of the FIR. This Court vide interim order dated 07.09.2021 while issuing notice, stayed arrest of the petitioners and directed the respondents to file their affidavits.

13. State authorities did not file any affidavit in the said writ petitions, and hurriedly filed impugned charge-sheet. Though in the FIR there was no allegation that the Secretary of the Society was not empowered/authorized to execute sale-deed dated 04.05.2007 in favour of the petitioners, but in the charge-sheet this allegation was also leveled. It is further said that the petitioners were never questioned/interrogated and no statement of the petitioners was ever taken by the Investigating Officer before filing the charge-sheet. It is submitted that lodging of FIR, preparing and filing charge-sheet hurriedly by the police and further proceedings in pursuance of the filing of the charge-sheet are nothing but a complete abuse of the process of the Court, which smacks mala fide.

14. Mr. Satya Prakash, learned counsel for the petitioners has submitted that the Society was dissolved by the Housing Commissioner in the year 1999. However, on an appeal made by the members in 2006, the Society was reinstated by the Appellate Authority vide order dated 18.04.2006. In the Order dated 18.04.2006, it was said that even after handing over the possession of the Flats to its members in the year 1990 after receiving full payment, sale-deeds were not executed in favour of the most of the

allottees. Taking cognizance of the order of the appellate authority, Assistant Housing Commissioner, appointed Mr. L.P. Dwivedi as Administrator of the Society vide order dated 27.05.2006. As per the power vested under Section 29(5) of the U.P. Cooperative Societies Act, 1965, the Administrator appointed Ajay Kumar Gupta (one of the petitioners) as Secretary of the Society vide order dated 10.08.2006, and issued written directions to the Secretary to execute sale deeds vide his letter dated 18.06.2006 in favour of the allottees of the Flats, whose sale deed could not be executed earlier.

15. Mr. Ajay Kumar Gupta was never removed from the post of Secretary by the Administrator, and he continued to discharge his assigned duties including execution of sale-deeds. Mr. Ajay Kumar Gupta had no role in allotment of the Flats to members. He merely executed sale-deeds in favour of allottees on behalf of the Society, who had paid full amount to the Society way back in 1990. He acted on the written direction of the Administrator as pointed out earlier.

16. Mr. Satya Prakash, learned counsel for the petitioners has submitted that allegation made by the complainant/opposite party No.3 that elections of Managing Committee of the Society were due when sale deeds were executed on 04.05.2007 is wholly incorrect. Process of conducting elections was initiated by the competent authority on 20.06.2007 whereas the sale-deeds were executed on 04.05.2007, and the complainant had no business/locus in respect of the execution of the sale deed being a stranger. The petitioners were officers/employees of the Bank of India, and they were founder members of the Society from its very inception. They had paid full cost of the Flats allotted to them by taking loans from the Bank. The Bank sanctioned loan after verifying all the details of the project and at no point of time raised any objection.

17. It has been further submitted that altogether 5 sale deeds were executed by the Secretary after his appointment on 10.06.2006 till 20.06.2007. The complainant misusing his reach and approach in police department being Former Deputy Superintendent of Police got the FIR in question registered and charge-sheet filed against the petitioners without there being an iota of evidence against the petitioners for commission of the offence for which charge-sheet has been filed.

18. The complainant wanted to get the sale-deed registered in his favour for Flat No. D-1, which was allotted to Mr. Sudarsh Awasthi, a founder Member of the Society. When office bearers of the Society refused and did not buzz under the pressure put on by the complainant/opposite party No.3, he has resorted to criminal proceedings. The impugned proceedings are nothing but a sheer abuse of the process of the Court and law and a malicious and capricious prosecution of the petitioners for ulterior purposes.

19. Mr. Ajay Kumar Gupta was never removed from the post of Secretary by the Administrator and he continued to discharge the assigned duties including the execution of the sale deeds. He had no role in allotment of flats to the members. He merely executed sale deeds in favour of allottees who had paid full amount to the Society way back in the year 1990 as per the written orders of the Administrator. It is

also submitted that total 5 sale-deeds were executed by the Secretary since appointment till 20.06.2007. However, charge-sheet has been filed only against two allotees, who are the petitioners herein and the Secretary.

20. It is important to note here that all three petitioners against whom charge-sheet has been filed are office bearers of the Society. Three other allotees in whose favour sale-deeds were executed in the same fashion as in respect of the two petitioners have not been implicated. It has been submitted that the FIR, charge-sheet and the impugned proceedings are only to put undue pressure on the office bearers of the Society to execute the sale deed of the flats belonging to Mr. Sudarsh Awasthi in favour of the complainant, opposite party No.3 in an illegal manner. The allegations against the petitioners, Mr. Awadhesh Pratap Singh, and Anil Kumar Agarwal do not hold ground as both of them had made full payment before 1990 and they were living in the same Flats since then. Only sale-deeds have been executed in their favour in the year 2006.

21. It has been further submitted that neither the Society nor any member of the Society has ever raised question regarding ownership or sale-deeds in favour of the petitioners, Awadesh Pratap Singh and Anil Kumar Agarwal, and the complainant himself never challenged the said sale-deeds before any court of law for their cancellations. In view thereof, it has been submitted that this court in order to prevent misuse of the process of the Court and in the interest of justice may quash the impugned proceedings.

22. On the other hand, Mr. Sushil Kumar Singh, learned counsel appearing for opposite party No.3 has submitted that Nazul land in Khasra Plot No.58 and 58A, area 1,19,351 sq ft situated at Mohalla Batlerganj, Ram Mohan Rai Ward, Prag Narayan Road, near Bhainsa Kund was given by the State Government on lease to Karan Trehan, Kishore Trehan and their family. The said lease was registered vide registration dated 07.10.1947 in Sub Registrar Office, Lucknow for a period of 90 years subject to two renewals in interval of 30 years each.

23. A Housing Society was established in the name of Bank of India Employees Cooperative Housing Society, which was registered in the office of Registrar/Housing Commissioner Avas Vikas. In 1985, Uma Builder Company, Lucknow was established by Mr. Sudarsh Awasthi. This Company started construction on behalf of the Society. Mr. Sudarsh Awasthi was later on dismissed /terminated from service in the year 1999 by Bank of India.

24. Agreement to sell was entered into between the Bank of India Employees Housing Society and Original Lessee of the land in Plot Nos.58 and 58A and, thereafter, sale-deed was executed on 28.06.1986. It is stated that vide Resolution dated 01.09.1988 by-laws of the Society were amended to have more members other than the bank employees to raise funds for construction of the Flats.

25. Mr. Sushil Kumar Singh, learned counsel for the opposite party No.3 has submitted that ownership of the land of Khasra Plot Nos.58 and 58A is of the State Government as it is a Nazul land and the sale deed dated 28.06.1986 by the original lessee in favour of the Society was an illegal act and would not confer any right in

favour of the Society. It has been further submitted that the Society was dissolved and the registration was cancelled on 07.10.1999. It is the appellate authority which vide order dated 18.04.2006 restored the Society's registration, and thereafter Mr. L.P. Dwivedi, an Officer of the Co-operative Department was appointed as Administrator of the Society vide order dated 27.05.2006 by the Assistant Registrar for the purposes of holding elections of the Society.

26. Mr. L.P. Dwivedi joined on 30.05.2006 as Administrator, and thereafter, he held a meeting on 09.06.2006 and proposed to appoint Mr. Ajay Kumar Gupta, as acting Secretary of the society. He submits that appointment of Mr. Ajay Kumar Gupta, as acting Secretary of the Housing Society was required to be approved by the Registrar under Sections 121, 122, 122A of the Cooperative Societies Act.

27. It has, therefore, been submitted that since Mr. Ajay Kumar Gupta's appointment was never approved by the Registrar, his appointment as Secretary was void and non-est, and any act done by him would be a nullity in the eyes of law.

28. It has been further submitted that Mr. L.P. Dwivedi was removed on 18.11.2006, and, thereafter a three members Committee was constituted on 20.06.2007 to look after the work of the society. Thus, there was no Administrator between 18.11.2006 and 20.06.2007. It has, therefore, been submitted that when Administrator himself was removed, and no one was there till 3 members Committee was constituted, sale deeds executed by Mr. Ajay Kumar Gupta on 04.05.2007 in favour of the petitioners, Awadhesh Pratap Singh and Anil Kumar Agarwal amounts to a fraudulent act and against the mandate of the Administrator, who was appointed only with a limited mandate to get the election of the Society conducted.

29. It has been further submitted that once the Administrator was removed on 17.11.2006, no authority remained vested in the acting Secretary, Mr. Ajay Kumar Gupta to execute the sale-deeds on 04.05.2007. He submits that the petitioners connived with each other and committed offences for which charge sheet has been filed against them.

30. It has been further submitted that after Mr. L.P. Dwivedi was removed as Administrator, one Mukesh Dixit was appointed as Administrator but he did not join, and thereafter, a 3 Member Committee was constituted vide order dated 20.06.2007 by Joint Registrar/Joint Commissioner, Avas for purposes of holding elections and elections were held on 03.11.2017.

31. Mr. Sushil Kumar Singh, learned counsel appearing for opposite party No.3 has further submitted that entire action of the Society on the basis of the sale-deed of the Nazul land is a nullity in the eyes of the law. The Society could not become the owner or could not have acquired any right over the land because Nazul land cannot be transferred by sale to a third party.

32. It has been further submitted that Awadhesh Pratap Singh, one of the petitioners herein appointed his brother, U.P. Singh as Secretary after Ajay Gupta. Mr. U.P. Singh sold the flat allotted to Mr. Sudarsh Awasthi to one Ayush Tripathi on 13.10.2020. It has been submitted that the petitioners, who are office bearers of the

Society, could not produce balance sheet, accounts of the Society and allegation is that office bearers of the Society had embezzled large amount of the Society. He has further submitted that the Investigating Officer has collected sufficient evidence against the petitioners for commission of offences by them, and the charge-sheet has been accordingly filed. This Court is not required to exercise its discretion under Section 482 Cr.P.C. to interfere with the impugned proceedings.

33. I have considered the submissions of learned counsel for the petitioners and learned counsel appearing for opposite party No.3.

34. Opposite party No.3 is a retired Deputy Superintendent of Police and belonged to U.P. Police. He was not an employee of Bank of India. Bank of India employees Cooperative Housing Society was established for providing affordable houses to the officers/employees of the Bank of India who became the members of the Society.

35. There are primarily three allegations in the FIR: (i) that the land of Kahsra Plots No.58 and 58A being Nazul land could not have been transferred by the original lessee in favour of the Society. (ii) that sale-deeds dated 04.05.2007 executed by Ajay Kumar Gupta in favour of the petitioners, Mr. Awadhesh Pratap Singh, and Anil Kumar Agarwal were without any authority and it was a fraud as Ajay Kumar Gupta, Secretary did not have any authority to execute the sale deeds; and (iii) that in the sale deed allotment date has been mentioned as 29.01.1986 whereas the land was purchased only on 28.06.1986 and on 29.01.1986 neither land was in possession of the Society not any flat was constructed and thus the petitioners had forged and fabricated the documents.

36. This Court fails to understand that how for these allegations, FIR in question came to be registered. The complainant himself claims to be the Member of the Society, however, he could not provide any proof of his Membership or making payment of contribution towards purchase and construction of the Flats, but at the same time he is alleging that the land could not have been sold by the Original Lessee in favour of the Society and the construction of flats by the society on Nazul land, their allotment and registration in favour of the allottees are illegal and amounts to crime.

37. I find that the stand of the complainant somewhat confusing and untenable. If he claims to be the member of the Society and the Society had indulged in criminal activity by purchasing the Nazul land, then he being member of the Society is also an accused for the said illegal and offending act done by the Society.

38. This Court is of the considered view that it is for the State Government to take action if there was any violation/infraction of the lease deed executed in favour of the Original Lessee who sold the land in favour of the Housing Society but for this fact the FIR could not have been registered against the Society or its Members on behalf of the opposite party No.3 who himself claims to be the member of the Society.

39. This Court finds that the charge-sheet filed for this allegation is wholly untenable and deserves to be quashed.

40. In respect of the second allegation, it is worthwhile to note that the land was purchased on 02.08.1985. Demand cum provisional allotment was made on 29.01.1986, and final possession of the Flats was given in 1990. Therefore,

there is no substance in the allegation that the land was purchased by the Society on 28.06.1986 and, therefore, allotment date in the sale-deeds as on 29.01.1986 was a fraud and this allegation does not hold ground. Even if it is considered that wrong allotment date was mentioned in the sale deeds of the two petitioners, the offence under Sections 420, 467, 468, 471 would not get attracted against the petitioners.

41. Under Section 47 of the Registration Act, 1908 it is provided that a registered document shall operate from the time which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. If the allotment was made on 29.01.1986 and the possession was handed over in 1990, this Court finds no substance in the allegations that this would amount to a fraud/forgery for the allegation that allotment date was mentioned in the sale deed as 29.01.1986.

42. Mr. L.P. Dwivedi, who was appointed as Administrator in exercise of powers under Section 29(5) of the U.P. Cooperative Societies Act, 1965 appointed Ajay Kumar Gupta (one of the petitioners) as Secretary of the Society vide order dated 10.08.2006, and the copy of the appointment order was also endorsed to U.P. Awas and Vikas Parishad, Lucknow. Members of the Society, who were allotted Flats and were living since 1990 after paying full cost, brought it to the notice of the Administrator that several sale deeds had not been executed by the Society in favour of the allottees. The Administrator issued written directions to the Secretary to execute the sale-deed vide his letter dated 18.06.2006. The Secretary, Ajay Kumar Gupta (one of the petitioner) thereafter executed sale-deeds in favour of the members of the Society who were allotted the flats and living since 1990. Though new Administrator Mr. Mukesh Dixit was appointed but he never took over charge as Administrator and as such Mr. L.P. Dwivedi continued as Administrator and Mr. Ajay Kumar Gupta was never removed as Secretary by the Administrator and he continued to discharge his assigned duties including execution of the sale-deeds. It is not the case of opposite party No.3 that Mr. Ajay Kumar Gupta executed the sale-deed to any person who was not the member of the Society or to a member who had not paid the contribution.

43. This Court fails to understand that what offence can be said to have been committed by Mr. Ajay Kumar Gupta in executing the sale-deed in favour of two petitioners on 04.05.2007 inasmuch as till the said date he was functioning as Secretary and nobody had any objection to his appointment as Secretary. No one challenged his appointment and continuation as Secretary of the Society. No member of the Society has made any grievance in this respect. It is also relevant to mention here that sale-deeds were executed on 04.05.2007 but the FIR in question came to be registered in 2021 i.e. after 14 years from the date of alleged illegal sale-deeds by Mr. Ajay Kumar Gupta in favour of the petitioners. The complainant is a stranger to the acts of the society and its members and no criminal proceedings are maintainable on his behest.

44. This Court having considered the material brought on record and also taking into account the fact that the dispute in respect of possession and execution of the sale-deed in respect of Flat No.D-1 allotted to Mr. Sudarsh Awasthi in favour of opposite party No.3 has been given a cloak

of criminal proceedings to put undue pressure on the petitioners and the Society. This is nothing but a gross abuse of the process of the Court. This Court is of the considered view that continuance of the proceedings would be wholly unjustified and liable to be quashed. The Investigating Officer has filed the charge-sheet without there being any adequate evidence to support the allegations for offences under Sections 420, 467, 468, 471, 120B IPC.

45. In view of the aforesaid discussion, the petitions are ***allowed*** and impugned proceedings of charge-sheet dated 24.09.2021 in FIR No.0085 of 2021 under Sections 420, 467, 468, 471, 120B IPC registered at Police Station Wazirganj, District Lucknow as well as summoning order/cognizance order dated 05.10.2021 passed by leaned Special Additional Chief Judicial Magistrate (CBI AP), Lucknow in Criminal Case No.NIL and entire proceedings of FIR No.0085 of 2021 under Sections 420, 467, 468, 471, 120B IPC, Police Station Wazirganj, District Lucknow are hereby quashed.

(2022) 8 ILRA 238
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.07.2022

BEFORE

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

Application U/S 482 No. 4928 of 2022

Mansur Ali ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Ambrish Kumar Dwivedi

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Criminal Procedure Code,1973 – Section 482 – Order of treating application u/s 156(3) as the complaint case – Quashing of – Held, a Magistrate, while entertaining an application filed under Section 156 (3) Cr.P.C. can reject or treat the same to be a complaint – Impugned order treating the application filed u/s 156 (3) Cr.P.C. as a complaint, cannot be said to be illegal. (Para 10 and 13)

Application disposed. (E-1)

List of Cases cited:-

1. Lalita Kumari Vs Govt. of U.P. & anr. 2014 (2) SCC 1

2. Sukhwasi Vs St. of U.P.; 2008 CriLJ 452.

3. Ramdev Food Products (P) Ltd. Vs St. of Guj.; (2015) 6 SCC 439

4. M/s. Cucusan Foils Pvt. Ltd. Vs St. (Delhi Admn.); 1991 Cr.LJ 683

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

1. Heard learned counsel for the revisionist, learned A.G.A for the State and perused the record.

2. The instant application u/s 482 Cr.P.C. has been filed by the applicant for quashing the impugned order dated 16.10.2020 passed by Chief Judicial Magistrate, Gonda in Criminal Misc. Case No.1890/2020, Yusuf Ali vs. Inayat Ali and others in application under Section 156(3) Cr.P.C.

3. Brief facts are that the applicant moved an application under Section 156 (3) Cr.P.C. for registration and investigation of the case which was heard and learned Magistrate vide order dated 16.10.2020 treated the same as complaint case and

fixed the date 18.11.2020 for recording the statement u/s 200 Cr.P.C.

4. Foremost submission of learned counsel for the applicant is that the impugned order is not sustainable in the law, insofar as the same is against the law laid down by the Hon'ble Apex Court in the case of **Lalita Kumari vs. Government of Uttar Pradesh and another, reported in 2014 (2) SCC 1.** He, thus, submitted that the only option available to the learned Magistrate was to allow the application filed under Section 156 (3) Cr.P.C. with a direction to the Station House Officer concerned for registration of F.I.R. regarding the matter. The learned Magistrate was not competent to direct that the application filed under Section 156 (3) Cr.P.C. be treated as complaint. The impugned order is thus, patently illegal which would cause miscarriage of justice, therefore, the same is liable to be quashed. He has also submitted that learned trial Court while passing the impugned order has lost sight of the fact that the question of recovery of alleged tractor in question was also involved which is otherwise not possible in a case instituted upon private complaint and the same would cause miscarriage of justice to the revisionist/complainant. He has also submitted that it was the duty of learned Magistrate concerned to issue a direction to the police station concerned to get the FIR lodged on the basis of application moved by the revisionist under Section 156(3) Cr.P.C. He, thus, prays that the impugned order is illegal which could not be sustained and deserves to be set aside.

5. Per contra, learned A.G.A. has supported the impugned order and has pointed out that the grievance of the applicant has not gone unattended by the court below. The court below after taking into consideration the entire gamut of the facts and circumstances of the case has rightly decided to treat the application filed by the applicant under Section 156 (3) Cr.P.C. as a complaint. The applicant shall still have an opportunity to prove his case before the court below. His further submission is that in **Lalita Kumari (supra)** Hon'ble the Apex Court has not referred, discussed and overruled the law laid down by the Division Bench of this Court in **Sukhwasi vs. State of Uttar Pradesh; 2008 Cri LJ 452**. Therefore, the impugned order cannot be termed to be illegal and no miscarriage of justice would be caused by the impugned order.

6. The scope and ambit of law laid down by the Hon'ble Supreme Court in **Lalita Kumari (supra)** can be ascertained from para no.6 of the judgment, which is quoted hereinbelow :

"6) Therefore, the only question before this Constitution Bench relates to the interpretation of Section 154 of the Code and incidentally to consider Sections 156 and 157 also." (Emphasis supplied)

7. In case of **Lalita Kumari (supra)** the controversy revolved around the registration of F.I.R in cognizable cases by the Police Officer. However, it did not dwelve upon scope and ambit of power vested in Magistrate by virtue of provision of Section 156 (3) Cr.P.C. which is, for ready reference, quoted hereinbelow :

"156. Police officer' s power to investigate cognizable case.

(1) .....

(2) .....

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

8. In **Sukhwasi (supra)** the Division Bench of this Court in paragraph nos.6, 7, 8 & 9 has held as under:

"6. It will also be noticed that the law was, and has always been, that if a cognizable offence is made out, the Police are bound to register the First Information Report. In case, the Police do not register the First Information Report, there is provision under Section 154(3) Cr.P.C. to send an application to Superintendent of Police, who shall direct the registration of a First Information Report, if a cognizable offence is disclosed. There was as such, no need for an authority in this regard being given to the Magistrate. That, this has been done and such authority as given to the Magistrate indicates, that this has been done, because the Magistrate will bring to bear upon the matter a judicial and judicious approach, which will be necessarily implication be selective. That gives a clear inkling to the intention of the legislature, that the Magistrate may consider the feasibility and propriety, of passing an order of registration of the First Information Report.

7. The matter may be looked into from another angle, and that is, in Section 154(3) Cr.P.C. where the Superintendent of Police has been given the authority for registration of First Information Report, the word used is 'shall' Section 143(3) Cr.P.C. is as hereunder

"154. Information of cognizable cases --

(1)

(2)

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing, and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence shall either investigate the case himself or direct an investigation to be made, by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer incharge of the police station in relation to that offence."

8. In Section 156(3) Cr.P.C. the word used is 'May' Section 156(3) Cr.P.C. is as follows;

156. Police Officer's power to investigate cognizable case--

(1)

(2)

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.

9. The use of the word 'shall' in Section 154(3) Cr. P.C: and the use of word 'May' in Section 156(3) Cr.P.C. should make the intention of the legislation clear. If the legislature intended to close options for the Magistrate, they could have used the word 'shall' as has been done in Section 154(3) Cr.P.C. Instead, use of the word 'May' is, therefore, very significant, and gives a very clear indication, that the Magistrate has the discretion in the matter, and can, in appropriate cases, refuse to order registration." (emphasis supplied)

9. The Hon'ble Supreme Court in the case of Ramdev Food Products (P) Ltd. v. State of Gujarat, (2015) 6 SCC 439 in paragraph no.32 has held as under:-

"32. We now come to the last question whether in the present case the Magistrate ought to have proceeded under Section 156(3) instead of Section 202. Our answer is in the negative. The Magistrate has given reasons, which have been upheld by the High Court. The case has been held to be primarily of civil nature. The accused is alleged to have forged partnership. Whether such forgery actually took place,

whether it caused any loss to the complainant and whether there is the requisite mens rea are the questions which are yet to be determined. The Magistrate has not found clear material to proceed against the accused. Even a case for summoning has not yet been found. While a transaction giving rise to cause of action for a civil action may also involve a crime in which case resort to criminal proceedings may be justified, there is judicially acknowledged tendency in the commercial world to give colour of a criminal case to a purely commercial transaction. This Court has cautioned against such abuse."

10. It is, thus, abundantly clear that in view of law laid down by the Division Bench of this Court in **Sukhwasi (supra)** and **Ramdev Food Products (P) Ltd. (supra),** it cannot be said that a Magistrate, while entertaining an application filed under Section 156 (3) Cr.P.C. cannot reject or treat the same to be a complaint.

11. So far as the question of recovery of alleged tractor is concerned, it is pertinent to mention that keeping in view the provisions contained in Section 202 Cr.P.C. in its entirety it is held in ***M/s. Cucusan Foils Pvt. Ltd. vs. State (Delhi Admn.), 1991 Cr.LJ 683*** in paragraph No.16, as under :-

"16. Even this judgment says that once the Magistrate proceeds on the basis of the original complaint, then he must first proceed to examine on oath the complainant and his witnesses under Section 200 and thereafter either hold an enquiry himself or direct the enquiry to be held by police officer under Section 202 of the Code, as he thinks fit and then either dismiss the complaint or issue the process, as the case may be."

(emphasis supplied)

12. Therefore, it is also open to the learned Magistrate, at the appropriate stage, to do the needful in this regard, keeping in view the provisions of Section 202 Cr.P.C. and law laid down by Delhi High Court in **M/s. Cucusan Foils (Supra).**

13. In view of what has been discussed above, the impugned order passed by learned Magistrate, whereby he has treated the application filed under Section 156 (3) Cr.P.C. as a complaint, cannot be said to be illegal. The impugned order cannot be said to be an abuse of process of the Court either. Therefore, the present application lacks merit and is liable to be dismissed.

14. In view of the aforesaid discussion, the present application is **disposed of**.

(2022) 8 ILRA 241
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.08.2022

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA I, J.

Application U/S 482 No. 5154 of 2022

Aditya Mishra ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Anil Kumar Tiwari, Abhishek Dwivedi

Counsel for the Opposite Parties:
G.A., Gaurav Mehrotra

A. Criminal Law - Criminal Procedure Code,1973 – Section 200 - Proviso (a) – Summoning order – – Quashing of – Complaint by public servant – No examination of complainant and witnesses was held – Effect – Legality of summoning order challenged – Held, once a complaint is filed by a public servant in discharge of his official duty, in view of proviso (a) to Section 200 Cr.P.C., the Magistrate is fully justified in taking the cognizance of the offences without recording the St.ment of the complainant. (Para 13)

B. Criminal Procedure Code – Section 482 – Scope – Offences under Sections 193, 196, 200, 209, 466, 467 & 468 I.P.C. r/w S. 340/195 Cr.P.C. – Non-disclosure of ingredients of the offence in complaint, how far a ground of quashing the criminal proceeding – Held, while exercising jurisdiction u/s 482 of Cr.P.C., the Court would not ordinarily embark upon an enquiry into whether the evidence is reliable or not or whether there is reasonable possibility that the accusation would not be sustained. (Para 15)

C. Criminal Law - Criminal Procedure Code,1973 – Section 482 – Summoning order – How far can be interference with, in the presence of availability of statutory remedy of Criminal Revision – Held, the impugned summoning order being revisable, the statutory remedy of filing a criminal revision is available to the applicant. Invoking the jurisdiction u/s 482 Cr.P.C., at the initial stage by circumventing the statutory remedy of filing criminal revision against the impugned order, appears by itself to be abuse of process of this Court by the applicant. (Para 17)

Application dismissed. (E-1)

List of Cases cited:-

1. Deputy Chief Controller of Imports & Exports Vs Roshanlal Agarwal; AIR 2003 SC 1900

2. Nupur Talwar Vs Central Bureau of Investigation & anr.; (2012) 11 SCC 465

3. St. of Andhra Pradesh Vs Gourieshetty Mahesh; (2010) 6 SCC 588

4. Municipal Corporation of Delhi Vs Ram Kishan Rohtagi & ors.; (1983) 1 SCC 1

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

1. Heard Sri Anil Kumar Tiwari, learned counsel for the applicant, Sri Alok Saran, learned A.G.A. for the State, Sri Gaurav Mehrotra, learned counsel appearing for the opposite party no.2 and perused the entire record.

2. The instant application has been filed by the applicant for quashing the summoning order dated 01.07.2022 passed by Chief Judicial Magistrate, Lucknow in Complaint Case No.58823 of 2022 "State of U.P. through Senior Registrar vs. Aditya Mishra", under Sections 193, 196, 200, 209, 466, 467, 468 I.P.C. read with Section 340/195 Cr.P.C., Police Station Vibhuti Khand, District Lucknow as well as the entire proceeding of Complaint Case No.58823 of 2022 "State of U.P. through Senior Registrar vs. Aditya Mishra", pending in the Court of Chief Judicial Magistrate, Lucknow.

3. In order to appreciate the facts & circumstances which led to filing of Complaint Case No.58823 of 2022, it would be useful to extract herein below the order dated 20.05.2022 passed by a Co-ordinate Bench of this Court in Writ B No.251 of 2022 "Smt. Shams Kazmi vs. Board of Revenue U.P. Though its Secy. Lucknow and others":

"1. Heard Sri Shyam Mohan Pradhan, learned counsel who appears for the petitioner in the instant petition which has been filed along with the affidavit of Sri Aditya Mishra who is supposedly the

authorized pairokar of the petitioner, Smt. Shams Kazmi and Sri Sunil Kumar Srivastava, learned counsel who appears for Smt. Shams Kazmi who has appeared in person, the learned Additional Chief Standing Counsel and the counsel for the caveator.

2. This matter has been listed before this Court today in light of the order passed on 12.05.2022 and the said order reads as under:-

"Heard Shri Shyam Mohan Pradhan, learned counsel for the petitioner.

At the very outset, before the matter could be heard, Shri S.K. Srivastava, learned counsel had stood out to inform the Court that the instant petition has not been filed by Smt. Shams Kazmi. He further states that neither the petitioner Smt. Shams Kazmi has authorized Shri Aditya Misra to institute the above petition nor any power of attorney has been executed by her in his favour entitling him to file the said petition. He has also moved an application seeking dismissal of the aforesaid petition on the aforesaid grounds.

The said application is accompanied with an affidavit of the petitioner herself. He further submits that the petition has been deliberately got instituted only to get the order passed by the Board of Revenue affirmed whereby harming the rights of the present petitioner. The paragraphs 5 to 8 of the affidavit filed by the petitioner Smt. Shams Kazmi is reproduced hereinafter:-

"5. That both orders dated 09.09.2016 and 03.10.2020 was challenged before Board of Revenue in second appeal by opp.parties of the aforesaid writ petition, there is no doubt that deponent is impleaded in place of her husband after death and second appeal was decided on 25.03.2022 cancelling orders dated 09.09.2016 and 03.10.2020.

6. That deponent was not aware with the proceeding of the cases as her husband died on 06.05.2021, it is evident that deponent is impleaded as successor of deceased husband before Board of revenue.

7. That the deponent became shocked when she acknowledged about the aforesaid writ petition preferred against order of Board of Revenue dated 25.03.2022 on behalf of deponent by some unknown person who became pairokar of deponent showing his name Aditya Mishra. The deponent never gave any power and attorney to Aditya Mishra for contesting the case against the order of Board of Revenue. There is some camouflage of other parties by whom Adiya Mishra became pairokar to defeat deponent and giving helping hands to the opp.parties.

8. That the deponent never signed upon the writ petition and no any power and attorney was given to Aditya Mishra, he is a stranger for deponent and may harm to the deponent through alleged writ petition."

In this view of the matter, let Aditya Mishra as well as Smt. Shams Kazmi appear in person before this Court on 20.05.2022 along with their respective identities and Shri Mishra shall also carry the authority or power of attorney on the basis of which the petition has been filed by him.

List this matter again on 20.05.2022, as fresh.

If any application is moved by any of the parties for withdrawal of the petition, the same shall also be considered on the next date fixed itself i.e. 20.05.2022.

Office to reflect the name of Shri S.K. Srivastava as counsel for the applicant when the case is next listed"

3. In furtherance of the said order, Sri Aditya Mishra has appeared so also Smt. Shams Kazmi. Sri Aditya Mishra

has been identified by Sri Shyam Mohan Pradhan, learned counsel for the petitioner and Smt. Shams Kazmi is accompanied by Sri Sohail Menhdi Khan who is reported to be her nephew and relative and she is identified by Sri Sunil Kumar Srivastava, learned counsel appearing for Smts. Shams Kazmi.

4. First the Court had put a question to Sri Aditya Mishra regarding under which authority, he had filed the instant petition on behalf of Smt. Shams Kazmi, however, he answered that he does not have any written authority nor any power of attorney has been executed in his favour by Smt. Shams Kazmi. He was then asked what is his qualification and he answered that is able to read and understand English reasonably but understands Hindi very well and that he is not educated. Thereafter he gave another statement that he is intermediate pass.

5. He was also specifically asked under what provision could he file an affidavit on behalf of the petitioner without any authority to which he answered that he was explained about the petition by some Mr. Tripathi, a junior counsel in the chamber of Mr. Akhilesh Kalra, who is also a counsel in the instant matter. He volunteered and stated that he has a Will in his favour executed by Sri Kazim Ali Khan, the late husband of Smt. Shams Kazmi and in this view of the matter, he was known to Smt. Shams Kazmi and that he had been authorized to file the instant petition. Another question which was put to Sri Sri Aditya Mishra was whether he has disclosed the fact that Nawab Kazim Ali Khan had executed any Will in his favour or whether this fact was brought to the notice of any of the Courts through which the instant petition has emanated. He answered in the negative and stated that this fact has not been disclosed nor stated. He was further asked the reason for not disclosing the aforesaid fact to which he kept quite and had no answer.

6. Thereafter the Court called upon Smt. Shams Kazmi and was asked about her age and also the reason whether she understood why she has been called before the Court. Smt, Shams Kazmi stated that she is 82 years old and earlier her husband was contesting the proceedings, however, upon his death, number of persons have come forward to institute proceedings in her name and the present petition is also one such attempt by an un-authorized person of which she had no knowledge or idea. Only when she became aware that her signatures are being forged and that petition has been filed in her name that she has authorized Sri Sunil Kumar Srivastava who appeared before the Court on 12.05.2022 and had filed an affidavit before the Court on the said date. She also stated she has two daughters who are married and settled and she has none to fall back upon and taking advantage of the aforesaid, numbers of persons posing as advocates, well-wishers etc. are flocking to institute proceedings in the name of the petitioner in order to usurp her property.

7. A specific question was put to Smt. Shams Kazmi as to whether she recognized the person who is before the Court today and has been identified as Sri Aditya Mishra by Sri Shyam Mohan Pradhan. Smt. Shams Kazmi categorically denied and could not identify Sri Aditya Mishra and stated that she does not know any such person nor she had seen him before, today. A further question was put to Smt. Kazmi as to whether she had executed any document authorizing any person to institute any proceedings on her behalf and that whether she had authorized any person orally or otherwise to institute any proceedings before this Court or continue

any proceedings on her behalf to which she replied in the negative and stated that she has not executed any authority in favour of Sri Aditya Mishra or anyone to continue or contest any proceedings before this Court on her behalf and there appears to be number of persons who are interested in fabricating her signatures to grab her property.

8. The aforesaid statements of Sri Aditya Mishra and Smt. Shams Kazmi were recorded in open Court in front of the learned counsel appearing for the parties.

9. After the statements were recorded, the Court directed both Smt. Shams Kazmi as well as Sri Aditya Mishra to sign on the order sheets as well as their respective counsel who identified them.

10. Having noticed the aforesaid statements and perusing the material on record, this Court is prima facie satisfied that the instant petition preferred in the name of Smt. Shams Kazmi through Sri Aditya Mishra is not bonafide and appears to be an abuse of the process of Court.

11. It has been admitted by Sri Aditya Mishra that he does not have any authority written or otherwise to institute the petition and file the affidavit. Thus, the institution of the petition by filing an affidavit of a third party stranger i.e. Sri Aditya Mishra is nothing but an abuse of the process and an attempt to deliberately mislead the Court.

12. It will be relevant to notice that the issue regarding institution of a petition and who can file an affidavit on behalf of the petitioner has been the subject matter before the Full Bench of this Court in the case of Syed Wasif Hussain Rizvi Vs. Hasan Raja Khan and 6 others 2016 SCC Online (Alld.) 175 (FB) wherein after considering the various provisions of the Power of Attorney Act and the Allahabad High Court Rules, 1952 and other provisions wherein in paragraph 7, 8, 12, 18, 19, 24, 25 and 26, the Full Bench observed as under:-

.....7. The Allahabad High Court Rules, 19527 contain in Chapter XXII provisions for directions, orders or writs under Article 226 and Article 227 of the Constitution (other than a writ in the nature of habeas corpus). Under Rule 1(1) of Chapter XXII, an application for a direction, order or writ under Article 226 and Article 227 of the Constitution (other than a writ in the nature of habeas corpus) is required to be made to the Division Bench appointed to receive applications. Rule 1(2) stipulates that the application shall set out concisely in numbered paragraphs the facts upon which the applicant relies and the grounds on which the Court is asked to issue a direction, order or writ and has to conclude with a prayer setting out the exact nature of the relief sought. The Rule further stipulates that the application shall be accompanied by an affidavit or affidavits verifying the facts stated therein by reference to the numbers of the paragraphs of the application containing the facts. Such affidavits shall be restricted to facts which are within the deponent's own knowledge and shall further state whether the applicant has filed, in any capacity whatsoever, any previous application on the same facts and, if so, the orders passed.

8. Chapter IV of the Allahabad High Court Rules provides for affidavits and Oath Commissioners. Rule 9(2) stipulates that an affidavit filed on behalf of the petitioner(s), appellant(s) or, as the case may be, revisionist(s), shall mention the relationship, association or connection of the deponent with the person on whose behalf it has been filed. Rule 12 stipulates that except on interlocutory applications, an affidavit shall be confined to such facts

as the deponent is able of his own knowledge to prove. On an interlocutory application where a particular fact is not within the deponent's own knowledge but is based on his belief or information received from others, which he believes to be true, the deponent is required to use the expression that he is informed and verily believes such information to be true or words to that effect.

12. Affidavits under the CPC are governed by the provisions of Order XIX. Order XIX Rule 3 provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated. The Allahabad amendment to Order XIX, inter alia, contains the following in Rule 9:

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression ?I am informed?, and, if such be the case, and verily believe it to be true?, and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents. (22-5-1915).

18. These principles which have been laid down by the judgments of the Constitution Benches of the Supreme Court elucidate the binding position in law. The right which is sought to be pursued in the exercise of writ jurisdiction under Article 226 of the Constitution is a right personal to the petitioner. The only exception which is contemplated, is in the case of a writ of habeas corpus or in a writ of quo warranto. The exception in the case of a writ of habeas corpus is necessitated in order to protect the value which the common law and the Constitution place on personal liberty which enables a writ to be moved by a person other than a person whose right is sought to be espoused. Similarly, the object and purpose of a writ of quo warranto is to protect a public office from a usurper who is continuing in the office in breach of the qualifications or eligibility prescribed for holding such an office of a public nature. The Division Bench of this Court, when it decided the case of Prabhu Nath Prasad Gupta (supra) was not really called upon to decide whether a writ petition could be instituted through the holder of a power of attorney. That was a case where an order of eviction was sought to be challenged not by the person to whom an accommodation had been allotted and who was sought to be removed but by his mother. This was clearly not permissible since the petitioner who had moved those proceedings was not espousing a case personal to her nor was she authorised to do so as an agent of the person who was directly affected.

19. This decision of the Division Bench in Prabhu Nath Prasad Gupta holds, however, that it becomes immaterial whether the power of attorney holder or someone else files a case in his name for the person aggrieved or the person aggrieved files a case through the power of attorney holder, and the petition itself would not be maintainable. With great respect, we are unable to agree with this

statement of law contained in the judgment of the Division Bench. We clarify that there can be no dispute about the principle which has been laid down by the Division Bench to the effect that the petitioner in the exercise of the writ jurisdiction under Article 226 of the Constitution must pursue a claim, right or cause of action personal to him or her. However, when the petitioner seeks to do so through the holder of a power of attorney, the donee of the power of attorney is no more than an agent who acts for and on behalf of the donor, for the reason that the donor is, for some reason, unable to present himself or herself before the Court in order to pursue the proceedings. The donor of the power of attorney may be incapacitated from doing so temporarily for reasons or exigencies, such as exigencies of service or station or, for that matter, an ailment which immobilizes him or her from pursuing the proceedings personally. The important point to be noted, as a matter of principle, is that when the donor authorises the donee to act on his or her behalf, the donee acts as an agent and is subject to the limitations which are created by the instrument by which he is authorised. The donee does not pursue a claim or right personal to him but it is the donor who espouses his own personal right through the holder of a power of attorney.

24. When a writ petition under Article 226 of the Constitution is instituted through a power of attorney holder, the holder of the power of attorney does not espouse a right or claim personal to him but acts as an agent of the donor of the instrument. The petition which is instituted, is always instituted in the name of the principal who is the donor of the power of attorney and through whom the donee acts as his agent. In other words, the petition which is instituted under Article 226 of the Constitution is not by the power of attorney holder independently for himself but as an agent acting for and on behalf of the principal in whose name the writ proceedings are instituted before the Court.

".....25. Having held so, we must, at the same time, emphasize the necessity of observing adequate safeguards where a writ petition is filed through the holder of a power of attorney. These safeguards should necessarily include the following:

(1) The power of attorney by which the donor authorises the donee, must be brought on the record and must be filed together with the petition/application;

(2) The affidavit which is executed by the holder of a power of attorney must contain a statement that the donor is alive and specify the reasons for the inability of the donor to remain present before the Court to swear the affidavit; and

(3) The donee must be confined to those acts which he is authorised by the power of attorney to discharge.

26. For these reasons, we hold and have come to the conclusion that the question referred for adjudication before the Full Bench must be answered in the affirmative and is accordingly answered, subject to due observance of the safeguards which we have indicated above."

Thus, in view thereof, this Court is prima facie satisfied that Sri Aditya Mishra did not have any authority to institute the petition in the name of Smt. Shams Kazmi.

13. Upon perusal of the material available on record, this Court finds that the statement given by Sri Aditya Mishra before this Court is also misleading and incorrect, inasmuch as, first he had stated that he is able to read and understand English reasonably and Hindi very well then he stated that he is not educated and further he improved his statement by

saying that he is intermediate pass. This also castes a doubt, inasmuch as, the affidavit which has been filed by Sri Aditya Mishra in support of the petition, he has stated his qualification to be a Graduate and has shown his occupation as business.

The contents of the paragraphs signed and filed by Sri Aditya Mishra before this Court along with the petition is being reproduced hereinafter for ready reference:

"Affidavit

"I, Aditya Mishra, aged about 44 years s/o Shri Jagat Narayan Mishra, Qualification: Graduate, Occupation: Business, R/o C-3/67, Vishesh Khand, Gomti Nagar, Lucknow, the deponent, do hereby solemnly affirm and state on oath as under:

1. That the petitioner is a very old Muslim pardanasheen lady, as such authorized the deponent as Pairokar of the petitioner to swear this affidavit on her behalf, as such, he is fully conversant with the facts and of the case and those deposed hereunder.

2. That the contents of 1 to 30 paragraph of the accompanying writ petition are true to my knowledge, while those of paras 31 are believed by me to be true on the basis of legal advice.

3. That the annexures 1 to 16 the present petition are true copies of their originals duly compared."

14. Thus, this Court is prima facie again satisfied that the statement as given by Sri Aditya Mishra before the Court is not inspiring at all and appears to be motivated.

15. This conduct, statement of Sri Aditya Mishra is to be seen in context of the statement given by Smt. Shams Kazmi who categorically denies knowing Sri Aditya Mishra or having seen him prior to today i.e. 20.05.2022.

16. Sri Aditya Mishra also could not bring before the Court any document of authorization nor did he have the courage to bring the Will which is said to have been executed in his favour by late Sri Nawab Kazim Ali Khan. Especially, when this Court in its order dated 12.05.2022 had clearly directed that Sri Mishra shall also carry the authority or power of attorney on the basis of which the petition has been filed and as per his own statement, he states that he has a Will in his favour which gave him the authority, yet he did not produce the same or carry it with him.

17. The affidavit which has been filed and is reproduced hereinabove states that the contents of the petition which has been filed are true to his personal knowledge. He has never been authorised nor has been conducting the proceedings before any of the Court either on behalf of Nawab Kazim Ali Khan and thereafter upon his death on behalf of Smt. Shams Kazmi. Sri Kazim Ali Khan is reported to have died on 06.05.2021 and Smt. Shams Kazmi has been substituted in his place in the proceedings which emanate from the Court of SDO, Sarojini Nagar, Lucknow. Thus, there could be no reason, when he had not been authorized nor appearing in any of the proceedings, yet how could he swear the affidavit on his personal knowledge which also prima facie does not inspire confidence.

18. Noticing the aforesaid, the Court takes strong exception to the manner in which an attempt has been made to file and introduce false affidavits and pleadings before this Court and a petition is sought to be filed in the name of Smt. Shams Kazmi who did not authorize

Sri Aditya Mishra to file the same. The act prima facie amounts to filing false affidavits which not only amounts to polluting the pure stream of justice but also amounts to committing criminal contempt, apart from the fact makes a person susceptible to a prosecution in terms of Section 195 & Section 340 Cr.P.C.

19. The Court notices the dictum of the Apex Court in the case of Dhananjay Sharma Vs. State of Haryana and Others 1995 (3) SCC 757; Dalip Singh Vs. State of Uttar Pradesh and Others 2010 (2) SCC 114; ABCD Vs. Union of India, 2020 (2) SCC 52 and wherein the issue of filing false affidavit and polluting the stream of justice has been considered in detail.

20. In view of the aforesaid, the Court is prima facie satisfied that the matter requires action and directs the Senior Registrar of this Court to do the needful to launch a prosecution against Sri Aditya Mishra, Son of Jagat Narain Mishra, R/o C-367, Vishesh Khand, Gomti Nagar, Lucknow before the Competent Court under Section 195 Cr.P.C. and 340 Cr.P.C.

21. Let this matter be placed before the Court on 04th July, 2022, as fresh on which date the Senior Registrar of this Court shall inform and place the action taken report.

22. Since the instant petition has not been filed by Smt. Shams Kazmi and for the reasons aforesaid, cannot be treated to be a petition on her behalf, therefore, this petition shall stand dismissed, however, this dismissal shall not come in the way of Smt. Shams Kazmi, in case if she genuinely wishes to challenge order impugned in this very petition.

Order Date :- 20.5.2022
Asheesh

After the order was passed but before it could be signed after the lunch recess, Mr. Akhilesh Kalra, learned counsel appearing on behalf of Sri Aditya Mishra as petitioner in the instant case also appeared before the Court and stated that before signing the order, he may be heard for 10 minutes, he was granted his audience where he made a feeble attempt to explain the filing of the petition by entering into merits of the controversy. After hearing him he was informed that the order passed by the Court prior to lunch still stands."

(emphasis supplied)

4. In compliance with the order dated 20.05.2022 passed in Writ B No.251 of 2022, aforesaid, a Complaint Case No.58823 of 2022 "State of U.P. through Senior Registrar vs. Aditya Mishra" came to be lodged against the applicant.

5. The foremost contention of learned counsel for the applicant is that neither complainant nor witnesses in support of complainant's version were examined by the learned trial Court, therefore, the impugned summoning order dated 01.07.2022 passed in Complaint Case No.58823 of 2022 including the entire proceedings of the aforesaid complaint case is vitiated.

6. It is submitted by learned counsel for the applicant that the applicant is innocent against whom the aforesaid criminal complaint came to be lodged due to misunderstanding. His further submission is that the applicant was not afforded any opportunity of showing cause against him while the order dated 20.05.2022 was passed by a Co-ordinate Bench of this Court in Writ B No.251 of

2022 which ultimately led to filing of Complaint Case No.58823 of 2022.

7. It is also submitted by learned counsel for the applicant that keeping in view the facts and circumstances of the case, the offences under Sections 193, 196, 200, 209, 466, 467 & 468 I.P.C. read with Section 340/195 Cr.P.C. are not at all made out against the applicant because of conspicuous absence of ingredients which constitute aforesaid offences. He has, thus, submitted that the proceedings of instant complaint case is nothing but a malicious prosecution of the applicant as well as an abuse of process of the Court.

8. Per contra, Sri Alok Saran, learned A.G.A. for the State and Sri Gaurav Mehrotra, learned counsel for the opposite party no.2 vehemently opposed the aforesaid submissions advanced by learned counsel for the applicant. They have submitted that the facts which led to filing of instant complaint constitute offences under Sections 193, 196, 200, 209, 466, 467 & 468 I.P.C. read with Section 340/195 Cr.P.C.. The applicant was afforded reasonable opportunity to explain his conduct by a Co-ordinate Bench of this Court while passing the order dated 20.05.2022 in Writ B No.251 of 2022.

9. They have also submitted that the instant complaint filed by the complainant in his official capacity, therefore, recording of his statement in support of complaint is not a condition precedent for summoning the applicant to face trial.

10. They have also submitted that the learned trial Court has summoned the applicant to face trial under Sections 193, 196, 200, 209, 466, 467 & 468 I.P.C. read with Section 340/195 Cr.P.C. vide order dated 01.07.2022. The said order can be assailed by filing criminal revision by the applicant, therefore, by circumventing the statutory remedy available to the applicant, the relief prayed for cannot be granted.

11. Section 200 Cr.P.C. is quoted herein below :

*"**200. Examination of complainant**. A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:*

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate ....."

12. In view of the provisions contained in proviso (a) to the Section 200 Cr.P.C., the contention of learned counsel for the applicant is to the effect that the proceedings of Complaint Case No.58823 of 2022 is vitiated, in want of non examination of complaint or other witnesses is wholly misconceived.

13. Hon'ble the Apex Court in **Deputy Chief Controller of Imports and Exports v. Roshanlal Agarwal,** reported in **AIR 2003 SC 1900** has held that once a

complaint is filed by a public servant in discharge of his official duty, in view of proviso (a) to Section 200 Cr.P.C., the Magistrate is fully justified in taking the cognizance of the offences without recording the statement of the complainant.

14. Hon'ble the Apex Court in **Nupur Talwar v. Central Bureau of Investigation and another,** reported in **(2012) 11 SCC 465** has held as under :-

"39. The same issue was examined by this Court in Jagdish Ram v. State of Rajasthan [(2004) 4 SCC 432 : 2004 SCC (Cri) 1294] wherein this Court held as under: (SCC p. 436, para 10)

"10. The contention urged is that though the trial court was directed to consider the entire material on record including the final report before deciding whether the process should be issued against the appellant or not, yet the entire material was not considered. From perusal of order passed by the Magistrate it cannot be said that the entire material was not taken into consideration. The order passed by the Magistrate taking cognizance is a well-written order. The order not only refers to the statements recorded by the police during investigation which led to the filing of final report by the police and the statements of witnesses recorded by the Magistrate under Sections 200 and 202 of the Code but also sets out with clarity the principles required to be kept in mind at the stage of taking cognizance and reaching a prima facie view. At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the police, a Magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. (Chief Controller of Imports & Exports v. Roshanlal Agarwal [(2003) 4 SCC 139 : 2003 SCC (Cri) 788] .)"

(emphasis supplied)

All along having made a reference to the words "there is sufficient ground to proceed" it has been held by this Court that for the purpose of issuing process, all that the court concerned has to determine is: whether the material placed before it "is sufficient for proceeding against the accused"? The observations recorded by this Court extracted above, further enunciate that the term "sufficient to proceed" is different and distinct from the term "sufficient to prove and establish guilt".

15. Thus, so far as the contention of learned counsel for the applicant to the effect that the complaint does not disclose ingredients constituting the offences under Sections 193, 196, 200, 209, 466, 467, 468 I.P.C. read with Section 340/195 Cr.P.C. is concerned, it would be apposite to refer to the judgment of Hon'ble the Apex Court rendered in **State of Andhra Pradesh v. Gourieshetty Mahesh,** reported in **(2010) 6 SCC 588** wherein it has been held that while exercising jurisdiction under Section 482 of Cr.P.C., the Court would not ordinarily embark upon an enquiry into

whether the evidence is reliable or not or whether there is reasonable possibility that the accusation would not be sustained.

16. A Three Judges Bench of Hon'ble Apex Court in **Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Others,** reported in **(1983) 1 SCC 1** has held as under :

"6. It may be noticed that Section 482 of the present Code is the ad verbatim copy of Section 561-A of the old Code. This provision confers a separate and independent power on the High Court alone to pass orders ex debito justitiae in cases where grave and substantial injustice has been done or where the process of the court has been seriously abused. It is not merely a revisional power meant to be exercised against the orders passed by subordinate courts. It was under this section that in the old Code, the High Courts used to quash the proceedings or expunge uncalled for remarks against witnesses or other persons or subordinate courts. Thus, the scope, ambit and range of Section 561-A (which is now Section 482) is quite different from the powers conferred by the present Code under the provisions of Section 397. It may be that in some cases there may be overlapping but such cases would be few and far between. ***It is well settled that the inherent powers under Section 482 of the present Code can be exercised only when no other remedy is available to the litigant and not where a specific remedy is provided by the statute. Further, the power being an extraordinary one, it has to be exercised sparingly. If these considerations are kept in mind, there will be no inconsistency between Sections 482 and 397(2) of the present Code.***

7. The limits of the power under Section 482 were clearly defined by this Court in Raj Kapoor v. State [(1980) 1 SCC 43 : 1980 SCC (Cri) 72] where Krishna Iyer, J. observed as follows: [SCC para 10, p. 47: SCC (Cri) p. 76]

"Even so, a general principle pervades this branch of law when a specific provision is made: easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code."

8. Another important consideration which is to be kept in mind is as to when the High Court acting under the provisions of Section 482 should exercise the inherent power insofar as quashing of criminal proceedings are concerned. This matter was gone into in greater detail in Smt Nagawwa v. Veeranna Shivalingappa Konjalgi [(1976) 3 SCC 736 : 1976 SCC (Cri) 507 : 1976 Supp SCR 123 : 1976 Cri LJ 1533] where the scope of Sections 202 and 204 of the present Code was considered and while laying down the guidelines and the grounds on which proceedings could be quashed this Court observed as follows: [SCC para 5, p. 741 : SCC (Cri) pp. 511-12]

"Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings."

10. It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482 of the present Code. *(emphasis supplied)*

17. It is not in dispute that the impugned summoning order dated 01.07.2022 has come to be passed against the applicant. The proceeding of Complaint Case No.58823 of 2022 is at initial stage. At this stage, the learned Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Moreover, the impugned order dated 01.07.2022 being revisable, the statutory remedy of filing a criminal revision is available to the applicant. Therefore, to invoke the jurisdiction of this Court under Section 482 Cr.P.C., at this initial stage by circumventing the statutory remedy of filing criminal revision against the impugned order, appears by itself to be abuse of process of this Court by the applicant.

18. In view of aforesaid discussion, the instant application under Section 482 Cr.P.C. filed by the applicant lacks merit, which is accordingly **dismissed**.

(2022) 8 ILRA 253
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.07.2022

BEFORE

THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Misc. Application U/S 482 No. 11244 of 2022

Sohan @ Radheshyam Ram & Anr.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Pushkar Kushwaha

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Criminal Procedure Code,1973 – Section 482 – Scope of interference – Abuse of process of law – Charge-sheet – Quashing of – Non-cognizable offence u/s 323 & 504 IPC – Proceeding as the St. case – Permissibility – Held, instead of treating as complaint, cognizance has been taken by the Magistrate as the St. case, which is not permissible under law – High Court found the case as a fit case to exercise the inherent power for being abuse of process of law. (Para 7 and 8)

Application allowed. (E-1)

List of Cases cited:-

1. U.O.I. Vs Prakash P. Hinduja & anr.; AIR 2003 SC 2612

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

1. Heard learned counsel for the applicants, learned A.G.A for the State and also perused the record.

2. This application under Section 482 Cr.P.C. has been filed by the applicants with a prayer to quash the charge sheet dated 12.09.2019 and cognizance & summoning order dated 07.11.2019 as well as entire proceedings of Case No.2282 of 2019 (State vs. Sohan @ Radheyshyam Ram and others) arising out of NCR No.156 of 2018, under Sections 323, 504 IPC, Police Station Baburi, District Chandauli, pending in the Court of Judicial Magistrate, Chakiya, District Chandauli.

3. Brief facts which are requisite to be stated for adjudication of this application are that complainant Santosh Kumar had moved a written complaint on 25.10.2018 before SO, Baburi, Chandauli with the allegations that on 25.10.2018 at about 05:00-06:00 pm, when the complainant was going towards his field, the accused persons Chandan and Sohan came and stopped the complainant and started using filthy language against him, when the complainant objected to do the same, they started beating him by stick, kick and fist. When the sister of the complainant, Gaytri tried to save, then all the accused persons also beaten her due to which she has also sustained injuries. On this application, NCR No.156 of 2018, under Section 323 & 504 IPC has been registered and after taking permission for investigation, Investigating Officer recorded the statement of the injured witnesses and submitted charge sheet no. NIL of 2019 in NCR No.156 of 2018 against the applicants under Sections 323, 504 IPC. On charge-sheet, Magistrate has taken cognizance on 07.11.2019 and issued summons to the applicants.

4. Feeling aggrieved, this application has been moved before this Court.

5. It is submitted by learned counsel for the applicants that matter relates to non-cognizance offence only and in such matters cognizance by the Magistrate should not be taken. The case should be treated as a complaint case, it should not be treated as a State case. The impugned order of the court below is an abuse of process of law and the same is liable to be quashed by this Court. Section 2-D Cr.P.C. lays down that :

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

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

6. The scope and ambit of power under section 482 Cr.P.C. has been examined by Hon'ble Apex Court in **Union of India vs. Prakash P. Hinduja and another, AIR 2003 SC 2612** and observed as follows:

"The grounds on which power under Section 482 Cr.P.C. can be exercised to quash the criminal proceedings basically

are (1) where the allegations made in the FIR or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused (2) where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused, (3) where there is an express legal bar engrafted in any of the provisions of Code of Criminal Procedure or the concerned Act to the institution and continuance of the proceedings. But this power has to be exercised in a rare case and with great circumspection".

7. On perusal of material brought on record, it transpires that charge sheet submitted by the IO under Sections 323 & 504 IPC only with regard to non-cognizable case. Instead of treating as complaint, cognizance has been taken by the Magistrate as State case, which is not permissible under law. Although, Magistrate has not specifically mentioned in the impugned order that the case should be proceeded under which manner State or complaint, but in absence of such specific mention on the charge sheet, it may be presumed that the case shall be proceeded as State case, which is not permissible under law.

8. In view of above discussion, application has substance and is liable to be **allowed** in part. This is a fit case in which inherent power should be exercised and there appears abuse of process of law. Application under Section 482 Cr.P.C. is allowed in part and impugned order dated 07.11.2019 by which, the cognizance was taken is hereby **quashed** with a direction to proceed with the matter as complaint case. The Magistrate shall proceed with the matter as complaint case as laid down in Explanation of Section-2(d) Cr.P.C. Rest prayer is refused.

9. It is made clear that in such situation, statement of the complainant under Section 200 and 202 Cr.P.C. is not required. No need to pass separate cognizance/summoning order but learned Magistrate should specify that said charge sheet shall be proceeded like a complaint case. Such principle is applicable in all cases relating to non-cognizance cases.

10. The Registrar General is directed to circulate this order throughout the State for effective compliance by all concerned.

(2022) 8 ILRA 255
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Misc. Application U/S 482 No. 19621 of 2021

Shivam Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Jata Shankar Pandey

Counsel for the Opposite Parties:
G.A., Sri Ashish Pandey

A. Narcotic Drugs and Psychotropic Substances Act, 1985 – Sections 52 (1) & 63 – Vehicle seized during commission of crime – Release of vehicle sought for – Remedy – Held, proper remedy available is to move application u/s 63 of N.D.P.S. Act before the trial court – The applicant

wrongly moved before the Magistrate – High Court found no infirmity in the impugned order, though accepted necessity of release of vehicle to avoid its damage. (Para 5 and 6)

Application disposed off. (E-1)

List of Cases cited:-

1. Sunder Bhai Ambalal Desai Vs St. of Guj. ; 2003 (46) A.C.C. 223

2. Crl. Rev. Pet No. 1449 of 2018; Revision Vs Shajahan decided by the Kerala High Court on 28.10.2019

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Sri Jata Shankar Pandey, learned counsel for the applicant, Sri Ashish Pandey appearing for NCB as well as Sri Rajeshwar Singh, Rakesh Chand Srivastava, Sri Amit Sinha, learned A.G.A. assisted by Rajnish Pandey and Sri Madnesh Prasad Singh, learned State Law Officer for the State and perused the record.

2. The present application has been filed for quashing the order dated 4.9.2021 passed by Additional Sessions Judge, Court No. 10, Allahabad in N.C.R. No. UPAD-01007233/2021 (State/NCB Vs. Vinod Yadav), under sections 8/20 N.D.P.S. Act, arsing out of Case Crime no. 188 of 2021, Police Station Shankargarh, District Prayagraj.

3. Learned counsel for the applicant contends that the vehicle bearing registration No. UP62 AT8908 belongs to the applicant and no useful purpose would be served in keeping the vehicle at police station which would result in the vehicle becoming junk. Learned counsel for the applicant has relied upon a decision of **Hon'ble Apex Court in the matter of Sunder Bhai Ambalal Desai Vs. State of Gujarat 2003 (46) A.C.C. 223** wherein it been held:-

"that any vehicle can not be permitted to be kept for a long time in the premise of police station and allowed to be destroyed. The fact and circumstance of this case is different from the fact and circumstance of ***SunderBhai Ambalal Desi's case (Supra)****, hence the impugned order passed by learned Judge can not be said illegal or improper. However, it is made clear that if the application for confiscation has not been filed or is not pending or the vehicle has still not been confiscated the revisionist may file fresh application for release of his vehicle in order to avoid the damage before he court below and the learned Judge may consider the application according to provision of law".*

4. In support of his contention, learned counsel for N.C.B. as well as learned A.G.A. for the State has also placed the reliance of Revision Vs. Shajahan decided on 28.10.2019 in Crl. Rev. Pet No. 1449 of 2018 decided by the Kerala High Court, whereof the paragraph No. 4 and 5 of the judgement is quoted below:

4. The main contention urged by the learned counsel for petitioners is that the conveyances involved in transportation of narcotic drugs or psychotropic substances may not belong to the actual transporter, in which event, confiscation and destruction by the competent officer without any enquiry in that regard may affect the rights of the owner of such vehicle. In fact, S.63 of the Act had provided for a procedure in making confiscations. S.63 gives the power to the Court to decide whether any article or

thing seized under the Act is liable to be confiscated in terms of Sections 60, 61 or 62 of the Act. Before the amendment to Section 52A, conveyance was not included as an item which should be seized and disposed. The very fact that conveyance had been incorporated in the amendment itself indicates that the Government intended to provide a special procedure to deal with such conveyance, while taking into account the fact that most of the transportation are done in conveyances which itself is defined Crl.R.P.No.1440/2018 & conn.cases u/s 2(viii) as meaning "a conveyance of any description whatsoever including any aircraft, vehicle or vessel." Therefore, if any vehicle is involved in transportation of narcotic drug, psychotropic substance or controlled substance, such vehicles also could be seized and disposed of in terms of S.52A(1) of the Act. S.63 was a special procedure available at the inception of the Act and when the statute had been amended giving the power of disposal of narcotic drugs, psychotropic substances, controlled substances or conveyances to a special officer, he will have to act in accordance with the procedure prescribed under the Act or the Rules framed thereunder.

5. When a Special Act prescribes the procedure for dealing in specified goods and the NDPS Act being a special statute and latter in time, the provisions of the special statute has to be followed by the Magistrate. In other words, the Magistrate may not have jurisdiction to entertain a petition u/s 451 of Cr.P.C. in the light of the special provision made u/s 52A of the NDPS Act. In fact, in Mohanlal (supra), the Apex Court had issued certain directions which are extracted hereunder:-

"31. To sum up we direct as under: Crl.R.P.No.1440/2018 & conn.cases 31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.

31.2. The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic drugs and psychotropic and controlled substances and conveyances duly equipped with vaults and double-locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1 of 1989 to ensure proper security against theft, pilferage or replacement of the seized drugs. 31.3. The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

31.4. Disposal of the seized drugs currently lying in the Crl.R.P.No.1440/2018 & conn.cases Police Malkhanas and other places used for storage shall be carried out by the DDCs

concerned in terms of the directions issued by us in the body of this judgment under the heading "disposal of drugs".

5. After hearing the learned counsel for the applicant, learned counsel for N.C.B as well as A.G.As., and after perusing the order impugned as well as averments made in the present application, this Court is of the opinion, that the arguments as raised by learned counsel for the applicant has substance that the vehicle shall be released in order to avoid damage but the applicant has been wrongly moved before the learned Magistrate. Such vehicle also could be seized and disposed of in terms of Section 52A (1) of the Act. However, the proper remedy available to the applicant to move application under section 63 of N.D.P.S. Act before the trial court, which is quoted below:-

" 63. Procedure in making confiscations.?

(1) In the trial of offences under this Act, whether the accused is convicted or acquitted or discharged, the court shall decide whether any article or thing seized under this Act is liable to confiscation under section 60 or section 61 or section 62 and, if it decides that the article is so liable, it may order confiscation accordingly.

(2) Where any article or thing seized under this Act appears to be liable to confiscation under section 60 or section 61 or section 62, but the person who committed the offence in connection therewith is not known or cannot be found, the court may inquire into and decide such liability, and may order confiscation accordingly: Provided that no order of confiscation of an article or thing shall be made until the expiry of one month from the date of seizure, or without hearing any person who may claim any right thereto and the evidence, if any, which he produces in respect of his claim: Provided further that if any such article or thing, other than a narcotic drug, psychotropic substance, 1[controlled substance,] the opium poppy, coca plant or cannabis plant is liable to speedy and natural decay, or if the court is of opinion that its sale would be for the benefit of its owner, it may at any time direct it to be sold; and the provisions of this sub-section shall, as nearly as may be practicable, apply to the net proceeds of the sale.

6. Accordingly, there is no infirmity in the impugned order. However, the contention advanced by learned counsel for the applicant is acceptable up to the extent that to avoid damage of the vehicle, the release of vehicle is necessary.

7. Considering the aforesaid judgments and discussions section 52A(1) and Section 63 of the N.D.P.S. Act are attracted. Therefore, the application is disposed off with liberty to the applicant to move an appropriate application under section 52A(1) and section 63 of the N.D.P.S. Act before the trial court, the same shall be entertained by the court below in accordance with law, as expeditiously as possible.

(2022) 8 ILRA 258
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.05.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Misc. Application U/S 482 No. 26024 of 2021

Miss Priti Pandya ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Dheeraj Singh (Bohra)

Counsel for the Opposite Parties:
G.A., Sri Rakesh Kumar Srivastava

A. Criminal Law - Criminal Procedure Code,1973 – Section 311 – Negotiable Instrument Act, 1881 – S. 138 – Production of documents – Applicability of S. 311 Cr.P.C. to the case relating to S. 138 of NI Act – Just decision of case – Held, in the cases relating to Section 138 N.I. Act, the Court can entertain an Application under Section 311 Cr.P.C at any St. of the inquiry, trial or other proceedings suo-moto or on the application of either party – IInd part of S. 311 of Cr.P.C. casts duty upon the Court to summon, examine and recall and reexamine any such person, if his evidence, appears to be essential for the just decision of the case – High Court held the exercise of power u/s 311 Cr.P.C. for passing impugned order and for producing the documentary evidence necessary for just decision of the trial. (Para 16, 17 and 34)

B. Criminal Law - Criminal Procedure Code,1973 – Section 397(2) & 482 – Interlocutory order – Maintainability of application u/s 482 – Nature of order passed u/s 311 Cr.P.C. – Held, order summoning or refusing to summon witnesses under Section 311 Cr.P.C is an interlocutory order within the meaning of Sec. 397 (2) Cr.P.C as it does not decide any substantive right of litigating parties. Hence no revision lies against such order – When Section 397 (2) Cr.P.C prohibits interference in respect of the interlocutory orders, Section 482 Cr.P.C cannot be availed to achieve the same objective. (Para 36 and 37)

Application dismissed. (E-1)

List of Cases cited:-

1. Goal Plast Ltd. Vs Chico Urmila 'D' Souza; 2003 Crl.J. 1723

2. M/s Mohan Lal Khem Chandra Vs Pawan Kumar Mohanka; 1996 Cr.L.J. 2927

3. Raja Kumarian Vs Subharama Naydu; A.I.R 2005 SC 109

4. N. Rangachari Vs B.S.N.L. Ltd.; A.I.R 2007 SC 1682

5. M.M.T.C Vs Medchal Chemicals & Pharma (P) Ltd.; A.I.R 2002 SC 182

6. R.B. Mithani Vs St. of Mah.; A.I.R. 1971, SC 1630

7. St. of Har. Vs Ram Prasad; 2006 Cr.L.J. 1001

8. Nira Vs St. of Orissa; 2008 Crl. L.R. 1315

9. St. of Sikkim Vs Thukchuk Lachungpa; 2005 Crl. L.R 201

10. Rama Paswan Vs St. of Jhharkhand; 2007 Crl. L.J. 2750

11. Ismail Baba Saheb Vs A.A. Hulagen; 1997 Crl.L.J. 1804

12. Raju Vs St. of Madhya Pradesh; 2002, Crl.L.J. 2367

13. Raj Deo Sharma Vs St. of Bihar; A.I.R 1999 SC 3524

14. Mohan Lal Sham Ji Soni Vs U.O.I.; 1991 Cr.L.J. 1521

15. Rajendra Prasad Vs Narcotic Cell Delhi, A.I.R 1999

16. Jamat Raj Vs St. of Mah.; A.I.R 1968 SC 178

17. Popat Lal & Ors. Vs St. of Mah.; 2002 Crl.L.J. 794

18. P. Chagu Lal Daga Vs M. Sanjay Show 2004; S.C.C (Criminal) 183

19. Chhanda Debi Varma Vs Keshab Banik; 2005, Crl.L.J. 2503

20. Ajai Dikshit Vs St. of U.P. & anr.; 2011 (75) ACC 388 (All-LB)

21. Sethuraman Vs Rajamanickam; 2009 (65) ACC 607 (SC)

22. Hanuman Ram Vs St. of Raj. & others; 2009 (64) ACC 895 (SC)

23. Asif Hussain Vs St. of U.P.; 2007 (57) ACC 1036 (All-D.B)

24. Girish Kumar Suneja Vs C.B.I. A.I.R, 2017; Supreme Court 3620

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

1. Heard Sri Dheeraj Singh (Bohra), learned counsel for the applicant, learned A.G.A for the State and perused the material available on record.

2. The applicant-accused in Criminal Complaint under Section 138 N.I. Act has preferred this application under Section 482 Cr.P.C to quash the order dated 22.10.2021, passed by Sri Vijay Kumar Agrawal, Presiding Officer of Additional Court No. 03, Gautam Budh Nagar, by which he allowed the complainant's application under Section 311 Cr.P.C and permitted the production of three documents on record and summoned the Post Office's Clerk and Advocate Sri Braj Bhushan Pal for deposition.

3. In brief, facts of the case are that M/s. Tanya Buildcon (India), Private Limited, has filed a complaint under Sections 138 & 141 N.I. Act, against M/s. Gujrat Isotop Pvt. Ltd. and its Director/M.D Miss. Priti Pandya before the C.J.M, Gautam Budh Nagar, bearing No. 16712 of 2010, which was contested by the opposite parties.

4. In this complaint case, evidence were recorded and documents were already produced by the complainant. Relevant parts of the order-sheets of the lower court has been produced by the applicant, which discloses that on 14.04.2021, the case was fixed for argument and the Court below heard the oral argument and also directed to produce the written argument.

5. The order-sheet dated 22.09.2021 discloses that the counsel for the accused raised some preliminary objections regarding maintainability of the complaint that the alleged legal notice in not signed by the concerned advocate and that no receipt regarding authorization for filing the complaint by the Director Sri Deepak Agrawal has been produced. He also argued that Sri Deepak Agrawal has produced his statement under Section 200 Cr.P.C on affidavit, which is not duly verified.

6. In view of these initial objections of the opposition, the court fixed a date for their disposal. Thereafter an Application U/s 311 Cr.P.C was moved to summon the Official of the Postal Department and the aforesaid counsel, who had sent the notice. Thereafter the order in question was passed after taking up the objections of the opposition and hearing the parties.

7. The applicant has taken mainly this ground to quash the impugned order that the legal notice filed with the affidavit dated 09.08.2010 was not signed by the advocate, who had dispatched the same to the applicant and that the Postal Receipt was invisible to ascertain the post office and year. The resolution/memorandum authorizing Mr. Deepak Agrawal for filing the complaint was not filed as primary document with the complaint. According to him the lower court perused the record and found that the list of documents does not contain the receipt of dispatch of legal notice and resolution of the Company and the legal notice does not contain the signature of the advocate. According to the applicant thus by accepting the application u/s 311 Cr.P.C, the court has provided an opportunity to fill up the lacuna to the complainant, hence the present application.

8. At the very outset it would be proper to state something about the Negotiable Instruments Act, 1881.

9. The Negotiable Instruments Act, 1881 was amended with effect from 01.04.1989 and the maximum term of punishment of one year has been enhanced up to two years and the period of notice of dishonor of cheque has been reduced from 30 days to a period of 15 days with effect from 06th February, 2003. The scheme of N.I. Act primarily to provide an additional criminal remedy over and above the civil remedy available under the Act.

10. Section 138 of the N.I. Act creates a new offence when a cheque is returned by the Bank unpaid. Section 139 casts a rebuttable presumption that a holder of the cheque has received, the same towards discharge of liability. The Section 140 precludes the drawer from the pleadings with that he had no reason to believe that the cheque would be dishonoured. As per Section 142, the offence has been made cognizable on the basis of written complaint. Section 142 (B) prescribes a period of one month for filing a complaint from the date when the cause of action arises. In the case of Goal Plast Limited Vs. Chico Urmila 'D' Souza 2003 Crl.J. 1723, Hon'ble Supreme Court has held that the new enactment of 1988 has been introduced with intention to discourage people for not honouring their commitment by way of payment of cheque. To form an offence under Section 138 of N.I. Act, mens-rea is not essential ingredient of a criminal offence. The partners of the firm can be prosecuted without impleading firm as an accused. He can be convicted if he was In-charge of a responsible Firm for the conduct of the business of the firm. The Manager of the Company in whose favour the cheque was issued can file complaint for dishonour of the cheque ***M/s Mohan Lal Khem Chandra Vs. Pawan Kumar Mohanka 1996 Cr.L.J. 2927***.

11. Under Section 138 (B), the payee is under the statutory obligation to make a demand by giving a notice.

12. In the case of ***Raja Kumarian Vs. Subharama Naydu A.I.R 2005 Supreme Court 109***, it is held that once the notice is dispatched, the part of the complainant is over and next depends what the sendee does. Once the notice is dispatched by registered post on correct address of the sendee, the presumption would arise in favour of the senders that the notice was duly served, unless the presumption is rebutted by the necessary evidence.

13. In the case of ***N. Rangachari Vs. B.S.N.L. Limited A.I.R 2007 S.C. 1682,*** it is held that if named Directors were In-Charge and responsible to the Company for the conduct of the business, complaint against the Directors is maintainable and can not be quashed. The Director of the Company by courageously liable for acts of the Company.

14. The Hon'ble the Supreme Court in the case of ***M.M.T.C Vs. Medchal Chemicals & Pharma (P) Ltd. A.I.R 2002 SC 182***, held that the complaint filed in the name and on behalf of the Company by its employee without necessary authorization is maintainable. Want of authorization may be rectified even at a subsequent stage.

15. In this matter the complaint was filed in the year 2010 and since then the complaint is pending for disposal. Since the whole order-sheet has not been produced before the Court, therefore, this Court can not say as to which party is responsible for delaying the complaint, but it is very strange that when after taking all evidence, the learned lower trial court was proceedings for deciding the case after

hearing the oral argument and taking written arguments of the parties, why the preliminary objections were raised by the applicant-accused. The learned lower trial court was competent enough to decide the objections raised by the applicant-accused finally with the judgment of the case. It is also strange that why these preliminary objections were not raised at the initial stage of the case by the applicant-accused. This Court is of the opinion that the learned trial court, should have decided the case on merit taking all the objections of the accused.

16. There is no doubt that in the cases relating to Section 138 N.I. Act, the Court can entertain an Application under Section 311 Cr.P.C at any state of the inquiry, trial or other proceedings suo-moto or on the application of either party if the recall of the witness for examination-in-chief, cross examination or re-examination or summoning of new witness and taking additional documentary evidence appears to be essential for the just decision of the case. When the complainant moved the Application U/s 311 Cr.P.C, the same was allowed partly and the impugned order was passed and the learned Trial Court permitted for production of all the three documents on record and summoned Post Office's Clerk and Advocate Sri Braj Bhushan Pal to adduce the evidence. The applicant-accused has only one objection that the learned trial court has not exercised the jurisdiction properly, but by allowing the application, it has provided an opportunity to the complainant to fill-up the lacuna of the case. This Court is of the opinion that all the three documents were necessary to be summoned and kept on record and if it was not clarified that from which Post Office, the notice was sent then summoning of the Post Office's Clerk and summoning of the aforesaid Advocate Sri Braj Bhushan Pal, who is alleged to be sender of the notice appears to be essential for the just decision of the case.

17. The second part of the Section 311 of C.P.C, casts duty upon the Court to summon, examine and recall and re-examine any such person, if his evidence, appears to be essential for the just decision of the case.

18. In the Case of ***R.B. Mithani Vs. State of Maharashtra, A.I.R. 1971, Supreme Court 1630***, the Hon'ble Supreme Court has held that additional evidence summoned must be necessary not because, it would be impossible to pronounce judgement but also because there would be failure of justice without it. Though the power must be exercised sparingly and only in suitable case but once such action is justified, there is no restriction on the kinds of evidence, which may be received. It may be formal or substantial in nature.

19. In the Case of ***State of Haryana Vs. Ram Prasad 2006 Cr.L.J. 1001***, the Punjab & Haryana High Court held that where the examination and re-examination of the witness is essential for the just decision of the case, it is obligatory of the Court to summon such a witness.

20. The Orissa High Court in the Case of ***Nira Vs. State of Orissa, 2008 Crl. L.R. 1315***, held that this power can be exercised by the Court even at the state of preparation of the judgment.

21. In the Case of ***State of Sikkim Vs. Thukchuk Lachungpa 2005, Crl. L.R 201***, the Sikkim High Court has held that this

power can be exercised even though at the earlier stage of the trial, the Court has rejected such application.

22. In the Case of ***Rama Paswan Vs. State of Jhharkhand, 2007 Crl. L.J. 2750***, the Hon'ble Supreme Court has held that it would not be improper, the exercise of the power of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The Section is a general Section, which applies to all proceedings, inquiries and trials under the Court and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or inquiry.

23. In the Case of ***Ismail Baba Saheb Vs. A.A. Hulagen, 1997 Crl.L.J. 1804***, the Karnataka High Court, has held that where the production of the document and the summoning of the witness is necessary for the just decision of the case, the rejection of the application on the ground that document has not been produced from proper custody is not proper.

24. In the Case of ***Raju Vs. State of Madhya Pradesh, 2002, Crl.L.J. 2367***, the Madhya Pradesh High Court has held that where the documents filed with the Charge-sheet have not been proved, important documents relevant for the just decision of the trial have not been filed, the Court would direct their production exercising of power under Section 311 Cr.P.C. and Section 165 of Evidence Act.

25. In the Case of ***Raj Deo Sharma Vs. State of Bihar, A.I.R 1999 Supreme Court 3524***, the Hon'ble Supreme Court has held that once it is found that the evidence is essential for the just decision of the case, the witness can be recalled at any time before pronouncement of the judgment, the time factor would not come in the way.

26. In the case of ***Mohan Lal Sham Ji Soni Vs. Union of India, 1991 Cr.L.J. 1521***, Supreme Court, the Hon'ble Supreme Court has held that an inquiry or trial in a criminal proceedings comes to an end or reaches its finality when the order or judgment is pronounced and until then the Court has power to use this Section.

27. In the Case of ***Rajendra Prasad Vs. Narcotic Cell Delhi, A.I.R 1999, Supreme Court 2292***, the Hon'ble Supreme Court has held that it can not be laid down as legal preposition that the Court can not exercise the power of re-summoning any witness, if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered latches only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even re-call any witness at any stage of the case, if the Court considers it necessary for a just decision.

28. As already said that there are two parts of the Section 311, in this context, the Hon'ble Supreme Court in the case of ***Jamat Raj Vs. State of Maharashtra, A.I.R 1968, Supreme Court 178*** has held that the user of "**May**" in first part "**Shall**" in second shows, that when the first part is discretionary, second part is obligatory.

29. In the Case of **Mohan Lal (Supra)** the Hon'ble Supreme Court has also held that the power to summon and examine any witness may be exercised at the stage, opportunity however is to be given to the parties to rebut the evidence.

30. In this case, the accused-appellant has certainly power to cross-examine the witness summoned and file documentary evidence in rebuttal, which have been permitted by the Court to keep on record.

31. The applicant-accused is of the view that by allowing the application under Section 311 Cr.P.C and by summoning the witnesses and keeping the documentary evidence on record, the accused-applicant have been prejudiced. In this respect a judgement of Bombay High Court is relevant, where in the Case of ***Popat Lal & Ors. Vs. State of Maharashtra, 2002, Crl.L.J. 794***, the Bombay High Court has held that Section 311 Cr.P.C. is not granted only for the benefit of the accused and it will not be improper exercise of power of the Court, if the Court summons a witness only because the evidence will support the prosecution case and not the defense case.

32. In the Case of ***P. Chagu Lal Daga Vs. M. Sanjay Show 2004 S.C.C (Criminal) 183***, the Hon'ble Supreme Court has held that in a case relating to N.I. Act that when the prosecution wanted to produce the Postal Receipt to prove the service of notice on the accused in a proceeding under Section 138 of the N.I. Act, the Trial Court can admit it even after close of the case.

33. In the case of ***Chhanda Debi Varma Vs.Keshab Banik 2005, Crl.L.J. 2503***, the Guwahati High Court has held in a case relating to dishonour of cheque, wherein the complainant placed two letters on record issued to him by the accused after the examination of the prosecution witness, the letters were necessary to meet the ends of justice, therefore, the prosecution witnesses were called for to prove those letters.

34. On the basis of the above discussions and in view of the judgments of Hon'ble Supreme Court and other High Courts, this Court is of the opinion that in this case exercise of powers by the learned Trial Court under Section 311, for passing impugned order and for summoning the witnesses and to permit the complainant to produce the documentary evidences as noted above, was necessary for just decision of the trial and for the ends of justice, therefore, so far as the merit of the case (Application U/s 482 Cr.P.C) is concerned, it has no merit.

35. It is also a question to be decided by the Court as to whether the impugned order can be challenged under Section 482 Cr.P.C or not.

36. In the following cases it is held that Order summoning or refusing to summon witnesses under Section 311 Cr.P.C is an interlocutory order within the meaning of Sec. 397 (2) Cr.P.C as it does not decide any substantive right of litigating parties. Hence no revision lies against such order. See:

(I). Ajai Dikshit Vs. State of U.P. & another, 2011 (75) ACC 388 (All-LB).

(II). Sethuraman Vs. Rajamanickam, 2009 (65) ACC 607 (SC).

(III). Hanuman Ram Vs. State of Rajasthan & others, 2009 (64) ACC 895 (SC).

(IV.) Asif Hussain Vs. State of U.P., 2007 (57) ACC 1036 (All-D.B)."

37. The Hon'ble Supreme Court in the Case of ***Girish Kumar Suneja Vs. C.B.I. A.I.R, 2017, Supreme Court 3620 (three Hon'ble Judges' Bench)***, has held that when the Section 397 (2) Cr.P.C prohibits interference in respect of the interlocutory

orders, Section 482 Cr.P.C cannot be availed to achieve the same objective.

38. On the basis of above discussions, this Court is of the considered view that the present petition / application u/s 482 Cr.P.C filed the accused-applicant against the impugned order is devoid of merits and is not maintainable. Hence, the present Application U/s 482 Cr.P.C is accordingly **dismissed**.

(2022) 8 ILRA 265
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.07.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Crl. Misc. Anticipatory Bail Application No. 4040 of 2022
(U/s 438 Cr.P.C.)

Siddharth Kappor ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vikrant Rana, Sri Anoop Trivedi (Sr. Advocate)

Counsel for the Opposite Parties:
G.A., Sri Vinay Sharma

A. Criminal Law - Code of Criminal Procedure, 1973 – Section 82 & 83 -If any person has filed any anticipatory bail application before the learned court below showing his reasonable apprehension of arrest in a case where the allegations of the prosecution prima facie do not corroborate with the material available on record and his/her anticipatory bail application is rejected, he or she has got a right to approach the High Court for such anticipatory bail and if the interregnum period any proclamation u/S 82 and 83 Cr.P.C. is issued it may be considered as a circumventive exercise being taken by the Investigating Officer. No one can be restrained from taking legal course strictly in accordance with law and such legal right may not be prevented even if any process is adopted by any authority which is not permissible under the law.

B. Indian Penal Code, 1860 - Section 306- Before holding an accused guilty of an offence u/S 306 IPC the Court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of, direct or indirect, acts of incitement to the commission of suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.

Application allowed. (E-12)

List of Cases cited:-

1. Amalendu Pal @ Jhantu Vs St. of W.B.

2. Chitresh Kumar Chopra Vs State (Govt. of NCT of Delhi) dercided on 10.08.2009 in Criminal Appeal No. 1473 of 2009

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Supplementary affidavit filed today is taken on record.

2. Heard Shri Anoop Trivedi, learned Senior Counsel assisted by Shri Vikrant Rana, learned counsel for the applicant, the

learned Additional Government Advocate for the State as well as Shri Vinay Sharma, learned counsel for the first informant and perused the record.

3. This anticipatory bail application under section 438 Cr.P.C. has been moved seeking anticipatory bail in Case Crime No. 23 of 2022, under sections- 306, 506 IPC, Police Station Lal Kurti, District Meerut.

4. Brief fact of the case emerges as such that an FIR was lodged by the opposite party no.2 under Section 306 IPC on 12.2.2022 against Pradeep Kumar, Shahzad and one unknown person alleging therein that her husband namely Yogendra Chaudhary borrowed some money in installment from Rajkumar Sirohi, Aastha Finance Company, 2nd Floor near Nandni Bar and Restaurant, Garh Road, Meerut and her husband was paying the said amount in installment, but the aforesaid company and his associates namely Honey and Harish Sonkar demanding more money from her husband and asked him that in case, he does not pay the money to them, they will not spare him and his family members and the said things were told by her husband to her and on account of the same, he lost his mental balance and committed suicide on 11.2.2022. The suicide note was recovered in which the mobile number of the applicant and his father Sri Shashi Kapoor i.e. 9837088231 included and after the said incident, the co-accused Rajkumar Sirohi came to her house on 12.2.2022 between 6.00 am to 7.00 am along with his son Akash Sirohi and unknown persons and left the place with the words that Yogendra has gone and now they will recover their money from them and they will compel them also to commit suicide. It was further alleged that she was not in a position to give a complaint and the names of the accused persons are written in the suicide note which was found to her has been annexed with the application.

5. The learned counsel for the applicant submits that the applicant is innocent and has been falsely implicated in the present case due to ulterior motive. It is further stated that while studying in class 11th, the applicant came into contact of daughter of opposite party no.2 namely Tanya and friendship developed between each other. On 25.6.2013, the applicant along with daughter of the first informant and other friends went to have lunch at Manssorpur in a car having registration no. UK-08-AA 0874 in the name of father of applicant, which was driven by his driver namely Naveen Chand. After having lunch, while returning to their place, the said car driven by the said driver Naveen Chand was hit by a Truck having registration no. HR-55-AM 4999 which resulted into serious accident and in the said accident, the daughter of the first informant died and the applicant also received injuries.

6. The learned counsel for the applicant further submits that the FIR of the aforesaid incident was lodged by the said driver Naveen Chand at P.S. Daraula, Meerut on 25.6.2013 against the driver of the said Truck which was registered as Case Crime No. 415 of 2013 U/s 279/304A IPC. It is further stated that after investigation, the final report no. 315/2013 dated 10.11.2013 was submitted by the police in the court concerned. It is further stated that after the death of the daughter of the first informant, she and her husband namely Shri Yogendra Singh filed Motor Accident Claim Petition bearing MACT petition no. 794 of 2013 which is still pending, in which the husband alleged in his plaint that the accident in question took

place due to rash and negligent driving of the said Truck and the car bearing No.UK-08-AA-0874. Thus, the truck owner is liable to pay compensation to them.

7. The learned counsel for the applicant further states that soon after the aforesaid accident, the husband of the opposite party no.2 started blackmailing and demanding Rs. 10 lacs on the pretext that he will send the applicant behind bars in the case of death of his daughter and also extended the threats of dire consequences, if he does not fulfil his illegal demand. It is further submitted that in the FIR, it is admitted fact that the husband of opposite party no.2 took loan from one Raj Kumar Sirohi who was demanding his money from him. It is further stated that the husband of the opposite party no.2 also took home loan of Rs. 15 lacs from H.D.F.C. Bank which could not be repaid by him and due to which, he committed suicide on 11.2.2022.

8. It is further stated by the learned counsel for the applicant that the investigating officer during investigation apart from two slips, the investigating officer obtained a copy of alleged draft email dated 4.1.2022 from the mobile phone of the deceased in which the name of the applicant and his father's name was disclosed. It is also submitted that in the said draft mail, he clearly addressed that the Hon'ble Chief Minister is also liable for his suicide.

9. The learned counsel for the applicant submits that there is no instant instigation by the applicant and there is no motive or intention to instigate the deceased for committing suicide on 11.2.2022. Thus, it is clear that the deceased committed suicide after one month and seven days of the alleged draft suicide note in the mobile of the deceased. It is further submitted that a perusal of the FIR and statement, no offence U/s 306 IPC is made out against the applicant. In support of his submissions, he has placed reliance upon the judgement of the Apex Court in the case of ***Amalendu Pal @ Jhantu vs. State of West Bengal*** in which it was held as under:

"12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the Court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without their being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.

13. In order to bring a case within the purview of Section 306 of IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC."

10. The learned counsel for the applicant further submits that earlier before availing the remedy of anticipatory bail

application before this court, the applicant and father of the applicant approached the sessions court and filed the anticipatory bail application which was duly rejected on 21.4.2022. It is further submitted that the investigating officer, who anyhow wanted to arrest the applicant, deliberately or intentionally procured an order U/s 82 CrPC on 29.4.2022. But the said order dated 29.4.2022 never came to the knowledge of the applicant. Therefore, the applicant filed anticipatory bail application on 5.5.2022. It is further stated that it is not the case where the investigating officer obtained the order of N.B.W. and process U/s 82 CrPC prior to filing of the said anticipatory bail application before the court below. The N.B.W. as well as process U/s 82 CrPC was issued against the applicant while the applicant is availing statutory remedy given by the appropriate court. Therefore, the learned counsel submits that the applicant is not an absconder inasmuch the N.B.W. and process U/s 82 CrPC was issued against the applicant during statutory remedy available. It is further submitted that in a catena of judgements of the Apex Court as well as this Court, it has been held that in the intervening period, when the applicant avails his remedy, then only on the basis of process U/s 82 CrPC, the anticipatory bail cannot be denied.

11. Lastly, the learned counsel for the applicant submits that the father of applicant has already been granted anticipatory bail by sessions court concerned having similar allegations vide order dated 21.4.2022. The applicant has no previous criminal history and therefore, he seeks anticipatory bail. He is ready to cooperate in the investigation.

12. Learned A.G.A. as well as the counsel for the first informant vehemently opposed the prayer for anticipatory bail of the applicant and has submitted that the offence is serious in nature. Hence, the application is liable to be rejected. In support of his submission, he relies upon the judgement of the Apex Court in the case of ***Chitresh Kumar Chopra vs. State (Govt. of NCT of Delhi) decided on 10.8.2009 in Criminal Appeal No. 1473 of 2009***. The relevant portion of which is being reproduced hereunder:

"10. Section 306 of the IPC reads as under:

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

11. From a bare reading of the provision, it is clear that to constitute an offence under Section 306 IPC, the prosecution has to establish: (i) that a person committed suicide, and (ii) that such suicide was abetted by the accused. In other words, an offence under Section 306 would stand only if there is an "abetment" for the commission of the crime. The parameters of "abetment" have been stated in Section 107 of the IPC, which defines abetment of a thing as follows:

"107. Abetment of a thing A person abets the doing of a thing, who -

First- Instigates any person to do that thing; or Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1- A person who by wilful misrepresentation, or by wilful concealment of a material fact which he is

bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."

12. As per the Section, a person can be said to have abetted in doing a thing, if he, firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing. Explanation to Section 107 states that any wilful misrepresentation or wilful concealment of material fact which he is bound to disclose, may also come within the contours of "abetment". It is manifest that under all the three situations, direct involvement of the person or persons concerned in the commission of offence of suicide is essential to bring home the offence under Section 306 of the IPC.

13. Therefore, the question for consideration is whether the allegations levelled against the appellant in the FIR and the material collected during the course of investigations, would attract any one of the ingredients of Section 107 IPC?

14. As per clause firstly in the said Section, a person can be said to have abetted in doing of a thing, who "instigates" any person to do that thing. The word "instigate" is not defined in the IPC. The meaning of the said word was considered by this Court in Ramesh Kumar Vs. State of Chhattisgarh. Speaking for the three-Judge Bench, R.C. Lahoti, J. (as His Lordship then was) said that instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be (2001) 9 SCC 618 capable of being spelt out. Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation.

15. Thus, to constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage doing of an act by the other by "goading" or "urging forward". The dictionary meaning of the word "goad" is "a thing that stimulates someone into action: provoke to action or reaction" (See: Concise Oxford English Dictionary); "to keep irritating or annoying somebody until he reacts" (See: Oxford Advanced Learner's Dictionary - 7th Edition). Similarly, "urge" means to advise or try hard to persuade somebody to do something or to make a person to move more quickly and or in a particular direction, especially by pushing or forcing such person. Therefore, a person who instigates another has to "goad" or "urge forward" the latter with intention to provoke, incite or encourage the doing of an act by the latter. As observed in Ramesh Kumar's case (supra), where the accused by his acts or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide, an "instigation" may be inferred. In other words, in order to prove that the accused abetted commission of suicide by a person, it has to be

established that: (i) the accused kept on irritating or annoying the deceased by words, deeds or wilful omission or conduct which may even be a wilful silence until the deceased reacted or pushed or forced the deceased by his deeds, words or wilful omission or conduct to make the deceased move forward more quickly in a forward direction; and (ii) that the accused had the intention to provoke, urge or encourage the deceased to commit suicide while acting in the manner noted above. Undoubtedly, presence of mens rea is the necessary concomitant of instigation."

13. The counsel for the opposite party has stated that in suicide note, the name of the applicant disclosed. The role of the applicant could not be denied and he extended threats for committing murder of the deceased several times and as such, the applicant made the deceased pressurize. Due to this, the complainant's husband committed suicide. It is further stated that the name of the applicant is clearly mentioned in the said suicide note. Thus, this is not a case of anticipatory bail and if the applicant is granted anticipatory bail, he might not cooperate in the investigation. It is also submitted that the applicant is an absconder, so benefit of anticipatory bail could not be granted to him.

14. Insofar as the argument of the counsel for the first informant is concerned, the counsel for the opposite party has failed to adduce any evidence that the process U/s 82 CrPC was issued prior to pendency of anticipatory bail application before the learned trial court which was rejected on 21.4.2022 and process U/s 82 CrPC was issued on 29.4.2022. However, the applicant approached this Court on 5.5.2022. Thus, it is admitted fact that the process U/s 82 CrPC was issued after rejection of the anticipatory bail application by sessions court concerned.

15. The law is trite on the point that if any person has filed any anticipatory bail application before the learned court below seeking anticipatory bail showing his reasonable apprehension of arrest in a case where the allegations of the prosecution prima facie do not corroborate with the material available on record and his anticipatory bail application is rejected, he has got a right to approach the High Court for such anticipatory bail and if in the interregnum period any proclamation u/s 82 & 83 Cr.P.C. is issued, it may be considered as a circumventive exercise being taken by the Investigating Officer. No one can be restrained from taking legal recourse strictly in accordance with law and such legal right may not be prevented even if any process is adopted by any authority which is not permissible under the law.

16. Therefore, in this matter, there is no bar to interfere the anticipatory bail application even after issuance of process U/s 82 CrPC.

17. Considering the nature of accusation as well as the fact that the applicant has no criminal antecedent and without expressing any opinion on the merits of the case, I am of the view that in this matter as the aforesaid suicide note was written on 4.1.2022 and the deceased committed suicide on 11.2.2022, there is no instant instigation or abetment to commit suicide and, as such, the applicant is entitled to be released on anticipatory bail in this case.

18. In the event of arrest, the applicant- **Siddharth Kappor** involved in

the aforesaid crime shall be released on anticipatory bail till the submission of police report, if any, under section 173 (2) Cr.P.C. before the competent court on his furnishing a personal bond with two sureties each in the like amount to the satisfaction of the Station House Officer of the police station concerned with the following conditions:-

(i) the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) the applicant shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police office;

(iii) the applicant shall not leave India without the previous permission of the Court and if he has passport the same shall be deposited by him before the S.S.P./S.P. concerned.

In default of any of the conditions, the Investigating Officer is at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant.

The Investigating Officer is directed to conclude the investigation of the present case in accordance with law expeditiously preferably within a period of three months from the date of production of a certified copy of this order independently without being prejudice by any observation made by this Court while considering and deciding the present anticipatory bail application of the applicant.

The applicant is directed to produce a certified copy of this order, before the S.S.P./S.P. concerned within ten days from today, who shall ensure the compliance of present order.

19. In view of the aforesaid terms, the application is **disposed of.**

(2022) 8 ILRA 271
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.06.2022

BEFORE

THE HON'BLE SAMEER JAIN, J.

Criminal Misc. Bail Application No. 24208 of 2022

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

Counsel for the Applicant:
Sri Kapil Tyagi

Counsel for the Opposite Party:
G.A.

Criminal Law - Indian Penal Code,1860 - Section 302 &120(B) - Dying declaration against the Applicant-Post Mortem-died due to ante mortem burn injuries.

Bail Application dismissed. (E-9)

List of Cases cited:

1.Birjmani Devi Vs Pappu Kumar & anr. reported in [2022 4 SCC 497]

2. Ms. Y. Vs St. of Raj. & anr. in Crl. Appeal No. 649 of 2022 arising out of SLP (Crl.) No. 7893 of 2021

3.Sabir Vs Bhura @ Nadeem & anr. in Crl. Appeal No. 227 of 2022 (arising out of SLP (Crl.) No. 6941 of 2021)

4.Sunder Lal Vs State reported in [1983 Crl J 736]

5.Chander @ Chandra Vs St. of U.P. reported in [1998 CRI.I. J. 2374]

(Delivered by Hon'ble Sameer Jain, J.)

1. Heard Sri Kapil Tyagi, learned counsel for the applicant, Sri Arvind Kumar, learned AGA for the State and perused the record of the case.

2. By way of the present application, applicant made prayer to release him on bail in Case Crime No. 39 of 2019, under Sections 302, 120B IPC, Police Station Sikandra, District Agra.

3. Applicant is the cousin brother (Mausera Bhai) of the deceased. The FIR of the present case was lodged on 20.01.2019 under Sections 302, 120B IPC against the applicant and his parents with the allegation that on 15.11.2018 applicant along with his parents ablazed the sister of informant, namely Rakhi by pouring kerosene oil and during the course of treatment, Rakhi (sister of informant) succumbed to her injuries on 20.11.2018. The dying declaration of the deceased Rakhi was recorded by the Additional City Magistrate-III, Agra on 15.11.2018 i.e. on the date of incident in the hospital in which she stated that applicant, his parents and Mintu (brother of applicant) dragged her in their home and after pouring kerosine oil ablazed her.

4. Learned counsel for the applicant submitted that entire allegation made in the FIR and in the dying declaration of the deceased is totally false and baseless and initially, during investigation, the accusation made against the applicant and his parents were found false, therefore, final report was submitted on 19.02.2019 thereafter, on the direction of the SSP concerned, further investigation was commenced and on 18.8.2019 charge-sheet was submitted against the parents of the applicant whereas, in respect of applicant, investigation continued. He further submitted that thereafter charge-sheet against the applicant was also filed. Learned counsel for the applicant submitted that dying declaration of the deceased Rakhi is not in accordance with law and is tutored one and he vehemently submitted that co-accused Smt. Mausammi @ Triveni, the mother of applicant, Raju, the father of applicant and Mintu, the brother of applicant have already been enlarged on bail by the co-ordinate Bench of this Court and as per dying declaration the allegation against the applicant is also at par with those accused persons, who have been enlarged on bail, therefore, on the ground of parity applicant should also be released on bail.

5. Per contra, learned AGA submitted that there is specific allegation against the applicant in the dying declaration of the deceased recorded by the Additional City Magistrate-III on 15.11.2018 and while granting bail to co-accused, namely, Smt. Mausammi @ Triveni, Raju and Mintu, the dying declaration of the deceased could not be discussed, therefore, on the ground of parity applicant should not be released on bail.

6. I have heard both the parties and perused the record of the case.

7. From the perusal of the FIR, it appears that informant, who is brother of the deceased was not an eye witness, but on 15.11.2018, Additional City Magistrate-III recorded the dying declaration of the deceased Rakhi in the hospital, which is annexed as Annexure No. 17 to the affidavit filed in support of bail application. From the perusal of the dying declaration of deceased it reflects that there is specific

allegation against the applicant and co-accused Smt. Mausammi @ Triveni, Raju and Mintu that all the accused persons including the applicant dragged her in their house and ablazed her after pouring kerosene oil.

8. Firstly co-accused Mintu @ Amit was granted bail by co-ordinate Bench of this Court on 6.8.2021 vide Crl. Misc. Case No. 27220 of 2021. Perusal of the bail order of co-accsued Mintu @ Amit shows that he was granted bail merely on the basis of argument advanced by learned counsel for the co-accused. The bail order dated 6.8.2021 is extracted below:

"Heard learned counsel for the applicant and learned A.G.A. for the State and perused the material on record.

By means of this application, the applicant who is involved in Case Crime No. 39 of 2019, under section 302 IPC, P.S. Sikandra, District Agra, is seeking enlargement on bail during the trial.

The first information report of this incident was lodged by the complainant about the unnatural death of his sister on 20.11.2018. It was alleged in the F.I.R. that the deceased was married with Kunwar Pal who was living in Sikandara Agra at the house of her naniya sasur Bhoopat and the complainant sister (deceased) who is mausiya saas was also living with her family in the same house. It was also alleged in the F.I.R. that there was a family dispute between them over distribution of property and due to that reason family of mausiya saas of the deceased was having enmity with the deceased. It was also alleged in the F.I.R. that the accused persons after pouring kerosine oil set ablaze the deceased. The deceased received serious burn injuries. She was taken to the hospital, where she succumbed to injuries during treatment on 20.11.2018. It was also alleged in the F.I.R. that police has not investigated the matter properly in connivance with the accused persons and no proceedings were initiated against the accused persons.

Learned counsel for the applicant has submitted that the first information report was lodged in pursuance of application given under section 156 (3) Cr.P.C. He further submits that the present accused is quiet innocent and he has been falsely implicated in the present case. Initially the matter was investigated and the police submitted the final report. Later on the matter was further investigated and the police has submitted charge sheet against the applicant on the basis of same evidence on which earlier final report was submitted. He has next submitted that the present accused was not named in the F.I.R. and the name of the present accused surfaced in the alleged dying declaration of deceased. He has submitted that deceased dying declaration was tortured one and she has given dying declaration in greed of property of naniya sasaur Bhoopat. He has submitted that Bhoopat whose property was distributed between the Kela and mausiya saas Mausammi and her family. He next submitted that deceased wanted share in property of Bhoopat but she was not given any share in property by Bhoopat and the property was distributed through a will by Bhoopat to her two daughters one is Mausammi and other is Kela. Kela is mother-in-law of the deceased. He has submitted that to put pressure on Bhoopat deceased threatened to commit suicide and she had poured kerosine oil over her body herself and set fire.

He lastly submitted that the applicant has no criminal history and he is languishing in jail since 27.09.2019 and in case he is released on bail, he will not

misuse the liberty of bail and will cooperate in trial.

The prayer for bail has been vehemently opposed by learned A.G.A and submitted that deceased has given a dying declaration before her death and in which she has specifically nominated the present accused and other accused persons and she has died due to burn injuries.

After considering the rival submissions made by learned counsel for the parties and without expressing any opinion on the merits of the case, this Court is of the view that the applicant is entitled to be enlarged on bail during the pendency of the trial.

Let the applicant, Mintu @ Amit be released on bail in the aforesaid case on his executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the court concerned subject to the following conditions:-

(a) The applicant shall attend the court according to the conditions of the bond executed by him.

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

It is further directed that the identity, status and residence proof of the sureties be verified by the authorities concerned before they are accepted.

In case of breach of any of the above conditions, the trial court will be at liberty to cancel the bail.

The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by learned counsel for the applicant along with a self attested identity proof of the said persons (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked before the concerned Court/Authority/Official

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

9. Similarly on 22.11.2021, co-accused Raju, the father of the applicant was released on bail by another co-ordinate Bench of this Court in Crl. Misc. Bail Application No. 45996 of 2021. Perusal of the bail order of co-accused Raju dated 22.11.2021 shows that he was also released on bail on the basis of argument advanced by learned counsel for co-accused Raju. The bail order dated 22.11.2021 is extracted below:-

"Heard learned counsel for the applicant, learned A.G.A. for State and perused the material available on record.

Accused-applicant, involved in S.T. No. 461 of 2019, Case Crime No.39 of 2019, under Section 302 I.P.C., Police Station Sikandra, District Agra, applied for bail.

Learned counsel for the applicant submits in following manner :-

(i) Applicant is innocent and has been falsely implicated in the present case; he has committed no offence; entire prosecution story is false and fake.

(ii) The applicant is named in F.I.R. but he has no concerned with the present case. He is the Mausiya Sasur of the victim. There was a dispute between the parties that is why victim committed suicide.

(iii) The allegation against the present applicant has been levelled only in the dying declaration of the deceased which is tutored and the same is very weak.

(iv) The investigation of the case has come to an end and charge sheet has already been submitted by Investigating Officer. There is no direct evidence against the applicant and no statement of children of deceased has been recorded.

(v) The incident is said to be in the house, thereafter, near a temple. The co-accused Mintu @ Amit, whose name has also come during investigation as well as in the dying declaration of deceased.

(vi) Co-accused Minto @ Amit has already been granted bail by co-ordinate Bench of this Court vide order dated 06.08.2021 in Criminal Misc. Bail Application No. 27220 of 2021 and the case of the applicant stands of identical footing, hence the applicant is also entitled for bail on the ground of parity.

(vii) Applicant is in jail since 03.07.2019. There is no possibility of the applicant's fleeing away from the judicial process or tampering with the witnesses. In case the applicant is enlarged on bail, he shall not misuse the liberty of bail.

Learned A.G.A. opposed the prayer for bail but conceded the factual submissions made by the learned counsel for the applicant.

Considering the facts and circumstances of the case, rival contention of learned counsel for the parties, detention of applicant in jail, severity of punishment in case of conviction, factum of bail to co-accused, evidence collected by I.O. during investigation and without commenting upon the merit of the case, applicant deserves bail.

Accordingly, bail application is allowed.

Let applicant Raju be released on bail in the aforesaid case crime on his furnishing a personal bond and two reliable sureties and filing an undertaking to the satisfaction of the court concerned subject to the following conditions:-

1. The applicant shall not tamper with the evidence or threaten the witnesses.

2. The applicant shall co-operate with the trial and shall not seek any adjournment on the dates fixed for charge, evidence when the witnesses are present in the court, statement under Section 313 Cr.P.C. and argument.

3. During trial, he shall not indulge in any criminal activities or case.

In breach of any condition enumerated above, Trial Court shall be at liberty to treat it as abuse of liberty of bail and pass appropriate orders in accordance with law."

10. Further, co-accused Smt. Mausammi @ Triveni mother of the applicant was granting bail by co-ordinate Bench of this Court on 11.4.2022 in Crl. Misc. Bail Application No. 20628 of 2020. Perusal of the bail order dated 11.4.2022 shows that she was also released on bail on the basis of the argument advanced by learned counsel for the co-accused Smt. Mausammi @ Triveni. The bail order dated 11.4.2022 is extracted below:-

"Heard learned counsel for the applicant, learned A.G.A. for the State and perused the material on record.

By means of this application, the applicant who is involved in Case Crime No. 39 of 2019, under sections 302 IPC, Police Station Shikandra, District Agra and is in jail since 3.7.2019, is seeking enlargement on bail during the trial.

Learned counsel for the applicant submits that the first information report of the present case was lodged in pursuance

of the application given under section 156(3) Cr.P.C. He further submits that the present accused applicant is quiet innocent and he has been falsely implicated in the present case. Initially the matter was investigated and the police submitted the final report. Later on the matter was further investigated and the police has submitted charge-sheet against the applicant on the basis of same evidence on which earlier final report was submitted. He has submitted that deceased's dying declaration was tutored one and she has given dying declaration in greed of property of Naniya Sasur Bhoopat. He has submitted that Bhoopat whose property was distributed between the Kela and Mausiya Saas Mausammi and her family. He next submitted that deceased wanted share in the property by Bhoopat and the property was distributed through a Will by Bhoopat to her two daughters one is Mausammi and other is Kela (mother-in-law of the deceased). He has submitted that to put pressure on Bhoopat deceased threatened to commit suicide and she had poured kerosine oil over her body herself and set fire. He next submitted that the applicant had no role whatsoever in the commission of alleged incident.

It is submitted by learned counsel for the applicant that similarly placed co-accused Mintu @ Amit and Raju have already been enlarged on bail by this Court by orders dated 6.8.2021 and 22.11.2021 passed in Criminal Misc. Bail Application Nos. 27220 of 2021 and 45996 of 2021, copy whereof have been submitted by the applicant, which are taken on record. He further submitted that since the role of the applicant is identical to that of co-accused Mintu @ Amit and Raju who have already been enlarged on bail, he is also entitled to be enlarged on bail on the ground of parity.

The prayer for bail has vehemently been opposed by learned A.G.A. However, the aforesaid factual aspect of the matter has not been disputed by him.

Considering the submissions made by learned counsel for the applicant as well as learned A.G.A., this Court is of the view that the applicant has made out a case for grant of bail on the ground of parity.

In view of the above, let the applicant, Smt. Mausammi @ Triveni be released on bail in the aforesaid case on her executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the court concerned with the following conditions :-

(a) The applicant shall attend the court according to the conditions of the bond executed by her.

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

It is further directed that the identity, status and residence proof of the sureties be verified by the authorities concerned before they are accepted.

In case of breach of any of the above conditions, the trial court will be at liberty to cancel the bail."

11. Therefore, from the perusal of bail orders of similarly placed co-accused shows that without assigning any reasons, they were released on bail merely on the basis of argument advanced by learned counsel for the co-accused persons.

12. Recently three Judges Bench of the Supreme Court in case of ***Birjmani***

Devi Vs. Pappu Kumar and another reported in ***[2022 4 SCC 497]*** deprecated the practice to allow bail application without assigning any reason and observed in paragraph 38 as follows-

"38. Thus, while elaborating reasons may not be assigned for grant of bail, at the same time an order de hors reasoning or bereft of the relevant reasons cannot result in grant of bail. It would be only a non speaking order which is an instance of violation of principles of natural justice. In such a case the prosecution or the informant has a right to assail the order before a higher forum."

The Apex Court in the above mentioned case cancelled the bail granted to the accused on the ground that while granting bail High Court failed to assigned the reasons.

13. On 19.4.2022, the Apex Court in case of **Ms. Y. Vs. State of Rajasthan and another in Crl. Appeal No. 649 of 2022 arising out of SLP (Crl.) No. 7893 of 2021** in paragraph-17 observes as follows:-

"17. Apart from the general observation that the facts and circumstances of the case have been taken into account, nowhere have the actual facts of the case been adverted to. There appears to be no reference to the factors that ultimately led the High Court to grant bail. In fact, no reasoning is apparent from the impugned order."

The Supreme Court in above case also cancelled the bail granted to the accused by the High Court on the ground that High Court did not assign any reasons.

14. The Apex Court in case of **Sabir Vs. Bhura @ Nadeem and another in Crl. Appeal No. 227 of 2022 (arising out of SLP (Crl.) No. 6941 of 2021)** while setting aside the bail orders granted by the High Court observed as follows:-

"Since we find that no reasons have been given in substance and there is only narration of facts in the orders impugned, we are of the opinion that the orders impugned deserve to be set aside."

15. The Full Bench of this Court in case of ***Sunder Lal Vs. State*** reported in ***[1983 Crl J 736]*** declined to accept the argument that as co-accused has been admitted to bail, therefore, the then applicant should also be granted bail on the ground of parity.

16. Further, Division Bench of this Court in case of ***Chander @ Chandra Vs. State of U.P.*** reported in ***[1998 CRI.I. J. 2374]*** observed in paragraph 21 as follows:-

"21. Our answers to the questions referred are as follows :

1. If the order granting bail to an accused is not supported by reasons, the same cannot form the basis for granting bail to a co-accused on the ground of parity.

2. A judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant factors essential for granting bail.-

3. A Judge hearing bail application of one accused cannot cancel the bail granted to a co-accused by another Judge on the ground that the same had been granted in flagrant violation of well settled principles. If he considers it

necessary in the interest of justice, he may, after expressing his views, refer the matter to the Judge who had granted bail, for appropriate orders.

4. If it appears that a bail order has been passed in favour of an accused on the basis of wrong or incorrect documents it is open to any Judge to initiate action for cancellation of bail."

17. Therefore, from the above discussion, it is apparent that parity cannot become the sole criteria to grant bail and if the bail granted to similarly placed co-accused persons without assigning any reasons then on the basis of such bail orders merely on the ground of parity, the bail application should not be allowed and parity can only be persuasive in nature and cannot be binding.

18. In the present case, in the dying declaration of the deceased, there is specific allegation against the applicant that he alongwith co-accused persons dragged the deceased in his house and poured kerosene oil on her and when she tried to manage to escape then after chasing her applicant and co-accused persons ablazed her and post mortem report of the deceased further shows that she died due to ante mortem burn injuries and co-accused persons who were although released on bail by co-ordinate Bench of this Court but their bail orders shows that they were released on bail merely on the basis of the argument advanced by their respective counsels without assigning any reasons, therefore, in my view, it is not a fit case in which applicant can either be released on bail on merit or on the ground of parity.

19. Accordingly, the present bail application is **dismissed**.

(2022) 8 ILRA 278
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.06.2022

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Misc. Bail Application No. 46494 of 2021

Mokhtar Ansari ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Upendra Upadhayay

Counsel for the Opposite Party:
Sri Ratnesh Kumar Singh, A.G.A., Sri M.C. Chaturvedi (A.A.G.)

(A) Criminal Law - Criminal Procedure Code,1860 - Section - 439, - Indian Penal Code, 1860 - Sections 120-B, 419, 420, 467, 468 & 471 - Application for Bail – principles of parity - allegation of cheating, forgery and mis-utilization of public money to the tune of Rs. 25 Lacs from *Vidhayak Nidi* along with co-accused - F.I.R. - during investigation - reveals that - on a forged proposal for construction of a School on plot in question said money was realised in favour of the co-accused (whom are their own party members) by the applicant and in place of school there were a banana & wheat crop is cultivated - applicant who is a sitting M.L.A. and facing various criminal trials about 58 criminal cases even in the age of 54 years and he is in jail since year 2005 seeking parity with co-accused - while considering the nature of involvement of the accused in the crimes and since he is no doubt to be named as 'history sheeter', & become interSt. Mafia - court afraid to extend the benefit of parity - consequently, the bail application is rejected.

(Para – 32, 34, 37)

(B) Criminal Law - Criminal Procedure Code1 1973 - Section - 439, - Indian Penal

Code,1860 - Sections 120-B, 419, 420, 467, 46 &, 471: - Cognizance of mis-utilization of *Vidhayak Nidhi* - Court find that - MLAs are not monarch or king of that area who can throw away or whimsicaly distribute the *Vidhayak Nidhi* as larges - *Vidhayak Nidhi* is a hard earned money of a tax payer not a private fiefdom any MLA - St. govt. is requested to constitute a committee under the leadership of Speaker of Assembly with three senior bureaucrats to audit the *Vidhayak Nidhi* of individual MLA and its utilization - directions issued accordingly.

(Para – 22, 36)

(C) Criminal Law - Criminal Procedure Code, 1973 - Sections 439, - Indian Penal Code,1860 - Section 120-B, 419, 420, 467, 468, 471: - Expedite disposal of trials - Applicant who is claiming himself to be a popular public figure & elected MLA from six consecutive time - this is most unfortunate and ugly face of our democracy where a person who has facing various criminal trials about 58 cases in his 54 years of life and become inter-St. Mafia - all these things if taken cumulatively goes to show that he is a simply canker to the society - Trial court directed to take up the aforesaid sessions trials on the top most priority and decide without consuming further time - directions issued accordingly. (Para – 25, 32)

Bail Application Rejected. (E-11)

List of Cases cited: -

1. Molana Mohammad Amid Rashadi Vs St. of U.P. & ors. (2012 AIR SC (Crl.) 469),

2. Ashwani Oberoi Vs St. of Har. (SLP (Crl.) No. 8695/2021 decided on 02.03.2022),

3. Criminal Bail Application No. 23138/2010 decided on 28.08.2010,

4. Harjeet Singh Vs Indrajeet Singh @ Inder & anr. (Crl. Appeal No. 883/2021 decided on 24.08.2021),

5. Gudikanti Narashimhulu Vs Public Prosecutor, High Court A.P. (1978 (1) SCC 240),

6. Ash Mohd. Vs L. Shiv Raj Singh (2012 (9) SCC 446),

7. Mahipal Vs Rajesh Kumar (2020 (2) SCC 118),

8. Sudha Singh Vs St. of U.P. & anr. (Crl. Appeal No. 448/2021 decided on 23.08.2021),

9. Neeru Yadav Vs St. of U.P. (Crl. Appeal No. 1272/2015 decided on 29.09.20215),

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

1. Heard Shri Upendra Upadhayay, counsel for the applicant, Sri M.C.Chaturvedi, learned A.A.G. assisted by Shri Ratnendu Kumar Singh, learned A.G.A. for State and perused the records of the present bail application.

2. Bail application on behalf of applicant and its counter affidavit as well as rejoinder affidavit have been exchanged between the parties and matter is ripe-up for final submissions.

3. Applicant, Mokhtar Ansari is facing prosecution in Case Crime No. 185/2021 U/s 419, 420, 467, 468, 471, 120B I.P.C. Police Station-Sarai Lakhansi, District Mau during pendency of trial. Though the applicant is behind the bars since 25.10.2005 in other cases and in the present case B-Warrant has been served on 16.06.2021.

4. The applicant deserves no introduction in the State of U.P. on account of his alleged "Robin Hood' image in Hindi speaking States of India. He is the harden and habitual offender, who is in sphere of crime since 1986 but surprisingly, he has managed not a single conviction against him. It is indeed astounding and more amusing angle of the issue, that a person having more than 50+ criminal cases to his credit of various varieties, has managed his affairs in such a way that he has not received a single conviction order against

him. Infact it is slur and challenge to the judicial system that such a dreaded and "White Collored' criminal in the field of crime undefeated and unabetted.

FACTS OF THE CASE:-

5. On 24.04.2021 one Ram Singh lodged a present FIR at police station Sarai Lakhansi, District Mau under Sections 419, 420, 467, 468, 471 and 120B IPC against five named accused persons including the applicant who was at relevant point of time was a sitting MLA though in jail.

6. The gravamen of the FIR is, that relying upon the inquiry report by a Circle Officer, Mau that on Anand Yadav son of Baijnath Yadav, his father Baijnath Yadav son of Khuddi Yadav, Sanjay Sagar and the present applicant were named in the FIR. It was surfaced during investigation, that at Arazi No. 1109 having area 0.064 Hect. and Arazi No. 1449 having area 0.196 Hect.at village Sarwan, District Mau, a proposal was floated to construct a brand new school for the young of that area. Baijnath Yadav and his son as per the allegation of the FIR, approached interstate Mafia No. 191 Mokhtar Anasari and his associate Sanjay Sagar son of Chandra Dev Ram to release Rs. 25 lakhs from his "Vidhayak Nidhi". Accordingly, this amount was disbursed for constructing the alleged school namely, "Guru Jagdish Singh Baijnath Pahalwan Uchhatar Madhyamik Vidyalaya, Sarwan' in three installments during 2012-2015. These named accused persons conspired in sending a forged proposal and get and agricultural plot allotted in the name of wife of Baijnath Yadav, over which the proposed school to be constructed. In the said inquiry report, it was surfaced that, there was no school was found over above Arazis' and Arazi No. 1109 having area of 0.032 Hect. was encircled by boundary wall whereas in the remaining part there was a banana grove over it. Similarly, at Arazi No. 1449 having aread of 0.196 Hect. standing crops of wheat was found and as such the entire sum of public money to the tune of Rs. 25 Lakhs were swindled and digested by the named accused persons.

7. Thus it was requested to lodged and FIR under the appropriate sections of IPC against the named accused persons.

8. Under these factual backdrop of the case, Shri Upendra Upadhayay, learned counsel for the applicant, before addressing the court on merits, have tried to glorify the character of applicant-Mokhtar Ansari sky-high by making a mention, that the applicant was born in year 1964, now he is 58 years of age and a popular and dashing political figure of Eastern U.P.. From March 1996 to 2022, he was elected as M.L.A. for six consecutive times on the tickets of different political parties. In fact, Sri Upadhaya tried to impress upon the Court, that he was an indispensable political personality in the State of Uttar Pradesh. But unfortunately, he is in jail since 25.10.2005 in connection with different cases to his credit. This by itself is dichotomous situation that a popular political personality is in jail since October, 2005. One can easily gauge his nature and character, whether he is a popular political personality or he is a biggest nuisance to the society, who is in jail since 2005 and despite of this he is winning the elections one after the other.

9. It is contended by the counsel for the applicant that, a politically motivated FIR has been lodged at the instance of changed political set-up in the State of U.P.

and for the offence allegedly have committed by him in year 2015. The present FIR was got registered on 24.04.2021 i.e. say about seven years of its occurrence. Thus, there is an apparent, inordinate delay delay of almost 7 years in lodging the present FIR without any cogent explanation for the same.

10. Sri Upadhyay, learned counsel for the applicant further urged that the only sin committed by the applicant that he wants to spread the light of education in the area among the youth, thus he has released Rs. 10.00 lakhs during FY; 2012-2013, Rs. 10.00 lacs during F.Y.- 2013-14 and Rs. 5.00 lakhs during F.Y. 2014-15 from his *"Vidhayak Nidhi"*. The most interesting feature of this release of amount is that, when he has made these recommendations of aforesaid funds from his *"Vidhayak Nidhi"*, he was remain behind the bars. On this Sri Upadhyaya, learned counsel for the applicant has floated very innocent & innocuous argument that at relevant point of time i.e. during 2012-2015, the applicant was serving his incarceration and as such he is not in position to physically verify the construction in the school in question and check the working of State Officials, namely, C.D.O, Tehsildar etc.. In fact, he as relying upon the report given by these officials to him and factually speaking these officials were his eyes and ears. In the entire prosecution, there is not a single iota of evidence, which could be termed as hatching the criminal conspiracy with other co-accused persons. The allegations that the applicant was in hand in gloves with the co-accused persons, is presumptive in nature that he has conspired with the co-accused persons in siphoning Rs. 25 lakhs of public money from his *"Vidhayak Nidhi"*.

11. It was further argued that Sri Anand Yadav and Sri Baij Nath, the co-accused persons were already enlarged on bail and thus applying the **principles of parity**, the applicant too deserves to be bailed out.

12. It is further contended by the counsel for the applicant that the innocent applicant has only recommended the aforesaid amount of Rs. 25 lakhs to be released in favour of co-accused persons for constructing school in his political constituency, so as to spread the education amongst the young ones. This is a work of public interest, which could be released from *"Vidhayak Nidhi"*.

13. It is further urged that the charge sheet has been submitted in the matter and nothing more to be investigated into the matter and thus in the fitness of circumstances, the applicant may be released on bail. And lastly it is argued by learned counsel for the applicant that all the sections fasten upon the applicant are triable by the Magistrate and trivial in nature and thus he should be released.

14. Sri Upendra Upadhayay, learned counsel for the applicant was aware of the fact that criminal credential of the applicant would come in his way, thus applicant has relied upon the judgement of Hon'ble Apex Court in the case of ***MOLANA MOHAMMAD AMID RASHADI VS. STATE OF U.P. AND OTHERS, Criminal Appeal No. 159/2012 decided on 16.01.2012 and reported in 2012 AIR SC(Crl.) 469*** in which THE Hon'ble Apex Court has opined;

"It is not disputed and highlighted that the 2nd respondent is sitting Member of Parliament, facing several criminal cases. It is not disputed that none of cases ended into acquittal for want of proper

witnesses for pending trial. As opined by the High Court, merely on the basis of criminal antecedents, claim of 2nd respondent cannot be rejected. In other hands it is duty of the court to find out the role of accused in case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the court etc."

Shri Upadhayay further relied upon another judgment of Hon'ble Apex Court in ***ASHWANI OBEROI VS. STATE OF HARYANA, SLP (Crl.) No. 8695/2021 decided on 02.03.2022*** in which it has been held that:-

"Dr. Monika Gusain, learned counsel appearing for the state submitted that the petitioner is the master mind. Innocent people were cheated. He was absconding for some time. There is a likelihood that he might abscond if he is released on bail and would tamper with the evidence.

We are of the considered view that the petitioner is entitled to be released on bail as charges have been framed and there is no likelihood of the trial being completed soon. Also there is no dispute that the other accused have been released on bail. The apprehension of the prosecution about the petitioner fleeing from justice or making himself scarce during the course of trial, can be taken care of by imposing conditions".

Lastly, Shri Upadhayay relied upon the judgment of Coordinate Bench of this Court in Criminal Misc. Bail Application No. 23138/2010 decided on 28.08.2010 and Hon'ble Shri Shrikant Tripathi.J., (as the then Judge of this Court) opined that:-

"Learned AGA, on the other hand, submitted that the applicant has a criminal history of 31 cases, out of which 3 cases are under Section 302 I.P.C.

The learned counsel for the applicant, in reply, submitted that bail prayer cannot be refused only on the ground of criminal history specially when there is no evidence regarding involvement of the applicant in entering into the alleged criminal conspiracy and he was in jail on the date of occurrence.

Keeping in view the nature of offence and evidence, complicity of the accused, the severity of punishment and submissions of the learned counsel for the applicant and the learned AGA, I am of the view that the applicant has made out a case for bail".

15. Per-contra, Shri Ratnendu Kumar Singh, learned A.G.A. has filed a detailed counter affidavit with a primary thrust of his arguments, that the criminal antecedents of the applicant in which it has been stated that the applicant has got criminal antecedents of number of cases lodged in different District viz, Ghazipur, Varanasi, Lucknow, Agra, Mau, Azamgarh, Barabanki as well as in the State of Punjab, attaching plethora of criminal cases of different texture and gravity.

16. It was candidly come out during inquiry that the school in question was not constructed over plot no. 1109 or 1449 over which, it was proposed to be constructed. It is also come out that the said amount from "Vidhayak Nidhi" was used for different purposes or expansion/renovation/extension of some other pre-existing school. This fact has find force when the Coordinate Bench of this Court while granting bail to **Baij Nath Yadav/co-accused**, having Bail Application No. 9866/2022 in which Shri Upendra Upadhayay was counsel, succeeded in getting bail by making submission/contentions as follows: -

"It is submitted that the applicant remain as Village Pradhan for 3 terms, he established 3 schools on his land and the name of the school were recorded in the revenue entries. At the relevant point of time extension/expansion of the school building was required therefore, the request was made to the then local M.L.A. for sanction of certain amount for raising construction/expansion of the school building. The amount was disbursed in 3 installments from the local M.L.A. funding during year 2013-2015. The applicant has got no relation with co-accused Sanjay Sagar and the then M.L.A."

From this, it is abundantly clear that no new construction was ever raised for any school for which the amount of Rs. 25 lakhs were taken, but was utilized for pre-existing structure in the name of new school.

17. It is worthwhile to mention here that Baij Nath Yadav is father of Anand Yadav (another co-accused). Sri Anand Yadav is the District President of ***"Qaumi Ekta Dal"*** and the applicant Mokhtar Ansari is its Founder Figure of this political entity, therefore, he urged that the circle is complete, when the applicant Mokhtar Ansari obliged his own District President of the political group, Anand Yadav, co-accused who in order to expand the pre-existing school, utilized the public fund from *"Vidhayak Nidhi"*.

18. It is clear-cut case of conflict of interest, whereby the applicant in the capacity of sitting M.L.A. have utilized the public property in the shape of *"Vidhayak Nidhi"* to his own worker/President of which the applicant is the Founding Figure for expanding/extending the school in question and not for establishing the new school for which the amount was disbursed.

19. The Court during arguments on 13.05.2022 has sought a report from District Magistrate, Mau to have a physical verification of school and to give his report after giving number of questionnaire to the District Magistrate, Mau. The Court is in receipt of reply of District Magistrate, Mau and have perused the same. From the report, it is clear that the school in question i.e. "Guru Jagdish Singh Baij Nath Pahalwan, Uchchatar Madhyamik Vidyalaya, Inter College, Sarwan," Tehsil Sadar, District Mau as per the khatauni of Fasli Year 1429 - 1434, situates at Khata No. 60 and 190 and Gata No. 797 (Minjumla), having total area 0.173 hectares, as against Arazi No. 1109 and 1449 for which the alleged school was proposed and the amount from "Vidhayak Nidhi" was disbursed by the applicant during the FY 2012-2013. Smt. Sarita Singh is Principal of the college, whereas Baij Nath Yadav is Manager of the school. From the entire report, it is not clear that (1) As to whether any new school was proposed over Araji No. 1109 and 1449 (?) and if it is not so, then how this public money was used in expanding in pre-existing school, which was not at all proposed.

20. On these submissions, Shri Ratnendu Kumar Singh, learned AGA submits that it is clear cut case of siphoning of the public amount by a reckless M.L.A. just to oblige his own worker, Anand Yadav, for the reasons best known to the applicant. It was argued that it seems to be more of domestic affair between the applicant and Anand Yadav while utilizing the said amount of Rs. 25 lakhs.

21. After hearing the rival submissions, it seems that though the applicant was in jail during relevant point of time, but co-accused Anand Yadav has acted as his personal worker, came to him and the applicant being sitting M.L.A. in order to swindle the public money without any verification in a most casual and callous way, have directed the concerned to release the sum in favour of Baij Nath Yadav and his son Anand Yadav. Ostensibly they used for constructing a new school, which in fact has never seen the light of the day.

There are particular guidelines for utilization of *"Vidhayak Nidhi"* dated 10th April, 2002. This court has seen these guidelines and the Court in the firm opinion that the covenants of these guidelines were thrashed and squeezed by the applicant with impunity.

22. The "Vidhayak Nidhi" is not a private fiefdom of any M.L.A. or his personal property. It is an hard earned money of the tax payers and cannot be permitted to utilize or drain in a casual and capricious way. Recently the State Government has enhanced the alleged "Vidhayak Nidhi" to the tune of Rs. 5.00 Crores. The M.L.A.s are the public representative and the amount entrusted to them that they would utilized their "Vidhayak Nidhi" discretely with utmost care and only for the purpose and objective for which it was released. The M.L.A. are not monarch or king of that area, who can throw away or whimsically distribute the "Vidhayak Nidhi" as larges. The Court has got no objection in raising the amount but expects from the Government to at-least have a double check volve in its disbursement and utilization only for "public good". The State Government must create an "in-house mechanism' to have a close vigil, that this "Vidhayak Nidhi" should be used only for "public purpose' and there shall not be any siphoning or seepage to subserve anybody's personal or vested interest. The member of the in-house mechanism the modalities mentioned in paragraph 36 of the judgment may be taken care of.

23. The way and manner in which Rs. 25.00 lacs were handed over to his own alleged District President- Anand Yadav, speaks volumes about the applicant, which need not be elaboration. Interestingly, the counsel for the applicant has pleaded innocence, that at a relevant point of time, the applicant was serving out his incarceration and thus he was not in position to physically verify the departmental work. This argument per-se is very innocent but unfortunately do not contain any leg to stand over it. Million dollor question remain unanswered, that if a sitting MLA is releasing the sum from his *"Vidhayak Nidhi"* to his own party President, it is the MLA concerned should be accountable for any misfeasance.

Extending the amount to his own Party President, Anand Yadav **"Qaumi Ekta Dal",** who utilized the amount in expending the pre-existing school. This by itself is sufficient to question the intention, motive and its expected outcome.

24. Now coming to yet another aspect of the issue i.e. criminal antecedent of the applicant. As mentioned in the opening paragraphs of this order that the applicant in this world of crime since 1986 and as per his own admission mentioned in the Rejoinder Affidavit (Annexure No. RA-1) that at present he is under trial in as many as in 21 criminal cases in the various Sessions Division at Mau, Ghazipur, Varanasi, Azamgarh, Lucknow, Barabanki,

Agra and Mataur, Roop Nagar (Punjab). Thus, it is clear that he is the blooded, harden, habitual offender against whom number of criminal cases are pending. The cases in tabular form is given herein below: -

Sl. No.	Police Station & District	Crime No. & Court Case No.	Sections	State of case and Court
1.	South tola Mau	399/2010, S.T. No. 130 of 2010	302, 307, 120B & 34 IPC, 25/27 Arms Act & & CLA	*Final Argument * MPM LA Court, Alld.
2.	South tola Mau	04/2020, Sessions Case No. is yet to be marked	419, 420, 467, 368, 471, 120B IPC and 30 Arms Act	* Bail out * Charge sheeted case * File Transferred to MPM LA Court, Mau for trail
3.	Sarai lakhansi, Mau	0185/2021 Sessions Case No. is yet to be marked	419, 420, 467, 468, 471, 120B, 427 IPC and 7 CLA Act & 136(2) Representation of Peoples Act 1950	* Bail rejected by Sessions Court, pending in High Court Allahabad * Charge sheeted case * File Transferred to MPM LA Court, Mau for trail
4.	Sarai lakhansi, Mau	0008/2022	3(1) U.P. Gangster Act	*New FIR registered on05.01.2022
5.	South tola Mau	055/2021 Sessions Case No. is yet to be marked	3(1) U.P. Gangster Act	*Bail rejected by Sessions court * Charge sheeted case *File Transferred to MPM LA

				Court, Mau for trail
6.	South tola Mau	891/2010, S.T. No. 62000/2012	3(1) U.P. Gangster Act	*Framing of charges. *MPM LA Court Mau for trial
7.	Mohammadabad Ghazipur	1182/2009, S.T. No. 10 of 2010	307, 506, 120B IPC	* Evidence *Bail out *MPM LA court Ghazipur for trial
8.	Kotwali Ghazipur	192/1996, S.T. No. 620007/2012	3(1) U.P. Gangster Act	*Bail out *Evidece *MPM LA Court Ghazipur for trial
9.	Mohamadabad Ghazipur	0121/1021, Session case no is yet to be marked	21/25 Arms Act	*Pending bail application in CJM court * Charge sheeted case * File transferred to MPM LA court Ghazipur for trial
10.	Mohamadabad Ghazipur	1051/2007, S.T. No. 6200090/2012	3(1) U.P. Gangster Act	* Evidence *Bail out *MPM LA court Ghazipur for trial
11.	Karanda Ghazipur	482/2010, S.T. No. 557/2012	3(1) U.P. Gangster Act	* Evidence *Bail out *MPM LA court Ghazipur for trial
12.	Mohamadabad Ghazipur & Varanasi	263/1990, S.T. NO. 22/2005	420, 467, 468, 120B IPC and 7/13 Prevention of Corruptio	*Bail out. *Evidence *MPM LA court Varanasi

			n Act	
13.	Bhelupur Varanasi	377/1997 S.T. No. 3541/2011	506 IPC	*Bail out. *Evidence *MPMLA court Varanasi
14.	Chetganj Varanasi	229/1991, S.T. No. 265/2007	147, 148, 149, 302 IPC	*Bail out. *Evidence *MPMLA court Varanasi
15.	Tarwa Azamgarh	20/2014, S.T. No. 6200195/2018	302, 307, 147, 148, 149, 120B, 506 IPC and 7 CLA	*Bail out. *Evidence *MPMLA court Azamgarh
16.	Tarwa Azamgarh	0160/2020, Sessions case no. is yet to be marked	3(1) U.P. Gangster Act	*Pending bail * Charge sheeted * Case/Trial in Special court Gangster Act, Azamgarh.
17.	Hazratganj, Lucknow	236/2020	120B, 419, 420, 467, 468, 471 IPC and Section 3 of Prevention from Damage to Public Property Act	* Charge sheeted case * CJM court Lucknow for copies
18.	Alambagh, Lucknow	66/2000, S.T. No. 167/2019	147, 336, 353, 506 IPC	*Bail out * Evidence *MPMLA court Lucknow
19.	Kotwali Barabanki	0369/2021, Crl. Case No. 02/2021	419, 420, 467, 468, 471, 120B, 177, 506 IPC and 7	* Bail pending in High Court Lucknow. * Framing of charge

			CLA	s * MPM LA Court Baraba nki
20.	Jagdis hpura, Agra	60/1999, S.T. No. 1604/2006	420, 419, 109, 120B IPC	*Bail out *Fram ing of charge s *MPM LA court Agra
21.	Matau r Rupna gar, Punjab State	05/2019	386, 506 IPC	* Police Station *CJM, Mohal i

25. Thus, it is clear that as per own admission by the applicant there are as many as 21 cases are pending against the applicant in which the applicant is facing a trial. The trial court are directed to take up the aforesaid Sessions Trials on the top most priority and decide without consuming further time.

26. The above mentioned is a rich criminal horoscope of the applicant on which the applicant can boast and claim himself to be a popular public figure, who was elected as MLA for the six consecutive time. As mentioned above, this is a most unfortunate and ugly face of our democracy where a person on one hand facing almost two dozen Sessions Trials and on the other hand the public is electing him as their representative for six consecutive times. It is really uphill task to adjudicate, as to whether he is really a popular public figure? Or his nuisance value, which are giving dividends to him?

27. At thus juncture Sri Shri Ratnendu Singh, learned A.G.A. has cited number of decisions of Hon'ble Apex Court whereby the Hon'ble Apex Court has come out heavily upon such type of spotted public figures.

28. In the recent judgment in the case of ***HARJEET SINGH VS. INDERPREET SINGH @ INDER AND ANOTHER, Criminal Appeal No. 883/2021 decided on 24th August, 2021***, has cancelled the bail order of Inderpreet Singh granted by High Court holding therein that High Court has committed a grave error in releasing Inderpreet Singh on bail. Hon'ble Apex Court in paragraph no. 12 of the judgment "antecedent of respondent no.1 herein the threat perception to the applicant and his family members were not considered by the High Court and the High Court kept his eyes shut in releasing the applicant/appellant when he was in jail, he has committed yet another offence and as soon as he came out, he again got involved in yet another murder case.

29. The concerned applicant/appellant was having criminal history of only 4 criminal cases, even then no mercy was shown to him and he was sent back to jail. But in the instant case, the applicant is a decorated criminal of 21 criminal cases tried by different Sessions Division in different districts, is expecting bail.

30. While canceling the bail to such type of graded offenders, the court has relied upon the judgment of ***GUDIKANTI NARASIMHULU VS. PUBLIC PROSECUTOR, High Court of A.P.,***

(1978)1 SCC Page 240, the court observed and held that:-

"The deprivation of freedom by refusal of bail is not for a punitive purpose, but for bifocal interests of justice. The nature of charge is a vital factor and nature of evidence is also pertinent. The severity of the punishment to which the accused may be liable if convicted also bears upon the issue. Another relevant factor is whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being. The Court has also to consider the likelihood of the applicant interfering with the witnesses for the prosecution or otherwise polluting the process of justice. It is further observed that it is rational to enquire into the antecedents of the man who is applying for bail to find out whether he has a bad record, particularly a record which suggests that he is likely to commit serious offences while on bail".

In yet another case of ***ASH MOHAMMAD VS.L SHIV RAJ SINGH (2012)9 SCC 446***, the Hon'ble Apex Court has evaluated this issue from different angle and have opined in paragraphs 18 and 19 observed and held as under:-

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

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

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

In the case of ***MAHIPAL VS. RAJESH KUMAR (2020)2 SCC 118***, where

the Court in its paragraph no.12 observed that:-

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

the continued custody of the accused sub serves the purpose of the criminal justice system. Where bail has been granted by a lower court, an appellate court must be slow to interfere and ought to be guided by the principles set out for the exercise of the power to set aside bail.

In the recent judgment in the case of ***SUDHA SINGH VS. THE STATE OF UTTAR PRADESH AND ANOTHER, Criminal Appeal No. 448/2021 decided on 23rd April, 2021***, its paragraph nos. 7,8 and 12 are quoted herein below: -

7. It is also contended by the appellant that the grant of bail in a routine manner to gangsters, has had an adverse effect in the past, upon the law and order situation. The appellant cites the example of a person who was prosecuted in connection with 64 criminal cases which included cases of murders, offences of dacoity, criminal intimidation, extortion and offences under the U.P. Gangster case, allegedly 8 policemen were killed and many grievously injured. Therefore, the appellant contends that courts must be extremely careful in releasing of history sheeters who have been charged with serious offences like murder, rape or other kinds of bodily harms several times.

8. We find in this case that the High Court has overlooked several aspects, such as the potential threat to witnesses, forcing the trial court to grant protection. It is needless to point out that in cases of this nature, it is important that courts do not enlarge an accused on bail with a blinkered vision by just taking into account only the parties before them and the incident in question. It is necessary for courts to consider the impact that release of such persons on bail will have on the witnesses yet to be examined and the innocent members of the family of the victim who might be the next victims.

12. There is no doubt that liberty is important, even that of a person charged with crime but it is important for the courts to recognize the potential threat to the life and liberty of victims/witnesses, if such accused is released on bail.

31. At this juncture Sri Ratendru Kuma Singh, learned AGA drawn the attention of the Court to paragraph 6 to the counter affidavit in which, as per the Government Dosier as many as 54 criminal cases to his credit, the district and State wise breakup of the criminal case are given herein below: -

DISTRICT- GHAZIPUR			
Sl. No.	**Case Crime NO.**	**Under Sections**	**Police Station/District**
1.	493/05	302, 506, 120B IPC	Mohammdabad
2.	589/05	302, 504, 506, 120B IPC	Bhanwar Col
3.	169/86	302 IPC	Mohammadabad
4.	266/90	467, 468, 420, 120B IPC	
5.	172/91	147, 323, 504, 506 IPC	Mohammadabad
6.	237/96	136(2), 130, 135, 136(1) Public Property Act & 384, 506 IPC	Mohammadabad
7.	1182/09	307, 506, 120B IPC	Mohammadabad
8.	1051/07	3(1) U.P. Gangster Act	Mohammadabad
9.	482/10	3(1) U.P.	Karanda

		Gangster Act	
10.	361/09	302, 120 IPC & 7 C.L. Act	Karanda
11.	NCR No. 219/78	506 IPC	Saidpur
12.	NCR No. 19/97	506 IPC	Saidpur
13.	106/88	302 IPC	Kotwali
14.	682/90	143, 506 IPC	Kotwali
15.	399/90	147, 148, 149, 307 IPC	Kotwali
16.	44/91	302, 506 IPC	Kotwali
17.	165/96	147, 148, 149, 307, 332, 353, 506, 504 IPC & 7C.Lact	Kotwali
18.	834/95	353, 504, 506 IPC	Kotwali
19.	284/96	3(2) NSA Act	Kotwali
20.	33/99	3(2) NSA Act	Kotwali
21.	192/96	3(1) U.P.Ganster Act	Kotwali
22.	121/21	21/25 Arms Act	Mohammadabad
DISTRICT- VARANASI			
1.	58/98	3 NSA Act	Bhelupur
2.	17/99	506 IPC	Bhelupur=
Note: In above mentioned case crime number in question, First Information Report has been lodged by Naveen Rungata son of Nand Kishore R3.ungata.			
3.	285/17	302 IPC	Bhelupur
4.	19/97	364A, 365 IPC	Bhelupur
Note: - In above mentioned case crime number in question is related with abduction for ransom and in this case one Sri Nand Kishore Rungata has been abducted, ransom was given but he has not been recovered dead or alive till date.			
5.	229/91	147, 148, 149, 302 IPC	Chetganj
6.	410/88	147, 148, 149, 302, 307 IPC	Cantt.
DISTRICT- LUCKNOW			
1.	209/02	3/7/25 Arms Act	Hazratganj
Note:- In aforesaid case crime number in question is related to recovery of ''Katar' made in Switzerland, one vernacular, telescope, 139 live cartridges of 375 bore, 20 live cartridges of 7.57 bore, 21 cartridges of 0.22 bore, 2 cartridges of 12 bore.			
2.	106/99	307, 302, 120B IPC	Hazratganj
Note:- In aforesaid case crime number in question is regarding the murder of Jail Superintendent, Sri Ramkant Tiwari and attempting to murder driver Sri Rakesh Kumar Singh.			
3.	91-A/04	147, 148, 149, 307, 427 IPC	Cantt.
Note:- In aforesaid case crime number lodged by Sri Krishan Nand Rai on 13.01.2004 and ultimately Sri Krishna Nand Rai was eliminated.			
4.	428/99	2/3 Gangster Act	Hazratganj
5.	126/99	506 IPC	Krishna

			Nagar
6.	66/2000	147, 336, 353, 506 IPC	Alambagh
7.	236/20	468, 471, 120B IPC & Section 3 of Damages of Public Property Act	Hazratganj
DISTRICT-CHANDAULI			
1.	294/91	302, 307 IPC	Mughalsarai/Chandauli
DISTRICT-AGRA			
1.	60/99	419, 420, 109, 120B IPC	Jagdishpura
Note:- In the above noted case the accused applicant was caught red handed while he was using the mobile hand set within the premises of jail.			
DISTRICT-SONEBHADRA			
1.	121/97	364A	Anpara
Note:- In this case Sri Deepak Kumar Varshney son of Sri Dinesh Chandra (General Manager) U.P. Electricity Board, Obra has been abducted for ransom and till date he has not been recovered dead or alive.			
DISTRICT-MAU			
1.	808/04	147, 148, 149, 393, 307, 504, 506, 342 IPC	Kotwali
2.	1580/05	147, 148, 149,302, 435, 436, 427, 153A IPC	Kotwali
3.	1866/09	147, 148, 149,302, 307, 120B, 404, 325/34 IPC & 7 CLAct	
4.	399/10	302, 307, 120B, 34 IPC & 7 CL Act & 25/27 Arms Act	Dakshin Tola
5.	891/10	3(1) Gangster Act	Dakshin Tola
6.	185/21	419, 420, 467, 468, 471, 120B IPC	Sarai Lakhansi (present one)
7.	55/21	3(1) of U.P. Gangster Act	Dakshin Tola
8.	4/20	30 Arms Act and Sections 419, 420, 467, 468, 471, 120 B IPC	Dakshin Tola
NEW DELHI			
1.	456/93	364A, 365, 387 IPC	Tilak Marg
2.	508/93	24/54/59 Arms Act & S. Tada	K.G. Marg
STATE OF PUNJAB			
1.	5/19	386/506 IPC	Mathaur, Mohali
Note:- present accused applicant was confined in Banda Jail as a prisoner, during the period of confinement in jail, the present accused applicant demanded Rs. 10 Crores as Gunda Tax from on Umang Jindal, CEO of Home Land Group.			
DISTRICT -AZAMGARH			

1.	20/14	147, 148, 149, 302, 307, 506, 120B IPC & 7 Crl. Law Amendment Act	Tarwa
2.	160/20	3(1) U.P. Gangster Act	Tarwa
DISTRICT - BARABANKI			
1.	369/21	419, 420, 467, 468, 471, 120B, 506, 177 IPC & 7 Crl. Law Amendment Act	Kotwali

32. Thus, it is clear that there are total 54 cases to the credit of the applicant and he is born in 1964, thus at present he is aged about 58 years. One can easily fathom that a man of 58 years is having 54 cases to his credit speaks bundle of volume about his checkered past and criminal antecedent. He is a interstate Mafia having no. 191, all these things if taken cumulatively goes to show that he is a simply canker to the society.

33. As mentioned above, Sri Upadhayay, learned counsel for the applicant has repeatedly hammered *that applying the doctrine of parity, the applicant too deserves to be bailed out*. Apparently the argument advanced seems to be lucrative and tempting but the Court could have lay his hand to the recent judgment of the Hon'ble Apex Court in the case ***of NEERU YADAV VS. STATE OF U.P. Criminal Appeal No. 1272/2015 decided on 29th September, 2015***, which squarely meet out the aforesaid submissions advanced by Sri Upadhyay, learned counsel for the applicant i.e. Principles of Parity.

34. In the case of **Neeru Yadav (supra)** too, this was a bail cancellation appeal whereby the accused was granted bail by the High Court on the basis of parity, though he was enjoying criminal cases of 7 cases. The Hon'ble Apex Court has opined..... "that the respondent no.2 is still in jail despite of the order of bail as he is involved in so many cases. Sri Yadav, counsel for the appellant has urged that despite of the factum of criminal history pointed out by the High Court, it has given it a glorious ignore, which law does not countenance. It is quite vivid that the respondent no. 2 is a history-sheeter and involved in a heinous offences. Having stated that facts and noting the nature of involvement of the accused in the crimes in question, there can be no scintilla of doubt to name him a "history-sheeter". The question, therefore, arises whether in these circumstances, should the High Court have enlarged him on bail on the foundation of parity.

"13. A crime , as is understood, creates a dent in the law and order situation. In a civilised society, a crime disturbs orderliness. It affects the peaceful life of the society. An individual can enjoy his liberty which is definitely of paramount value but he cannot be a law unto himself. He cannot cause harm to others. He cannot be a nuisance to the collective. He cannot be a terror to the society; and that is why Edmund Burke, the great English thinker, almost two centuries and a decade back eloquently spoke thus:-

" Men are qualified for civil liberty, in exact proportion to their

disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobreity of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters."

15. This being the position of law, it is clear as cloudless sky that the High Court has totally ignored the criminal antecedents of the accused. What has weighed with the High Court is the doctrine of parity. A history-sheeter involved in the nature of crimes which we have reproduced hereinabove, are not minor offences so that he is not to be retained in custody, but the crimes are heinous nature and such crimes, by no stretch of imagination, can be regarded as jejune. Such cases do create a thunder and lightening having the effect potentiality of torrential rain in an analytical mind. The law expects the judiciary to be aleert while admitting these kind of accused persons to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner.

17. That apart, it has to be remembered that justice in its conceptual eventuality and connotative expanse engulfs the magnanimity of the sun, the sternness of mountain, the complexity of creation, the simplicity and humility of a saint and the austerity of a Spartan, but it always remains wedded to rule of law absolutely unshaken, unterrified, unperturbed and loyal.

35. Thus, weighing the facts and circumstances of the present case and the argument advanced by Sri Upendra Upadhaya, learned counsel for the applicant in the light of the above pronouncement by the Hon'ble Apex Court, I have got no hesitation that the applicant is prima facie, a culprit of swindling the public money entrusted to him by way of "Vidhayak Nidhi" and has distributed to his own near and dear ones in the name of alleged construction of new educational institution. On making inquiry, a banana grow and wheat crop were standing over the plot in question and Sri Upadhyay, at one stage canvassed that the money was used for expanding and extension of pre-existing school and obtain the bail order of co-accused Bail Nath Yadav, but in the instant case a new theory was propounded by him that the applicant was in jail and the amount from *"Vidhayak Nidhi"* was given to co-accused person for raising a new school but as mentioned above there was no school over the plot in question and pre-existing school was found over Khata No. 60 and 190 and Gata No. 797 (Minjumla). This public money and its indiscreet utilization goes unaccounted. The prosecution has got every right to inquire as to where this huge amount of Rs. 25 lakhs has been used or rather misutilized.

36. As mentioned above, the *"Vidhayak Nidhi"* is a hard earned money of a tax payers and no body is authorized for having moral or legal guts to misutilize the amount for his own use or for any other clandestine purpose. The applicant has to take this responsibility of misfeasance of public sum.

The Court is requesting to Govt. of Uttar Pradesh to constitute a committee under the leadership of Speaker of Assembly with three senior bureaucrats to audit the *"Vidhayak Nidhi"* of individual MLA and its utilization as mentioned in paragraph 22 of the instant order. Reckless distribution of *"Vidhayak Nidhi"* by unscrupulous MLA are causing more harm to the society and subject matter resentment among the masses.

37. So far as the parity is concerned, I am afraid to extend the benefit of parity to the present applicant in the light of Judgement of Hon'ble Apex Court in the case of **Neeru Yadav (supra)** and thus assessing the totality of circumstances, I do not find any good reason to release the applicant on bail and consequently, the bail application of the applicant Mokhtar Anasri is hereby **turned down and rejected.**

The records of the case is consigned to records.

(2022) 8 ILRA 295
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.08.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Criminal Misc. I[st] Bail Application No. 56202 of 2021

Dilip Mishra ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Tarun Jha, Sri Satya Dheer Singh Jadaun, Sri Shashank Shekhar Mishra, Sri V.P. Srivastava (Sr. Advocate)

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 162, 313, 315 & 439 - Amendment Act,1781 - Section - 7 - Indian Penal Code,1860 - Sections 302 & 120-B - Indian Evidence Act, 1872 - Sections 24, 25, 26 & 30 - Constitution of India,1950 - Article 21 : - Application for Bail – FIR - Offence of Criminal Conspiracy and Murder - Investigating officer made spot inspection & collected empty cartridges, blood stained stone and goggles etc. from spot - and also recorded St.ment of witnesses - further, collected a CCTV footage & DVR and also collected call detail report of family members of deceased - It is true that Court has always emphasised that personal liberty of person is prime consideration but that personal liberty has to be exercised within bounds of law and in a manner so that peace and tranquillity is not disturbed - Court further, emphasised that valuable right of liberty of an individual and interest of society in general has to be balanced while considering the bail application - the criminal history of applicant having 48 cases out of which 21 are pending reflects that the is a hardened & habituated criminal and has misused the bail - consequently, the bail application is rejected. (Para – 39, 43)

Bail Application Rejected. (E-11)

List of Cases cited: -

1. Nikesh Tarachand Shah Vs U.O.I. & anr., 2018 (11) SCC 1

2. Dataram Singh Vs St. of U.P. & anr., 2018 (3) SCC 22

3. Rama Kant Yadav Vs The St. of U.P., Criminal Misc. Bail Application No.28420 of 2009

4. Maulana Mohammed Amir Rashadi Vs St. of U.P. & anr., 2012 (2) SCC 382

5. Neeru Yadav Vs St. of U.P., (2015) 3 SCC (Cri) 527

6. Pakala Narayana Swami Vs The King Emperor, 40 Cr. L.J. 1939

7. Harjit Singh Vs Inderpreet Singh @ Inder & anr., AIR 2021 SC 4017

8. Mokhtar Ansari Vs St. of U.P., Criminal Misc. Bail Application No.46494 of 2021

9. Prahlad Singh Bhati Vs NCT of Delhi & anr., 2001 (4) SCC 280

10. Prasanta Kumar Sarkar Vs Ashish Chatterjee & anr., 2010 (14) SCC 496

11. Gudikanti Narasimhulu Vs Public Prosecutor, High Court of A.P., (1978) 1 SCC 240

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

13. Mahipal Vs Rajesh Kumar Alias Polia & anr., (2020) 2 SCC 118

14. Rajesh Kumar Vs St. through Government of NCT of Delhi, (2011) 13 SCC

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

1. Heard Sri V.P. Srivastava, learned Senior Counsel assisted by Sri S.D. Singh Jadaun and Sri Shashank Shekhar Mishra, learned counsel for the applicant and Sri Vikas Sahai and Sri Manoj Kumar Dwivedi, learned AGA for the State.

2. Pleadings have been exchanged between the parties.

3. The present bail application has been filed on behalf of applicant in Case Crime No. 28 of 2017, under Sections 302 of IPC and Section 120-B of IPC, Police Station Kydganj, District Prayagraj with the prayer to enlarge the applicant on bail.

4. On 12.01.2017 at about 7.00 O'clock in the evening one Dr. A.K. Bansal was murdered by unknown assailants. A first information report was lodged on the same day i.e. 12.01.2017 against unknown persons bearing Case Crime No.28 of 2017, under Section 302 of I.P.C. & Section 7 of the Criminal Law Amendment Act at P.S. Kydganj, District Prayagaj.

5. Thereafter, the police commenced investigation and recorded the statement under Section 161 of Cr.P.C of first informant-Pradeep Kumar Bansal, brother of deceased. The investigating officer made spot inspection and collected two empty cartridges, blood stained stone and goggles etc. from the spot. The investigating officer also recorded the statement of witnesses of inquest report under Section 161 Cr.P.C. The investigating officer also collected a CCTV footage and DVR and also collected call detail report of the family members of the deceased.

6. It appears that the investigating officer was informed by the informant that he has identified the person whose images appear on the CCTV footage of the incident in question. The names of the person identified were Yasir and Shoiab. The investigating officer on 26.3.2021 recorded the statement of Asif, brother of the accused-Yasir, under Section 161 Cr.P.C., who identified out of the two persons one his elder brother Yasir and another Shoiab, friend of Yasir. He further stated that his brother Yasir was in touch with Shoiab and Maksud @ Zaid and they had committed number of crimes. He also disclosed that Maksud @ Zaid, committed the murder of his brother Yasir. In this respect, a first information report was lodged at Police Station Antu, Pratapgarh, under Section 302 of IPC, and in this case Maksud @ Zaid has been arrested and languishing in jail.

7. Later on, the police arrested Shoiab and immediately after his arrest, police in

Nakal Fard recorded his statement wherein he has stated that the deceased had given Rs.55,000,00/- to one Alok Sinha for admission of his son but Alok Sinha could not manage the admission of son of deceased and had swindled the money of deceased. The deceased in this regard lodged an FIR against Alok Sinha, and in the said criminal case, Alok Sinha was arrested and was put in the jail in one number circle of B-class barrack, where Alok Sinha came in contact with the applicant-accused Dilip Mishra, Ashraf @ Akhatar Katra, Julfikar @ Tota, Gulam Rasool and Pawan Singh. He further stated that Alok Sinha conspired to kill the deceased with the applicant-accused and Ashraf @ Akhatar Katra. Thereafter, Maksud @ Zaid, Yasir and Shoiab were contacted by the applicant-accused and Ashraf @ Akhatar Katra through one Abrar Mulla. It was agreed that Rs.70 lakh was to be paid by Alok Sinha for the murder of the deceased. He further made disclosure in the statement as to how the murder of the deceased was committed.

8. The investigating officer recorded the statement of Shoiab under Section 161 of Cr.P.C. in which he has reiterated the same statement which was recorded by the police on the arrest of the Shoiab in Nakal Fard. In the statement recorded under Section 161 Cr.P.C., Shoiab reiterated that the applicant-accused was in one number circle of B-Class barrack before Alok Sinha was put in the said barrack.

9. Sri V.P. Srivastava, learned Senior Counsel has submitted that except the statement of Shoiab, in which the name of the applicant-accused has surfaced for the first time after about four years from the date of commission of offence, there was no incriminating material on record which points to the involvement of the applicant-accused in the said offence. He further submits that statement of Shoiab before the police under Section 161 of Cr.P.C. cannot be read in evidence on account of bar put by Section 25 & 26 of the Indian Evidence Act, 1872, therefore, the statement of Shoiab recorded by the police cannot be read in evidence against the applicant-accused. He submits that as there is no incriminating material against the applicant-accused except the statement of Shoiab recorded by the police under Section 161 of Cr.P.C, the implication of the applicant-accused in the said criminal case is false.

10. Elaborating the aforesaid submission, learned Senior Counsel has placed reliance upon Section 162 of Cr.P.C. and submits that the statement recorded by police during investigation can be used only for the purposes of contradiction in the statement of the witness and for no other purposes. He submits that the stage of recording of statement of accused comes when the trial is proceeded and the Court proceeds to examine the accused under Section 313 Cr.P.C. during trial. He further placed Section 315 of Cr.P.C. which provides for the defence of the accused as witness in his defence. On the strength of the aforesaid submission, it is contended that in the absence of any incriminating material or any legal evidence against applicant-accused, the accused cannot remain in incarceration.

11. He further submits that in the instant case, it is manifest from the record that the arrest of the applicant-accused is malicious, therefore, the criminal history of the accused does not come in the way of the applicant from being released on bail. He submits that illegal detention of the

accused infringes fundamental rights of the accused enshrined under Article 21 of the Constitution of India, therefore, applicant deserves to be enlarged on bail by this Court.

12. Sri V.P. Srivastava, learned Senior Counsel has also placed paragraph 3(i) to (xxvii) of the supplementary affidavit explaining the criminal history of 26 cases in which the accused has been acquitted and paragraph 4(i) to (xviii) of the supplementary affidavit explaining the pending criminal cases against the accused in which applicant has been enlarged on bail.

13. He further submits that it is a case of circumstantial evidence and prosecution has to establish every chain of events to establish the guilt of the applicant-accused. It has been further submitted that applicant is languishing in jail since 27.07.2021 and that in case the applicant is released on bail, he will not misuse the liberty of bail and will cooperate in trial.

14. In support of his submission, learned Senior Counsel has placed reliance upon the judgment of the Apex Court in ***Nikesh Tarachand Shah Vs. Union of India & Anr. Reported in 2018 (11) SCC 1, Dataram Singh Vs. State of U.P. & Anr., 2018 (3) SCC 22*** and order of this Court passed in ***Criminal Misc. Bail Application No.28420 of 2009 (Rama Kant Yadav Vs. The State of U.P.).*** He has also relied upon the judgment of Apex Court in ***Maulana Mohammed Amir Rashadi Vs. State of U.P. & Anr., 2012 (2) SCC 382, Neeru Yadav Vs. State of U.P., (2015) 3 SCC (Cri) 527*** and the judgment of PRIVY Council in ***Pakala Narayana Swami Vs. The King Emperor, 40 Cr. L.J. 1939.***

15. It is further urged that the accused is also entitled to parity with the co-accused Alok Sinha, Abrar Mulla @ Mohammad Abrar Khan, Ashraf @ Akhatar Katra who have already been enlarged on bail in Criminal Misc. Bail Application Nos. 43296 of 2021, 53760 of 2021 and 15274 of 2022 vide order dated 10.12.2021, 20.12.2021 and 13.07.2022 respectively. Hence, the applicant-accused is also entitled to be released on bail on the ground of parity as his case stands on a better footings than the above co-accused persons.

16. Per-contra, learned AGA has submitted that there are sufficient material and evidence on record which establishes the prima facie involvement of the applicant-accused in the crime. He submits that during the investigation the duty of the investigating officer is to see as to whether there are incriminating material and evidence on record which leads to indicate the prima facie involvement of the accused in the crime. He further submits that the statement of one Pran Nath was recorded under Section 161 Cr.P.C. wherein he has stated that he along with his late brother Madhav Prasad stood surety for Alok Sinha after his release from bail in Case Crime No. 644 of 2015 on the instructions of the applicant-accused-Dilip Mishra. It is submitted that the statement of Pran Nath acknowledges the fact that the applicant-accused has close acquaintance with Alok Sinha.

17. He further submits that one Anirudh Yadav, an employee of Jeevan Jyoti Hospital, has made the statement that the deceased had purchased about three bigha land in the vicinity of land of applicant-accused, who was pressurizing the deceased to sell the said land to him but

the deceased did not agree to sell the said land to the applicant-accused which led the applicant-accused to encroach upon the land of the deceased situated in the vicinity of the applicant-accused. He further stated that the persons known to the applicant-accused stood surety for Alok Sinha. Accordingly, it is submitted that the accused-applicant has motive for eliminating the deceased, and the aforesaid fact clearly indicates the prima facie involvement of the accused in the crime.

18. He further submits that the criminal history of applicant-accused demonstrates that he is habituated and hard core criminal which disentitles him from being released on bail. In this respect, he has placed reliance upon the judgment of the Apex Court in the case of ***Harjit Singh Vs. Inderpreet Singh alias Inder and another, AIR 2021 SC 4017*** and the recent judgment of this Court passed in ***Criminal Misc. Bail Application No.46494 of 2021 (Mokhtar Ansari Vs. State of U.P.***

19. Sri Vikas Sahai, learned AGA has also placed Section 30 of the Indian Evidence Act, 1872 to contend that though the confessional statement or statement recorded under Section 161 Cr.P.C. is a weak evidence but it can be read as an evidence under Section 30 of the Indian Evidence Act, 1872 when more persons than one are being tried jointly for the same offence.

20. I have heard learned counsel for the parties and perused the record.

21. Before proceeding to deal with the respective contention of the learned counsel for the parties, it would be apposite to refer to few judgments wherein the Apex Court has elucidated the principles to be born in mind while granting bail. In the case of ***Prahlad Singh Bhati Vs. NCT of Delhi and Anr., 2001 (4) SCC 280,*** the Apex Court stated the principles which are to be considered while granting bail. Relevant paragraph of the said judgment is reproduced herein below:

8. The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, 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 interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not excepted, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

22. In the case of ***Prasanta Kumar Sarkar Vs. Ashish Chatterjee and Anr., 2010 (14) SCC 496*** the Apex Court laid down the factors which the Court should bear in mind while considering an application for bail, which are reproduced herein below:

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

(ii) nature and gravity of the accusation;

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

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

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

(vi) likelihood of the offence being repeated;

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

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

23. Now in the light of aforesaid principles which the Court has to keep in mind in considering a bail application, the Court proceeds to consider the contention of the respective parties.

24. Learned counsel for the applicant has laid emphasis as to the purpose of granting bail, in this regard, he has placed reliance upon a judgment of the Apex Court in the case of ***Nikesh Tarachand Shah (supra),*** wherein the Apex Court had considered the history of bail as defined in Clause 39 of the Magnacarta. Relevant paragraph nos. 15, 16 and 18 of the judgment are reproduced herein below:

15. The provision for bail goes back to Magna Carta itself. Clause 39, which was, at that time, written in Latin, is translated as follows:

"No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." It is well known that Magna Carta, which was wrung out of King John by the barons on the 15th of June, 1215, was annulled by Pope Innocent III in August of that very year. King John died one year later, leaving the throne to his 9 year old son, Henry III. It is in the reign of this pious King and his son, Edward I, that Magna Carta was recognized by kingly authority. In fact, by the statutes of Westminster of 1275, King Edward I repeated the injunction contained in clause 39 of Magna Carta. However, when it came to the reign of the Stuarts, who believed that they were kings on earth as a matter of divine right, a struggle ensued between Parliament and King Charles I. This led to another great milestone in the history of England called the Petition of Right of 1628. Moved by the hostility to the Duke of Buckingham, the House of Commons denied King Charles I the means to conduct military operations abroad. The King was unwilling to give up his military ambition and resorted to the expedient of a forced loan to finance it. A number of those subject to the imposition declined to pay, and some were imprisoned; among them were those who became famous as "the Five Knights". Each of them sought a writ of habeas corpus to secure his release. One of the Knights, Sir Thomas Darnel, gave up the fight, but the other four fought on. The King's Bench, headed by the Chief Justice, made an order sending the knights back to prison. The Chief Justice's order was, in fact, a provisional refusal of bail. Parliament being displeased with this, invoked Magna Carta and the statutes of Westminster, and thus it came about that the Petition of Right was presented and adopted by the Lords and a reluctant King. Charles I reluctantly accepted this Petition of Right stating, "let right be done as is

desired by the petition". Among other things, the Petition had prayed that no free man should be imprisoned or detained, except by authority of law.

16. In Bushell's case, decided in 1670, Chief Justice Sir John Vaughan was able to state that,

"the writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it."

Despite this statement of the law, one Jenkes was arrested and imprisoned for inciting persons to riot in a speech, asking that King Charles II be petitioned to call a new Parliament. Jenkes went from pillar to post in order to be admitted to bail. The Lord Chief Justice sent him to the Lord Chancellor, who, in turn, sent him to the Lord Treasurer, who sent him to the King himself, who, "immediately commanded that the laws should have their due course." (See Jenke's case, How. St. Tr. at pp. 1207, 1208, (1676) 6 How St Tr 1189). It is cases like these that led to the next great milestone of English history, namely the Habeas Corpus Act, 1679. This Act recited that many of the King's subjects have been long detained in prison in cases where, by law, they should have been set free on bail. The Act provided for a habeas corpus procedure which plugged legal loopholes and even made the King's Bench Judges subject to penalties for non-compliance.

18. What is important to learn from this history is that clause 39 of Magna Carta was subsequently extended to pre-trial imprisonment, so that persons could be enlarged on bail to secure their attendance for the ensuing trial. It may only be added that one century after the Bill of Rights, the US Constitution borrowed the language of the Bill of Rights when the principle of habeas corpus found its way into Article 1 Section 9 of the US Constitution, followed by the Eighth Amendment to the Constitution which expressly states that, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". We may only add that the Eighth Amendment has been read into Article 21 by a Division Bench of this Court in Rajesh Kumar v. State through Government of NCT of Delhi (2011) 13 SCC 706, at paragraphs 60 and 61.

25. Learned counsel for the applicant has also placed reliance upon the judgment of Apex Court in the case of ***Dataram Singh (supra)*** in respect to the principle that though the grant or refusal of bail entirely depends upon the discretion of the judge it must be exercised in a judicious manner and human approach should be adopted by the Judge. Relevant paragraph nos. 3 and 4 of the judgment are reproduced herein below:

3. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being

victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

4. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons, (2017) 10 SCC 658.

26. Now coming to the first contention of learned counsel for the applicant that the confessional statement or statement made before the Investigating Officer under Section 161 Cr.P.C. cannot be considered as evidence in view of bar put by Section 24 and 25 of the Indian Evidence Act, 1872.

27. There is no dispute or quarrel on the said principle of law as the said principle has been settled by catena of decisions by the Supreme Court but in the instant case, the Court has to keep in mind that the accused was involved in the crime with the Shoiab and other co-accused and the trial of accused applicant and co-accused shall be conducted jointly, therefore, Section 30 of the Evidence Act may also come into play, and if the ingredients of Section 30 of Evidence Act are present, the statement of the co-accused can be pressed into service against the other co-accused if the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from said evidence.

28. In such view of the fact, the argument of the learned counsel for the applicant that the statement of co-accused Shoiab recorded by the police is no evidence in the eye of law can't be considered against the Shoiab and co-accused at the stage of bail in view of the Section 30 of the Indian Evidence Act. It is a case where more persons than one are being tried jointly for the same offence, and if the ingredients of Section 30 of the Evidence Act are present, the Court may look into the statement of Shoiab against the applicant also. In such view of the fact, the contention advanced by the learned counsel for the applicant relying upon Sections 24 & 25 of the Evidence Act can be considered at the trial and does not arise for consideration while dealing with bail application as the bail application is to be considered with the parameters of Section 439 of Cr.P.C. and on the factors enumerated by the Apex Court in the judgements referred above.

29. Now the Court proceeds to consider as to whether the prima facie involvement of the accused is manifest from the record or not.

30. In the instant case, a look at the statement of Pran Nath discloses that he and his brother became surety of Alok

Sinha on the instructions of the accused which prima facie establishes the link and acquaintance between Alok Sinha and the applicant-accused. The record further reveals that Alok Sinha, Dilip Mishra-applicant, Ashraf @ Akhatar Katra, were lodged in one number circle of B-class barrack where these three persons had met and hatched the conspiracy to kill Dr. A.K. Bansal, the deceased. It has come on record in the statement of Shoiab that applicant-accused and Ashraf @ Akhatar Katra had contacted him, Yasir and Maksud @ Zaid, through Abrar Mulla and gave contract (supari) for killing the deceased.

31. The motive of the applicant-accused for eliminating the deceased has come on record in the statement of Anirudh Yadav, employee of Jeevan Jyoti Hospital, wherein he has stated that about three bigha land was purchased by Dr. A.K.Bansal (deceased) in the vicinity of the land of the applicant-accused which the applicant-accused wanted to purchase from Dr. A.K.Bansal but he refused to sell the same to him, the accused encroached upon the land of deceased. The aforesaid fact prima facie establishes the motive of the applicant and involvement of the applicant-accused in the commission of offence as one of the main conspirator.

32. Now coming to the question as to whether the criminal history of the applicant-accused comes in the way for grant of the bail. Before considering the said question it would be fruitful to glance through judgments of the Supreme Court on this aspect. In the case of ***Harjit Singh (supra),*** an order granting bail has been set aside by the Apex Court on the ground that the High Court failed to consider the antecedents of the respondent no.1 and the threat perception to the appellant and his family members, accordingly, the Apex Court found that the order granting bail was not within the bounds of law which permits the Court to release an accused on bail.

33. It would be apt to refer to the judgment of Apex Court in the case of ***Gudikanti Narasimhulu Vs. Public Prosecutor, High Court of A.P., (1978) 1 SCC 240***. Relevant paragraph Nos.7, 8 and 9 of the judgment are reproduced herein below:

"7. It is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

8. Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being.

9. Thus the legal principle and practice validate the court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record-- particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance."

34. In the case of ***Ash Mohammad Vs. Shiv Raj Singh, (2012) 9 SCC 446,*** the Apex Court has elaborated that the the

personal liberty cannot be stretched to an extent which may disturb the peace of the society. The personal liberty has to be enjoyed within the bounds of the law so that the tranquillity and safety of the society at large may not jeopardise. Relevant paragraph no.17, 18 and 19 of the judgment are reproduced herein below:

"17. We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasize, the sacrosanctity of liberty is paramount in a civilized society. However, in a democratic body polity which is wedded to Rule of Law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialized. The life of an individual living in a society governed by Rule of Law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom".

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

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

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

35. At this point, it would be also apposite to refer to judgment of the Apex Court in the case of ***Neeru Yadav (supra)*** which has been relied upon by counsel for the applicant as well as learned counsel for

the respondent. Relevant paragraph nos. 12, 13 and 16 of the judgment are reproduced herein below:

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

13. In the case at hand, two aspects have been highlighted before us. One, the criminal antecedents of the 2nd Respondent and second, the non-applicability of the principles of parity on the foundation that the accusations against the accused Ashok and second Respondent are different.

16. The issue that is presented before us is whether this Court can annul the order passed by the High Court and curtail the liberty of the second Respondent? We are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bed rock of constitutional right and accentuated further on human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilized society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from the member, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the Court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law."

36. In the case of ***Mahipal Vs. Rajesh Kumar Alias Polia and Anr., (2020) 2 SCC 118***, the Apex Court in paragraph 14 has observed as under:-

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

37. This Court also in the case of ***Mokhtar Ansari (supra)*** after considering long line of decisions has refused to grant bail to the applicant keeping in view that the applicant has the criminal history of 54 cases to his credit.

38. Now coming to the facts of the present case, as per counter affidavit, the applicant has criminal history of 48 cases including the present case. The cases pertaining to criminal history are reproduced herein below:

प्रारूप					
क्र.स.	जनपद	थाना	मु०अ०सं०/धारा	अभियुक्तों के नाम व पता	अभियोजन की स्थिति
1	प्रया०	नैनी	मु०अ०सं० 91/91 धारा 498ए/304बी IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 10.02.95
2	प्रया०	नैनी	मु०अ०सं० 611/91 धारा 147/148/149/307/504/506 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला	दोषमुक्त

				थाना औद्योगिक क्षेत्र जनपद प्रयागराज	
3	प्रया०	नैनी	मु०अ०सं० 498/92 धारा 307 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त
4	प्रया०	नैनी	मु०अ०सं० 169/93 धारा 332/506 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनप	दोषमुक्त 06.02.95

				द प्रयागराज	
5	प्रया०	नैनी	मु०अ०सं० 216/93 धारा 323/504/506 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 06.02.95
6	प्रया०	नैनी	मु०अ०सं० 456/93 धारा 323/504/506 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 28.04.2005
7	प्रया०	नैनी	मु०अ०सं०	दिलीप मिश्रा	दोषमु

			557/95 धारा 304ए IPC	पुत्र राम गोपाल मिश्रा निवासी लवायन कलाथाना औद्योगिक क्षेत्र जनपद प्रयागराज	क्त 15.04.1997
8	प्रया०	नैनी	मु०अ०सं० 429/96 धारा 323/504/506 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कलाथाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 27.08.2004
9	प्रया०	औ०क्षेत्र	मु०अ०सं० 185/98 धारा 386/504 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवा	दोषमुक्त 31.03.2011
			3(1)10 एससीएसटी एक्ट व 22/23 मनि लान्ड्रिंग अधि०	सी लवायन कलाथाना औद्योगिक क्षेत्र जनपद प्रयागराज	
10	प्रया०	सिविल लाइन्स	मु०अ०सं० 328/2000 धारा 147/148/323 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कलाथाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 28.04.2007
11	प्रया०	औ०क्षेत्र	मु०अ०सं० 110/02 धारा ¾ गुण्डा अधि०	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कलाथाना	कार्यवाही समाप्त

				औद्योगिक क्षेत्र जनपद प्रयागराज	
12	प्रया०	सिविल लाइन्स	मु०अ०सं० 89/03 धारा 147/148/149/302 IPC व 7 CLA Act व 2/3 गैंगस्टर अधि०	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 07.03.2018
13	प्रया०	औ०क्षेत्र	मु०अ०सं० 270/03 धारा 147/148ख/149ख/307 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद	दोषमुक्त 19.12.2005
				प्रयागराज	
14	प्रया०	औ०क्षेत्र	मु०अ०सं० 119/07 धारा 392 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	FR स्वीकृत
15	प्रया०	औ०क्षेत्र	मु०अ०सं० 170/07 धारा 504 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 05.12.2012
16	प्रया०	औ०क्षेत्र	मु०अ०सं० 174/0	दिलीप मिश्रा पुत्र	दोषमुक्त

			7 धारा 392/386/323/506 IPC	राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	06.05.2013
17	प्रया०	औ०क्षेत्र	मु०अ०सं० 219/07 धारा 2/3 गैंगस्टर अधि०	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	सीआरपीसी 313 में
18	प्रया०	औ०क्षेत्र	मु०अ०सं० 257/07 धारा 323/504/506 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 08.05.2012
19	प्रया०	औ०क्षेत्र	मु०अ०सं० 261/07 धारा 364/504 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	FR स्वीकृत 06.03.2010
20	प्रया०	नैनी	मु०अ०सं० 288/07 धारा 384/504/506 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्यो	दोषमुक्त 16.03.2009

				गिक क्षेत्र जनपद प्रयागराज	
21	प्रया०	औ०क्षेत्र	मु०अ०सं० 11/08 धारा 147/148/149/504/506/307 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त
22	प्रया०	औ०क्षेत्र	मु०अ०सं० 240/08 धारा ¾ गुण्डा अधि०	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयाग	कार्यवाही समाप्त
				राज	
23	प्रया०	नैनी	मु०अ०सं० 245/08 धारा 147/148/323/504/506 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 16.03.2009
24	प्रया०	औ०क्षेत्र	मु०अ०सं० 165/09 धारा 147/148/149/302 IPC 7 क्रि० ला०एक्ट	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 28.09.2013
25	प्रया०	औ०क्षेत्र	मु०अ०सं० 238/09 धारा	दिलीप मिश्रा पुत्र राम	बहस डिफेंस

			2/3 गैंगस्टर अधि०	गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	
26	प्रया०	नैनी	मु०अ०सं० 493/09 धारा 332/333/504/506 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 18.05.2013
27	महाराष्ट्र		मु०अ०सं० 61/10 धारा 353 IPC व 4/25 A. ACT	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवाय	

			व 135 BP ACT	न कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	
28	प्रया०	औ०क्षेत्र	मु०अ०सं० 71/10 धारा 302 IPC व 3(2)5 एससी एसटी एक्ट	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	दोषमुक्त 06.04.2013
29	प्रया०	मुट्ठीगंज	मु०अ०सं० 103/10 धारा 419/420 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक	हाजिरी

				क्षेत्र जनपद प्रयागराज	
30	प्रया०	औ०क्षेत्र	मु०अ०सं० 153/10 धारा 2/3 गैंगस्टर अधि०	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	सीआरपीसी 313 में
31	प्रया०	नवाबगंज	मु०अ०सं० 208/10 धारा 419/420/467/468 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	हाजिरी में पत्रावली चल रहा है
32	प्रया०	नगर कोतवाली	मु०अ०सं० 237/10 धारा 307/302/120बी IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	साक्ष्य में
33	प्रया०	औ०क्षेत्र	मु०अ०सं० 95/15 धारा 3/25 व 30 A. ACT	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	
34	प्रया०	थाना खुल्दाबाद जनपद	मु०अ०सं० 120/15 धारा 506	दिलीप मिश्रा पुत्र राम गोपाल	

		प्रयागराज	IPC	मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	
35	प्रया०	औ०क्षेत्र	मु०अ०सं० 183/15 धारा 147/332/504/353 IPC व 136(2) लोक प्रतिनिधित्व अधिनियम	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	चार्ज में
36	प्रया०	औ०क्षेत्र	मु०अ०सं० 184/15 धारा 147/148/332/353/392/504/506 IPC व 7 CLA ACT व 136(2) लोक प्रतिनिधित्व अधिनियम	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	चार्ज में
37	प्रया०	औ०क्षेत्र	मु०अ०सं० 209/15 धारा 110G CRPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	कार्यवाही समाप्त
38	प्रया०	औ०क्षेत्र	मु०अ०सं० 416/16 धारा ¾ गुण्डा अधि०	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक	कार्यवाही समाप्त

				क्षेत्र जनपद प्रयागराज	
39	प्रया०	थाना कीडगंज	28/17 धारा 302/120B IPC व 7 CLA ACT	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	हाजिरी
40	प्रया०	औ०क्षेत्र	35/17 धारा 110 G CRPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	कार्यवाही समाप्त
41	प्रया०	औ०क्षेत्र	163/17 धारा 448/188 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	हाजिरी में
42	प्रया०	औ०क्षेत्र	261/17 धारा 2/3 गैंगस्टर अधि०	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	हाजिरी में
43	प्रया०	औ०क्षेत्र	144/18 धारा 419/420/467/468	दिलीप मिश्रा पुत्र राम गोपाल	हाजिरी में

			/471 IPC	मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	
44	प्रया०	औ०क्षेत्र	02/2020 धारा 110G CRPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	
45	प्रया०	औ०क्षेत्र	121/2020 धारा 307/420/467/468/471 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन	हाजिरी में

				कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	
46	प्रया०	औ०क्षेत्र	124/2020 धारा 420/467/468/471 IPC	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	हाजिरी में
47	प्रया०	औ०क्षेत्र	125/2020 धारा 27/30 आर्म्स एक्ट	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र	हाजिरी में

				जनपद प्रयागराज	
48	प्रया०	औ०क्षेत्र	218/2020 धारा 2/3 गैंगस्टर एक्ट	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	चार्ज में
49	प्रया०	थाना कीडगंज	15/2022 धारा 2/3(1) गैंगस्टर एक्ट	दिलीप मिश्रा पुत्र राम गोपाल मिश्रा निवासी लवायन कला थाना औद्योगिक क्षेत्र जनपद प्रयागराज	

39. From the above chart, it is clear that the applicant has been acquitted in 21 cases while the trial in remaining cases are pending and the accused has been enlarged on bail. The aforesaid conduct and criminal history of the applicant reflects that he is a hardened and habituated criminal and has misused the bail inasmuch whenever he was enlarged on bail, he came out from jail and was involved in criminal offences for which number of cases as detailed above, has been registered against him.

40. While considering the bail, the Court besides other factors has to keep in mind the criminal antecedents of the accused. For enlarging the accused on bail the issue that he has been acquitted in many cases and enlarged on bail in other pending cases does not have much relevance for the reason that the question of enlarging the applicant on bail has to be considered within the parameters laid down by the various pronouncement of the Apex Court. The Court in granting the bail has also to keep in mind factors such as likelihood of the offence being repeated, reasonable apprehension of a witness being influenced, likelihood of danger of justice being thwarted by grant of bail.

41. In the instant case, the applicant has history of 48 criminal cases to his credit out of which in some cases he has been acquitted and in some cases he has been enlarged on bail. The record reflects that after coming out of jail, he has committed offences, hence, it cannot be ruled out that if the applicant is released on bail he shall not commit a crime after release on bail.

42. At this juncture, it would be apposite to consider the statement of Anirudh Yadav, the employee of Jeevan Jyoti Hospital who in

his statement has categorically stated that the accused is dreaded criminal and he is scared of him. Now this statement of Anirudh Yadav leads to indicate that if the applicant is released on bail, he may influence the witnesses. The offence alleged against the accused is also grave in nature and if charge is proved the accused will be liable for severe punishment.

43. Though, it is true that the Court has always emphasised that the personal liberty of the person is prime consideration but that personal liberty has to be exercised within the bounds of the law and in a manner so that the peace and tranquillity is not disturbed. The courts have emphasised that valuable right of liberty of an individual and the interest of society in general has to be balanced while considering bail application.

44. Now coming to the judgments relied upon by learned counsel for the applicant at paragraph 19 in the case of ***Ramakant Yadav (supra),*** wherein this Court has held that the criminal antecedent of the applicant would not be a ground to refuse the bail to the applicant-accused when he is otherwise entitled to be enlarged on bail which judgment has been affirmed by the Apex Court in ***Maulana Mohammed Amir Rashadi (supra),*** but the facts of the case in Ramakant Yadav (supra) are different from the facts of the present case inasmuch in the case of ***Ramakant Yadav (supra)*** the complainant and one more witness was examined in the Court and in such circumstances this Court found that chances of tempering of witness is slender, therefore, considering the nature of accusation against the applicant in that case this Court granted bail to the applicant.

45. In the instant case, the trial has not yet commenced, and that the statement of the witnesses has not yet been recorded by the Court, therefore, keeping in view the criminal antecedent of the accused, there is every likelihood that he can influence or tamper the evidence. Therefore, the judgment relied upon by the learned counsel for the applicant is not applicable in the facts of the present case.

46. Now so far as the issue of parity is concerned, it is pertinent to note that this Court while granting the bail to Ashraf @ Akhtar Katra, Abrar Mulla @ Mohammad Abrar Khan and Alok Sinha has not considered the law of criminal history and further the orders passed on bail application against the said co-accused person do not disclose as to what was the criminal history of those accused persons, therefore, this fact itself distinguishes the fact of the applicant-accused against all the co-accused who have been granted bail by this Court.

47. In such view of the fact, this Court applying the principles elucidated by the Apex Court is of the view that applicant is not entitled to be enlarged on bail by this Court. Accordingly, the bail application of applicant-Dilip Mishra is hereby rejected. Any observation made hereinabove shall not prejudice the trial of the accused-applicant.

(2022) 8 ILRA 318
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 4083 of 2017

Pintu Gupta ...Appellant (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:

Sri Dharmendra Kumar Singh, Sri Rajesh Yadav.

Counsel for the Opposite Parties:
G.A.

Criminal Law- Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3 (2) (v) - Documentary evidence showing what caste to the offender and the injured belong has not been brought on record. For attracting the provisions of Section 3 (2) (v) of SC/ST Act, there should be corroboration by way of documentary evidence to prove that the injured, on whom the act is committed, belongs to 'Scheduled Castes' or 'Scheduled Tribes'- No independent witness have been examined who would depose that the accused committed the offence on the ground that injured belonged to a community covered under SC/ST Act. This omission proves fatal for the prosecution in such a vital matter where punishment is for life imprisonment. The learned Judge has not even discussed the evidence and only on the basis of caste, he held that the offence was deemed to be committed. There is no deeming provision under SC/ST Act- Conviction and sentence under Section 3 (2) (v) of the accused-appellant is, therefore, set aside.

Where the prosecution has failed to prove the caste of the injured by documentary evidence and there is no independent corroboration of the bald allegation that the offence was committed on the ground that the injured belonged to the SC/ST community, then the conviction under Section 3 (2) (v) of SC/ST Act will be rendered illegal.

Indian Penal Code, 1860- Section 326-The provisions of Section 326 of IPC relates to voluntary causing grievous hurts by dangerous weapons or means. In this case the glass bottle filled with acid was used as weapon of offence and/or substance which is deleterious to the human body and, therefore, ingredients of Section 326 of IPC are made out- Section 320, Sixthly, designate "Permanent disfiguration of the head or face" as 'grievous hurt' which is punishable under Section 326 of IPC. The present offence falls in the said category.

As the weapon of offence is a glass bottle filled with acid resulting in grievous hurt to the injured, hence the offence would fully come within the purview of Section 326 of the IPC.

Quantum of sentence- Doctrine of Proportionality- Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream- criminal jurisprudence in our country which is reformative and corrective and not retributive- 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. We reduce the sentence to 9 years' incarceration.

Settled law that punishment should not be either unduly harsh or ridiculously inadequate but it ought to be proportionate to the gravity of the offence as well as other factors. As the criminal jurisprudence of our country is reformative and not retributive, hence applying the doctrine of proportionality sentence reduced to a period of nine years. (Para 21, 23, 26, 27, 28,29, 30)

Criminal Appeal partly allowed. (E-3)

List of Cases cited:

1. Crl. Appeal No. 707 of 2020 Hitesh Verma Vs St. of U.K & anr. decd. on 5.11.2020

2. Crl. Appeal No. 1283 of 2019 Khuman Singh Vs St. of M.P decd. on 27.8.2019

3. Crl. Appeal No. 8196 of 2008 Jai Karan @ Pappu Vs St. of U.P.) decd. on 10.11.2021

4. Crl. Appeal No. 204 of 2021 Vishnu Vs St. of U.P. decd. on 28.1.2021

5. Ram Das Vs St. of U.P., AIR 2007 SC 155

6. Dharmendra Vs St. of U.P., 2011 Cri LJ 204 (All)

7. St. of Guj. Vs Munna, 2016 Cri LJ 4097 (Guj)

8. Mohd. Giasuddin Vs St. of AP, [AIR 1977 SC 1926]

9. Deo Narain Mandal Vs St. of UP [(2004) 7 SCC 257]

10. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

11. Jameel Vs St. of UP [(2010) 12 SCC 532]

12. Guru Basavraj Vs St. of Kar. [(2012) 8 SCC 734]

13. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323]

14. State of Punj. Vs Bawa Singh, [(2015) 3 SCC 441]

15. Raj Bala Vs St. of Har., [(2016) 1 SCC 463]

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Rajesh Yadav, learned counsel for the accused-appellant and Sri Nagendra Srivastava, learned A.G.A. assisted by Sri Akhilesh Kumar Tripathi, learned A.G.A. for the State.

2. This appeal challenges the judgment and order dated 13.6.2017 passed by IIIrd Additional Sessions Judge, Court No.4, Jaunpur in Sessions Trial No.74 of 2011 convicting accused-appellant, Pintu Gupta, under Sections 326 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Section 3 (2) (v) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as SC/ST Act). The accused-appellant was sentenced to rigorous imprisonment of 10 years with fine of Rs. 25,000/- under Section 326 of I.P.C. and was sentenced to imprisonment for life with fine of Rs.10,000/- under Section 3 (2) (v) of SC/ST Act. Default sentences for both the offences were one-year rigorous imprisonment each. The date of sentence was 14.6.2017.

3. Brief facts as culled out from the record are that on the basis of the written report, the F.I.R. came to be lodged against the accused on 29.1.2011 by the father of the injured as the injured was hospitalized. The injured was caused burn injuries by hitting him with a bottle in which there was some liquid which is said to be acid and the injured was taken for medical treatment. The F.I.R. states that the age of the accused-Pintu Gupta was 20 years and that of the injured-Sanju Kumar Benvanshi, namely the son of the informant was 18 years at the time of incident. It was further alleged in the F.I.R. that looking to the incident there was commotion in the public and public started running here and there. As the accused sprinkled acid on the face of the injured, his face was badly burnt and for some time his eyesight was lost. The First Information Report was lodged on 29.1.2011. The incident occurred at 6.30 in the evening when people were sitting in shops and were having their tea. Ladies with their children were purchasing vegetables and other grocery items.

4. The police, after recording statements of P.W.2 namely the injured, medical professionals namely, Dr. Prabha Shankar Chaturvedi who had treated the

injured and the police authorities, laid the charge-sheet against the accused on 4.2.2011.

5. The accused was committed to the Court of Session as the case was triable by the Court of Session. The learned Sessions Judge framed charges on the accused on 27.4.2012. The accused pleaded not guilty and wanted to be tried.

6. For bringing home the charge, the prosecution has examined 7 witnesses who are as under:

1	Rajendra Benvanshi	PW1
2	Sanju Kumar Benvanshi	PW2
3	Dr. Prabha Shankar Chaturvedi	PW3
4	Dr. R.A. Chakravarti	PW4
5	Jayantri Lal	PW5
6	Vijendra Giri	PW6
7	Narendra Pratap Singh	PW7

7. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.9
2	Written Report	Ex.Ka.1
3	Recovery Memo of Pieces of Bottle of acid and half burnt grass	Ex. Ka.5
4	Search Memo & Recovery of Pant	Ex.Ka.6
5	Injury Report	Ex.Ka.2
6	Bed Head Ticket	Ex. Ka.3
7	Charge-sheet	Ex. Ka. 12
8	Site Plan with Index	Ex. Ka.11

8. The Court has also examined a witness namely Kayam Mehndi. The accused-appellant was examined under Section 313, Cr.P.C. and the judgment of the Sessions Judge was delivered on 13.6.2017 and the sentence was ordered on 14.6.2017.

9. This appeal came to be filed in July, 2017 and was admitted by this Court. **The accused is in jail since 2.2.2011**, meaning thereby, he was under trial prisoner and during trial he was not enlarged on bail.

10. As far as factual aspects are concerned, learned counsel for the appellant has submitted that Section 326 of IPC is not made out as injuries are not such which would fall within the purview of Section 326 of IPC. It is further submitted by learned counsel for the appellant that even if it is proved that the offence under Section 326 IPC is made out, the punishment is on higher side which requires to be modified.

11. As far as commission of offence under Section 3 (2) (v) of SC/ST Act is concerned, it is submitted by learned counsel that the F.I.R. nowhere states that the injured belongs to a particular community. No documentary evidence to prove the same is there. The documentary evidence, so as to prove that the injured belongs to Scheduled Caste or Scheduled Tribe, has not been produced either before Investigating Officer or Sessions Court. The F.I.R. also according to the counsel for the appellant does not state anything about the same though the incident is said to have occurred it was in public place. No independent witness has been examined by the prosecution except the father of the injured whose presence at the place of incident is very doubtful as in his examination-in-chief, he has opined that he does not know why the incident had

occurred. In his statement, he has mentioned that he is not aware whether accused-appellant, Pintu was also injured. It is his categorical statement that the police officer inquired of his son but he has denied the fact, in his oral testimony, he has not mentioned that as he belongs to a particular community, the incident had occurred. It is further submitted that P.W.2, the injured has also not mentioned that the incident occurred because of his community. It is further submitted that P.W.2, in his oral testimony, has opined that before the said incident, the accused-appellant used to meet him regularly. He has also opined that when the incident occurred, there were people who were having tea in shop and ladies were buying vegetables at the place of incident. It is stated that before the police authority, under Section 161 of Cr.P.C., P.W.2 has only stated that accused-appellant, Pintu Gupta, had beaten him and, therefore also, no case is made out under Section 3 (2) (v) of SC/ST Act. It is further submitted that the finding of fact by the learned Sessions Judge is based on surmises and conjectures.

12. Learned counsel for the appellant has relied on decisions of the Apex Court in Criminal Appeal No. 707 of 2020 **Hitesh Verma Vs. State of Uttarkakhand and another** decided on 5.11.2020 and on Criminal Appeal No. 1283 of 2019 **(Khuman Singh vs. State of Madhya Pradesh)** decided on 27.8.2019 & learned counsel for the for the appellant has also pressed the decisions of this Court in Criminal Appeal No. 8196 of 2008 **(Jai Karan @ Pappu vs. State of U.P.)** decided on 10.11.2021 and in Criminal Appeal No. 204 of 2021 **(Vishnu vs. State of U.P.)** decided on 28.1.2021 so as to contend that provisions of Section 3 (2) (v) of SC/ST Act are not made out and accused requires to be acquitted as there is no mention either in F.I.R. or testimony that the incident occurred because the injured belonged to Scheduled Caste. Learned counsel further submitted that the ingredients to invoke Section 3 (2) (v) of SC/ST Act are not proved and decision only holds that the accused guilty as injured belongs to Scheduled Caste.

13. Learned A.G.A. has taken us through the testimony of P.W.2 & P.W.3 so as to contend that provisions of Section 3 (2) (v) of SC/ST Act is made out as the injured and the father of the injured belong to scheduled caste and, therefore conviction under the aforesaid section is just and proper and the judgment cited by counsel for the appellant in **Khuman Singh, Jai Karan & Vishnu (Supra)** would not apply to the facts of this case and the conviction under SC/ST Act be maintained.

14. Section 3 (2) (v) of SC/ST Act reads as under:

"3. Punishments for offences of atrocities.--

(1).....xx.....xx.....

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,--

(i).....xxx.....

(ii).....xx.....

(iii).....xxx.....

(iv).....xxx.....

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member,

shall be punishable with imprisonment for life and with fine."

15. Normally, we do not discuss the importance of F.I.R. but, this is a classic case where discussion on contents and importance of F.I.R. is necessary. Section 154 of Cr.P.C. will be necessary which reads as under:

" 154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

16. The F.I.R., in the case at hand, was lodged by the father of the injured. Whether it can be said that the incident which occurred in broad day light was on the ground that the injured belong to a particular community falling in the term 'Scheduled Castes' or 'Scheduled Tribes' so as to attract the provision of Section 3 (2) (v) of SC/ST Act. **The F.I.R. is silent about this aspect.** Documentary evidence showing what caste to the offender and the injured belong has not been brought on record. For attracting the provisions of Section 3 (2) (v) of SC/ST Act, there should be corroboration by way of documentary evidence to prove that the injured, on whom the act is committed, belongs to 'Scheduled Castes' or 'Scheduled Tribes'. Just because a person belongs to and says so, will it be a piece of evidence? It is nobody's case that the appellant committed this crime on the ground that the injured belong to a particular community. Even if we believe that there is no documentary evidence and that the injured belongs to the community which he states then also can it be said that the offence has been committed as he belongs to a particular community? This is moot question which arises before us.

17. In **Ram Das vs. State of U.P., AIR 2007 SC 155** wherein there was rape on woman belonging to Scheduled Caste, it was held that these could be no ground to convict the accused under Section 3 (2) (v) when there was no evidence to support the charge under Section 3 (2) (v) of SC/ST Act. Mere fact that victim happened to be a girl belonging to Scheduled Caste did not attract provisions of SC/ST Act.

18. In **Dharmendra vs. State of U.P., 2011 Cri LJ 204 (All),** the Court has held that there was no evidence on record to

show that incident was caused by the accused on the ground that victim belonged to Scheduled Caste. Fact of victim, belonging to Scheduled Caste by itself was not sufficient ground to bring case within the purview of Section 3 (2) (v) of Act. Conviction under Section 3 (2) (v) was improper.

19. In **State of Gujarat v. Munna, 2016 Cri LJ 4097 (Guj),** the Court held as under:

"In the instant case, so far as the charge against the accused for the offence punishable under Section 3 (2) (v) of the Atrocity Act, 1989 was concerned, from the deposition of the witnesses it had not come out that the accused committed the offence against the deceased on the ground that deceased was a member of Scheduled Caste or Scheduled Tribe. In absence of such evidence it could not be said that the original accused had committed the offence punishable under Section 3 (2) (v) of the Atrocity Act, 1989. Under the circumstances on the basis of the evidence of record the accused could not be held guilty for the aforesaid offence."

20. Decision of the Division Bench of this Court in case of **Vishnu (Supra)** penned by one of us (Dr. K.J. Thaker, J.) held as under:

"38. Section 3(2)(v) of Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is concerned, the FIR and the evidence though suggests that any one or any act was done by the accused on the basis that the prosecutrix was a member of Scheduled Castes and Scheduled Tribes then the accused can be convicted for commission of offence under the said provision. The learned Trial Judge has materially erred as he has not discuss what is the evidence that the act was committed because of the caste of the prosecutrix. The sister-in-law of the prosecutrix had filed such cases, her husband and father-in-law had also filed complaints. We are unable to accept the submission of learned AGA that the accused knowing fully well that the prosecutrix belongd to lower strata of life and therefore had caused her such mental agony which would attract the provision of Section 3(2)(v) of the Atrocities Act. The reasoning of the learned Judge are against the record and are perverse as the learned Judge without any evidence on record on his own has felt that the heinous crime was committed because the accused had captured the will of the prosecutrix and because the police officer had investigated the matter as a attrocities case which would not be undertaken within the purview of Section 3(2)(v) of Atrocities Act and has recorded conviction under Section 3(2)(v) of Act which cannot be sustained. We are supported in our view by the judgment of Gujarat High Court in Criminal Appeal No.74 of 2006 in the case of ***Pudav Bhai Anjana Patel Versus State of Gujarat*** *decided on 8.9.2015 by Justice M.R. Shah and Justice Kaushal Jayendra Thaker (as he then was).*

39. Learned Judge comes to the conclusion that as the prosecutrix belonged to community falling in the scheduled caste and the appellant falling in upper caste the provision of SC/ST Act are attracted in the present case.

40. While perusing the entire evidence beginning from FIR to the statements of PWs-1, 2 and 3 we do not find that commission of offence was there because of the fact that the prosecutrix belonged to a certain community.

41. The learned Judge further has not put any question in the statement recorded under Section 313 of the accused

relating to rape or statement which is against him.

42. In view of the facts and evidence on record, we are convinced that the accused has been wrongly convicted, hence, the judgment and order impugned is reversed and the accused is acquitted. The accused appellant, if not warranted in any other case, be set free forthwith."

21. In the case at hand, no independent witness have been examined who would depose that the accused committed the offence on the ground that injured belonged to a community covered under SC/ST Act. This omission proves fatal for the prosecution in such a vital matter where punishment is for life imprisonment. The learned Judge has not even discussed the evidence and only on the basis of caste, he held that the offence was deemed to be committed. There is no deeming provision under SC/ST Act. In view of the above, we cannot concur with the learned Sessions Judge as the evidence which has been laid before the learned judge has been misread by learned Sessions Judge and he has misconstrued the provision of Section 3 (2) (v) of SC/ST Act. Conviction and sentence under Section 3 (2) (v) of the accused-appellant is, therefore, set aside

22. This takes us to the commission of offence under Section 326. Section 326 of IPC reads as under:

***"326. Voluntarily causing grievous hurt by dangerous weapons or means**--Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

23. The evidence in this matter of P.W.1 and P.W.2 coupled with the medical evidence and the fact that the injured had sustained burn injuries on the face, show that the injures had sustained grievous injuries. The provisions of Section 326 of IPC relates to voluntary causing grievous hurts by dangerous weapons or means. In this case the glass bottle filled with acid was used as weapon of offence and/or substance which is deleterious to the human body and, therefore, ingredients of Section 326 of IPC are made out. Section 320, Sixthly, designate "Permanent disfiguration of the head or face" as 'grievous hurt' which is punishable under Section 326 of IPC. The present offence falls in the said category and, therefore, we are unable to subscribe to the submission of the counsel for the appellant that no case is made out under Section 326 of IPC.

24. This takes us to the alternative submission of learned counsel for the appellant that the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

25. In ***Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]***, explaining rehabilitary & reformative aspects in

sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

26. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

27. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,*** the Supreme Court referred the judgments in ***Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463]*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of

sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

28. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

29. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

30. In view of the above, as far as offence under Section 326 of IPC is concerned, punishment of 10 years imprisonment is too harsh and the fine of Rs.25000/- is also too harsh. We reduce the sentence to 9 years' incarceration and fine to Rs.2000/-, reason being, the complainant and the injured would have been adequately compensated by the Government as they have invoked provisions of Section 3 (2) (v) of SC/ST Act. We do not direct refund of the said amount though we record clean acquittal under Section 3 (2) (v) of SC/ST Act. We also reduce the default sentence to one month.

31. The accused-appellant is in jail. If 9 years of incarceration is over, he shall be set free immediately, if not warranted in any other offence. The default sentence will be given effect to after completion of 9th year of incarceration and if the period of default sentence is also over, he need not pay fine. Record be transmitted to Trial Court.

(2022) 8 ILRA 327
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Crl. Misc. Application Defective (Leave To Appeal) No. 01 of 2014
(U/s 372 Cr.P.C.)
IN
Criminal Appeal No. NIL of 2013

Archana Devi ...Appellant (Informant)
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri P.K. Singh

Counsel for the Respondents:
Govt. Advocate, Sri Apul Mishra, Sri Rakesh Dubey

Criminal Law - Code of Criminal Procedure,1973 - Section 372 - Appeal for enhancement of punishment-not maintainable.

Appeal dismissed. (E-9)

List of Cases cited:

1. Parvinder Kansal Vs The St. of NCT of Del. & anr, 2020 (113) ACC 676

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

1. List revised. None is present to present this appeal on behalf of the applicant. Sri Rakesh Dubey, learned counsel for the accused-respondents is present.

2. The present appeal has been filed with delay condonation application.

3. Office has reported a delay of 122 days.

4. Sri Rakesh Dubey, learned counsel for the accused-respondent while drawing attention to the prayer clause has submitted that the present appeal has been filed for enhancement of the sentence. The prayer so made in the memo of appeal is quoted as under:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to enhance the sentence of accused respondents No. 2 & 3 and convict the accused respondent No. 3 to 6 who have been acquitted from the charges ignoring the evidence And /or pass such other and further order which this Hon'ble court may deem fit and proper in the circumstances of the case."

5. By placing reliance on the judgment of Hon'ble Apex Court in the case of **Parvinder Kansal Vs. The State of NCT of Delhi and Anr. reported in 2020 (113) ACC 676**, Sri Rakesh Dubey submitted that the appeal for enhancement of punishment u/s 372, Cr.P.C. is not maintainable, paragraph no. 9 which is quoted as under:-

"9. Chapter XXIX of the Code of Criminal Procedure, 1973 deals with "Appeals' and Section 372 makes it clear that no appeal to lie unless otherwise provided by the Code or any other law for the time being in force. It is not in dispute that in the instant case appellant has preferred appeal only under Section 372, Cr.P.C. The proviso is inserted to Section 372, Cr.P.C. by Act 5 of 2009. Section 372 and the proviso which is subsequently inserted read as under:

"372. No appeal to lie unless otherwise provided. - 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:

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court." A reading of the proviso makes it clear that so far as victim's right of appeal is concerned, same is restricted to three eventualities, namely, acquittal of the accused; conviction of the accused for lesser offence; or for imposing inadequate .A.@S.L.P.(Crl.)No.3928 of 2020 compensation. While the victim is given opportunity to prefer appeal in the event of imposing inadequate compensation, but at the same time there is no provision for appeal by the victim for questioning the order of sentence as inadequate, whereas Section 377, Cr.P.C. gives the power to the State Government to prefer appeal for

enhancement of sentence. While it is open for the State Government to prefer appeal for inadequate sentence under Section 377, Cr.P.C. but similarly no appeal can be maintained by victim under Section 372, Cr.P.C. on the ground of inadequate sentence. It is fairly well settled that the remedy of appeal is creature of the Statute. Unless same is provided either under Code of Criminal Procedure or by any other law for the time being in force no appeal, seeking enhancement of sentence at the instance of the victim, is maintainable. Further we are of the view that the High Court while referring to the judgment of this Court in the case of National Commission for Women v. State of Delhi & Anr. (2010) 12 SCC 599 has rightly relied on the same and dismissed the appeal, as not maintainable."

6. The appeal stands **dismissed** as not maintainable in the light of the judgment of Hon'ble Apex Court in the case of **Parvinder Kansal Vs. The State of NCT of Delhi and Anr**. reported in **2020 (113) ACC 676**.

7. Since this appeal itself is not maintainable therefore there is no question of consideration on delay condonation application, accordingly, the delay condonation application stands rejected. At present, there is no requirement to file leave to appeal.

8. The connected criminal appeal are of the year 2013, accordingly, office is directed to list the connected criminal appeals in the next cause list before appropriate bench.

(2022) 8 ILRA 329
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal U/S 372 No. 220 of 2021

Shyam Sunder Sharma
...Appellant/Complainant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Shyam Surat Shukla, Sri Shailendra Kumar Ojha

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure1973 - Section 372 - Appeal against acquittal- enormous delay in lodging of the FIR without explanation - nature of injuries do not support the case of the prosecution that after three hits by a four-wheeler upon a two-wheeler such type of injuries could have been sustained -no medical examination- material contradictions in testimony of the prosecution witnesses.

Appeal dismissed. (E-9)

List of Cases cited:

1.Tota Singh & anr. Vs St. of Pun., (1987) 2 SCC 529

2. Ramesh Babulal Doshi Vs St. of Guj. (1996) 9 SCC 225

3. St. of Raj. Vs St. of Guj. (2003) 8 SCC 180

4. St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755,

5.Chandrappa & ors. Vs St. of Kar., (2007) 4 S.C.C. 415

6.Ghurey Lal Vs St. of U.P., (2008) 10 SCC 450

7.Siddharth Vashishtha @ Manu Sharma Vs St. (NCT of Delhi), reported in (2010) 6 SCC 1

8.Babu Vs St. of Ker., (2010) 9 SCC 189

9.Ganpat Vs St. of Har., (2010) 12 SCC 59,

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Mah., (2010) 13 SCC 657

11. St. of U.P. Vs Naresh, (2011) 4 SCC 324

12. St. of M.P. Vs Ramesh, (2011) 4 SCC 786,

13. Jayaswamy Vs St. of Kar., (2018) 7 SCC 219,

14. Ramanand Yadav Vs Prabhu Nath Jha & ors., (2003) 12 SCC 606,

15. Jafarudheen & ors. Vs St. of Ker., JT 2022(4) SC 445

16. Mohan @Srinivas @Seena @Tailor Seena Vs St. of Kar., [2021 SCC OnLine SC 1233]

17. Kuldeep Singh Vs Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429

18.Atley Vs St. of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653

19. Apren Joseph @ Current Kunjukunju & ors. Vs The St. of Ker, (1973) 3 SCC 114

20. P. Rajagopal & ors. Vs St. of T.N. (2019) 5 SCC 403.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is an appeal u/s 372 of the Cr.P.C. 1973 instituted by the appellant/complainant against the judgment and order dated 10.08.2021 passed by learned Session Judge, Mathura in Sessions Trial No. 264 of 2019 (State Vs. Udaichand Sharma @ Uddi and one other) u/s 307/34, 325/34, 427, 504 IPC, P.S. Chhata, District Mathura acquitting the accused/opposite party nos. 2 and 3.

2. The factual matrix of the case is concerned as worded in the present appeal purported to be u/s 372 Cr.P.C. are that the appellant/complainant being Shyam Sundar Sharma S/o Sri Bhoop Singh R/o Village Bathain Kala, P.S. Kosikala, District Mathura had submitted that a typed complaint on 23.08.2018 with the allegation that on 13.08.2018 the appellant/complainant along with his brother Mukesh R/o Bathain Kala, Chatta, Mathura and Ram Gopal Tomar S/o Prem Singh R/o Laxmi Nagar, Krishna Nagar, Mathura had gone to the Registry Office, Chatta. It has been further alleged that the appellant/complainant had also gone to Police Station Chatta before Station House Officer in connection with his case. According to the appellant/complainant his brother Mukesh and Ram Gopal did not accompanied him as they were in the District Court. In the complaint it has further alleged that after meeting the Station House Officer at about 6 in the evening he while riding his motorcycle bearing registration no. HR30N0336 proceeded for his house situate at Bathain Kala and on Gauhari crossing he saw a car chasing him bearing registration no. HR50F5244 in which the accused respondent no. 2 Udai Chand S/o Chimman, Peetam S/o Nita @ Nitti opposite party no. 3 Giriraj S/o Nitti and Ravi S/o Giriraj were sitting and the said vehicle was driven by Ravi S/o Giriraj. As per the written complaint with the view to dispose of the appellant/complainant the subject vehicle hit the two wheeler of the appellant/complainant form the back on account whereof the appellant/complaint fell down on the surface of the road and thereafter again the vehicle which had proceeded from the place where the appellant/complainant fell down it was again taken back and put upon the

appellant/complainant in order to trample him. It is further alleged that accused uttered that earlier complainant got himself saved from gun shot firing which was resorted earlier and he still alive so in the aforesaid factual backdrop according to the appellant/complainant for the third time the vehicle was put to motion so as to trample the appellant/complainant. In the FIR it was further alleged that by that time brother of the appellant/complainant being Mukesh and one Ram Gopal came on the site in question and they witnessing the said incident proceeded to catch the accused but they fled away from there. In the FIR it was further alleged that the brother of the appellant/complainant being Mukesh and Ram Gopal took away to appellant/complainant to B.P.L. Nursing home, Kosi Kala wherein treatment at first instance was done by the Doctor therein, however looking into the severe injuries so sustained by the appellant/complainant, he was referred to Survodaya Hospital situate at Sector-8 Faridabad, Haryana. As per the FIR, the injuries so sustained by the appellant/complainant was to the effect that the bones of the shoulders got fractured and three ribs of left side also got fractured and injuries were sustained on head, hand and legs. Record reveals that the incident occurred on 13.08.2018 around 06:00 p.m. whereas the FIR was lodged on 23.08.2018 purported to be u/s 325, 307, 504, 429 IPC, Investigating Officer was nominated and he conducted the investigation.

3. In order to bring home the charges the following prosecution witness were produced namely:-

1.	Mukesh Sharma	P.W.-1
2.	Shyam Sundar Sharma	P.W.-2
3.	Dr. Raj Mishra	P.W.-3
4.	Dr. Mukesh Garg	P.W.-4
5.	Constable 405 Jitendra Singh	P.W.-5
6.	S.I. Rajveer Singh	P.W.-6
7.	Inspector Ramesh Chandra Sharma	P.W.-7

4. The prosecution produced the following exhibits in support of their case namely:-

1.	Written Complaint	Ex. A-1
2.	Medical Report	Ex. A-2
3.	Discharge Certificate	Ex. A-3
4.	X-ray Report	Ex. A-4
5.	C.T. Scan	Ex. A-5
6.	C.T. Scan Head Plan	Ex. A-6
7.	X-ray of Clavicle Spine	Ex. A-7
8.	X-ray of Left Elbow	Ex.-A-8
9.	X-ray Chest	Ex. A-9
10.	C.T. Scan Test	Ex. A-10
11.	X-ray L.S. Spine	Ex. A-11
12.	F.I.R.	Ex. A-12
13.	G.D.	Ex. A-13
14.	Site Plan	Ex. A-14
15.	Charge Sheet	Ex. A-15

5. On behalf of the defence the following witnesses were produced:-

1.	Pankaj	D.W.-1
2.	Bhoora Singh	D.W.-2

6. The charges so sought to be framed against the accused who are two in number u/s 304/34, 325/34, 427 and 504 IPC read over to the accused. The accused denied the charges while putting up a plea that they are innocent and they have been falsely implicated. The case was also committed for trial.

7. The trial culminated into passing of the order dated 10.08.2021 passed by

Additional Sessions Judge, Mathura in Session Trial No. 264/2019 acquitting the accused opposite party no. 2 in Case Crime No. 514/2018 P.S. Chhata, Mathura u/s 307/34, 325/34, 427, 504 IPC.

8. Challenging the judgment in question acquitting the accused who are two in number now the appellant/complainant is before this Court in the proceedings purported to be u/s 372 of Cr.P.C.

9. We have heard Sri S. S. Shukla, learned counsel for the appellant/complainant as well as Sri Ratan Singh, learned A.G.A. appearing for the State and perused the record.

10. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

11. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***Tota Singh and another vs. State of Punjab,*** reported in ***(1987) 2 SCC 529***, the Hon'ble Apex Court in paragraph-6 has observed as under: -

"6. The High Court has not found in its judgment that the reasons given by the learned Sessions Judge for discarding the testimony of PW 2 and PW 6 were either unreasonable or perverse. What the High Court has done is to make an independent reappraisal of the evidence on its own and to set aside the acquittal merely on the ground that as a result of such reappreciation, the High Court was inclined to reach a conclusion different from the one recorded by the learned Sessions Judge. This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a reappreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."

12. Further, in the case of ***Ramesh Babulal Doshi vs. State of Gujarat,*** reported in ***(1996) 9 SCC 225,*** *in* ***paragraph 7,*** the Hon'ble Apex Court observed as under:

"7. Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to

whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above-quoted conclusions. This Court has repeatedly laid down that the mere fact that a 'view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."

13. In the case of ***State of Rajesthan vs. State of Gujarat***, reported in ***(2003) 8 SCC 180,*** *in* ***paragraph 7***, the Hon'ble Apex Court observed as under:

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.[1]) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra[2], Ramesh Babulal Doshi v. State of Gujarat[3] and Jaswant Singh v. State of Haryana."

14. In the case ***of State of Goa vs. Sanjay Thakran***, reported in ***(2007) 3 SCC 755,*** *in* ***paragraph 15***, the Hon'ble Apex Court observed as under:

"15. Further, this Court has observed in Ramesh Babulal Doshi v. State of Gujarat: (SCC p. 229, para 7)

"7.... This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court

can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then - and then only - reappraise the evidence to arrive at its own conclusions." and in State of Rajasthan v. Raja Ram8: (SCC pp. 186-87, para 7) -

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra 10, Ramesh Babulal Doshi v. State of Gujarat and Jaswant Singh v. State of Haryana11"."

15. Further in the case of ***Chandrappa and others vs. State of Karnataka,*** reported in ***(2007) 4 S.C.C. 415***, the Apex Court has observed as under:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong

circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

16. In the case of ***Ghurey Lal vs. State of U.P.,*** reported in ***(2008) 10 SCC 450,*** *i*n ***paragraph 43 and 75,*** the Hon'ble Apex Court observed as under:

"43. The earliest case that dealt with the controversy in issue was Sheo Swarup v. King Emperor. In this case, the ambit and scope of the powers of the appellate court in dealing with an appeal against acquittal has been aptly a elucidated by the Privy Council. Lord Russell writing the judgment has observed as under (at AIR p. 230): (IA p. 404)

"... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he b has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

The law succinctly crystallised in this case has been consistently followed by this Court. On proper analysis of the ratio and findings of this case, it is revealed that the findings of the trial court are based on the fundamental principles of the criminal jurisprudence. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the trial court. The appellate court undoubtedly has wide powers of reappreciating and re-evaluating the entire evidence but it would be justified in interfering with the judgment of acquittal only when the judgment of the d trial court is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.

75. On careful analysis of the entire evidence on record, we are of the view that the reasons given by the High Court for reversing the judgment of acquittal is unsustainable and contrary to settled principles of law. The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable."

17. In the case of ***Siddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi),*** reported in ***(2010) 6 SCC 1***, *in* ***paragraph 303(1),*** the Hon'ble Apex Court observed as under:

"303. Summary of our conclusions:

(1) The appellate court has all the necessary powers to re-evaluate the evidence let in before the trial court as well as the conclusions reached. It has a duty to specify the compelling and substantial reasons in case it reverses the order of acquittal passed by the trial court. In the case on hand, the High Court by adhering to all the ingredients and by giving b cogent and adequate reasons reversed the order of acquittal. ..."

18. In the case of ***Babu vs. State of Kerala***, reported in ***(2010) 9 SCC 189***, *in* ***paragraph 12 and 19***, the Hon'ble Apex Court observed as under:

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P.1, Shambhoo Missir v. State of Bihar2, Shailendra Pratap v. State of U.P.3, Narendra Singh v. State of M.P.4, Budh Singh v. State of U.P.5, State of U.P. v. Ram Veer Singh6, S. Rama Krishna v. S. Rami Reddy7, Arulvelu v. State8, Perla Somasekhara Reddy v. State of A.P.9 and Ram Singh v. State of H.P.10).

...

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

19. In the case of ***Ganpat vs. State of Haryana***, reported in ***(2010) 12 SCC 59***, *in* ***paragraph 14 and 15***, the Hon'ble Apex Court observed as under:

"14. The only point for consideration in these appeals is whether there is any ground for interference against the order of acquittal by the High Court. This Court has repeatedly laid down that the first appellate court and the High Court while dealing with an appeal is entitled and obliged as well to scan through and if need be reappreciate the entire evidence and arrive at a conclusion one way or the other.

15. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly,

against an order of acquittal: (i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. (Vide Madan Lal v. State of J&K¹, Ghurey Lal v. State of U.P.2, Chandra Mohan Tiwari v. State of M.P.3 and Jaswant Singh v. State of Haryana4.)"

20. In the case of ***Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra***, reported in ***(2010) 13 SCC 657,*** *in* ***paragraph 38, 39 and 40***, the Hon'ble Apex Court observed as under:

"38. It is a well-established principle of law, consistently reiterated and followed by this Court that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanour of the witnesses is the best judge of the credibility of the witnesses.

39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration. The appellate court should bear in mind the presumption of innocence of the accused, and further, that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference.

40. In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding material or by taking into consideration irrelevant/inadmissible material. A finding may also be said to be perverse if it is "against the weight of evidence", or if the

finding so outrageously defies logic as to suffer from the vice of irrationality. (See Balak Ram v. State of U.P.9, Shailendra Pratap v. State of U.P.10, Budh Singh v. State of U.P.11, S. Rama Krishna v. S. Rami Reddy¹2, Arulvelu v. State 13, Ram Singh v. State of H.P.14 and Babu v. State of Kerala¹5.))"

21. In the case **of *State of U.P. vs. Naresh***, reported in ***(2011) 4 SCC 324***, *in* ***paragraph 33 and 34***, the Hon'ble Apex Court observed as under:

"33. We are fully aware of the fact that we are entertaining the appeal against the order of acquittal. Thus, the Court has to scrutinise the facts of the case cautiously and knowing the parameters fixed by this Court in this regard.

34. Every accused is presumed to be innocent unless his The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India. The law in this regard is well settled that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. An appellate court must also consider whether the court below has placed the burden of proof incorrectly or failed to take into consideration any admissible evidence or had taken into consideration evidence brought on record contrary to law? In exceptional cases, whether there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of acquittal. So, in order to warrant interference by the appellate court, a finding of fact recorded by the court below must be outweighed evidence or to suffer from the vice of guilt is proved. such finding if outrageously defies logic as irrationality. [Vide Babu v. State of Keralall and Sunil Kumar Sambhudayal Gupta (Dr.)8.]"

22. In the case of ***State of M.P. vs. Ramesh***, *reported in* ***(2011) 4 SCC 786***, in ***paragraph 15***, the Hon'ble Apex Court observed as under:

"15. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to reappreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal."

23. The Apex Court recently in ***Jayaswamy vs. State of Karnataka***, *(2018) 7 SCC 219*, has laid down the principles for laying down the powers of appellate court

in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"13. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

14. It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

24. The Apex Court recently in Jafarudheen & Ors. **vs. State of Kerala, JT 2022(4) SC 445** has observed as under:-

"DISCUSSION Scope of Appeal filed against the Acquittal:

25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed

only by thorough scrutiny on the accepted legal parameters. Precedents:

Mohan @Srinivas @Seena @Tailor Seena v. State of Karnataka, *[2021 SCC OnLine SC 1233] as hereunder: -*

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under : (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179]) "20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to

be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality.

(Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

14.3. In the recent decision of Vijay Mohan Singh [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586], this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of this Court right from 1952 onwards. In para 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai [Umedbhai Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108]. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence.

This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case.'

31.1. In Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320], the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question

whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable.

Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under:

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 : 1996 SCC (Cri) 972] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case.' 31.2. In K. Ramakrishnan Unnithan [K. Ramakrishnan Unnithan v. State of Kerala, (1999) 3 SCC 309: 1999 SCC (Cri) 410], after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation

of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653], in para 5, this Court observed and held as under:

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order. It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State [Surajpal Singh v. State, 1951 SCC 1207 : AIR 1952 SC 52]; Wilayat Khan v. State of U.P. [Wilayat Khan v. State of U.P., 1951 SCC 898 : AIR 1953 SC 122]) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.' 31.4. In K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305], this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."

N. Vijayakumar v. State of T.N., [(2021) 3 SCC 687] as hereunder: - "20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325 has

laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432) "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. Further in the judgment in Murugesan [Murugesan v. State, (2012) 10 SCC 383: (2013) 1 SCC (Cri) 69] relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction.

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23. Further, in Hakeem Khan v. State of M.P., (2017) 5 SCC 719 : (2017) 2 SCC (Cri) 653 this court has considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial court cannot be interdicted and the High Court cannot

supplant over the view of the trial court. Para 9 of the judgment reads as under: (SCC pp. 722-23) "9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This reason, coupled with the fact that the only independent witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned counsel for the respondent may be right in stating that the trial court went overboard in stating that the complainant party was the aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case. This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

24. By applying the abovesaid principles and the evidence on record in the case on hand, we are of the considered view that having regard to material contradictions which we have already noticed above and also as referred to in the trial court judgment, it can be said that acquittal is a "possible view". By applying the ratio as laid down by this Court in the judgments which are stated supra, even assuming another view is possible, same is no ground to interfere with the judgment of acquittal and to convict the appellant for the offence alleged. From the evidence, it is clear that when the Inspecting Officer and other witnesses who are examined on behalf of the prosecution, went to the office of the appellant-accused, the appellant was not there in the office and office was open and people were moving out and in from the office of the appellant. It is also clear from the evidence of PWs 3, 5 and 11 that the currency and cellphone were taken out from the drawer of the table by the appellant at their instance. There is also no reason, when the tainted notes and the cellphone were given to the appellant at 5.45 p.m. no recordings were made and the appellant was not tested by PW 11 till 7.00 p.m."

25. This Court had the occasion to consider the scope and the extent of interference in the cases, wherein this Court has to delve into the issues, which gets encompassed in the proceedings, and the judgment and the order under challenge is of acquittal and this Court in Government Appeal no. 3804 of 2001, State of U.P. vs. Subedar and others, has held that it is a settled principle of law that while exercising powers even at two reasonable views/conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court.

26. Undisputedly, as per the version as sought to be portrayed by the prosecution the alleged incident took place on 13.08.2018 according to which at about

06:00 p.m. the appellant/complainant who was riding the two wheeler being motorcycle having registration no. HR30N0336 proceeded from District Court to his house at Bathai Kala then a four wheeler bearing registration no. HR50F5244 had three times hit the bike of the appellant/complainant which was being driven by Ravi S/o Giriraj and besides the opposite party no.2 and 3 one Sri Giriraj S/o Nitti was also sitting in the said vehicle. As already discussed the incident took place on 13.08.2018 at 06:00 p.m., however the FIR was lodged on 23.08.2018 at 19:04 hours u/s 325, 307, 504 IPC. The reasons so offered by the appellant/complainant is to the effect that the delay occasioned on account of the fact that though the incident took place on 13.08.2018 at 6 in the evening however, he sustained severe injuries so his brother Mukesh and Ram Gopal took him to the B.P.L. Nursing Home, Kosikala wherein treatment was accorded to him, however, as he sustained grievous injury so he was referred to Survodaya Hospital, Sector-8, Faridabad, Haryana. So far as the nature of injuries are concerned, as per the version contained in the FIR the bones of his shoulder got fractured and three ribs of left side also got fractured and he sustained severe injuries on head, hand and legs. From the record it reveals that the appellant/complainant got admitted in Surovdaya Hospital at Sector-8 Faridabad on 13.08.2018 at 07:55 p.m. and he was discharged on 17.08.2018 itself wherein in the discharge summary certificate the has been shown to be 00:00:00. This Court further finds that taking the prosecution version on face value even if the appellant/complainant sustained injuries on 13.08.2018 and got discharged on 17.08.2018 then why FIR was not lodged immediately after discharge. An additional fact is also to be noted herein that once the incident occurred in Mathura then why the appellant/complainant or his brother who claimed to have witnessed the said offence, did not lodge FIR on 13.08.2018 and waited for approximately 10 days. Even from the perusal of the FIR in question that this Court finds that after discharge on 17.08.2018 why the appellant/complainant did not approach the concerned police station for lodging of the FIR, however, a plea has been taken that the FIR was not lodged by the police officials on the pretext that until and unless he gets a direction from the higher authorities and on 23.08.2018 as per the version contained in the FIR, the FIR will not be lodged. Further as per the FIR, the informant/complainant for the very first time approached for lodging of FIR on 23.08.2018 not prior to it.

27. Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory has observed in the case of **(1973) 3 SCC 114 Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala** wherein para 11 following was mandated:

11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or

contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.

28. In the case of **Tara Singh and others Vs. State of Punjab 1991 Supp (1) SCC 536**, the Hon'ble Apex Court in paragraph 4 has observed as under:-

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

29. Yet, in the case of **P. Rajagopal and others Vs. State of Tamil Nadu (2019) 5 SCC 403**, the Hon'ble Apex Court in paragraph 12 has held as under:-

12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and

without any motive for implicating the accused falsely.

30. Keeping the issue of delay in lodging of the FIR on one side the other facets of the matter is to be analyzed and scan. P.W. 1 who happens to be Mukesh Sharma the real brother of the appellant/complainant has deposed in his statement that he had witnessed the commission of the crime in question. As per the version contained in the FIR Mukesh did not accompany the appellant/complainant when he had gone to the District Court for some case, however, he along with one Ram Gopal were in the District Court. In the entire statement of the P.W. 1 Mukesh there has been no recital of the fact that as to how he reached the place of occurrence of commission of crime. Even otherwise, the statement of the P.W. 1 Mukesh itself create suspicion and cloud as in his cross- examintion at page no. 6 of the statement he has stated that he does not remember that what was the distance of his motorcycle viz a viz the motorcycle of the appellant/complainant. Even the statement has also been sought to be made that he was also not aware of the fact that the whether the appellant/complainant was lying down on the road on his stomach or back. Even the P.W. 1 Mukesh in his statement deposed that he is not aware at what time they reached the Survodaya Hospital, Faridabad and he is also not sure after how many days the appellant/complainant got discharged from the Survodaya Hospital, Sector-8, Faridabad. The entire statement of the P.W. 1 Mukesh itself creates serious doubt over the prosecution theory as one additional fact need to be noticed that P.W.1 Mukesh who happens to be the brother of the injured and thus in absence of any strong indication marking the accused to have commission of the crime and various contradictions in the statement of the P.W. 1 Mukesh Kumar, his statement becomes wholly unreliable to support the prosecution story.

31. P.W. 2 being Shyam Sundar Sharma is the injured as per the prosecution theory, the accused who are two in number with others had committed the offence however, this has come on record that the accused and the appellant/complainant belong to one village and in the year 2013 itself certain events occurred wherein proceedings u/s 307 IPC were initiated with respect of the commission of the crime and the case was shown to be pending thus, enmity bore in the heart of the accused and the complainant. In normal parlance the same may be a motive for commission of crime, however, what is to be seen is the fact that enmity is a two sided dragger and the Court has to be meticulous analysed in determining as to whether motive was the basis for committing crime. Here in the present case the Court finds that once on 13.08.2018 at 6 in the evening the alleged occurrence took place then why proceedings while complaint/FIR was not put to motion immediately. Rather, there were various hospitals including district hospitals available at Mathura where at the complainant could have got himself medically examined in the presence of law enforcing authorities however, the complainant got himself admitted in a private place being B.P.L. Nursing Home and thereafter got referred to Survodaya Hospital, Sector-8, Faridabad. In case, the injuries as stated by the complainant was so severe then it was not possible to take the injured to such a far place in another district. Nonetheless, P.W. 3 who happens to be Dr. Rajesh Mishra, C.M.O., Survodaya Hospital, Faridabad in his

statement has though recited the injuries and the physical status of the complainant but according to him the complainant was brought to emergency and the injuries so sustained is on account of road traffic accident in Chhata. The said statement also disbelieves the prosecution theory.

32. In defence D.W. 2 Pankaj got himself examined and according to him the complainant who is injured came to his house and he along with one Tejveer had taken into his house. In case the version so contained in the FIR is taken into face value viz a viz the statement of D.W. 1 Pankaj then it would emerge that the complainant went to his house at the first instance however, in the FIR in question and the statement of the other prosecution witnesses shows that the complainant was firstly taken to B.P.L. Nursing Home and from there he was referred to Survodaya Hospital, Sector-8, Faridabad.

33. Analysing the entire prosecution case while bestowing anxious consideration on the fact as to whether on the basis of the ocular testimony viz a viz the evidence so adduced by the prosecution whether conviction is possible or not this Court finds that not only there is enormous delay in lodging of the FIR without any plausible explanation coupled with the fact that the nature of injuries do not support the case of the prosecution that after three hits by a four wheeler upon a two wheeler such type of injuries could have been sustained particularly when the four wheeler is alleged to have been driven over the body of the injured as well as the additional fact that even as stated by the complainant he suffered serious injuries then to he did not get himself medically examined in the presence of law enforcing agency as well as the fact that there are material contradictions regarding the testimony of the prosecution witnesses which also included the fact that the P.W. 1 who happens to be brother of the injured could not prove his actual presence in the place of occurrence and further the issue with relation to taking away the injured to Faridabad despite adequate medical facilities available in Mathura that too in a private Nursing Home and referring to Survodaya Hospital, Faridabad after the incident and the statement of D.W. 1 Pankaj that he along with Tejveer had taken the injured from the place of occurrence to his house. These all factors shows that the prosecution theory is engineered to falsely implicate the accused who are two in number.

34. Hence, in any view of the matter applying the principles of law so culled out by the Hon'ble Apex Court in the facts of the present case, we have no option but to concur with the view taken by the learned Sessions Judge.

35. We find that it is not a case worth granting leave to appeal. The application for granting leave to appeal is rejected.

36. Since the application for granting leave to appeal has not been granted, consequently, present criminal appeal also stands **dismissed**.

37. Records of the present case be sent back to the concerned court below.

(2022) 8 ILRA 349
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal U/S 372 No. 254 of 2022

Devendra Singh ...Appellant-Informant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Ram Behari Saxena, Sri Aishwarya Saxena

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 498 A,201,302,304,322 & 323 - Prosecution witnesses and documents-weak evidence-FIR lodged after enormous delay.

Appeal dismissed. (E-9)

List of Cases cited:

1.Tota Singh & anr. Vs St. of Pun., (1987) 2 SCC 529

2.Ramesh Babulal Doshi Vs St. of Guj., (1996) 9 SCC 225

3.St.of Raj. Vs St. of Guj., (2003) 8 SCC 180,

4.St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755,

5.Chandrappa & ors. Vs St. of Kar., (2007) 4 S.C.C. 415

6.Ghurey Lal Vs St. of U.P., (2008) 10 SCC 450

7.Siddharth Vashishtha @ Manu Sharma Vs St. (NCT of Delhi), (2010) 6 SCC 1

8. Babu Vs St. of Ker., (2010) 9 SCC 189

9. Ganpat Vs St. of Har., (2010) 12 SCC 59

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Mah., (2010) 13 SCC 657

11. St. of U.P. Vs Naresh, (2011) 4 SCC 324,

12. Jafarudheen & ors. Vs St. of Ker., JT 2022(4) SC 445

13.Mohan @Srinivas @Seena @Tailor Seena Vs St. of Kar., [2021 SCC OnLine SC 1233]

14.Vijay Mohan Singh Vs St. of Kar., (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586]

15.Umedbhai Jadavbhai [Umedbhai Jadavbhai Vs St. of Guj., (1978) 1 SCC 228 : 1978 SCC (Cri) 108]

16. 1973) 3 SCC 114 Apren Joseph Alias Current Kunjukunju & ors. Vs The St. of Ker.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal under Section 372 of Criminal Procedure Code, 1973 (in short 'Cr.P.C.'), instituted by the appellant informant seeking to challenge the judgment and order dated 14.12.2018 passed by Additional District and Sessions Judge, (Faminine) Fast Tract Court-1, Mathura in Sessions Trial No.40 of 2012 (State Vs. Tejveer & others) in Case Crime No.218 of 2010, under Sections 498A, 201, 302, 304 IPC, P.S. Mant, District Mathura acquitting the accused opposite parties No. 2 to 8.

2. The factual matrix of the case as worded in the present appeal are that the appellant-informant being Devendra Singh son of Deshraj had submitted a written report in Police Station Mant, District Mathura with an allegation that the sister of the appellant-informant being Shreemati solemnised marriage with Tejveer son of Vijendra Singh being accused opposite party no.2 in the year 2000.

3. As per the written report the opposite party no.2 being Tejveer son of Vijendra Singh husband opposite party and the in-laws of the sister of the informant demanded dowry and harassed his sister pursuant whereof a first information report was lodged against the accused herein under being FIR No. 3 of 2006, under Sections 498A, 322 IPC and also Criminal Case No.141 of 2007, under Sections 498A and 323 IPC. It has further been alleged that proceedings under Section 125 Cr.P.C.

was also lodged by the sister of the informant which got registered as Case No.502 of 2007 before the Police Station Raya. However, thereafter compromise/settlement was entered into between the parties and thereafter the informant sister being Shreemati started residing in her in-laws place. Allegation was also made to the effect that consequent to the staying of the sister of the informant in-laws place the attitude of the accused husband and the in-laws did not change and they acted in a manner which was unbecoming of husband and in-laws and the position which existed prior to lodging of the above mentioned proceedings continued.

4. As per prosecution the informant use to visit his sisters in-laws place in every two months in order to know about his sisters marital position and relationship of hers with her in-laws. As per the prosecution theory on 23.10.2010 the informant proceeded to his uncle's (Foofa) place being Dharmpal son of Mohan Lal, who was residing near the house of her sister's in-laws place. According to the informant in the intervening night of 23/24.10.2010, when he was sleeping in his uncle's place then at 2.30 a.m. his uncle heard screaming of Shreemati and he woke up the informant and thereafter the informant along with his uncle Dharmpal immediately proceeded to the house of his sister and at that relevant point of times the accused herein met him as they were not sleeping and they apprised the informant that Shreemati (deceased) was having eight month pregnancy and due to certain complications they were taking the deceased to Raya hospital.

5. Accordingly, the complainant and his uncle Dharmpal apprised the in-laws of the deceased that they are proceeded to their own house and they will come in the next morning in the hospital. As per the prosecution theory on the next morning the informant along with his second uncle (Phupha), Sri Man Singh son of Sri Hari Singh along with Dharmpal proceeded to the hospital in question and when they traced the whereabouts of the deceased they could not find her thus according to the informant, the husband and the in-laws and the other accused herein have disposed of his sister Shreemati and the baby which was in the womb and hidden the dead body. It has further come on record that the first information report was lodged on 29.10.2010 before the police station Mant which was registered as Case Crime No.218 of 2010, under Sections 304, 498A & 201 IPC against the accused herein.

6. Consequent to the lodging of the first information report in question one Sri Anil Kumar Sharma was nominated as the Investigating Officer. Records further reveal that site plan was also prepared and investigation was put to motion. A charge sheet purported to be under Section 304, 498A and 201 IPC was also submitted against the accused. In the Sessions Trial No.40 of 2012 on 25.5.2012 proceedings were also undertaken under Section 319 of the Cr.P.C. and by virtue of order dated 8.7.2015 case was committed to sessions and subsequently charges were read over to the accused. Accused pleaded innocence and not guilty.

7. In order to bring home the charges, the prosecution produced the following witnesses, namely:

1.	Devendra Singh	PW1
2.	Dharmpal	PW2
3.	Ved Prakash	PW3

4.	Karan Singh	PW4
5.	Munshi Lal Saraswat	PW5
6.	Updesh Kumar	PW6
7.	Anil Kumar Sharma	PW7

The prosecution produced the following documents in order to prove the charge:-

1.	Written report	Ex.ka1
2.	Report of Omvati Nursing Home	Ex.ka2
3.	Receipts of Omvati Nursing Home	Ex.ka3
4.	Receipts of Omvati Nursing Home	Ex.ka4
5.	First Information Report	Ex.ka5
6.	Nakal Report	Ex.ka6
7.	Site plan	Ex.ka 7
8.	Charge sheet	Ex.ka 8

The defence produced one Sri Charan Singh, DW2 in order to substantiate their version.

8. We have heard Sri Aishwarya Saxena, holding brief of Sri R.B. Saxena, learned counsel for the appellant and Sri Ratan Singh, learned A.G.A. for the State.

9. Before delving upon the issue in question which is being sought to be raised at the behest of the informant/complainant while filing the present appeal purported to be under Section 372 Cr.P.C. against the order of acquittal so passed in favour of the accused herein.

10. This Court has to bear in mind the judicial verdict and the mandate so envisaged by the Hon'ble Apex Court wherein the courts of law have been cautioned while exercising jurisdiction under Section 372 Cr.P.C. as well as Section 378 of the Cr.P.C. when the courts of law have been occasioned to deal with the Government Appeal against the acquittal.

11. The Hon'ble Apex Court in the series of decisions have been consistently mandating that it is well settled principle of law that appellate courts hearing the appeal filed against the judgment and the order of the acquittal should not overrule or otherwise disturbing the judgment acquittal, if the appellate court does not find substantiate and compelling reasons for doing so.

12. Nonetheless if the trial courts conclusion with regard to the facts is palpably wrong if the trial court decision was based on erroneous view of law and the judgment is likely result in grave miscarriage of justice and the approach proceeded towards wrong direction or the trial court has ignored the evidence or misread the material evidence which should have determining the factor in the lis of the matter then obviously the appellate court is right in interfering with the order acquitting the accused. However, Hon'ble Apex Court has further held that in case two views are possible and the view so taken by the trial court while acquitting the accused is a plausible view then in the backdrop of the fact that there is double presumption of innocence available to the accused then obviously the appellate court should not interfere with the order of acquittal.

13. The above noted proposition of law is clearly spelt out in umpty number of decisions, some of them are as under namely:-***Tota Singh and another vs. State of Punjab, (1987) 2 SCC 529, Ramesh***

Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225, State of Rajesthan vs. State of Gujarat, (2003) 8 SCC 180, State of Goa vs. Sanjay Thakran, (2007) 3 SCC 755, Chandrappa and others vs. State of Karnataka, (2007) 4 S.C.C. 415, Ghurey Lal vs. State of U.P., (2008) 10 SCC 450, Siddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi), (2010) 6 SCC 1, Babu vs. State of Kerala, (2010) 9 SCC 189, Ganpat vs. State of Haryana, (2010) 12 SCC 59, Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra, (2010) 13 SCC 657, State of U.P. vs. Naresh, (2011) 4 SCC 324, State of M.P. vs. Ramesh, (2011) 4 SCC 786, and ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219.***

14. The Apex Court recently in ***Jafarudheen & Ors. vs. State of Kerala, JT 2022(4) SC 445*** has observed as under:-

"DISCUSSION Scope of Appeal filed against the Acquittal:

25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. Precedents:

Mohan @Srinivas @Seena @Tailor Seena v. State of Karnataka, [2021 SCC OnLine SC 1233] as hereunder: -

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under : (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179]) "20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality.

(Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

14.3. In the recent decision of Vijay Mohan Singh [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586], this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of this Court right from 1952 onwards. In para 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai [Umedbhai Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108]. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence.

This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case.'

31.1. In Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320], the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable.

Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under:

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 : 1996 SCC (Cri) 972] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by

the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case.'

31.2. In K. Ramakrishnan Unnithan [K. Ramakrishnan Unnithan v. State of Kerala, (1999) 3 SCC 309: 1999 SCC (Cri) 410], after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653], in para 5, this Court observed and held as under:

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order. It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State [Surajpal Singh v. State, 1951 SCC 1207 : AIR 1952 SC 52]; Wilayat Khan v. State of U.P. [Wilayat

Khan v. State of U.P., 1951 SCC 898 : AIR 1953 SC 122]) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.' 31.4. In K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305], this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."

N. Vijayakumar v. State of T.N., [(2021) 3 SCC 687] as hereunder: - "20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325 has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432) "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. Further in the judgment in Murugesan [Murugesan v. State, (2012) 10 SCC 383: (2013) 1 SCC (Cri) 69] relied on by the learned Senior Counsel for the appellant, this Court has considered the

powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction.

xxx xxx xxx

23. Further, in Hakeem Khan v. State of M.P., (2017) 5 SCC 719 : (2017) 2 SCC (Cri) 653 this court has considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court. Para 9 of the judgment reads as under: (SCC pp. 722-23) "9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This reason, coupled with the fact that the only independent witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned counsel for the respondent may be right in stating that the trial court went overboard in stating that the complainant party was the aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case. This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

24. By applying the abovesaid principles and the evidence on record in the case on hand, we are of the considered view that having regard to material contradictions which we have already noticed above and also as referred to in the trial court judgment, it can be said that acquittal is a "possible view". By applying the ratio as laid down by this Court in the judgments which are stated supra, even assuming another view is possible, same is no ground to interfere with the judgment of acquittal and to convict the appellant for the offence alleged. From the evidence, it is clear that when the Inspecting Officer and other witnesses who are examined on behalf of the prosecution, went to the office of the appellant-accused, the appellant was not there in the office and office was open

and people were moving out and in from the office of the appellant. It is also clear from the evidence of PWs 3, 5 and 11 that the currency and cellphone were taken out from the drawer of the table by the appellant at their instance. There is also no reason, when the tainted notes and the cellphone were given to the appellant at 5.45 p.m. no recordings were made and the appellant was not tested by PW 11 till 7.00 p.m."

15. Bearing in mind the proposition of law so culled out by the Hon'ble Apex Court in the above noted decisions coupled with the limitations so envisaged while deciding the present appeal which emanates at the instance of an informant against the acquittal of the accused, now the present case in hand is to be analysed while giving the verdict as to whether the trial court was in error in acquitting accused or not.

16. To begin with the ocular testimony of the prosecution witness is to be first analysed.

17. The prosecution produced PW1 being Devendra Singh in witness box and as per the testimony of Devendra Singh, the marriage of his sister Shreemati (since deceased) was solemnised in the year 2000 with Tejveer and according to PW1 Tejveer and his parents along with the relatives who are accused herein used to demand dowry and also kept on metting deceased with harassment.

18. As per PW1, he on the fateful day i.e. 23/24.10.2010 was in his uncle Dharmpal place which is nearby to the in-laws house and his uncle heard the screaming of his sister, consequently when they approached the in-laws place then they were apprised that the deceased was pregnant and her pregnancy was of eight months and due to certain complications she was unwell and labour pain occurred which resulted into screaming and accused assured the informant and his (Phupha) uncles that they were proceeding to take her to Raya hospital and on their assurance informant along with uncle came back to house and when they on the next day went to the hospital whereas whereabouts of the sister were not found.

19. PW1 in this statement has further deposed that on 23/24.10.2010, he found that the husband of the deceased being Tejveer beating his sister with cuddle and when the informant and his uncle Dharmpal tried to save her then he pushed them and the Jeth of the sister of the informant while holding the hand of the deceased throwed her in the vehicle being four-wheeler.

20. PW2 one Dharmpal presented himself as PW2 and he in his examination in chief has deposed that the deceased Shreemati is the daughter of his brother-in-law and she got married 13 years back and adquate gifts were offered to the in-laws of the deceased. According to PW2 Shreemati the deceased used to complaint that she was administered beating on account of non-payment dowry commensurate to the demand so raised. In the deposition of the PW2, it has been further deposed that the house of the in-laws of the deceased is just 4/5 steps from his house and on 23/24.10.2010 PW1 had stayed with him and when they had heard screams of the deceased, they had proceeded to in-laws house. It was further deposed that the accused herein were beating the deceased and when they resisted then it was of no avail and they took away the deceased in a four-wheeler being Bolero.

21. PW3 Dr. Ved Prakash in his examination-in-chief has deposed that he is the owner of the Omvati Nursing Home Trans Jamuna, Mathura. According to him on 23.10.2010, the deceased came to his nursing home in connection with stomach ache and she was having high pulse rate and even the heartbeats were also high, she was suffering from high-blood pressure and fever also. According to PW3, he attended her and provided medication and also put her on sline and injected her and discharged on the same day. According to PW1 the stomach ache also disappeared.

22. PW4 Karan Singh also appeared in the witness box and in his examination-in-chief he deposed that he knew Tejveer, who happens to be the husband of the deceased, however, he is not knowing the deceased. He is also not conversant with the fact that there was any marital discord was between the deceased and the accused, who happens to be the husband and he is also not aware that the deceased died on 24.10.2010 in the village, however he had heard about the same. It has further been deposed that he is not aware about the pregnancy of the deceased and he is totally ignorant about the fact that Tejveer being accused opposite party no.2 had used his leg while putting it upon the deceased that too on stomach on account whereof the deceased died.

23. PW5 Munshi Lal Saraswat in his deposition stated that he is an organiser of the cremation place being Dhruva Ghat since 2005 and he was holding the said office on 24.10.2020 and according to him the cremation ceremony was not conducted on 24.10.2010 in the subject Ghat.

24. One Updesh Kumar PW6 also appeared in the witness box, according to him he is the head writer of the police station Mant on 29.10.2010, first information report in question was lodged.

25. As PW7 Anil Kumar Sharma appeared while deposing that he was SHO of police station Mant on 29.10.2010 and on the same day on the basis of the written complaint so lodged by PW1 Devendra Singh FIR under Section 304, 498A and 201 IPC was registered being Case Crime No.218 of 2010.

26. So far as the defence witness being DW1 the accused got Charan Singh examined. According to DW1 Charan Singh, the marriage of the deceased with the accused Tejveer was solemnised 17-18 years ago and he being the neighbour attended the marriage. According to him after marriage there was matrimonial discord between the deceased and her husband. however consequent to the settlement, they were living together happily. He also deposed that the deceased was pregnant, however on the fateful day i.e. 23/24.10.2010 suddenly complications occurred pursuant whereof the deceased started vomiting and witnessing stomach ache and thereafter consequent to the screaming, he along with the other neighbours inclusive of ladies went in the house and then they were apprised that the deceased was being taken to hospital and the deceased was being put up in the four-wheeler and he in his motorcycle went to the Nursing Home where medication was done and it revealed that the baby had died in the womb on account whereof poison was being scattered in the body and thereafter it was advised that the deceased be taken to hospital at Agra and then the deceased was taken to Agra hospital and in the meantime, he came back to his village. According to DW1 subsequently he got the

information that the deceased had died. It was further deposed that from the maternal side of the deceased about 3-4 persons came and the villagers, who was staying in the village of the in-laws had gone to the cremation ground at Mathura and attended cremation ceremony.

27. Records reveal that the first information report was lodged on 29.10.2010 at about 12.30 hours in police station Mant, District Mathura. It is not disputed that the alleged incident which is being sought to be made a ground for commission of the crime occasioned on 23/24.10.2020 at about 2.30 hours in the morning. As per the records the place of the occurrence about 7 kms. towards east from the police station Mant, District Mathura.

28. Now a question arises as to why the first information report in question has been lodged after a period of 5 days, when admittedly the first informant being the PW1 Devendra Singh was already present on 23/24.10.2010 at a place where the deceased was said to have been tortured and administered beating with the aid of leg so used by the accused opposite party no.2 being Tejveer (husband).

29. An explanation has been offered by the PW1 Devendra Singh being the first informant that on 24.10.2010, he came to know from the in-laws place that his sister has died and accordingly he submitted a written report on 24.10.2010 before the concerned police station but the same was not registered and so he got the first information report registered by virtue of a written report at second instance on 29.10.2010. The said deposition finds place at page-7 of PW1 Devendra Singh.

30. A perusal of the first information report in question further reveals that no such fact has been recited in the first information report. Even otherwise as per the statement of PW1 Devendra Singh, he could not give the name description and details of person, who told him that his sister died on 24.10.2010.

31. Remarkably another fact also need to be noticed that PW1 in his statement has come up with a stand that on 23/24.10.2010 when after hearing the hue and cry of his sister when he along with his uncle reached there then they witnessed the fact that Tejveer being the accused husband was beating his sister and when PW1 and his uncle Dharmpal intervened then they were kept aside. Further the said fact also does not find place in the first information report. Meaning thereby that the first informant had full knowledge regarding the incident which occurred on 23/24.10.2010 then to first information report has been lodged after enormous delay. Even otherwise there is no plausible explanation offered by the informant in lodging the first information report after such a long unexpected delay.

32. Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory has observed in the case of **(1973) 3 SCC 114 Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala** wherein para 11 following was mandated:

11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal

investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.

33. In the case of ***Tara Singh and others Vs. State of Punjab 1991 Supp (1) SCC 536***, the Hon'ble Apex Court in paragraph 4 has observed as under:-

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

34. Yet, in the case of ***P. Rajagopal and others Vs. State of Tamil Nadu (2019) 5 SCC 403***, the Hon'ble Apex Court in paragraph 12 has held as under:-

12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving

much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely.

35. Applying the judgments with relation to the impact of delay in lodging of the first information report, the prosecution case cannot be thrown out or disbelieved, however certain other factors so as to put a nail upon the coffin for convicting needs to be further analysed.

36. In order to link the accused with respect to the commission of the crime, the allegations so contained in the prosecution theory is to be first noticed. As per the FIR allegation has been levelled with the accused herein being the in-laws of the deceased had been demanding theory and when the same was not being fulfilled as per the expectation of the in-laws then harassment coupled with beating was also administered. It has also come on record that proceedings under Section 498A, 323 IPC as well as under Section 125 Cr.P.C. was also lodged. PW1 being Devendra Singh in his statement had though deposed that even after settlement between the deceased and her husband and their relatives, the position did not change at all and she was met with harassment and after approximately 8 years from the date of the marriage, dowry was also demanded. PW1 Devendra Singh has further deposed that the deceased was 8th passed and she was good in writing Hindi. However, there was no letter/complaint written by the deceased regarding harassment, however she had told oraly.

37. Similarly, PW2 Dharmpal, who happens to be the uncle of the informant has reiterated the statement of the PW1 in relation to the demand of dowry. It has further come on record that the PW2 in his statement has come up with a stand that the accused are possessing 10-11 Bigha of agriculture land tractor etc. However, there is nothing on record to substantiate the fact that after settlement so arrived between the deceased and her in-laws family, there was any beating or harassment being meted to her. Baring oral allegations there is nothing on record to substantiate the same.

38. Learned Trial Court has analysed the said issue in detail and has recorded a categorical finding that the prosecution had miserably failed to prove the fact that the deceased died due to non-fulfillment of the expectations of the in-laws relating to demand of dowry.

39. The issue can also be seen from another point of angle that first of all, first information report has been lodged after five days despite the fact that the first informant was himself present on 23/24.10.2010 and according to him he had gone into in-laws place. Further another aspect which needs to be considered while delving into the issue is with respect to the fact that in the first information report, there was no indication that the husband of the deceased Tejveer was beating the deceased though subsequently in the statements of the PW1 and 2, it has been stated that the deceased was subjected to beating by her husband and in-laws. In order to attract the provisions contained under Section 498A read with Section 302, 304 and 201 IPC, the prosecution has to prove that the death occurred on account of demand of dowry.

40. The present case can viewed from the fact that though proceedings under Section 498A, 323 IPC and Section 125 Cr.P.C. was also lodged but the deceased was living with amicably in-laws place even after settlement. Even PW2 in his statement at page 4 had stated that he had informed the police officials regarding the administering of beating by tin-laws upon the deceased but the same was not written. Even PW2 in his statement at page 4 has deposed that he is not aware as to why in the first information report the fact regarding administrating of beating by the accused was not written.

41. It is quiet paradoxical and amazing that in case the prosecution story so build up by them with respect to administrating of beating of that too of a pregnant woman was being witnessed by the PW1 & PW2 then why the same did not find place in the first information report and further the fact as to why after five days the FIR was not lodged. It is not case wherein PW1 is a stranger rather he is the real brother of the deceased. Moreso the deceased happens to be the daughter of the brother-in-law of PW2 and stays in a place which is very close to the in-laws of the deceased then to he did not take any immediate steps. The said fact itself shows that the prosecution story has been engineered just in order to implicate the accused.

42. PW1 Devendra Singh has further deposed that he is not aware whether the cremation ceremony of the deceased was done at a Dhruv Ghat in Mathura and about the fact that receipts have been submitted before the trial court or not. However, from the documents, he has come to know that the deceased cremation ceremony was conducted in Mathura and further it is falls to say that in the cremation ceremony any of the members of his family were present.

43. PW5 Munshi Lal Saraswat, who happens to be the organiser of Dhruv Ghat at Mathura, came in the witness box and according to him, no cremation ceremony was conducted therein. In his cross-examination, he has come up with a stand that he is posted as an organiser in the Dhruv Ghat cremation place since 2005 and on 24.10.2010, he was holding the office of the organiser and on that day no cremation ceremony of Shreemati was done. The said facts itself shows that the prosecution proceeds on weak evidence and further there is nothing on record to link the accused while commission of the crime.

44. More so, DW1 Charan Singh in his cross-examination has supported the case of the defence and has further deposed that the house of the accused is in between 8-10 house from his house and he is not aware about the fact that Tejveer and the deceased had certain marital discard which emerged in a form of fighting. According to him, deceased was witnessing certain complications regarding her pregnancy, he did not enter the house on the fateful day, however certain ladies of the village, they entered the house and he was informed that the situation of the deceased was critical and thereafter she was taken to the hospital in a four-wheeler. However, he is not aware about the details of the car and his number. According to him the four-wheeler was of white colour and he had proceeded in a motorcycle, the motorcycle belonged to one Pratap and thereafter, he came back and subsequently, he was informed that the

deceased had died and in the cremation ceremony, maternal side of the deceased were present.

45. Meticulously, analysing the prosecution case in the backdrop of the testimony of the prosecution witnesses and the documents so produced before the trial court this Court finds that the prosecution story proceeds on weak evidence and the same in no manner whatsoever completely links the accused with respect to commission of crime. Notably, not only the first information report has been lodged after 5 days and the occurrence took place on 23/24.10.2010, FIR lodged on 29.10.2010, absence of plausible explanation in lodging of the FIR coupled with the fact that even the prosecution has failed to prove that the death of the deceased occurred on account of dowry attracting the provisions contained under Sections 498A IPC and further the fact that improvement has been sought to be made as certain allegations have been sought to be inserted, which did not find place in the first information report that too in a such situation wherein the first informant was present at the time of the alleged occurrence and the fact that he is the real brother of the deceased.

46. Nonetheless, this Court finds that the view taken by the learned Trial Court while acquitting the accused does not warrant any interference as no other view is possible even if it is possible also, this Court will not grant indulgence while reversing the judgment of the acquittal while convicting them in absence of wreak evidence so sought to be propagated by the prosecution.

47. In view of above, the Criminal Appeal is **dismissed**.

48. The records be sent back to the court-below.

(2022) 8 ILRA 365
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.08.2022

BEFORE

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

Government Appeal No. 3339 of 1985

State of U.P. ...Appellant
Versus
Ram Naresh & Ors.
...Accused-Respondents

Counsel for the Appellant:
A.G.A., Sri A.D. Giri

Counsel for the Respondents:
Sri Ravindra Rai, Sri Ashok Kumar Mishra, Sri Ramji Singh Patel, Sri Rupak Chaubey

(A) Criminal Law – Criminal Procedure Code, 1973 - Sections 107, 117, 154, 378 & 428 - Indian Penal Code, 1860 - Sections – 148, 149, 302, 304-(II) & 307 - Indian Evidence Act,1872 - Sections 3, 27 & 116 : - Govt. Appeal – against acquittal - Offence of murder & attempt to murder - Prosecution alleging that the incident was took place at his own house where a Panchayat was assembled for settlement of an quarrel arises between the both the parties wherein accused persons hurled Gandasa and co-accused persons armed with gun, Lathi, fired upon deceased-father of complainant and other injured persons - FIR lodged promptly - Trial court acquitted all the accused by giving finding that, prosecution were failed to proved the motive, place of occurrence, manner of incident and testimony of the witnesses are full of contradiction on the point of theory of Panchayat, theory of light and further being all the witness are family members - Appeal - on scrutinizing the evidence on record - Court held that - Trial court taken pains & stretched itself in

fishing out very minor discrepancies to dislodge the prosecution case by ignoring overtly the consistent testimony of the ocular witnesses - order of acquittal is liable to be set aside.(Para - 37, 38, 66, 67, 68, 69)

(B) (A) Criminal Law – Criminal Procedure Code, 1973 - Sections 154 & 378 - Indian Penal Code, 1860 - Sections 148, 149, 302, 304 (II &, 307 - Indian Evidence Act, 1872 - Sections 3, 27 & 116 : - Common intention - Offence of murder and attempt to murder - Accused exhorted to finish deceased for falsely implicating them - Accused hurled Gandasa to cause injury but missed the target - Though accused had not caused injury , they are vicariously liable for acts of co-accused, as all came together on spot - Overt acts and active participation established their common intention. (Para 67, 68, 69)

Appeal Allowed. (E-11)

List of Cases cited: -

1. Anwar Ali Vs St. of H.P. (2020) 10 SCC 166.

2. Babu Vs St. of Kerala - (2010) 09 SCC 189,

3. Atley Vs St. of UP - (AIR) 1955 SC 807,

4. Chandrappa Vs St. of Karn. - (2007) 4 SCC 415,

5. Murugesan Vs State - (2012) 10 SCC 383,

6. Tarsem Kumar Vs Delhi Administration 1994 Suppl. 3 SCC 367,

7. Mukesh Vs St. (NCT of Delhi) - 2017 (6) SCC 1,

8. Sardul Singh Vs St. of Punjab (1994) Cr. LJ626 (SC),

9. St. of UP Vs Anil Singh (1988) Suppl. SCC 686,

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

11. Gangadhar Behera Vs St. of Orissa (2002) 8 SCC 381,

12. Miller Vs Minister of Pensions (1947) 2 All ER 373,

13. In Masalti Vs St. of U.P. (AIR 1965 SC 202, (1965) 1 Cr. L.J. 226,

14. Lalji Vs St. of U.P. - (1989) 1 SCC 437,

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

1. Heard Sri Vikas Goswami, learned A.G.A. for the State and Sri Ashok Kumar Mishra, learned counsel for the accused respondents.

2. The instant appeal has been filed against the judgment and order dated 05.09.1985, passed by the Ist Additional District and Session Judge, Varanasi, in Session Trial No. 244 of 1984, under sections 302/149, 307/149 I.P.C., whereby, the accused respondents have been acquitted.

3. The appeal has been filed against all the acquitted accused. During pendency of the appeal the second respondent-Yadurai, S/o Sri Alakh Narain, and third respondent-Harishankar, S/o Sri Brajnath Singh, have died. Accordingly, the appeal against them stands abated. First respondent-accused Ram Naresh, fourth respondent-Devendra and fifth respondent-Virendra are opposing the appeal and the present appeal is confined to the said accused.

Prosecution case:

4. As per prosecution case, accused Yadurai was assigned the role of firing and accused-Harishankar of causing injury by lathi. First, fourth and fifth respondent have been assigned assault weapon gadasa and farsa. Fourth and fifth respondents are brothers and sons of first respondent.

5. As per F.I.R., complainant Udaynath Singh (P.W.-1) alleged that about 20-25 days prior to the incident there was quarrel between the accused and Baba @ Digvijay Nath Dubey. Attempts were made to arrive at a compromise between the quarrelling parties, but failed. On 08.04.1984, at about 9 P.M., a community panchayat was convened at the door of the complainant to settle the matter between the parties, both the parties were invited to the panchayat. It is stated that Baba @ Digvijay Nath Dubey (P.W.-3), his sister Pramila Devi, his aunt Indrawati Devi, his younger brother Narendra Nath Dubey and Dhirendra Nath Dubey had come to attend the panchayat. The complainant's father Kedar Singh (deceased) and his younger brother Mahendra (P.W.-2), Surendra, Rajendra and the wives of Rajendra and Surendra were also present. Panchayat was convened by father of the complainant on the consent of both the parties.

6. It was further stated that there was electric light burning at the door of the complainant and a mercury light at the crossing of the road. It was moonlit night. A person was sent to call the accused persons. He returned informing that they will come shortly. It is alleged that in the mean time accused Yaduri armed with gun, accused Harishankar with lathi, accused Ram Naresh, Devendra and Dhirendra armed with gadasa came on the spot. Accused started hurling abuses and exhorted that family of Kedar Singh (deceased) wants to suppress and humiliate them in collusion with the family of Baba; and at that moment accused Yadurai fired five shots from his gun injuring Kedar, Smt. Nirmala Devi, Mahendra, Smt. Pramila and Smt. Indrawati. Mahendra is said to have also received single blow of lathi afflicted by accused Harishankar. Ram Naresh Singh, Virendra and Devendra wielded gadasa, but, no one was injured. An alarm was raised, patrol police reached, accused escaped. The complainant send his injured father, Nirmala Devi, Pramila, Indrawati alongwith his younger brother Rajendra to district Hospital at Varanasi; father of the complainant (Kedar Singh) succumbed to the injuries in the hospital on the same night.

7. On written complaint, F.I.R. was promptly registered, the case was investigated and upon investigation, charge sheet was submitted against the accused under sections 302/149, 307/149 I.P.C. The case was committed to the court of session for trial. The prosecution examined in all eight witnesses. (P.W.-1) complainant Uday Nath Singh, eye witness and he proved the report; (P.W.-2) Mahendra Singh brother of the complaint is an injured eye witness; (P.W.-3) Digvijay @ Baba is also the eye witness; (P.W.-4) Nirmala a family member of complainant, is an injured eye witness; (P.W.-5) constable Achhaiber Nath Yadav took the dead body to the mortuary for post mortem; (P.W.-6) Dr. T.B. Rai examined the injuries of deceased Kedar Singh and other injured persons. He found the following injuries caused to Kedar Singh.

1. Gun shot wound 1 cm x 1 cm depth not probed on the back of right high lower part with blackening and charring. Kept under observation. Advised X-ray.

2. Gun shot wound 1 cm x 1 cm depth not probed with blackening and charring on right knee joint kept under observation. Advised X-ray.

8. He also examined Smt Nirmala (P.W.-4) and found the following injuries:

Gun shot wound on the left elbow with blackening and charring. Kept under observation. Depth not probed. Advised X-ray and expert opinion.

9. He examined Smt. Indrawati and found the following injuries:

1. Gun shot wound 25 cm x 25 cm x depth not probed with blackening and charring on back of right fore-arm upper part.

2. Gun shot wound 25 cm x 25 cm x through and through with blackening and charring on the right index finger on top.

3. Gun shot wound 25 cm 25 cm x depth not probed on front and outer of right elbow joint.

4. Gun shot wound multiple eight in number each 25 cm x 25 cm x depth not probed with blackening and charring on right thigh is already 20 cm x 3 cm.

5. Gun shot wound 25 cm x 25 cm blackening and charring present on front of right leg middle.

6. Multiple gun shot wound with blackening and charring 25 cm x 25 depth not probed on middle of abdomen.

7. Multiple gun shot wound each 25 cm x .25 cm depth not probed with blackening and charring on front and out of left thigh.

10. He also examined Smt. Pramila Devi and found the following injuries:

1. Gun shot wound 2 cm x .5 cm x depth not probed blackening and charring on right side thigh outer aspect upper part.

2. Gun shot would 25 cm x .25 cm x depth not probed will blackening and charring on front and outer right thigh lower part.

11. He examined Mahendra Singh (P.W.-2) and found the following injuries:-

1. Lacerated wound 4 cm x .5 cm x scalp deep on back of head 13 cm above left ear.

2. Gun shot wound with blackening and charring 2 cm x .5 cm x depth not probed on right thumb kept under observation advised X-ray.

12. (P.W. 6) Dr. T.B. Rai proved the injury reports Ex- Ka-2 to Ex. Ka-6.

13. (P.W.-7) S.I. Shiv Shaknar Tripathi investigated the case and proved the report Ex. Ka-7 and case diary entry Ex. K-8. He prepared the site plan (Ex. Ka-9) and after the death of Kedar Singh converted the case into Section 302 I.P.C. vide case diary Ex. Ka-10. He also collected blood smear soil and plain earth and an empty cartridge from the spot and prepared memo Ex. Ka-10 and Ka 12, respectively. He prepared the panchayatnama Ex. Ka-13 and various other documents Ex. Ka 14 to Ka 16 for the post mortem. P.W.-7 submitted charge sheet under section against the accused Ex. Ka 17.

14. (P.W.-8) Dr. A.K. Kocher conducted the post mortem of deceased Kedar Singh and found the following injuries:

1. Gun shot wound 1 cm x 1 cm depth not probed on the back of right high lower part with blackening and charring. Kept under observation. Advised X-ray.

2. Gun shot wound 1 cm x 1 cm depth not probed with blackening and charring on right knee joint kept under observation. Advised X-ray.

1. Gun shot wound of entry of 1 cm diameter in front of right knee just above the patella bone with margin contused and lacerated and margin inverted distance 52 cm above right heel. The missile has passed through skin, subcut..... tissue, muscles, fractured into pieces to the lower end of femur bone, raptured poplitial vessel, passed through thigh muscle, subcut.... Tissue and made on.

2. Wound of exits 1.5 cm in diameter, circular with irregular lacerated and everted margin on the posterior surface of right thigh 52 cm above right heel. Direction front to back.

3. Multiple abraded contusion 1.5 c.m. x 2 cm on the right side of front of abdomen at the level of umbilicus and 8 cm outer to umbilicus.

Internal Examination:

Both lungs pale, part both side empty.

Stomach: digested food one litre.

15. Accused pleaded not guilty and alleged that they have been falsely implicated due to enmity; accused Ram Naresh stated that complainant had always attempted to grab his land. For this purpose, a false sale deed was got executed by the complainant and Badri, a suit in that regard is pending. The accused further stated that he was not present; the deceased and injured received gun shot injuries from some unknown persons. He has been falsely implicated due to enmity. Accused Devendra and Virendra stated that Badri and deceased wanted to grab land of Ram Naresh for which a false sale deed was executed and they were implicated due to enmity. Accused have filed various documents in defence.

16. The trial court upon examining the evidence reached a finding that the prosecution failed to prove the charge framed under Sections 148, 302/149, 307/149 I.P.C., accordingly, the accused were held not guilty for the offence and were acquitted.

Submissions:

17. Learned State Counsel, in the backdrop of the prosecution evidence, submits that the finding reached by the trial court is perse perverse on misreading/appreciation of the evidence and the site plan; place and time of incident was duly proved by the witnesses of fact, including, injured witnesses; the identity of the accused is not disputed being neighbours; the site plan shows the spot of firing duly corroborated by the witnesses of fact; injury report and post mortem report corroborates the prosecution case. The witnesses had categorically stated that the place of incident was duly illuminated; light was at the door of the complainant, as well as, street light at the crossing of the road; further, it was a moonlit night. The F.I.R. was lodged promptly; empty cartridges of 12 bore rifle was recovered from the spot; marks caused by pellet was found on the wall of the house of P.W.-1; the deceased and injured received pellet injury fired from close range. Learned State counsel submits that prosecution proved the case beyond reasonable doubt, the impugned judgment and order is liable to be set aside and the accused-respondents are liable to be convicted.

18. Learned counsel appearing for the accused-respondents submits that the impugned judgment is well reasoned based on appreciation of evidence; role of firing was assigned to accused Yadurai and accused Hari Shankar was assigned the role of causing injury by lathi on the head of

Mahendra Singh, both the accused have since died during the pendency of the appeal. The accused-respondents are father and sons and were assigned the role of exhortation and hurling gadasa, but no injury was caused with the assault weapon. He further submits that insofar the case of the accused-respondents is concerned the offence would not travel beyond Section 304 Part (II) I.P.C. He accordingly submits that appeal is liable to be dismissed.

Appellate Court-Scope of enquiry:

19. At the out set, it would be apposite to examine the law on the scope of enquiry by an appellate court under Section 378 Cr.P.C. while dealing with an appeal against acquittal.

20. The Supreme Court in **Anwar Ali v. State of Himanchal Pradesh** held as under:

"14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 which reads as under: [Babu v. State of Kerala2]:

"20. ***The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality.*** *(Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE[1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad[(2001) 1 SCC 501], Aruvelu v. State, [(2009) 10 SCC 206] and Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636])."*

21. In **Atley v. State of U.P**., Supreme Court observed and held as under:

"It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well- established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers ***of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.***

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated."

22. In **Chandrappa v. State of Karnataka**, Supreme Court has laid down the general principles regarding the powers

of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

23. In **Murugesan v. State**, Supreme Court held:

"only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. *In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that* ***if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction."***

Analysis: Case of the prosecution witness.

24. To appreciate the submissions of learned State counsel in the backdrop of the general principles regarding powers and scope of the appellate court, we would briefly refer to the prosecution case and the evidences in support thereof, and examine as to whether the finding reached by the trial court acquitting the accused is against the weight of evidence and is the "possible view'; and or whether the finding defies logic as to suffer from the vice of irrationality.

25. The incident is alleged to have taken place on 08.04.1984, at 9.00 P.M., report was lodged promptly at 12.35 in the night on the same day.

26. Udaynath Singh (P.W.-1), son of the deceased, alleged that Baba @ Digvijay Nath Dubey and the accused persons Ram Naresh, Yadurai, Harishankar, Devendra and Virendra had a quarrel on the occasion of Holi, efforts were being made to settle the dispute and for that purpose the complainant had convened a panchayat (meeting) of both the quarrelling sides at 9.00 P.M. at his door (house). Baba @ Digvijay Nath Dubey (P.W.-3) along with his family arrived, however, to call the other side i.e. Ram Naresh, Yadurai, Harishankar, Devendra and Virendra, complainant sent a person. The person returned and stated that they will arrive shortly. Immediately, thereafter, accused Yadurai armed with gun, Harishankar with lathi, Ram Naresh, Devendra and Virendra with gadasa reached the spot and started hurling abuses; they rushed towards the door of the complainant exhorting that the family of Kedar (deceased), in connivance with Baba @ Digvijay Nath Dubey wants to intimidate and falsely implicate them, today the family would be eliminated. Yadurai with the intention to kill fired five shots at the complainant, his father and brothers, consequently, complainant's father (Kedar), younger brother and Smt. Nirmala, wife of his younger brother, Surendra, Mahendra, Smt. Pramila Devi and Indrawati incurred gun shot injuries. In the firing the condition of Kedar, Smt. Nirmala Devi, Smt. Pramila Devi and Indrawati became serious; Rajendra Pratap the younger brother of the complainant immediately had taken them to the hospital.

27. Udaynath Singh (P.W.-1) was examined, he reiterated the prosecution version and deposed in detail regarding the location of his house and that of his younger brother, his father Kedar Singh (deceased), the direction from where the accused had come and the place from where firing was resorted. He stated that 24-25 days earlier at the Holi festival the accused and Baba @ Digvijay Nath Dubey had a quarrel and the panchayat was convened on 08.04.1984, at 9.00 P.M. at his residence to settle the dispute. On specific query, he categorically stated that meeting was convened by his father Kedar Singh (deceased) on the request of the rival parties. He further stated that there was sufficient illumination at his door and the mercury light at the road crossing was illuminating his entrance door. He further stated that it was moonlit night. He reiterated that Yadurai had a gun, Harishankar was armed with lathi, Ram Naresh and his sons Devendra and Virendra were armed with gadasa. The accused exhorted to eliminate the family membe+rs of Kedar Singh and in furtherance thereof, Yadurai continuously fired five shots, which hit his father and other family members. Accused Hari Shankar, thereafter, assaulted with lathi on the head of his younder brother Mahendra (P.W.-2), whereas, Ram Naresh, Virendra and Devendra hurled gadasa to assault, but, no injury was caused. The accused escaped upon arrival of patrol police.

28. In cross examination, P.W.-1 stated that his family and that of the accused are not enimical. He further stated that one hour before the incident his family members were seated in front of the house on the open land which is part of their house. He further stated that there is no chabutara (elevated platform) but an open verandah without any cover. He further stated that on the open verandah and in front of the verandah on the ground people were sitting.

29. The trial court picking up a single sentence of P.W.-1 that there is no chabutara in front of his house was of the opinion that the place of incident is

doubtful, whereas, in contrast all the other injured witnesses had stated that family members of Baba @ Digvijay Nath Dube and Kedar Singh had assembled and were sitting on the chabutara and on the open ground beyond the chabutara. Relevant portion of the trial court judgment is extracted:

"Not only this there are conflicting version about the place of Panchayat. According to Udai Nath Singh P.W.-1 there is no chabutara attached to his house. The prosecution case is that there was a Chabutara whereupon certain persons were sitting and waiting for the accused. Udai Nath Singh has stated in para 12 of his cross examination that there is no Chabutara in his house but there is an open verandah. People had collected in this open verandah and open land. The Chabutara was introduced by complainant's brother Mahendra Singh P.W.-2. No Chabutara was found by the I.O. nor the same has been shown any where in the site plan."

30. P.W.-1 further testified in cross examination that both the quarrelling parties were asked to assemble at 9.00 P.M., Baba @ Digvijay Nath Dubey and his family had arrived, Narendra Nath Dubey was sent to call the accused. He returned shortly within one and half minutes and immediately thereafter the accused arrived on the spot. P.W.-1 further stated that he could not disclose the name of Narendra Nath Dubey in the F.I.R. who was sent to call the accused due to tension of the incident. He further stated that the accused came from the east direction and when the accused arrived, he along with his wife Shanti Devi, his younger brothers Surendra, Rajendra and Ramnath Dubey were sitting on the chabutara. The accused were 2-3 steps away from the chabutara and stood at north east corner and exhorted that Kedar Singh in connivance with the family of Baba @ Digvijay Nath Dubey wants to show the accused down, to pressurize them and to falsely implicate them. Thereafter, Yadurai fired five gun shots facing west-south corner. He further stated that Yadurai fired the shots from the same spot standing. Thereafter, P.W.-1 reiterated that Harishankar caused assault with lathi upon Mahendra. He further deposed that after the gun shots were fired, thereafter, assault was made by lathi and gadasa upon the injured.

31. P.W.-2 Mahendra Singh, the injured witness, reiterated the prosecution version stating that some of the family members were sitting on the chabutara at the door of P.W.-1 while the rest on the ground beyond the chabutara. He further stated that the assailants are known, they were armed with gun, lathi and gadasa. Upon exhortation to eliminate the family of Kedar Singh, five shots was fired by Yadurai; Harishankar assaulted with lathi on his head and the other accused hurled gadasa to cause injury, but no injury was caused. He categorically stated that Baba @ Digvijay Nath Dubey and his family were sitting on the chabutara, whereas, his family was sitting on the ground beneath of chabutara. He further stated that the accused fired from a distance of 2-4 steps away from western and southern corner from the chabutara. Yadurai was 3-4 steps away from chabutara in front of the house of Uday Nath Singh (P.W.-1).

32. P.W.-3 Digvijay Nath Dubey @ Baba, reiterated the prosecution version and specifically assigned the role to the accused of having caused injury by firing, lathi and hurling gadasa. He stated that the

direction from where the accused came (north and east) and the firing was made from a distance of 3-4 steps away from the chabutara.

33. P.W.-4 Nirmala, daughter-in-law of the deceased, stated that she is a teacher of primary school. She reiterated the prosecution version and further stated that at the door of the P.W.-1 both families assembled. The door site was lit by a bulb and street light at the road crossing. It was moonlit night. In cross examination, she stated that Yadurai facing north and east direction was firing from a distance 3-4 steps away from the chabutara.

34. P.W.-6 Dr. T.B. Rai examined injured Kedar Singh (deceased), Smt. Nirmala Singh (P.W.-4) and Indrawati, seven gun shot injuries, blackening and charring is noted; Smt. Pramila suffered two gun shot injuries, blackening and charring; Mahendra Singh (P.W.-2) suffered gun shot injury, blackening and charring; lacerated wound 4 x 5 cm. scalp deep on the back of the head.

35. P.W.-7 Shiv Shankar Tripathi, Sub Inspector/Investigating Officer deposed that the complainant (P.W.-1) and his younger brother injured Mahendra Singh (P.W.-2) came to the Thana to lodge report; injured was sent to the hospital; on the subsequent day i.e. 09.04.1984 statement of Mahendra Singh was recorded, blood smeared soil and plain soil was collected from the spot; two empty cartridges was recovered from the spot; he prepared panchayatnama and the site plan on the pointing of P.W.-1 and Mahendra Singh P.W.- 2. He further, deposed that he had not shown the place of panchayat/chabutara in the site plan, but had shown the place from where the gun shots was fired, which is marked "Ka" and the distance "X' is three steps away; deceased was shot at the spot marked "X'. In cross examination, he stated that chabutara is in front of the house of P.W.-1 extending east to the house of Mukhram; house of P.W.-1 was shown in the site plan. Blood was found three steps away from the tea shop corner of Mukhram; he further stated that pellet mark was seen on the wall of the house of P.W.-1; blood was collected from spot "X". On specific query, the witness stated that "X' is 5-6 steps away from the house of P.W.-1; he further stated that the gun shot was fired from three steps towards the east of "X'. He further stated that there was sufficient light at the door of P.W.-1, and there was street light.

36. P.W.-8 Dr. A.K. Kochar, Medical officer, conducted the post mortem on the body of the deceased on 09.04.1984, at 3.00 P.M. In his opinion, the deceased died on 08.04.1984; deceased was healthy.

Grounds of acquittal:

37. In acquitting the accused, trial court in the impugned judgment, inter alia, recorded: (i) motive in the case is not proved; (ii) theory of panchayat is doubtful: (iii) theory of light at the place of occurrence is highly doubtful; (iv) there is inconsistent statement on the manner of the incident and none of the witnesses could see the incident ; (v) there is no independent witness except family members; (vi) the prosecution story is not correct.

38. The relevant portion of the judgment and order is extracted:

"Thus in this case the motive, the place of occurrence is not proved and the

manner in which the incident is said to have taken place is also highly doubtful."

Findings and analysis:

39. The learned trial court reached a finding that it is a case of no motive as against the accused Yadurai and Hari Shankar who joined hands with the accused to commit the offence. The trial court relying upon Ex. Ka-3, Ka-4 and Ka-5 noted that there was a quarrel between Ram Naresh, his sons and Baba @ Digvijay Nath Dubey and proceedings under section 107/117 Cr.P.C. was initiated, but, P.W.-1 categorically stated in his testimony that this quarrel had taken place with all the accused persons. Further, P.W.-3 suppressed the fact about proceedings under section 107 Cr.P.C. Ex Ka-5 shows that P.W.-3 Digvijay Nath Dubey @ Baba and others appeared in the court pursuant to proceedings under section 107 Cr.P.C. Meaning thereby, there was some quarrel between Ram Naresh, his sons and Digvijay Nath Dubey @ Baba, proceedings under section 107/117 Cr.P.C. was initiated. The relevant portion of the trial court judgment is extracted:

"There is no evidence regarding any such quarrel on the occasion of Holi. No such witness has been examined. Thus apparently there can be no motive for accused Yadurai and Hari Shanker to join hands with accused. There is nothing on record to show that there was any privity between Yadurai and other accused. Udai Nath Singh P.W.1 has stated that the quarrel of Holi had taken place but he did not know about any proceedings u/s 107 Cr.P.C. He has categorically stated that this quarrel had not taken place with the family of only Ram Naresh but with all the accused persons. In other words, he has repeated the F.I.R. version. Mahendra Singh P.W.-2 the real brother of complainant has also stated the role of Yadurai and hari Shanker in the quarrel which took place on Holi. Digvijay Nath Dubey P.W.-3 has also suppressed the fact about the proceedings u/s 107 Cr.P.C. where as the copy of notice Ex. Kha 5 clearly shows that Digvijay Nath Dubey and others had appeared in the court in pursuance of notice in the proceedings u/s 107 Cr.P.C. The copy of reports ex. Kha-3 and Kha 4 and Ex. Kha 5 clearly shows that there was some quarrel between Ram Naresh, his sons and Digvijay Nath Dubey and the proceedings u/s 107/117 Cr.P.C. was initiated. The defence papers referred to above, clearly shows that accused Yadurai and Hari Shanker had nothing to do with the quarrel between Digvijay Nath Dubey and family of Ram Naresh nor the family of deceased had to do anything. If the version given by the complainant in his F.I.R. and in his statement about the involvement of accused Yadurai and Hari Shanker then their names must have been in the first information report. Thus there was absolutely no motive for accused Hari Shanker and Yadurai to commit the offence.

It is admitted to Digvijay Nath Dubey that there was no altercation or enmity with accused Yadurai except the Holi incident which is not proved. Thus the motive in the case is not proved."

40. It is settled principle that F.I.R. is not an encyclopedia and neither the complainant is required to report the details of the back ground of the crime. Merely not stating or suppressing the involvement of accused Yadurai and Hari Shankar during Holi quarrel that would not be fatal to the prosecution case. All the witnesses of fact, including, injured witnesses have clearly stated that the quarrel between the parties

had taken place 20-25 days earlier on the festival of Holi and panchayat was convened by the deceased at his door to settle the dispute. It is then the incident had occurred. The testimony supports the FIR version of the prosecution case. Further, motive is not relevant to disbelieve the prosecution version on the face of sterling and truthful eye witness account. The finding reached by the trial court that the motive of the case is not proved is perse perverse and not borne from the evidence. The exhortation by the accused to eliminate the family of the deceased for siding with Baba and to falsely implicate the accused was the motive of the crime. Motive of committing the offence in any case is not relevant in the backdrop of the eye witness account.

41. The Supreme Court in **Tarsem Kumar v. Delhi Administration** held as follows:

"8. Normally, there is a motive behind every criminal act and that is why investigating agency as well as the court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. ***It has been repeatedly pointed out by this Court that where the case of the prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the court, the motive loses its importance.*** *But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the court for purpose of recording a finding that it was the accused who committed the crime in question, even in absence of proof of a motive for commission of such a crime, the accused can be convicted. But the investigating agency as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question. ....."*

42. The trial court doubted the theory of panchayat merely for the reason that the I.O. has not shown the place, in the site plan, where the panchayat has taken place. Further, trial court relying on the prosecution version of the F.I.R., was of the opinion that there was no mention of the light in the report, the theory of light was setup for the first time when the witnesses were examined also makes the place and site of panchayat doubtful. The name of the person sent to call the accused to attend the panchayat was not disclosed in the FIR by P.W.-1. Further, the trial court noted that there is conflicting version about the exact place of panchayat. Reliance was placed on the contradictory statement of P.W.-1 and the injured witness, brother of the complainant P.W.-2 in that regard. The relevant portion of the finding is extracted:

"Besides this fact that motive in the case is not proved, the theory of Panchayat is also doubtful. The I.O. has not shown any place in the site plan which show that this Panchayat has taken place. The oral testimony on this point also does not inspire confidence. Complainant Udai Nath Singh P.W. 1 has mentioned in the F.I.R. that he has called the Panchayat. When he entered in the witness box, he has stated that his father had called the Panchayat. Digvijay Nath Dubey who was alleged to be one of the parties, whose matter was to be settled in the Panchayat, has stated that the Panchayat was called by his younger brother Narendra Nath and

deceased Kedar Singh. Udai Nath Singh P.W. 1 has stated that his family members and the family members of Digvijay Nath Dubey were sitting from one hour prior to the incident for the said Panchayat. Mahendra Singh the brother of complainant has stated that they had assembled just 2 or 3 minutes prior to the incident. The two contradictory version cannot be reconciled. According to the prosecution, the Panchayat had to take place at 9 P.M. Uday Nath Singh P.W.-1 has stated that Narendra Nath Dubey was sent to call the accused persons 2 or 3 minutes prior to 9 P.M. This appears to be unreasonable because of the reason that once a particular time has been fixed for Panchayat with intimation to the parties, any party not arriving within time shall be called only after the given time has expired and the people who are waiting there, thus there can be absolutely no chance for sending the man prior to 9 P.M.

Learned counsel for the defence has submitted that there was absence of light and the injured persons were made injured by the unknown assailants. I have perused the F.I.R. on this point, I find that the incident took place at 9 P.M. but there is no mention of the light in the report. The theory of light was introduced for the first time when the witnesses were examined. The question of light was challenged by the defence. Udai Nath Singh P.W.-1 has stated that he could not mention the presence of light in his report as he was got perplexed. He has stated that he has told about the light to the I.O. but this fact also does not find place in the statement u/s 161 Cr.P.C. The learned counsel for the defence has further submitted that this fact is confirmed by the statement of I.O. as well. The I.O. Sri S.S Tripathi PW7 has not stated anything about the light in his statement but at the close of the cross examination he was re-examined by the prosecution wherein he has stated that there was light in the house of complainant and at the crossing of the road. The learned counsel for the accused has submitted that if there was any light, why the I.O. could not collect the empty cartridges or prepare the site plan when he visited the place at 10.45 P.M. and then at 12 P.M. This fact also confirms the defence suggestion that there was no light. Thus the theory of light, being on the place of occurrence, has become highly doubtful. Not only this there are conflicting version about the place of Panchayat. According to Udai Nath Singh P.W.-1 there is no chabutara attached to his house. The prosecution case is that there was a Chabutara whereupon certain persons were sitting and waiting for the accused. Udai Nath Singh has stated in para 12 of his cross examination that there is no Chabutara in his house but there is an open verandah. People had collected in this open verandah and open land. The Chabutara was introduced by complainant's brother Mahendra Singh P.W.-2. No Chabutara was found by the I.O. nor the same has been shown any where in the site plan."

43. Recently, in **Mukesh v. Stae (NCT of Delhi)**, Supreme Court observed as follows:

"57. ***As far as the argument that the FIR does not contain the names of all the accused persons is concerned****, it has to be kept in mind that it is settled law that FIR is not an encyclopaedia of facts and it is not expected from a victim to give details of the incident either in the* ***FIR or in the brief history given to the doctors. FIR is not an encyclopaedia which is expected to contain all the details of the prosecution case; it may be sufficient if the broad facts***

of the prosecution case alone appear. If any overt act is attributed to a particular accused among the assailants, it must be given greater assurance."

44. Further, all the witnesses of fact have clearly stated that there was sufficient light, it was moonlit night. In the site plan, the light has been shown and marked "L' at the door of the complainant and at the road crossing. The place from where gun shot was fired is 2-3 steps away from the place of incident causing injury to the deceased and others. The site plan duly corroborates the testimony of the eye witnesses, including, that of the complainant. The finding reached by the trial court that the place of incident, theory of panchayat and the chabutara is not identifiable, therefore, sufficient to discard the prosecution case is perse perverse. Not mentioning of light in the report is not a relevant fact to nonsuit the prosecution case. The witnesses of fact have clearly stated that light was at the door and at the street, duly marked (L) in the site plan, it was moonlit night; P.W.-7 I.O. on re-examination clearly stated that there was light at the house of the complainant and at crossing of the road. Similarly, not mentioning in the report the name of the person as to who was sent by P.W.-1 to call the accused is of no relevance. In cross examination, he named the person.

45. On close scrutiny of the statement of witnesses, the finding reached by the trial court is perse perverse, defies logic, and against the weight evidence available on record. The complainant P.W.-1 clearly stated that for settlement of the dispute between the quarrelling parties panchayat was convened at his door (house). He further stated the names of the family members of the deceased and that of Baba @ Digvijay Nath Dubey who were present at the panchayat. He further deposed that panchayat was convened by the deceased on the request of the parties at the door of his house, there was light at his door and mercury light at the crossing of the road; it was moonlit night. Therefore, door and the site of the incident was sufficiently lit. He categorically stated that he or his family had no enmity with accused Yadurai and Harishankar. In para 12, P.W.-1 has stated that outside the house the families of the deceased and Baba @ Digvijay Nath Dubey had assembled and were sitting at the adjacent land which is part of the house, he though at one place during cross examination stated that there is no chabutara, but an uncovered verandah and at the adjacent land the people were sitting. This part of the statement has been taken out of context by the trial court to form an opinion that the place of incident was not proved. As against the statement of P.W.-1, other witness of fact stated that people were sitting on the chabutara and the adjacent ground. In paragraph 16, P.W.-1, however, categorically stated that accused Yadurai shot from a distance of 3-4 steps from the chabutara and Mahendra Singh (P.W.-2) was assaulted by Harishankar with lathi.

46. On conjoint reading of the statement of P.W.-1 in para 12 and para 16 and that of other injured witnesses of fact, we do not find any contradiction. The open verandah is probably the chabutara referred to in para 16. Merely, stating that there is no chabutara is not a contradiction going to the root, to discard the prosecution case. The other witnesses of fact have clearly stated that outside the door, in front of house of the complainant there is a chabutara, thereafter, an open land which is part of the pathway; some of the assembled persons were sitting on the chabutara and

the others on the ground. Chabutara is a raised platform outside the house which is part of the house of P.W.-1.

47. Reading together of the testimony of witnesses of fact P.W.-1, P.W.-2, P.W.-3 and P.W.-4 the F.I.R. version of the prosecution case is duly supported, there is no contradiction. Minor contradictions are natural. With regard to chabutara the finding reached by the trial court, is perverse, against the weight of the evidence. The testimony of I.O. (P.W.-7) also corroborates the prosecution case. Non mentioning in the F.I.R. by P.W.-1 the name of the messenger sent to call the accused, to attend the panchayat; or the site being lit with bulb/street light or the chabutara; is of no consequence. The prosecution case is duly supported by the witnesses, they categorically deposed that the panchayat was convened at the door of P.W.-1; the site was duly lit, the families assembled and were seated at the chabutara which is part of the house of P.W.-1 and the ground adjoining the chabutara. The spot of firing is two-three steps from the chabutara. Medical expert opinion noting blackening and charring duly corroborates the prosecution version.

48. Further, the trial court was of the view that discovery of cartridges was not made by the I.O. (P.W.-7) on the date of incident despite visiting the spot twice in the night of the incident, therefore, doubts the recovery. The fault of the I.O. would not absolve the accused in the back drop of the truthful and consistent statement of the prosecution witnesses. Merely for the reason that two empty cartridges was collected by the I.O. on the following day and not on the day of the incident is not sufficient to discard or discredit the prosecution version in the backdrop of the consistent testimony of the eye witnesses. The discovery of two empty cartridges from the spot and presence of blood where the deceased was shot corroborates the testimony of eye witness account of the incident and the prosecution case. The presence of the accused at the site and commission of the crime is duly proved. The ocular evidence, if truthful and duly corroborated would prevail not only over medical evidence but also any minor discrepancy in the site plan or lack of motive of the offence. In the given facts, the prosecution has been successful to prove the prosecution case by the testimony of the ocular witness; including, injured witness. The place and site of incident; the injury caused by firing; the time of incident, and the close range of firing has been duly proved and corroborated by the injury report, post mortem report and the site plan. The only possible view in the given facts points to the guilt of the accused in commission of the crime. No other view or theory is possible. The finding reached by the trial court lacks logic and suffers from irrationality.

49. In the case of **Sardul Singh v. State of Punjab**, Hon'ble Supreme Court has held that *"ocular evidence will prevail over medical evidence when credibility of eye witnesses is established beyond doubt."*

50. The trial court further has picked up one sentence from here and there from the statement of the prosecution witnesses to reach a finding that there are contradictions in the statements of the prosecution witnesses. The trial court has gone in detail to examine as to which of the family members were sitting on the chabutara and that on the ground adjacent to the chabutara, further, contradiction with regard to the carpet (dari) and the persons

sitting on it has been discussed in detail to dislodge the prosecution case. The trial court concluded:

"All these contradictions about the existence of chabutara and Duri and place of sitting falsified the prosecution theory of Panchayat. If there was any such Panchayat as alleged by the prosecution, the version of the prosecution witnesses would have been consistent on all the points. It will not be out of place to mention that certain shifting in the statement has been made in order to suit the prosecution case."

51. The trial court has further doubted the place of occurrence and has in detail examined the distance to precession with regard to the spot and direction of firing reaching a finding based on the apprehension of the defence that the incident was caused by some other persons.

52. It is settled principle that while examining the testimony of the witnesses unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer. The evidence of P.W.-1 simultaneously keeping in view the appreciation of the evidence of this witness and other witnesses (P.W.-2, P.W.-3 and P.W.-4) by the trial court, we have no hesitation in holding that the trial court was in error in rejecting or doubting the testimony of the ocular witnesses as a whole whose evidence appears to us trustworthy, consistent and credible and duly corroborated.

53. In **State of U.P. v Anil Singh**, the Supreme Court observed that:

*".....**If there is a ring of truth in the main, the case should not be rejected.** It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses."*

54. The Court can separate the truth from the false statements in the witnesses' testimony. In **Leela Ram v. State of Haryana**, the Supreme Court held as follows:

*"12. It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment -- sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their overanxiety they may give a slightly exaggerated account. **The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same."***

55. Moreover, it is not necessary that the entire testimony of a witness be disregarded because one portion of such testimony is false. But that is not the case in the given facts. The testimony of the

ocular account of the crime and role of the accused is consistent and cannot to said that the inconsistent or falsehood are so glaring to utterly destroy the prosecution case. Supreme Court observed thus in **Gangadhar Behera v. State of Orissa:**

"15. To the same effect is the decision in State of Punjab v. Jagir Singh [(1974) 3 SCC 277 : 1973 SCC (Cri) 886 : AIR 1973 SC 2407] and Lehna v. State of Haryana [(2002) 3 SCC 76 : 2002 SCC (Cri) 526]. Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the 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 a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained.*** *It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the 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 a 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 liars.*** *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."*

56. Section 3 of the Evidence Act, 1850 (for shot "Act'), while explaining the meaning of the words **"proved"**, **"disproved"** and **"not proved"** lays down the standard of proof, namely, about the existence or nonexistence of the circumstances from the point of view of a prudent man. The Section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is this degree of certainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the Court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and coming to the third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by 'a prudent man'.

57. There is a difference between a flimsy or fantastic plea which is to be rejected altogether. But a reasonable though incompletely proved plea which casts a genuine doubt on the prosecution

version indirectly succeeds. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating, capricious, indolent, drowsy or confused mind. It must be the doubt of the prudent man who assumed to possess the capacity to "separate the chaff from the grain". It is the doubt of a reasonable, astute and alert mind arrived at after due application of mind to every relevant circumstances of the case appearing from the evidence. It is not a doubt which occurs to a wavering mind.

58. Lord Denning, J. in **Miller v. Minister of Pensions**, while examining the degree of proof required in criminal cases stated:

"That degree is well-settled. It need not reach certainty but it must reach a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. *If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course, it is possible but not in the least probable", the case is proved beyond reasonable doubt....."*

59. Regarding the concept of benefit of reasonable doubt Lord Du Paraq, in another context observed thus:

"All that the principle enjoins is a reasonable scepticism, not an obdurate persistence in disbelief. It does not demand from the Judge a resolute and impenetrable incredulity. He is never required to close his mind to the truth."

60. The prosecution case has been proved beyond shadow of doubt, the approach of the trial court in picking out irrelevant details from the testimony of the witnesses, site plan to non suit the prosecution case is an obdurate persistence in disbelief and not a reasonable scepticism. The trial court closed its mind to truth which is writ large from the prosecution evidence.

61. The learned counsel for the accused respondents finally submitted that as per prosecution case and the evidence, the accused respondents armed with sharp assault weapon have not caused any injury. It is, therefore, urged that the case against the accused respondents would not travel beyond Section 304(II) I.P.C.

62. We find no merit in the submission of the learned counsel for the accused respondents. The prosecution proved that the accused respondents came to the site along with Yadurai and Hari Shankar. Yadurai armed with gun fired; Hari Shankar armed with lathi assaulted P.W.-2 after the firing; accused respondents hurled gadasa with the intention of causing injury but failed to injure. The accused exhorted to finish Kedar Singh and his family. Kedar Singh succumbed to the injury and other members of his family suffered gun shot injury, duly corroborated by the medical examination report. The accused respondents were merely not passive witnesses, but a part of the unlawful assembly duly armed with gadasa entertaining the common object of the assembly i.e. to finish Kedar Singh and his family. In this background Section 149 creates a constructive or vicarious liability, every member of an unlawful assembly at the time of committing of the offence would be guilty of that offence for unlawful acts done in pursuance of common object. Section 149 does not always proceed on the

basis that the offence has been actually committed by every member of the unlawful assembly. As such the members of that assembly knew that if an offence is committed or likely to be committed by any of the members of the unlawful assembly, every person who is a member is guilty of that offence.

63. In **Masalti v. State of U.P.**, it was observed that any member of the unlawful assembly can be prosecuted for the criminal act; it need not to be proved that he had committed an overt act:

*"17. ...**what has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC.** Section 142 provides that however, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified in Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of Baladin v. State of U.P., AIR 1956 SC 181 assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, **Section 149 makes it clear that 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; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."***

64. In **Lalji v. State of U.P.**, Supreme Court observed as follows:

"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. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be

committed in prosecution of that object. ***Once the case of a person 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."*

65. The prosecution has been able to prove beyond doubt that accused respondents appeared on the spot of the incident along with accused Yadurai and Hari Shankar. All were armed with gun, lathi and gadasa. Upon exhortation to finish Kedar Singh and his family firing was resorted from close range, lathi injury was caused after the firing and the accused respondents hurled gadasa with an intention to cause injury but missed. The accused respondents being members of the unlawful assembly is proved. All of them were armed with assault weapon. The common intention of the members was to teach a lesson to Kedar Singh for siding and conniving with Baba to falsely implicate the accused. The members of the assembly in prosecution of their common object exhorted to finish Kedar Singh and his family. Yadurai resorted to firing (five shots) causing injury to Kedar Singh (deceased) and other four members of his family. Thereafter, all the accused escaped together. The accused respondent wielded gadasa and hurled to cause injury but missed the target is of no consequence. Their overt act and active participation indicate the common intention of the members of that assembly and would fasten upon them the vicarious criminal liability under Section 149 I.P.C.

Conclusion:

66. The trial court, in nutshell, has taken pains and stretched itself in fishing out very minor discrepancies to dislodge the prosecution case, ignoring overtly the consistent testimony of the ocular witnesses. We have noted on scrutinising the evidence, the discrepancies pointed out by the trial court would not demolish the prosecution case. The discrepancy noted by the trial court include:

(i) that the time of the incident occurring at 9 p.m. has been doubted, as PW-1 stated he had sent the messenger to call the accused at 9 p.m. The trial court ignored that part of the statement of PW-1 that within one and half minutes the accused reached the spot following the

messenger. 9 p.m. does not certainly mean sharp 9 p.m. by 5-10 minutes up and down.

(ii) that the position and place from where Yadurai fired gunshot, was disbelieved by the trial court upon noticing contradiction in the testimony of the ocular witness that PW-1, P.W.-2 stated Yadurai fired in standing position from two-three steps, whereas, in contradiction PW-3 stated Yadurai fired turning around. This contradiction will have no bearing upon the prosecution case. Investigating Officer collected blood and two empty cartridges from the spot of firing narrated by the witnesses. Whether Yadurai was firing standing at a place or turning around while firing is of no relevance as long as firing was caused by Yadurai, killing one and injuring four persons of the same family.

(iii) that the trial court doubted the recovery of the empty cartridges by the Investigating Officer merely for the reason that the same was recovered by the Investigating Officer on the following morning and not on the night of the incident when he visited the spot twice. The site being illuminated was also doubted for the same reason. The finding is perse perverse having regard to the overwhelming truthful ocular account of the incident duly corroborated by the site map, medical evidence. The conduct of the Investigating Officer or shortcoming in the investigation is of no advantage to the accused to demolish the prosecution case based on ocular evidence.

(iv) that the place of the chabutara or whether chabutara is present in front of the house of PW-1; whether dari (carpet) was on the chabutara or the adjoining ground, whether the blood of the deceased/injured would have fallen on the dari or the ground; the place and distance from where firing was resorted were irrelevant consideration to demolish the prosecution case. The site plan clearly marks the place of shooting and the spot from where the blood smeared soil was collected. The medical examination of the deceased and the injured records blackening and charring. The empty cartridges recovered from the spot is of 12 bore, injury suffered is of pellets. The firing was resorted from a close range corroborating the ocular testimony. Pellet marks was seen on the wall of the house of P.W.-1.

(v) that the trial court discarded/doubted the ocular witness account being members of the same family, but ignored the testimony of PW-3 Baba an independent witness. Further, there was no occasion to implicate the accused, PW-1 stated that their family is not inimical with the accused.

67. In final analysis to put in perspective the prosecution case and the evidence in support thereof. The incident was reported promptly, the complainant P.W.-1 and the injured P.W.-2 had gone to the Thana to lodge the report. From Thana, P.W.-2 was sent to the hospital. As per the prosecution version a panchayat was convened at the door of P.W.-1 to effect a settlement between Baba @ Digvijay Nath P.W.-3 and the accused. The families of the deceased and that of Baba had already assembled. P.W.-1 sent a person to call the accused. The accused reached shortly within few minutes, hurled abuses, and exhorted to finish the deceased and his family. Families of the deceased and Baba were sitting on the chabutara and on the ground adjacent to the chabutara. Yadurai fired five shots from close range (2-3 steps) from the chabutara, consequently, deceased, P.W-2 and three others incurred gun shot injury duly supported and corroborated by the medical examination report. Firing from close range is established noting blackening and charring. From the site

blood was collected by the I.O. and two empty cartridges (12 bore) recovered. After resorting to firing, accused Hari Shankar assaulted P.W.-2 with lathi on his head, duly corroborated by the medical examination report. The appellants weilded gadasa to assault but injury was not caused. The prosecution version has been supported by ocular witnesses of which some are injured, Baba @ Digvijay P.W.-3 is an independent witness. The assailants are known to the prosecution witnesses. P.W.-1 categorically stated that there is no personal enmity with the accused. The site of incident is illuminated, duly corroborated by the ocular witness and the I.O. The spot of incident is duly identified by the prosecution witnesses. The deceased and the injured suffered gun shot injury caused by pellets. I.O. categorically stated that pellet marks on wall of the house of P.W.-1 was seen. On cumulative scrutiny of the ocular witness account, duly corroborated by the medical report, post mortem report and the site map, the only possible view is the guilt of the accused in commission of the offence.

68. In our considered opinion, having regard to the prosecution case setup in the FIR and the testimony of the prosecution witnesses, including the injured witness, stands duly corroborated by the injury report, post-mortem report and site plan. The perversity in the finding reached by the trial court on all counts is writ large. No two opinion can be formed except that leading to guilt of the accused in commission of the offence. The trial court has totally ignored the basic principles with regard to reading and examination of the testimony of ocular witness account and has gone over board in acquitting the appellants.

69. Accordingly, the trial court judgment and order dated 05.09.1985 is set aside; the respondent-accused are held guilty for the offence under Section 302 read with 149 I.P.C. Consequently, the respondent-accused Ram Naresh, Devendra and Virendra are sentenced under Section 302 read with 149 I.P.C. to life imprisonment and fine at Rs. 50,000/- is imposed on each accused, in case of default the accused-respondents to undergo two years further rigorous imprisonment.

70. Government appeal is, accordingly, allowed.

71. The benefit of set-off under section 428 Cr.P.C. to be extended to the accused-respondents.

72. The accused-respondents are on bail, the accused-respondents shall be taken into custody, forthwith, to serve out the sentence awarded to each of them.

73. The Registry to send copy of this order to Chief Judicial Magistrate and Senior Superintendent of Police, District Varanasi, to ensure compliance and shall send a report to this Court within one month.

74. The Registry to return the lower court record along with this order for compliance and necessary action.

(2022) 8 ILRA 386
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Special Appeal No. 489 of 2022

Hari Om Rastogi ...Petitioner/Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Kshitij Shailendra

Counsel for the Respondents:
Sri Ankit Gaur, State Law Officer

A. Service Law – Disciplinary enquiry – Punishment of major penalty – Obligation of enquiry officer – Burden to adduce evidence, on whom lie – Principle laid down – In a disciplinary inquiry, which may lead to imposition of major penalty, it is the obligation of the establishment to fix a date, time and place for the inquiry. It is then their obligation to ensure that evidence, which must include oral evidence also, is produced before the Inquiry Officer on behalf of the establishment whether the delinquent employee appears to defend or remains *ex parte* – The burden is on the establishment to adduce evidence, including oral evidence to establish the charge, on the basis of which a major penalty may be imposed. (Para 18)

B. Service Law – Disciplinary proceeding – Charge of passing judicial order to extend undue benefit to someone – A wrong decision, how far can be a basis of disciplinary proceeding – Punishment – Penalty of 50% reduction of pension and 50% reduction of gratuity – Inquiry officer sat over the judicial order like an appellate authority – Validity challenged – Held, a mere wrong decision or a wrong order passed by an Officer, acting in a *quasi judicial* or judicial capacity, cannot be the basis of disciplinary action against him – Zunjarrao Bhikaji Nagarkar's case relied upon. (Para 22)

Special Appeal allowed. (E-1)

List of Cases cited:-

1. St. of U. P. & ors. Vs Saroj Kumar Sinha; (2010) 2 SCC 772

2. Roop Singh Negi Vs P.N.B, & ors.; (2009) 2 SCC 570

3. St. of U.P. Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB) (LB)

4. Zunjarrao Bhikaji Nagarkar Vs U.O.I. & ors.; (1999) 7 SCC 409

5. U.O.I. & ors. Vs Duli Chand; (2006) 5 SCC 680

6. U.O.I. & ors. Vs K.K. Dhawan; (1993) 2 SCC 56

7. Ramesh Chander Singh Vs High Court of Allahabad & anr.; (2007) 4 SCC 247

(Delivered by Hon'ble Rajesh Bindal, C.J.
&
Hon'ble J.J. Munir, J.)

1. This is an appeal by the writ petitioner, who met with partial success before the learned Single Judge. He wants this Court to allow the writ petition *in toto*, modifying the judgment of the learned Judge.

2. The petitioner-appellant was a Consolidation Officer. On 09.11.2006, while posted at Agra, he was served with a charge sheet in relation to certain judicial orders that he had made in the year 2003 at Farrukhabad. The learned Single Judge has quoted the charges in the judgment impugned, but it would be pertinent to reproduce some more details and particulars carried in the charge sheet dated 09.11.2006, besides just the content of the charges. Charges Nos.1 and 2, as set out in the charge sheet, together with the reference to evidence, by which these were sought to be established, are extracted below:

"आरोप संख्या-1

आपने ग्राम मौधा जनपद फर्रुखाबाद के वाद संख्या-592 धारा 9अ में पारित आदेश दिनांक 28-2-03 द्वारा ग्राम मौधा के गाटा संख्या-1285/0-60/1420/2-00 से ग्राम सभा का नाम खारिज करके अनार सिंह पुत्र परशुराम का नाम दर्ज किया। तदोपरान्त नियम 109 के

अन्तर्गत वाद संख्या-198 तारीख फैसला 18-10-03 में पारित आदेशानुसार उक्त आदेश का अमलदरामद करा दिया। जिससे ग्राम सभा सम्पत्ति को अपूर्णीय क्षति व श्री अनार सिंह पुत्र परशुराम को अनुचित लाभ पहुँचा, जिसके लिये आप दोषी है तथा इस कृत्य से आपकी सत्यनिष्ठा संदिग्ध होती है।

उक्त आरोप की पुष्टि में निम्न साक्ष्य पठनीय है।

1- ग्राम मौधा वाद संख्या-592 अन्तर्गत धारा-9अ दिनांक 28-2-03।

2- ग्राम मौधा मुकदमा नं0-198/2003 नियम 109 में पारित आदेश दिनांक 18-10-03

3- बन्दोबस्तअधिकारी चकबन्दी फर्रुखाबाद का पत्रांक 486/वि0का0 दि0 17-6-06

<u>आरोप संख्या-2</u>

ग्राम बिढ़ैल के वाद संख्या-1405 अन्तर्गत धारा-9 क ता0फै0 2-4-98 द्वारा ग्राम सभा के गाटा संख्या-374/0.70, 424/0.36, 426/0.67 कुल 1.73 एकड़ से नाम खारिज करके श्री देवेन्द्र कुमार मिश्रा, चकबन्दी अधिकारी द्वारा श्री फेरु सिंह पुत्र जौहरी नाम दर्ज करने का अनियमित आदेश पारित किया था। आपने वाद संख्या-191 अन्तर्गत धारा-109 में पारित आदेश दिनांक 28-10-03 द्वारा अमलदरामद करा दिया। जिससे ग्राम सभा को अपूर्णीय क्षति हुई तथा व्यक्ति विशेष को अनुचित लाभ पहुँचा। जिसके लिये आप दोषी है। तथा इस कृत्य से आपकी सत्यनिष्ठा संदिग्ध होती है।"

उक्त आरोप की पुष्टि में निम्न साक्ष्य पठनीय है।

1- ग्राम बिढैल वाद संख्या-191 नियम 101 में पारित आदेश दिनांक 28-10-03।

2- बन्दोबस्तअधिकारी चकबन्दी फर्रुखाबाद का पत्रांक-486/वि0का0 दि0 17-6-06"

3. It is the petitioner-appellant's case that after service of the charge sheet, he was neither provided documents that he demanded nor any oral evidence recorded on behalf of the establishment by examining witnesses. The petitioner-appellant too was not examined and the inquiry report was submitted *ex parte* on 09.08.2007 by the Inquiry Officer, the Deputy Director of Consolidation, Etawah to the Disciplinary Authority, the Consolidation Commissioner, U.P., Lucknow.

4. A show cause notice was issued on 09.10.2007 by the Disciplinary Authority to the petitioner-appellant. asking him to show cause that the charges being proved, why major penalty should not be imposed upon him. A time period of 15 days was granted to answer the show cause notice. On 15.11.2007, the petitioner-appellant filed a detailed reply to the show cause, asserting that both the charges against him were not established.

5. The petitioner-appellant superannuated while posted at Rampur on 30.04.2008 and retired from service. On the 9th of July, 2008 after retirement, the petitioner-appellant was served with another show cause notice based on the existing inquiry report, requiring him to answer why the penalty of 50% reduction of pension and 50% deduction of gratuity be not awarded. The reply was again demanded within 15 days. The petitioner-appellant submitted a reply dated 29.07.2008, disputing the truth of the charges as well as the fact that these were proved.

6. The respondents proceeded to punish the appellant by means of an order dated 03.08.2012, by which it was ordered that there would be a 10% of permanent reduction in pension payable and 50% deduction, each from the pension and the gratuity.

7. The petitioner-appellant challenged the order dated 03.08.2012 by instituting Writ - A No.61226 of 2012 before the learned Single Judge. The aforesaid writ petition was partly allowed by the learned Single Judge holding the charges proved, but there was no evidence to hold that the orders were passed to extend undue benefit to anyone or the appellant's integrity was doubtful. It was also held that pecuniary loss, if any, caused to the Gaon Sabha, was not quanitified. The appellant was held to be guilty of not following the due process while passing orders in the cases, subject matter of the two charges. It was also held that the appellant's reply was vague and without any legal basis.

8. In the circumstances, the learned Judge proceeded to hold that the punishment awarded to the appellant was very harsh and shockingly disproportionate. In consequence of the aforesaid conclusion, the impugned order of punishment dated 03.08.2012 has been set aside with a remand to the respondents to pass a fresh order of punishment, after considering the remarks in the judgment entered by the learned Single Judge.

9. The petitioner-appellant, dissatisfied with the judgment impugned, has preferred this appeal under Chapter VIII Rule 5 of the Rules of Court.

10. Heard Mr. Kshitij Shailendra, learned Counsel for the petitioner-appellant and Mr. Ankit Gaur, learned State Law Officer appearing for the State-respondents.

11. Before us, Mr. Kshitij Shailendra, learned Counsel for the appellant has contended that the learned Single Judge has gone wrong in that, that on one hand his Lordship has accepted the appellant's contention that the Inquiry Officer and the Disciplinary Authority have scrutinized the appellant's judicial orders, like an Appellate Authority, which they could not have done, and on the other, has upheld the charges, interfering with the order of punishment alone. It is submitted by the learned Counsel for the appellant that once the learned Judge was of opinion that the Inquiry Officer and the Disciplinary Authority could not have scrutinized the appellant's judicial orders in disciplinary proceedings, as if they were the Appellate Authority, the logical consequence is that the charges are not established. It is submitted that the order of punishment, on the findings recorded by the learned Single Judge, ought to have been quashed *in toto*; not just the part thereof, inflicting punishment on the issue of quantum.

12. Mr. Ankit Gaur, the learned State Law Officer, appearing for the State, on the other hand, has argued that the learned Single Judge has passed the impugned judgment in accordance with law, as it was not open to his Lordship in a writ petition, to interfere with the findings recorded by the Inquiry Officer and accepted by the Disciplinary Authority.

13. We have carefully considered the rival contentions at the Bar, perused the order impugned and the record.

14. Indeed, the learned Single Judge has recorded definitive findings holding the charges not proved due to procedural flaws that go to the root of the matter. In this regard, the findings of the learned Single Judge are extracted below:

21. I have carefully perused the inquiry report. The inquiry officer has dealt in the inquiry as to how due procedure was

not followed by the petitioner and that required precautions were not adhered to. I found merit in the argument of learned counsel for petitioner that Inquiry Officer has scrutinized the orders like an Appellate Authority and not like an Inquiry Officer. The finding of loss are not supported by any evidence or valuation of land. No witness was examined from Gram Sabha. It was also not noticed by Inquiry Officer that one order was passed only in compliance of an earlier order. The record was not verified in absence of original record which remained untraceable. The Inquiry Officer has proceeded with inquiry like an Appellate Authority and failed to decide whether any grave misconduct was committed or any pecuniary loss was caused to Gaon Sabha.

15. Interestingly, the aforesaid finding has been recorded by the learned Single Judge on the supposition that the charges stand proved, but if at all these would fall under 'grave misconduct', or an act causing pecuniary loss to the Government, by misconduct or negligence during service.

16. We are of opinion that the kind of finding, recorded in Paragraph No. 21 of the impugned judgment, is one that relates to the proof of the charges and not the proportionality of punishment. The learned Single Judge, however, has recorded the finding, extracted above, while considering the issue that is set out in Paragraph No.16 of the impugned judgment, which reads:

16. Now, I proceed to consider the second issue that, "whether charges were proved against petitioner and punishment thereon is proportionate or not?"

17. The question of proportionality of punishment in disciplinary proceedings is to be considered if the charges are proved in the disciplinary proceedings strictly in accordance with law. Once the learned Single Judge has held, and in our opinion rightly so, that it was not the business of the Inquiry Officer or the Disciplinary Authority to scrutinize the appellant's order passed in a judicial capacity, like an Appellate Authority, the findings on the charges by the Inquiry Officer and its acceptance by the Disciplinary Authority, are bad in law.

18. The other issue that the learned Single Judge has dealt with is the non-examination of witnesses by the respondents to prove the charge. There is brief remark by the learned Judge that "no witness was examined from the Gram Sabha". This again is a conclusion that is absolutely right, though not elaborated upon. However, the consequence of the aforesaid conclusion is vitiative of the inquiry and the resultant order of punishment. The principle is that in a disciplinary inquiry, which may lead to imposition of major penalty, it is the obligation of the establishment to fix a date, time and place for the inquiry. It is then their obligation to ensure that evidence, which must include oral evidence also, is produced before the Inquiry Officer on behalf of the establishment whether the delinquent employee appears to defend or remains ex parte. The burden is on the establishment to adduce evidence, including oral evidence to establish the charge, on the basis of which a major penalty may be imposed. Though, the aforesaid principle is too well settled to brook any doubt, reference may be made to the decision of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772**. In **Saroj Kumar Sinha** (supra), the principle has been stated thus:

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

19. To the same effect is the guidance of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570,** where it has been held:

14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

20. The principle has been more eloquently stated in the decision of a Division Bench of this Court in **State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB) (LB)**. In **Aditya Prasad Srivastava** (*supra*), it has been held:

17. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary.

(emphasis by Court)

21. There is no cavil here that the respondents did not examine witnesses or led oral evidence to prove the charges against the appellant. The charges were held proved, on the basis of the Inquiry Officer going through the records, that may constitute material, but not evidence in the absence of proof by oral evidence. The learned Single Judge has also held that no witness was examined from the Gaon Sabha. Thus, the inquiry that has led to the impugned order of punishment is beset by a fundamental procedural flaw, that goes to the root of the matter, on account of non-production of evidence, particularly oral evidence before the Inquiry Officer by the establishment.

22. There are then those remarks by the learned Single Judge, where it is said that the Inquiry Officer has sat over judicial orders passed by the appellant, like an Appellate Authority, and on that basis, held the charges proved. This approach of the Inquiry Officer and the Disciplinary Authority has been certainly disapproved by the learned Single Judge and rightly so. It has been remarked by the learned Single Judge that there is no evidence that orders were passed to give undue benefit to someone, or that the integrity of the appellant was doubtful. It must be observed that a mere wrong decision or a wrong order passed by an Officer, acting in a quasi judicial or judicial capacity, cannot be the basis of disciplinary action against him. In this connection, reference may be made to the decision of the Supreme Court in **Zunjarrao Bhikaji Nagarkar v. Union of India and others, (1999) 7 SCC 409**, where it has been held:

40. When we talk of negligence in a quasi-judicial adjudication, it is not negligence perceived as carelessness, inadvertence or omission but as culpable negligence. This is how this Court in *State of Punjab v. Ex-Constable Ram Singh* [(1992) 4 SCC 54 : 1992 SCC (L&S) 793 : (1992) 21 ATC 435] interpreted "misconduct" not coming within the purview of mere error in judgment, carelessness or negligence in performance of duty. In the case of K.K. Dhawan [(1993) 2 SCC 56 : 1993 SCC (L&S) 325 : (1993) 24 ATC 1] the allegation was of conferring undue favour upon the assessees. It was not a case of negligence as such. In Upendra Singh case [(1994) 3 SCC 357 : 1994 SCC (L&S) 768 : (1994) 27 ATC 200] the charge was that he gave illegal and improper directions to the assessing officer in order to unduly favour the assessee. The case of *K.S. Swaminathan* [(1996) 11 SCC 498] was not where the respondent was acting in any quasi-judicial capacity. This Court said that at the stage of framing of the charge the statement of facts and the charge-sheet supplied are required to be looked into by the court to see whether they support the charge of the alleged misconduct. In *M.S. Bindra case* [(1998) 7 SCC 310 : 1998 SCC (L&S) 1812] where the appellant was compulsorily retired this Court said that judicial scrutiny of an order imposing premature compulsory retirement is permissible if the order is arbitrary or mala fide or based on no evidence. Again in the case of *Madan Mohan Choudhary* [(1999) 3 SCC 396 : 1999 SCC (L&S) 700] which was also a case of compulsory retirement this Court said that there should exist material on record to reasonably form an opinion that compulsory retirement of the officer was in public interest. In *K.N. Ramamurthy case* [(1997) 7 SCC 101 : 1997 SCC (L&S) 1749] it was certainly a case of culpable negligence. One of the charges was that the officer had failed to safeguard government revenue. In *Hindustan Steel Ltd. case* [(1969) 2 SCC 627 : AIR 1970 SC 253] it was said that where proceedings are quasi-judicial penalty will not ordinarily be imposed unless the party charged had acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. This Court has said that the penalty will not also be imposed merely because it is lawful so to do. In the present case, it is not that the appellant did not impose penalty because of any negligence on his part but he said it was not a case of imposition of penalty. We are, however, of the view that in a case like this which was being adjudicated upon by the appellant

imposition of penalty was imperative. But then, there is nothing wrong or improper on the part of the appellant to form an opinion that imposition of penalty was not mandatory. We have noticed that the Patna High Court while interpreting Section 325 IPC held that imposition of penalty was not mandatory which again we have said is not a correct view to take. A wrong interpretation of law cannot be a ground for misconduct. Of course it is a different matter altogether if it is deliberate and actuated by mala fides.

41. When penalty is not levied, the assessee certainly benefits. But it cannot be said that by not levying the penalty the officer has favoured the assessee or shown undue favour to him. There has to be some basis for the disciplinary authority to reach such a conclusion even prima facie. The record in the present case does not show if the disciplinary authority had any information within its possession from where it could form an opinion that the appellant showed "favour" to the assessee by not imposing the penalty. He may have wrongly exercised his jurisdiction. But that wrong can be corrected in appeal. That cannot always form a basis for initiating disciplinary proceedings against an officer while he is acting as a quasi-judicial authority. It must be kept in mind that being a quasi-judicial authority, he is always subject to judicial supervision in appeal.

42. Initiation of disciplinary proceedings against an officer cannot take place on information which is vague or indefinite. Suspicion has no role to play in such matter. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer. Merely because penalty was not imposed and the Board in the exercise of its power directed filing of appeal against that order in the Appellate Tribunal could not be enough to proceed against the appellant. There is no other instance to show that in similar case the appellant invariably imposed penalty.

43. If every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi-judicial officers like the appellant. Since in sum and substance misconduct is sought to be inferred by the appellant having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi-judicial authority something more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi-judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge-sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi-judicial authority. The entire system of administrative adjudication whereunder quasi-judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings.

23. The decision in **Nagarkar's** case was held in **Union of India and others v. Duli Chand, (2006) 5 SCC 680** as one that was contrary to the view expressed in **Union of India and others v. K.K. Dhawan**, (1993) 2 SCC 56. But again, the principle in Nagarkar was endorsed in a later Three Judge Bench decision of the Supreme Court in **Ramesh Chander Singh**

v. High Court of Allahabad and another, (2007) 4 SCC 247, where it has been held:

17. In *Zunjarrao Bhikaji Nagarkar v. Union of India* [(1999) 7 SCC 409 : 1999 SCC (L&S) 1299 : AIR 1999 SC 2881] this Court held that wrong exercise of jurisdiction by a quasi-judicial authority or mistake of law or wrong interpretation of law cannot be the basis for initiating disciplinary proceeding. Of course, if the judicial officer conducted in a manner as would reflect on his reputation or integrity or good faith or there is a prima facie material to show recklessness or misconduct in discharge of his duties or he had acted in a manner to unduly favour a party or had passed an order actuated by corrupt motive, the High Court by virtue of its power under Article 235 of the Constitution may exercise its supervisory jurisdiction. Nevertheless, under such circumstances it should be kept in mind that the Judges at all levels have to administer justice without fear or favour. Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate judicial officers and subjecting them to severe disciplinary proceedings would ultimately harm the judicial system at the grassroot level.

24. In the present case, the charge against the appellant is about passing orders directing mutation on the basis of earlier orders, where original record had remained untraceable. He has passed an order of mutation i.e. subject of the first charge, acting on a copy of the order passed 10-12 years ago, where the records are said to have been destroyed by fire. The order, subject matter of the other charge, was also passed in haste, without taking precautions. But, none of the orders, as the learned Single Judge has held on perusal of records, were evidently passed to extend any undue benefit to anyone nor the appellant's integrity was proved doubtful.

25. In our opinion, the learned Single Judge has fallen into an error in upholding the charges in the first limb of the order and then recording findings in reference to the quantum of punishment, that go to vitiate the findings of the Inquiry Officer and the impugned order made by the Disciplinary Authority. The kind of flaws that the learned Single Judge has discerned in the process of the inquiry and the approach of the Inquiry Officer, including the orders of the Disciplinary Authority, the findings of the Inquiry Officer and the impugned order adjudging the appellant guilty, had to be quashed. However, the learned Single Judge has upheld the charges and merely opined the punishment imposed to be shockingly disproportionate. We find that the findings recorded by the learned Single Judge are at variance with his conclusions. The findings recorded by the learned Single Judge regarding the fundamental flaws in the approach of the Inquiry Officer as well as the Disciplinary Authority, which we have elaborated upon, irresistibly lead to the conclusion that the order passed by the learned Judge must be modified and the impugned order of punishment quashed.

26. In the result, this appeal **succeeds** and is **allowed**. The impugned judgment passed by the learned Single Judge is modified in terms that the impugned order of punishment dated 03.08.2012 passed by respondent no.1 is hereby **quashed**. A **mandamus** is issued to the respondents to

release the entire retiral benefits due to the petitioner-appellant along with interest @ 6% p.a. from the date the same was due till payment.

(2022) 8 ILRA 395
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2022

BEFORE

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

Writ-C No. 1337 of 2021

Smt. Rahimun-nisha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sudheer Rana

Counsel for the Respondents:
C.S.C., Sri Rahul Pandey

A. Constitution of India – Article 23 – Begar – Recovery of emolument paid for extra works done – Permissibility – Held, if the petitioner's husband rendered work for 10 months, recovery of emoluments paid for those extra 10 months of work, would amount to *begar*, which is prohibited under Article 23 of the Constitution – For work already rendered by an employee and remunerated by the employers, howsoever wrongly appointed or permitted to continue, cannot be recovered for that would be *begar*, applies with greater force. (Para 14 and 15)

B. Service Law – Retirement – Pension, Gratuity and Family Pension – Entitlement – Petitioner's husband worked 10 months more service and drawn the salary – Effect on entitlement of pension – Held, the authorities need not be multiplied which emphasize the importance of prompt settlement and quick disbursement of post retiral benefits, particularly, pension and gratuity – This would apply with equal, if not greater, vigour to the case of a surviving spouse/ widow of the deceased government servant/ employee, like the case here. (Para 19)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Sushil Kumar Pandey Vs St. of U.P. & ors.; 2010 (5) ALJ 554

2. St. of Punjab & ors. Vs Rafiq Masih (White Washer) & ors.; (2015) 4 SCC 334

3. Thomas Daniel Vs St. of Kerala & ors.; 2022 SCC OnLine SC 536

4. St. of Kerala & ors. Vs M. Padmanabhan Nair; (1985) 1 SCC 429

5. V. Sukumaran Vs St. of Kerala & anr.; (2020) 8 SCC 106

6. Gorakhpur University & ors. Vs Dr. Shitla Prasad Nagendra & ors.; (2001) 6 SCC 591

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

1. The petitioner is the widow of a Class-IV employee, who superannuated from the services of the *Nagar Palika Parishad*, Bindki, District Fatehpur, as a Daftari on 05.01.1995. She has not been paid the post retiral benefits due on account of her husband's services, including family pension till date. This is the case that the petitioner has come up with before this Court, praying for the issue of a *mandamus* directing the respondents to sanction and disburse the post retiral benefits due on account of her husband's services.

2. Heard Mr. Sudheer Rana, learned Counsel for the petitioner, Mr. Rahul Pandey, learned Counsel appearing on behalf of respondent no.4 and Mr. Vimla Prasad, the learned Standing Counsel appearing on behalf of respondent nos. 1, 2 and 3.

3. According to the petitioner, her husband, Mubarak Hussain, retired as a *Daftari*, a Class-IV employee with the *Nagar Palika Parishad*, Bindki, District Fatehpur. He retired on 05.01.1995, and passed away within the course of a year, on 16.12.1995. His services were acknowledged by the Chairman, *Nagar Palika Parishad*, with the *Palika*, passing a condolence resolution showering encomiums. Still, the petitioner's post retiral benefits were not paid. The petitioner says that by the time she instituted the present writ petition, she had become a lean and impoverished woman of 81 years, looking forward to the payment of her husband's post retiral benefits, including the family pension.

4. There is a letter dated 12.01.1996 on record from the Commissioner, Allahabad Division, Allahabad addressed to the Collector, Fatehpur concerning the post retiral benefits due to the petitioner for her husband's services. This letter seems to have been written in ignorance of the *factum* of the employee's death, because it refers to pension payable to Mr. Mubarak Hussain, a retired *Daftari*. All that it says is that the required pension papers have not been forwarded by the Collector to the Commissioner, which should be made available. It is the petitioner's case that she has visited the office of the *Nagar Palika Parishad* time over again during all these many years and decades, but to no avail. It is also averred that the petitioner is dependent on the meagre income of her son, who is a married man and works as a labourer to earn his livelihood. It is averred in Paragraph No.19 of the writ petition that there are no dues outstanding against the petitioner's late husband payable to the employers, yet the petitioner is being denied her legitimate rights to pension etc. It is also pleaded that pension is not a bounty, as also the other post retiral benefits, which should come to her after her husband's demise. She has no source of livelihood and is on the verge of starvation.

5. There are two counter affidavits, carrying the respondents' substantial defence, that is to say, one on behalf of respondent no.3, the District Magistrate, Fatehpur and the other on behalf of respondent no.4, the *Nagar Palika Parishad*, Bindki, Fatehpur represented by its Executive Officer. The last affidavit is sworn by the Executive Officer of the *Nagar Palika Parishad*.

6. The stand taken in both the counter affidavits is almost identical. It is not denied that the petitioner's husband retired from the post of *Daftari*, but the date of his retirement is denied. The *Nagar Palika Parishad* say that he retired on 30.09.1994, whereas the petitioner says that it was 05.01.1995. That date may not be very material. The defence which the Nagar Palika Parishad have put forward, amongst others, in Paragraph No.8 of the counter affidavit, is that the petitioner's husband has worked 10 months exceeding the period of his service, on the basis of something described as "wrong papers". It is alleged that he has drawn salary for 10 months beyond his entitlement to work. As such, the Director, Sthaniya Nidhi Lekha Pariksha Vibhag, U.P., Allahabad vide Letter No. 2232 dated 04.01.1996 has raised an objection in this regard. The Pension Department, presumably of the *Nagar Palika Parishad*, required the petitioner's husband to remove the said objection, but it is said that he did not offer any evidence for the purpose.

7. It must be noticed here that the petitioner's husband, the late Mubarak Hussain, passed away on 16.12.1995.

Apparently when the Pension Department, be it of the *Nagar Palika Parishad* or the Government, raised some kind of an objection, on account of the deceased employee serving 10 months more than his entitlement, he was not in the mortal world to answer or remove the said objection. The widow would have her own limitations in removing the objection, or as the respondents say, offering evidence to show that the deceased employee did not, in fact, work beyond his tenure. There is then a further stand taken in Paragraph No.16 of the counter affidavit filed on behalf of the District Magistrate, where it is said that Mubarak Hussain and the petitioner have not yet deposited the extra salary that the deceased employee has drawn for the 10 months of his services rendered beyond entitlement nor made an application to adjust the extra salary drawn.

8. The District Magistrate's stand in the counter affidavit filed on his behalf is also substantially the same. It is disconcerting to note, however, that while the *Nagar Palika Parishad* have blamed their employee for working 10 months beyond his entitlement and drawing extra salary without resolving the issue, the District Magistrate has been more insensitive and harsh in his rather contradictory stand, besides all that is common. On behalf of the District Magistrate, it has been averred in Paragraph No.8 of the counter affidavit that after the death of Mubarak Hussain, his wife has received extra payment on the basis of wrong papers. The relevant averments read:

"that after death of Sri Mubarak Hussain, his wife received extra payment on the basis of wrong papers, but thereafter she did not deposit the extra payment, regarding which pension department made objection. But, the genuine papers could not produce, did not cooperate to prepare the pension papers, and also did not produce papers pertaining to removal of objection of the pension department, but misbehaved with the employees of the Nagar Palika, due to which the pension paper could not be prepared as per rules, for which the carelessness and negligence of late Mubarak Hussain and his wife is showed."

9. The petitioner, in the rejoinder affidavit, has denied the stand taken by both the *Nagar Palika Parishad* and the District Magistrate and asserts that she has been denied her husband's post retiral benefits. It has particularly been emphasized in the rejoinder affidavit that the respondents have not annexed any evidence to show that they took any action, requiring the petitioner to undertake any formalities for the purpose of payment of pension and other post retiral benefits. The assertion that the petitioner did not cooperate, though the respondents tried to process the pension papers and the other post retiral benefits, is without the slightest evidence offered on behalf of the respondents. There is an averment in Paragraph No.10 of the rejoinder affidavit filed on behalf of the petitioner in answer to the District Magistrate's affidavit, that whenever she approached the competent Authorities, she was ill-treated and rebuked.

10. This Court has carefully perused the record and considered the submissions advanced at the Bar.

11. Besides the remarks about the stand taken by the respondents, that have figured earlier, it must be said that the

respondents' stand is most unfair, unreasonable and arbitrary. The respondents do not deny the fact that the petitioner's husband retired from the *Nagar Palika Parishad's* employ. They do not deny the fact that he was a permanent employee, entitled to payment of post retiral benefits, including family pension payable to the petitioner. All that they say is that the petitioner's husband had worked 10 months more than his entitlement and drawn salary for that period, which is either required to be adjusted or deposited. The petitioner has not done that. The District Magistrate has gone a step ahead to say that it is the petitioner who has received extra payment on the basis of something called, "wrong papers". It is not known what the expression "wrong papers" mean. It is vague, illusory and mystifying. The petitioner admittedly has not been paid a single paisa towards her entitlement on account of her husband's services and yet the District Magistrate has taken a preposterous stand that the petitioner has received extra payment.

12. The *Nagar Palika Parishad*, on the other hand, say more logically that the petitioner's late husband worked 10 months beyond his entitlement and drew salary for those extra months. According to them, that is the impediment which is required to be removed in order to entitle the petitioner to her family pension and payment of all other post retiral benefits due to her late husband. If, in fact, the stand of the respondents is that the petitioner's husband worked beyond his entitlement and drew salary for that period, quite apart from the legal position about the liability to refund such emoluments, all that the respondents could have done was to deduct the said sum of money and pay the petitioner's post retiral benefits. Her family pension had to be sanctioned and disbursed. The mere fact that the respondents think that the petitioner's husband has drawn some extra emoluments, by working beyond his entitlement, would not entitle the respondents to indefinitely postpone the payment of the petitioner's family pension or the post retiral benefits due to her on account of her husband's services. It must be remarked here that the respondents' plea about the petitioner's husband working 10 months beyond his entitlement, is woefully vague. It has not been indicated by reference to specific dates as to what, according to the respondents, was Mubarak Hussain's date of superannuation and when he actually retired. It has also not been indicated as to how and under what circumstances he could work for the claimed extra 10 months. There is not the slightest description of facts and dates about all things claimed. The respondents are the establishment, who possess all service records. They could precisely indicate in their affidavits the precise manner in which the petitioner's late husband worked 10 months beyond entitlement. They could also show as to who was responsible for those extra 10 months of work that he rendered in the fourth respondent's employ. Not only are these particulars about dates and facts missing, there is not the slightest evidence to show that the petitioner's husband worked an extra 10 months. The respondents could have annexed the petitioner's husband's service-book and show when he actually retired; and how it was beyond his superannuation.

13. The respondents being the employers, surely, the petitioner's husband could not have continued unilaterally in service beyond the date of his superannuation. The rather unrefined

expression "wrong papers" that both the District Magistrate as well as the *Nagar Palika Parishad* have employed in their affidavits, could be indicated with more specificity to show what incorrect document, if any, the petitioner's husband produced or used to continue those extra 10 months in the *Nagar Palika Parishad's* employment. Not a whisper has been said about the character of that document, or who produced it, and how the petitioner's deceased husband, a mere employee, utilized it to his advantage.

14. There is another aspect of the matter. Assuming that by some mistake or wrong entry of the date of birth of the petitioner's husband or by some other means, he continued in service for 10 months beyond the date of his superannuation, for which he received salary, the same cannot be recovered by the respondents or made the subject matter of adjustment. This is for the reason that the petitioner's husband, according to the respondents, drew salary for 10 months, but for work that he actually rendered. If the petitioner's husband rendered work for 10 months, recovery of emoluments paid for those extra 10 months of work, would amount to begar, which is prohibited under Article 23 of the Constitution. A Division Bench of this Court in **Sushil Kumar Pandey v. State of U.P. and others, 2010 (5) ALJ 554** had occasion to consider this question in the context of a compassionate appointment, secured by the dependent of a deceased government servant, about whom it was revealed that he was temporary and terminated from service during his lifetime. The question was that notwithstanding the appointment secured by fraud being void, the 10 years' work that the appellant had rendered in terms of that void appointment, for which he was remunerated, would entitle the employers to recover the salary paid. In this context, it was held by their Lordships of the Division Bench in **Sushil Kumar Pandey (supra):**

"23. Therefore, upon the aforesaid discussions, we are of the view that the judgment of the learned Single Judge does not call for any interference. However, we have our reservation regarding the portion of the order by which the learned Single Judge has directed for recovery of salary that was paid to the appellant. Considering the facts and circumstances of the case, it is undeniably true that fraud has been played in obtaining the appointment by the appellant and it is also true that the said fraud would have remained undetected if the mother of the appellant had not applied for family pension. During this period more than 10 years had elapsed and the authorities continued to take work from the appellant and for the services rendered he was remunerated by salary. Now after 10 years of service as the appellant has been dismissed, in such a case, the recovery of entire salary from the person would be too severe for the acts and omission on his part but also the omission and negligence on the part of the authorities in granting appointment to the appellant, which in the facts of the case can not be ruled out. Even otherwise Article 23 of the Constitution of India prohibits taking of "Begar'. The State-respondents having taken work from the appellant (Sushil Kumar Pandey) for more then 10 years before the fraud was detected, cannot be permitted to ask for refund of the entire salary paid to him as it would amount to taking of "Begar' which the Constitution of India strictly prohibits."

15. The principle that for work done and remunerated the emoluments paid to a

person, not at all lawfully appointed or lawfully entitled to serve, could not be recovered, was laid down in the extreme background of an abject fraud. Here, the 10 months of extra work beyond what the respondents claim could have been rendered by the petitioner's husband, is vague and nondescript. In this background, the principle that for work already rendered by an employee and remunerated by the employers, howsoever wrongly appointed or permitted to continue, cannot be recovered for that would be begar, applies with greater force.

16. It must be clarified that the principle prohibiting recovery of certain excess payment made to employees of certain classes or categories laid down in **State of Punjab and others v. Rafiq Masih (White Washer) and others, (2015) 4 SCC 334 and Thomas Daniel v. State of Kerala and others, 2022 SCC OnLine SC 536**, is different from the one involved here to the understanding of this Court. In **Rafiq Masih** (supra) and **Thomas Daniel** (supra), the principle is about prohibiting recovery of emoluments paid in excess of entitlement to a certain class of employees, like those in Group-C and Group-D services or retired employees etc. made on account of a wrong calculation or reckoning of entitlement, to which the employee has not contributed. Here, the principle involved is about recovery of the emoluments paid to a person, who has either been retained without employment or permitted to continue in service beyond his entitlement or tenure. In this case, since the recovery is of the entire emoluments paid for the duration of work rendered, and not some part of the emoluments paid, the constitutional prohibition of begar is attracted. It needs hardly be emphasized that an employee, whose post retiral benefits, that include pension and gratuity are withheld on account of apathy at the hands of the employers, particularly, State employers, led the Supreme Court to observe in **State of Kerala and others v. M. Padmanabhan Nair, (1985) 1 SCC 429,** thus:

"1. Pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become, under the decisions of this Court, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment.

2. Usually the delay occurs by reason of non-production of the L.P.C. (last pay certificate) and the N.L.C. (no liability certificate) from the concerned Departments but both these documents pertain to matters, records whereof would be with the concerned Government Departments. Since the date of retirement of every Government servant is very much known in advance we fail to appreciate why the process of collecting the requisite information and issuance of these two documents should not be completed at least a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following day and pension at the expiry of the following month. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over-emphasised and it would not be unreasonable to direct that the liability to pay penal interest on these dues at the current market rate should

commence at the expiry of two months from the date of retirement."

17. In a slightly different context about reckoning of the period of service prior to recruitment against a regular post, interpreting the service rules for the purpose of entitlement to pension, the Supreme Court in **V. Sukumaran v. State of Kerala and another, (2020) 8 SCC 106** emphasized the nature and entitlement to pension thus:

"1. Pension is succour for post-retirement period. It is not a bounty payable at will, but a social welfare measure as a post-retirement entitlement to maintain the dignity of the employee. The appellant has been claiming his entitlement for the last almost 13 years but unsuccessfully, despite having worked with government departments in various capacities for about 32 years.

22. We begin by, once again, emphasising that the pensionary provisions must be given a liberal construction as a social welfare measure. This does not imply that something can be given contrary to rules, but the very basis for grant of such pension must be kept in mind i.e. to facilitate a retired government employee to live with dignity in his winter of life and, thus, such benefit should not be unreasonably denied to an employee, more so on technicalities."

18. The delay in disbursement of pension and gratuity, which would apply, in the opinion of this Court, to all post retiral benefits due to a retired employee or his surviving spouse, the Supreme Court in **Gorakhpur University and others v. Dr. Shitla Prasad Nagendra and others, (2001) 6 SCC 591** held:

"5. We have carefully considered the submission on behalf of the respective parties before us. The earlier decision pertaining to this very University, reported in S.N. Mathur [(1996) 2 ESC 211 (All)] is that of a Division Bench, rendered after considering the principles laid down and also placing reliance upon the decisions of this Court reported in R. Kapur [(1994) 6 SCC 589 : 1995 SCC (L&S) 13 : (1994) 28 ATC 516] which, in turn, relied upon earlier decisions in State of Kerala v. M. Padmanabhan Nair [(1985) 1 SCC 429 : 1985 SCC (L&S) 278] and Som Prakash [(1981) 1 SCC 449 : 1981 SCC (L&S) 200 : AIR 1981 SC 212]. This Court has been repeatedly emphasizing the position that pension and gratuity are no longer matters of any bounty to be distributed by the Government but are valuable rights acquired and property in their hands and any delay in settlement and disbursement whereof should be viewed seriously and dealt with severely by imposing penalty in the form of payment of interest. Withholding of quarters allotted, while in service, even after retirement without vacating the same has been viewed to be not a valid ground to withhold the disbursement of the terminal benefits. Such is the position with reference to amounts due towards provident fund, which is rendered immune from attachment and deduction or adjustment as against any other dues from the employee. ....."

19. The authorities need not be multiplied which emphasize the importance of prompt settlement and quick disbursement of post retiral benefits, particularly, pension and gratuity. This would apply with equal, if not greater,

vigour to the case of a surviving spouse/ widow of the deceased government servant/ employee, like the case here. The petitioner, as already noticed, is living in penury, though under the Rules, for her husband's services, she is entitled to monetary relief in terms of post retiral benefits. The respondents have resolutely delayed payment of post retiral benefits due to the petitioner on account of her husband's services.

20. In the circumstances, this Court is of opinion that the respondents must not only forthwith sanction, release and disburse all post retiral benefits due to the petitioner on account of her deceased husband's services, but also compensate the petitioner in costs and by payment of adequate interest on the delayed disbursement of post retiral benefits. It is made clear that there shall be no deduction or adjustment out of the post retiral benefits payable to the petitioner on account of her husband's services, on ground that her husband worked for some months beyond the age of superannuation.

21. In the result, this petition **succeeds** and is **allowed**. A **mandamus** is issued to the Commissioner, Prayagraj Division, Prayagraj, the District Magistrate, Fatehpur and the *Nagar Palika Parishad*, Bindki, Fatehpur represented by its Executive Officer to ensure between themselves sanction and disbursement of the petitioner's post retiral benefits, including retirement pension, if any, family pension, gratuity, general provident fund, group insurance, besides any other dues under the rules within **six weeks** of the date of receipt of a copy of this order. The dues shall be remitted in such bank account to the petitioner as she would indicate, upon the District Magistrate, Fatehpur ascertaining the relevant particulars from her or a family member of hers in her presence, within the aforesaid period of time. The substantive entitlement of the petitioner under various heads of post-retiral benefits shall carry simple interest at the rate of 6% per annum from the date of entitlement till payment in the petitioner's account. The petitioner's family's pension, current as well as future, shall be paid regularly. The petitioner shall be entitled to cost of Rs. 25,000/-, which shall be paid by the respondent, Nagar Palika Parishad, Bindki, District Fatehpur separately through a bank instrument, payable in account to the petitioner. In the event of default in payment of costs, upon an application for the purpose made to the Registrar General of this Court, the Registrar General shall cause the costs to be recovered from the *Nagar Palika Parishad* as arrears of land revenue through the District Magistrate, Fatehpur and remitted in account to the petitioner.

22. Let a copy of this judgment be communicated to the Commissioner, Prayagraj Division, Prayagraj, the District Magistrate, Fatehpur and the Executive Officer, *Nagar Palika Parishad*, Bindki, Fatehpur by the Registrar (Compliance).

(2022) 8 ILRA 402
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ-C No. 9511 of 2022

Govind Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava III, Sri Girja Shanker Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law – Recruitment for appointment in force – Accusation in criminal cases –Petitioner was acquitted in two cases relating to the charge of robbery on the basis of benefit of doubt and trial against him in one another case is pending – Effect – Candidature refused – Validitty challenged – Held, the acquittal of petitioner in two criminal cases was not 'honourable' as well as he is facing trial for the offence which could not be said to be of trivial in nature – Employer has a right to consider antecedents of employee – Considering the antecedents of petitioner the respondents-authorities have rightly refused to consider the candidature of petitioner for a part of disciplined force – Methu Meda relied upon. (Para 11 and 12)

B. Service Law – Acquittal in criminal case, to what extent effect candidature – Honourable acquittal and Acquittal on the basis of benefit of doubt distinguished – Term 'Honourable Acquittal' defined – When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges leveled against the accused, it can possibly be said that the accused was honourably acquitted – S. Samuthiram's case relied upon. (Para 6)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Avtar Singh Vs U.O.I. & ors.; 2016(8) SCC 471

2. Deputy Inspector General of Police & anr. Vs S. Samuthiram; 2013 (1) SCC 598

3. St. of Raj. & ors. Vs Love Kush Meena' 2021 SCC Online SC, 252

4. U.O.I. & ors. Vs Methu Meda; (2022) 1 SCC 1

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Sri Arvind Srivastava III, learned counsel for petitioner has not disputed that petitioner was an accused in three criminal cases. In two criminal cases after trial petitioner was acquitted, however, in one case trial is pending. Details of criminal cases with their present status alongwith nature of acquittal are mentioned hereinafter:

Sl. No.	Case No.	Section	Nature of acquittal
1.	394 of 2013	392, 411 IPC	Benefit of doubt
2.	553 of 2013	392, 411, 467, 468, 471 IPC	Benefit of doubt
3.	478A of 2014	147, 148, 149, 336, 323, 504, 506, 325 IPC	Trial is pending

2. Learned counsel for petitioner submits that since petitioner was acquitted in two criminal cases, as the prosecution was failed to proved its case beyond reasonable doubt and also that the charges in third case are not of serious in nature, therefore, respondents-authorities ought to have considered the case of petitioner in the light of principles enumerated in **Avtar Singh vs. Union of India and others, 2016(8) SCC 471**, but they have not considered the case of petitioner in the light of aforesaid judgment, therefore, the impugned order is liable to be set aside and matter should be remanded back for consideration of case of petitioner in the light of **Avtar Singh (supra).**

3. Learned Standing Counsel appearing for State-Respondents, while

opposing the above submissions submits that nature of acquittal of petitioner in two criminal cases does not fall under category of honourable/ clean acquittal, rather the order of acquittal was passed granting benefit of doubt as the prosecution was failed to prove its case beyond reasonable doubt, which has been considered in impugned order. Petitioner was involved in the offences which were serious in nature, i.e., robbery, and it cannot be considered to be a case of trivial nature as well as presently petitioner is facing trial for the offence being part of an unlawful assembly and causing hurt.

4. Heard learned counsel for parties and perused the material available on record.

5. From the chart mentioned above, undisputedly petitioner was charged for an offence of robbery in two criminal cases. Offence of robbery is a serious charge. Trial Court passed order of acquittal in the cases referred at Serial Nos. 1 and 2 of the chart. I have perused the said judgments. The Trial Court has acquitted petitioner, as the prosecution was failed to prove its case beyond reasonable doubt and, therefore, granted benefit of doubt.

6. The nature of acquittal i.e. honorable acquittal or acquittal on the basis of benefit of doubt are terminologies not mentioned in the Criminal Procedure Code. However, the Apex Court has discussed these terminologies in **Deputy Inspector General of Police and another Vs. S.Samuthiram, 2013 (1) SCC 598,** relevant paragraph 24 of which is reproduced below:

"24. The meaning of the expression ''honourable acquittal' came up for consideration before this Court in RBI Vs. Bhopal Singh Panchal, (1994) 1 SCC 541. In that case, this Court has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, this Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable. ***The expressions ''honourable acquittal', ''acquitted of blame', ''fully exonerated' are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression ''honourably acquitted'. When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted."*** *(Emphasis added)*

7. The Apex Court in a recent case of **State of Rajasthan and Ors. Vs. Love Kush Meena, 2021 SCC Online SC, 252** has also observed in this regard and relevant paragraph 15 of which is mentioned hereinafter:

"15. It is pointed out that various nuances arising in this judgment has been considering even in the subsequent judgments. In Union Territory, Chandigarh Administration & Ors. v. Pradeep Kumar & Anr., (2018) 1 SCC 797, a two Judge Bench of this Court dealt with the expression "honourable acquittal". ***It was opined that acquittal in a criminal case was not conclusive for suitability of the candidate concerned and it could not always be inferred from an acquittal or discharge that the person was falsely***

involved or has no criminal antecedents. Thus, unless it is an honourable acquittal, the candidate cannot claim the benefit of the case. *No doubt, it was mentioned by relying on the earlier judgment of this Court in Inspector General of Police v. S. Samuthiram, (2013) 1 SCC 598, that while it was difficult to define precisely what is meant by the expression "honourable acquittal", an accused who is acquitted after full consideration of the prosecution evidence and prosecution has miserably failed to prove the charges levelled against the accused...."*

(emphasis added)

8. It is also not in dispute that in the case mentioned at Serial No. 3 in the above referred chart, petitioner is facing trial wherein offences are under Sections 147, 148, 149, 336, 323, 504, 506, 325 IPC. Section 336 IPC provides details of an offence of doing an act endangering life or personal safety of others and Section 323 IPC provides punishment for voluntarily causing hurt. The petitioner was part of unlawful assembly and, therefore, nature of offence could not be termed to be trivial.

9. In **Avtar Singh (supra)** in para 38.5 the Court held that, ***"in a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate."*** In **Avtar Singh (supra)** Court further held that, ***"Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee."***

10. Supreme Court in a recent judgment while considering **Avtar Singh (supra)** in **Union of India and others vs. Methu Meda, (2022) 1 SCC 1** has observed as under:

"Acquittal on technical ground in respect of the offences of heinous/serious nature, which is not a clean acquittal, the employer may have a right to consider all relevant facts available as to the antecedents, and may take appropriate decision as to the continuance of the employee. Even in case, truthful declaration regarding concluded trial has been made by the employee, still the employer has the right to consider antecedents and cannot be compelled to appoint the candidate."

(Emphasis added)

11. In the present case, the acquittal of petitioner in two criminal cases was not "honourable" as well as he is facing trial for the offence which could not be said to be of trivial in nature. As held in **Methu Meda (supra),** in these circumstances employer has a right to consider antecedents of employee, which was decided against the petitioner in the present case.

12. Considering the antecedents of petitioner the respondents-authorities have rightly refused to consider the candidature of petitioner for a part of disciplined force, therefore, after considering the facts as well as law, discussed above, this Court does not find any reason to interfere with the impugned order.

13. The writ petition is accordingly dismissed.

(2022) 8 ILRA 406
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 30536 of 2014

Kedar Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh, Sri J.P. Singh

Counsel for the Respondents:
C.S.C., Sri B.P. Singh

A. Service Law – Entitlement of Gratuity – GO dated 30.07.2007 and 16.09.2009 – Applicability – Prospective effect – Petitioner retired on 31.03.2006 from the post of Head Clerk after attaining the age of 60 years and had also given an option – Finance Controller refused to grant gratuity – Validity challenged – Held, GO dated 16.09.2009 refers only to revision of rates and how the emoluments are to be calculated for grant of benefit of such revised rates. It does not decide entitlement. The Government Order dated 30.7.2007 decides entitlement towards gratuity and it refers to such employees who had been left out from being given such facility of gratuity earlier. It was decided by the Government to extend the facility of gratuity to such employees on their retirement but such facility was extended only with prospective effect – High Court found no good ground for interference, however left it open to the petitioner to challenge the GO dated 30.07.2007. (Para 20 and 21)

Writ petition disposed off. (E-1)

List of Cases cited:-

1. Writ A No. 40568 of 2016; Noor Jahan Vs St. of U.P. & ors. decided on 04.01.2018

2. Writ A No. 17399 of 2019; Usha Rani Vs St. of U.P. & ors. decided on 07.11.2019

3. Special Appeal Defective No. 40 of 2021; St. of U.P & ors. Vs Usha Rani decided on 28.01.2021

4. Writ A No. 5108 of 2021; Prem Kumari Vs St. of U.P. & ors. decided on 08.07.2020

5. Smt. Ranjana Kakkad Vs St. of U.P. & ors.; 2008 (10) ADJ 63

6. Writ-A No. 2948 of 2021; Sarwasti Gupta Vs St. of U.P. & ors. decided on 16.09.2021

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

1. Heard learned counsel for the petitioner and perused the record of the case.

2. None appears on behalf of B.S.A. although name of Mr. B.P. Singh, learned counsel for the B.S.A. has been shown in the cause list.

3. It is the case of the petitioner that he was working as Head Clerk in the Office of Sub Deputy Basic Education Officer, Azamgarh and retired on 31.3.2006 after attaining the age of 60 years. The petitioner had submitted his option to retire at the age of 60 years, therefore, he was covered under the Government Order dated 16.9.2009 which was issued accepting the recommendation of the Pay Commission revising the rates of pension/gratuity/family pension and commutation of pension in relation to teachers and employees of the Basic Education Board retiring on 01.01.2006 or thereafter. Paragraph 4(1) of the said government order provides that such teaching/non-teaching employees who retired before completing 10 years of qualifying service though not entitled to get

pension like government servants, would be entitled to receive gratuity, if they retired on attaining the age of 60 years. Paragraph 4(4) of Government Order dated 16.09.2009 clarifies that teaching/non-teaching employees who retired on 1.1.2006 or thereafter would be governed by Pension Rules which were applicable before the issuance of the Government Order dated 16.9.2009. Before such Government Order dated 16.9.2009 was issued, there was Government order dated 30.7.2007 which sanctioned benefit of gratuity to those working/left out non-teaching staff of different offices of the Basic Education Board who had retired at the age of 60 years. The Government had decided to extend the benefit of gratuity to all working/left out non-teaching staff who had opted for retirement at the age of 60 years.

4. It has been argued that the petitioner's claim for gratuity was not accepted by the Finance Controller. The petitioner, aggrieved thereby, filed petition bearing Writ-A No. 69236 of 2013 (Kedar Ram Vs. State of U.P. and another) which was disposed of by a Co-ordinate Bench of this Court vide order dated 17.12.2013 with a direction to the Competent Authority to consider and decide the petitioner's representation by a speaking order. The Finance Controller, Basic Education Board had earlier given certain directions to the Finance and Accounts Officer but then decided the case of the petitioner himself. It has been mentioned in the order dated 17.2.2014, challenged in this petition, that the petitioner had retired as Head Clerk on 31.3.2006 and pension for the said post was to be approved by the Assistant Basic Education, Director, but since the representation had been made to the Finance Controller a direction was issued by the High Court to the Finance Controller for taking decision on the representation of the petitioner. The petitioner was heard personally on 27.1.2014, and he had based his claim upon Government Order No. 1754/79-5-09-02/2009 of Shiksha Anubhag-5 dated 16.9.2009. The Finance Controller in his order stated that such order dated 16.9.2009 is not a Government Order. It is a Circular/ Office Order issued by the Shiksha Anubhag-5 for revision of rates of pension/gratuity/family pension and commutation of pension.

5. The case of the petitioner is governed by Government Order dated 30.7.2007 which refers to the remaining/left out employees of the Board and who had retired at the age of 60 years and extended the benefit of pension/gratuity to them but such Government Order become applicable only with effect from 30.07.2007 and the petitioner had retired on 31.03.2006 much before issuance of the Government Order dated 30.7.2007, as a result of which, gratuity is not payable to the petitioner. The Office Order/Circular dated 16.9.2009 did not create any substantive rights in favour of the employees for getting gratuity. It only revised the rates of pension/ family pension/ commutation/ gratuity etc.

6. It is the case of the Respondents that an employee who retired before Government Order dated 30.07.2007, like the petitioner herein (which made gratuity applicable/admissible to employees of the Basic Education Board) and which government order is thus, prospective in its effect, could not be given to the petitioner.

7. It is the case of the petitioner that the order dated 16.09.2009 has been wrongly referred to by the Finance

Controller as an Office Order issued by Shiksha Anubhag-5. This is in violation of observations made by this Court in its various judgments which have referred to the Government Order dated 16.09.2009 and had given benefit of such government order to the employees for family pension.

8. Learned counsel for the petitioner has placed reliance upon a judgment passed by a Co-ordinate Bench of this Court in ***Writ-A No. 40568 of 2016 (Noor Jahan Vs. State of U.P. And 4 others).*** He has also referred to a judgment in ***Writ-A No. 17399 of 2019 (Usha Rani Vs. State of U.P. and 6 others)*** passed by a Co-ordinate Bench of this Court decided on 07.11.2019. Against such an order passed by the Single Judge, a ***Special Appeal Defective No. 40 of 2021 (State of U.P and 6 others Vs. Usha Rani)*** was filed which was also disposed of vide order dated 28.01.2021. Learned counsel for the petitioner has also placed reliance upon order passed in ***Writ-A No. 5108 of 2021 (Prem Kumari Vs. State of U.P. And 7 others)*** decided on 08.07.2020, wherein reliance was placed upon the case of ***Usha Rani (supra).***

9. It has been submitted by learned counsel for the petitioner that this Court has held in its various judgments as cited hereinabove that the Government Order dated 16.09.2009 provides for revision of pension and other retiral benefits to the retired employees of the Department of Basic Education Board granting higher benefits with effect from 01.01.2006. It had also observed that although pension would not be available to those employees who had not completed 10 years of qualifying service but such employees who retired after attaining the age of 60 years shall be entitled to gratuity and other retiral benefits.

10. It is the case of the petitioner that the petitioner had retired after attaining the age of 60 years and that he had given an option in this regard, therefore, it cannot be said that government order dated 16.9.2009 is not applicable to him.

11. This Court has carefully perused the judgment of this Court rendered in ***Noor Jahan (supra)*** and finds that the question decided by this Court related to admissibility of family pension to the petitioner whose husband had died at the age of 57 years, i.e., before completing the age of 60 years. The Circular/ Office Order dated 16.09.2009 was interpreted strictly by the State-respondents and gratuity was not given to her. The Court had clarified that under Clause 5 of the said Order, gratuity would be payable to an employee who did not complete qualifying ten years of service and died early, therefore, she would still be entitled for getting some retiral gratuity as per the Office Order dated 16.09.2009.

12. It is evident from the judgment rendered in Noor Jahan (supra) that there was no issue framed with regard to whether gratuity would be admissible as per the Government Order dated 30.7.2007 or the Office Order dated 16.09.2009. The Court had assumed that the Office Order issued by Shiksha Anubhag-5 is a Government Order making death-cum-retirement gratuity and other retiral benefits admissible as per revised rates to retired employees/dependants of such employees of the Department of Basic Education Board.

13. This Court has also considered the judgment rendered in the case of ***Usha Rani (supra)*** where reference has been made to several judgments passed by Co-ordinate Benches of this Court making

admissible payment of gratuity as per the Office Order dated 16.9.2009 to such employees who had not given option for retirement at the age of 60 years, by placing reliance upon judgment rendered in ***Noor Jahan's*** case. The Court observed that even if the daughter of the petitioner therein had died during course of service before completing the age of 60 years, the mother would be entitled to get death-cum-retirement gratuity as was admissible to her daughter. Gratuity could not be denied only on the ground that the employee concerned had died before attaining the age of 60 years.

14. In the Special Appeal filed by the State of U.P., the Division Bench was of the opinion that as per the Office Order dated 16.07.2009, the employees who had given the option to continue in service beyond the normal age of superannuation of 58 years and for extension of service with the condition that gratuity would be denied to such employees would shall be given gratuity as this Court in the case of ***Smt. Ranjana Kakkad Vs. State of U.P. and others reported in 2008 (10) ADJ 63*** had extended the benefit of gratuity to such employees.

15. In the case of ***Prem Kumari (supra)*** also, the judgment rendered by a Co-ordinate Bench of this Court in the case of ***Usha Rani (supra)*** was relied upon. The writ petitioner's husband had died before completing the age of 60 years. Similar is the case of ***Sarwasti Gupta Vs. State of U.P. And 5 others*** *in* ***Writ-A No. 2948 of 2021***, decided on 16.09.2021 where respondents had denied the gratuity of petitioner's husband on the ground that the husband of the petitioner had not opted for retirement at the age of 60 years and had died before reaching his age of superannuation.

16. All the judgments cited by the learned counsel for the petitioner rendered by Co-ordinate Benches of this Court have referred to the Office Order issued by Shiksha Anubhag-5 as a Government Order. However, no issue with regard to whether it is a Government Order or Circular or Office Order had been framed by any of the Co-ordinate Benches. The only question the Co-ordinate Benches had considered was if an employee dies before attaining the age of 60 years, or if an employee retires without giving option as required in the Government Order, whether he or his dependants would be entitled to any gratuity.

17. In the case of the petitioner he had given an option for extension and he was allowed to work till he attained the age of 60 years and retired thereafter.

18. Now, this Court has to consider the contention raised by the Respondents in the counter affidavit that the facility of gratuity in favour of the employees like the petitioner had been introduced for the first time by the Government Order dated 30.7.2007. It was made operative with immediate effect and would not be applicable to such employees as the petitioner who had retired prior to the issuance of the said Government Order.

19. This court has considered the language of Office Order dated 16.09.2009 which has been issued by the Shiksha Anubhag-5 informing of the Government's decision to accept the recommendations of the Pay Committee, 2008 for revision of rates of pension of teaching and non-teaching staff and their gratuity/family pension and commutation of pension. It has referred to revision of rates of pension/family pension, gratuity and commutation of pension as applicable to

those employees who had already been made entitled to such facility and it gives the revised rates with effect from 01.07.2006. It also refers to such cases where teaching and non-teaching staff had already been assigned pension/family pension/death-cum-retiral gratuity-cum-commutation of pension at rates which were higher than the revised rates as notified in the Office Order dated 16.09.2009 and says that in such cases revision shall not be done to the detriment of the employee concerned. It refers to detailed procedure as to how pension has to be fixed on the basis of emoluments last drawn by an employee. It also gives the method of calculating emoluments on revised rates. In Clause 4(1) of the said Office Order, mention has also been made of such teaching and non-teaching staff who had retired before completing 10 years of qualifying service being not entitled to pension but at the same time, says that such employees would still be entitled to revised rates of gratuity under the extant Rules. It also refers to reduction in the minimum qualifying service for getting full pension from 33 years to 20 years. Clause 4(4) of the said Office Order, referring to Clauses 4(2) and 4(3), states that such facility would be available to teaching and non-teaching staff who had retired on 1.1.2006 or thereafter. Those who had retired before 1.1.2006, would get pension/family pension/gratuity and commutation of pension at the rates that were admissible before the issuance of the said order.

20. This Court after careful perusal of Office Order dated 16.09.2009 finds that indeed it refers only to revision of rates and how the emoluments are to be calculated for grant of benefit of such revised rates. It does not decide entitlement. The Government Order dated 30.7.2007 issued by the Principal Secretary, Government of U.P. decides entitlement towards gratuity and it refers to such employees who had been left out from being given such facility of gratuity earlier. It was decided by the Government to extend the facility of gratuity to such employees on their retirement but such facility was extended only with prospective effect.

21. Having heard the learned counsel for the petitioner and having perused the entire material available on record, this Court finds no good ground to show interference in the order passed by the Finance Controller dated 17.2.2014 at this stage but leaves it open to the petitioner to approach this Court challenging the Government Order dated 30.7.2007 or any other Government Order which decides the entitlement of the petitioner to get service gratuity by filing a fresh writ petition in this regard.

22. The petition stands **disposed off** accordingly.

(2022) 8 ILRA 410
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-C No. 9412 of 2022

Bank of Baroda ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sandeep Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Vidyapati Tripathi

A. Civil Law -Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002-Sections 14 & 34 -The petitioner is a bank whose application rejected u/s 14 SARFAESI Act on the ground of temporary injunction passed by civil court filed by tenant in which the bank was not a party -an unregistered lease agreement executed by wife in favour of her husband conferring right to him to mortgage and sublet etc.-The unregistered rent deed is hit by the provisions of Section 17 r/w Section 49 of the Registration Act, 1908-Temporary injunction could not have been passed as the secured asset in question was mortgaged with the bank and the jurisdiction of civil court was barred by Section 34 of the SARFAESI Act, 2002-Thus, O.S. pending in the Civil Court is dismissed-Respondent No. 2 is directed to pass an order afresh for physical possession over the secured asset to the petitioner within 30 days.(Para 1 to 21)

The writ petition is allowed. (E-6)

List of Cases cited:

Bajarang Shyam Sunder Agarwal Vs Central Bank of India & anr. CRLA No. 1371 of 2019

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Sandeep Kumar Singh, learned counsel for the petitioner, Sri Nimai Das, learned Additional Chief Standing Counsel for the respondent Nos. 1 & 2 and Sri Vidyapati Tripathi, learned counsel for the respondent No.5.

2. This writ petition has been filed by the petitioner - Bank praying for the following reliefs :

"(a). issue a writ order or direction in the nature of CERTIORARI quashing the order dated 17.02.2022 passed by Respondent No.2;

(b) issue a writ order or direction in the nature of MANDAMUS commanding the Respondent Nos.2 to pass fresh order on the Bank's application dated 17.02.2018 in order to hand over the actual physical possession of the mortgaged property (specifically detailed in the body of the writ petition in Para No.4) to the Petitioner Bank within a stipulated period;"

3. By order dated 06.07.2022, this Court directed the respondent No.1 (State of U.P. through the District Magistrate, Agra), the respondent No.2 (The Additional District Magistrate (Finance & Revenue), Agra and the respondent No.5 (Abhimanyu Singh Director, Eena Cable T.V. Network Pvt. Ltd., Agra) to file counter affidavit. The order dated 06.07.2022 is reproduced below:

"The petitioner is the bank, whose application under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act') has been rejected by the impugned order dated 17.2.2022 passed by the respondent no. 2 on the ground that there is a temporary injunction order passed by the Court of Additional Civil Judge Senior Division, Agra in Suit No. 1258 of 2020 filed by the respondent no. 5/tenant in which the bank is not a party and since temporary injunction is operating, therefore,

possession of the secured asset cannot be given.

Prima facie, it appears that neither the civil suit is maintainable nor the application of the bank under Section 14 of the SARFAESI Act ought to have been rejected on the ground of temporary injunction obtained by the tenant, when the bank was not a party in the suit and therefore, the temporary injunction so obtained would not be operative against the bank in respect of the secured asset. *In paragraph 19 of the writ petition, it has been alleged that the aforesaid temporary injunction has been obtained on the basis of an alleged unregistered lease deed dated 1.8.2010 for a period of 29 years and 8 months which, prima facie, was required to be compulsorily registered in view of Section 17 of the Registration Act, 1908 and failure of registration would attract the consequences under Section 49 of the Registration Act, 1908.*

It further appears that the order under Section 14 of the SARFAESI Act on the application of the petitioner/bank was passed by the competent authority on 26.8.2018 by the Additional District Magistrate (F & R), Agra. The respondent no. 4/ owner of the secured asset filed S.A. No. 113 of 2018 in which there is not even a whisper about the tenancy of the respondent no. 5. The aforesaid S.A. was partly allowed by the Debts Recovery Tribunal, Allahabad *by order dated 30.3.2019 on the ground that opportunity of hearing to the owner/borrower was not afforded by the ADM (F & R), Agra while passing the order dated 26.2.2018 under Section 14 of the SARFAESI Act. Consequently, the order was quashed and it was directed that both the parties shall appear before the ADM (F & R), Agra on 30.4.2019, who shall decide the matter afresh following principles of natural justice. It appears that, thereafter,* ***the respondent no. 5 (alleged tenant) filed a Suit No. 1258 of 2020 without impleading the bank as defendant in which an interim order was passed despite bar of jurisdiction of civil court created under Section 34 of the SARFAESI Act. Now by the impugned order, on the ground of temporary injunction in the aforesaid suit, the application of the petitioner/bank has been rejected by the ADM (F & R), Agra dated 17.2.2022.***

*In view of the facts as briefly noted above****, the respondent nos. 1, 2 and 5 are directed to file counter affidavit within a week*** *in which they shall specifically state that how the temporary injunction obtained by the respondent no. 5 is binding on the petitioner-bank when bank is not party in the suit.* ***They shall further state that how the suit is maintainable in respect of the secured asset in view of Section 34 of the SARFAESI Act.*** *In the counter affidavit, the respondent nos. 1 and 2 shall show cause how they overlooked the provisions of Section 34 of the SARFAESI Act, and the order of this court dated 11.11.2021 in Writ Petition No. 28839 of 2021 and the order dated 24.8.2021 in Writ Petition No. 7126 of 2021 and the order of the Debt Recovery Tribunal, Allahabad dated 30.3.2019 in S.A. No. 113 of 2018.*

Put up as a fresh case before the appropriate Bench on 13.7.2022."

4. Pursuant to the aforequoted order dated 06.07.2022, the respondent Nos.1 and 2 have filed counter affidavit on 13.07.2022 while the respondent No.5 prayed for and was granted three days further time to file counter affidavit.

However, **the respondent No.5 has chosen only to file short counter affidavit dated 20.07.2022. On 20.07.2022, this Court passed the following order:**

"Heard Sri Sandeep Kumar Singh, learned counsel for the petitioner, Sri Nimai Das, learned Additional Chief Standing Counsel for the respondent Nos. 1 & 2 and Sri Vidyapati Tripathi, learned counsel for the respondent No.5.

Short counter affidavit filed today by the respondent no.5 and the rejoinder affidavit to the counter affidavit of the respondent nos.1 & 2, filed today by the learned counsel for the petitioner, are taken on record.

Learned counsel for the respondent no.5 has produced before us a copy of plaint of O.S. no.1258 of 2020 alongwith copy of affidavit, list of documents relied upon by the plaintiff and copies of such documents which as produced are kept on record.

The respondent no.5 is directed to file a supplementary counter affidavit annexing therewith the aforementioned entire documents i.e. copy of plaint etc.

We also direct the respondent nos. 1 & 2 to produce the entire records relating to the order dated 17.02.2022.

Put up tomorrow for further hearing at 10 AM."

5. **On 21.07.2022**, this Court passed the following order:

"Rejoinder affidavit filed today is taken on record.

Sri Vidyapati Tripathi, learned counsel for the respondent No.5 prays for and is granted three days' further time to enable the respondent No.5 to file supplementary counter affidavit in compliance to the order dated 20.07.2022.

We also direct the Registrar General to inform this court on the next date fixed, the name of the Civil Judge (Senior Division), Agra who passed the interim order dated 07.12.2020 in O.S. No.1258 of 2020 *(Sri Abhimanyu Singh vs. Smt. Rupa Singh and others).*

Put up as a fresh case for further hearing on 26.07.2022 on 10:00 A.M.

Original Record as produced by Sri Nimai Das, is returned to him with a direction to produce it again on the next date fixed."

6. **By order dated 26.07.2022,** this Court directed the Registrar General to comply with the order dated 21.07.2022 and disclose the name of Judicial Officer, who passed the interim order dated 07.12.2020 in O.S. No.1258 of 2020. In compliance to the said order, **the Registrar General has submitted a note dated 26.07.2022** based on the report of the District Judge, Agra **that the interim order dated 07.12.2020 in O.S. No.1258 of 2020** (Sri Abhimanyu Singh Vs. Smt. Roopa Singh and others) **was passed by Sri Prashant Kumar - II, Civil Judge (Senior Division), Agra who is presently posted in District Judgship, Kushinagar at Padrauna.**

Submissions:-

7. **Learned counsel for the petitioners submits** that the impugned order is wholly arbitrary and illegal. The respondent nos. 4 & 5 are in collusion and have played fraud upon this Court as well as upon D.R.T. Even after knowing well that the property in question is mortgaged in favour of the Bank and recovery proceedings are going on, yet the respondent no.5 in collusion with respondent no.4 has filed a suit for injunction in which they have not

impleaded the petitioner bank as defendant. Even though the respondent no.5 has not filed a copy of any alleged rent agreement or lease deed which has been admitted by him in Court to be an unregistered one. An unregistered lease deed can not be executed for more than 11 months whereas the respondent no.5 has alleged that it is a lease deed commencing from the year 2010 and ending in the year 2039 which is totally impermissible in view of the provisions of Section 69 of the Registration Act, 1908 which could not even looked into in view of provisions of Section 17 read with Section 69 of the Registration Act 1908. The respondent no.5 has concealed the material facts even before this Court while not filing the copy of the alleged lease deed and copy of the plaint. The respondent no.5 is the son of the respondent no.4 i.e. the mortagor and both are in collusion. He relied upon a judgment of Hon'ble Supreme Court in **Criminal Appeal No.1371 of 2019 (Bajarang Shyam Sunder Agarwal Vs. Central Bank of India and another) decided on 11.09.2019.**

8. **Learned Additional Chief Standing Counsel submits** that since there was an order of status-quo dated 07.12.2020, passed by the Court of Additional Civil Judge (Senior Division), Agra in O.S. no. 1258 of 2020 (Abhimanyu Singh Vs.Smt. Roopa Singh and others) directing for status-quo, therefore, the respondent no.2 has correctly passed the impugned order inasmuch as he could not violate the order passed by the Additional Civil Judge (Junior Division), Agra.

9. Learned counsel for the respondent no.5 submits that the respondent no.5 became tenant of the secured assets under the rent agreement dated 01.08.2010 for a period of 11 months @ Rs. 500/- per month, which later on was extended till the year 2039. He submits that since the respondent no.5 is the tenant in the house in question, therefore, he cannot be dispossessed from the house in question in proceedings under section 14 of the SARFAESI Act. He further submits that the respondent no.5 is running a Cable T.V. Network in the name and style of M/s. ENA Cable T.V. Network Pvt. Ltd. which is a Company incorporated under the Companies Act, 2013, therefore, the respondent no.5 cannot be dispossessed from the house in question.

Discussion and Findings:-

10. The petitioner is a bank, whose application under Section 14 of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act') has been rejected by the impugned order dated 17.02.2022 passed by the respondent No.2 on the ground that there is a temporary injunction order passed by the court of Civil Judge (Senior Division) Agra in O.S. No.1258 of 2020 filed by the respondent No.5/ tenant in which the bank is not a party and since temporary injunction is operating, therefore, possession of the secured asset cannot be given. Aggrieved with this order, the petitioner has filed the present writ petition.

11. It is admitted fact of the case that the **respondent No.4 namely Smt. Roopa Singh wife of Sri Pawan Kumar Singh,** resident of 247-Jaipur House, Agra **is the owner of the secured asset who has mortgaged it with the petitioner - bank** for loan taken by M/s Gayatri Development well Private Limited. **The respondent No.5 is the son of the respondent No.4.** Since the

borrower defaulted in payment of bank dues, therefore, the petitioner bank initiated proceedings for recovery of its dues amounting to Rs.2,83,82,364/- as on 15.07.2017 and interest and other expenses. The petitioner bank moved an application dated 08.01.2018 before the respondent No.1 under Section 14 of the SARFAESI Act, supported by an affidavit. Application was registered as Case No.D-201801010000965 and the order dated 26.02.2018 was passed by the District Magistrate allowing the application. Aggrieved with that order, the respondent No.4 namely Smt. Roopa Singh wife of Pawan Kumar Singh filed S.A. No.113 of 2018 which was disposed of by the Debts Recovery Tribunal Allahabad by order dated 30.03.2019 remitting back the matter to the respondent No.2 to pass an order afresh after affording opportunity of hearing to the respondent No.4. Thereafter, the aforesaid Section 14 Application of the petitioner was registered by the respondent No.2 as Case No.D202001010003247. Since the aforesaid application under Section 14 of the SARFAESI Act was being kept pending by the respondent No.2, therefore, **the petitioner filed Writ-C No.28839 of 2021** which was disposed of by order dated 11.11.2021 in terms of the **judgment in Writ-C No.7126 of 2021, decided on 24.08.2021. The relevant portion of the aforesaid order of this Court is reproduced below:**

"Accordingly, we dispose of the writ petition with a direction that the instant proceedings be concluded necessarily within a period 30 days' unless there is any legal impediment in the nature of any stay order obtained by the competent court. "

12. Thereafter in the aforesaid pending application of the petitioner under Section 14 of the SARFAESI Act, the respondent No.5 namely Abhimanyu Singh Director, Eena Cable T.V. Network Pvt. Ltd., Agra filed an objection dated 30.12.2021 on the ground that physical possession of the property cannot be given to the petitioner inasmuch as he (the respondent No.5) is the tenant on the strength of a lease agreement dated 01.08.2010 which is effective till 31.12.2039.

13. In Paras 3, 5, 6, 12, 14 and 15 of his short counter affidavit, the respondent No.5 has stated as under:-

"3. That the secured assets no.247 Jaipur House was lease out by respondent no. 4 in favour of Director of Ena Cable T.V. Network Pvt. Ltd. namely Pawan Kumar Singh Agreement dated ***01.08.2010, initially lease was agreed for a period of 11 months on rent of 500/-*** *but later on it was* ***extended till 2039*** *on depositing of Rs. 7 Lacs as advance money and rectified rent of Rs. 2,000/- per month.*

5. ***That the petitioner bank was approved a credit facility to Gayatri developmet Pvt. Ltd. on the nortgage property Khasra No.*** *831, 832, 838, 839, Mauza Sikandra Bahistabad, Agra but* ***later on Plot no. 247 Jaipur house, Lohamandi Ward, Agra was substituted on the above mentioned Khasra Numbers on 31.12.2012*** *with duly signature by assistant General Manager S.N. Singh and Gayatri Development Pvt. Ltd. Director Devendar Dixit. For kind perusal of this Hon'ble Court, a true copy of the notification of the credit facility dated 31.12.2012 is being filed herewith and marked as* ***Annexure No. SCA-2*** *to this affidavit.*

6. That it is noteworthy that petitioner's bank and Gayatri Development Pvt. Ltd. were substituted the Plot No.247

Jaipur House in which Rupa Singh was added as the Guarantor for collateral security, purpose behind that was just to eviction the business of Ena Cable Netwfork from the House No.247, Jaipur House. After the substitution of Security, a credit facility was also enhanced from Rs.245 lacs to 270 lacs and this fact itself verifying from the terms and condition of between petitioner bank and Director of Gayatri Development Pvt. Ltd. For kind perusal of this Hon'ble Court, a true copy of the Terms and condition of the credit facility between petitioner's bank and Director of Tayatri Development Pvt. Ltd. is being filed herewith and marked as ***Annexure No.SCA-****3 to this affidavit.*

12. That the secured property 247 Jaipur House was lease out in 2010 while the credit facility in favour of respondent no.2 by petitioner bank was rendered in 2012 and thus it is quite clear that the property was lease out before the secured to the bank.

14. That the petitioner bank well known while sanctioning the credit facility to Gayatri Development Pvt. Ltd. that the House No.247 Jaipur house had already given on rent by respondent no.4 to Director of Ena Cable T.V. Network namely Pawan Singh, despite of That petitioner bank sanction the credit facility in favour of respondent no.3 by substituting the secured assets 247 Jaipur House with collusion of respondent no.4.

15. ***That the Civil Suit for Interim Injunction No.1258 of 2020 Abhimanyu Singh Vs. Smt. Rupa Singh has not finally been decided and the court concerned vide its order dated 07.12.2020 has simply ordered for status quo and further the case is listing for final hearing, therefore petitioner bank has ample opportunity to appear in the above civil suit and defending its grievances. For kind perusal of this Hon'ble Court, a true copy of the order of Civil Judge Senior Division Agra dated 07.12.2020 is being filed herewith and marked as Annexure No.SCA-5 to this affidavit."***

14. The application of the petitioner-bank for physical possession by the impugned order dated 17.02.2022; was rejected by the respondent No.2 observing as under:

''मेरे द्वारा पत्रावली का अवलोकन किया। पत्रावली के अवलोकन से विदित होता है कि बैंक की ओर से बन्धक सम्पत्ति का कब्जा दिलाये जाने के सम्बन्ध में प्रस्तुत प्रार्थना पत्र एवं ***मा0 उच्च न्यायालय में दाखिल रिट याचिका में किरायेदार श्री अभिमन्यु सिंह को पक्षकार नही बनाया गया और ना ही मा0 उच्च न्यायालय को यह अवगत कराया गया है कि उक्त बंधक सम्पत्ति के सम्बन्ध में यथास्थिति बनाये रखने का आदेश मा0 अपर सिविल जज (सी0 डि0), आगरा द्वारा पारित किया गया है। इसी प्रकार श्री अभिमन्यु सिंह द्वारा भी वाद संख्या 1258/2020 में मा0 अपर सिविल जज (सी0 डि0), आगरा को सम्पत्ति के बंधक होने की कोई जानकारी नहीं दी गयी है और ना ही बैंक को पक्षकार बनाया गया है।*** *मा0 उच्च न्यायालय, इलाहाबाद द्वारा पारित आदेश दिनांक 11.11.2021 में याचिका संख्या 7126/2021 दिनांक 24.08.2021 में पारित आदेश के अनुसार निस्तारित की गयी है एवं* ***दिनांक 24.8.2021*** *को पारित आदेश में मा0 उच्च न्यायालय द्वारा पारित आदेश में स्पष्ट रुप से यह निर्देश दिया गया है कि किसी विधिक बाधा जैसे कि सक्षम न्यायालय द्वारा स्थगन आदेश आदि न होने की दशा में याचिका 30 दिन में निस्तारित करें। वर्तमान प्रकरण में मा0 अपर सिविल जज(सी0 डि0), आग रा द्वारा बंधक सम्पत्ति के सम्बन्ध में यथास्थिति बनाये रखने के* ***आदेश के प्रभावी रहते बंधक सम्पत्ति पर याची बैंक को भौतिक कब्जा दिलाया जाना उचित प्रतीत नहीं होता है।***

आदेश

उपरोक्त विवेचना एवं जिला शासकीय अधिवक्ता सिविल, आगरा द्वारा दिये गये विधिक अभिमत से सहमत होते हुये प्रस्तुत याचिका दिनांक 17.01.2018 अस्वीकार की जाती है। याची बैंक सक्षम मा0 सिविल न्यायालय, आगरा में उपस्थित होकर अपना पक्ष रखकर स्थगन आदेश निरस्त कराने के उपरान्त पुनः याचिका प्रस्तुत करने हेतु स्वतंत्र है। पत्रावली वाद आवश्यक कार्यवाही दाखिल दफ्तर हो।''

15. **We find that the respondent No.5 namely Abhimanyu Singh is the son of Pawan Kumar Singh and the respondent No.4 namely Smt. Roopa Singh is is mother. Thus, Pawan Kumar Singh and Roopa Singh are husband and wife and the respondent No.5 - Abhimanyu Singh is their son.**

16. Pursuant to our order dated 20.07.2022, the respondent No.5 has produced before us a copy of plaint of O.S. No.1258 of 2020 filed by him. Perusal of the plaint shows that the respondent No.5 has consciously suppressed the fact that Roopa Singh (the defendant No.1) and Eena Cable T.V. Network Pvt. Ltd. through its proprietor Sri Pawan Kumar Singh (the defendant No.2) are his parents. Along with the plaint, a copy of alleged unregistered lease agreement dated 01.08.2010 was filed by which it has been shown that Roopa Singh has given the secured asset in question on rent of Rs.500/- per month for 11 months to her husband Pawan Kumar Singh. **According to the plaintiff of the suit/ respondent No.5 herein, that unregistered rent deed dated 01.08.2010 allegedly executed by Roopa Singh** (respondent No.4 herein) **authorised the defendant No.2 (Pawan Kumar Singh) to assign, transfer, lease, mortgage, sublet or grant lease and licence or transfer or part with or sell the property to any person/ company etc. Such an alleged instrument needs compulsory registration in view of Section 17(1)(b) of the Registration Act, 1908** inasmuch as according to the respondent No.5, it created a right in Pawan Kumar Singh in respect of immovable property in question to assign, transfer, lease, mortgage, sublet, transfer of property etc. **Such an alleged instrument cannot be received as evidence of any transaction effecting the property in question or conferring the aforesaid powers in view of Section 49 of the Registration Act, 1908.** As per story developed in paragraph-3 of the plaint, **the alleged registered lease deed dated 23.02.2019 was executed by Pawan Kumar Singh in favour of his son Abhimanyu Singh** (respondent No.5) **in respect of the secured asset in question** and not by its owner namely Roopa Singh (respondent No.4). **This alleged registered lease deed is for a period of 29 years from 01.01.2011 to 31.12.2039, which was executed on 23.02.2019, i.e. much after the secured asset in question was mortgaged and the recovery proceedings under the SARFAESI Act was initiated by the petitioner - bank** in respect of secured asset to recover the dues. **Neither the alleged unregistered agreement nor alleged registered deeds were ever brought to the notice of the authorities/ DRT nor any such objection was raised although the respondent Nos.4 and 5 who are mother and son.** Thus, the facts and circumstances noted above and the effect of Section 17 read with Section 49 of the Registration Act, leaves no manner of doubt that **the alleged unregistered lease agreement dated 01.08.2010** was between the respondent No.4, i.e. Roopa Singh and her husband Pawan Kumar Singh and, thereafter, the alleged **rent lease deed 23.02.2019** executed by Pawan Kumar Singh in favour of his son Abhimanyu Singh (respondent No.4) **are nothing but a manipulated and fraudulent piece of paper which cannot deprive the petitioner - bank for physical possession of the secured asset in question under Section 14 of the SARFAESI Act.**

17. The Civil Judge (Senior Division) Agra passed the interim order dated 07.12.2020 in O.S. No.1258 of 2020 (Sri

Abhimanyu Singh vs. Roopa Singh and others), which is reproduced below:

"दिनांक – 07/12/2020

पत्रावली पेश हुई। पुकार पर वादी के विद्वान अधिवक्ता उपस्थित।

पत्रावली पेश हुई। वादीगण की ओर से अंतरिम निषेधाज्ञा हेतु प्रार्थनापत्र 8ग मय शपथपत्र 9ग प्रस्तुत किया गया है।

प्रार्थनापत्र 8ग मय शपथपत्र 9ग पर वादी के विद्वान अधिवक्ता को एक पक्षीय रुप से सुना एवं पत्रावली पर उपलब्ध समस्त प्रपत्रों का अवलोकन किया।

वादी की ओर से कथन किया गया है कि उसने प्रतिवादी सं0 2 ने प्रतिवादी सं0 1 से वादग्रस्त सम्पत्ति को ***लीज एग्रीमेन्ट दिनांकित 01–08–2010 के माध्यम से 500/– रुपये प्रतिमाह की दर से किराये पर लिया था। लीज एग्रीमेन्ट दिनांकित 01–08–2010 में यह स्पष्ट रुप से उल्लिखित है कि प्रतिवादी सं0 2 वादग्रस्त सम्पत्ति को आगे बंधक रख सकता है या किसी अन्य को किराये पर भी दे सकता है। प्रतिवादी सं0 2 द्वारा सम्पत्ति सं0 247 जयपुर हाउस, लोहामण्डी वार्ड आगरा की बाबत वादी के पक्ष में दिनांक 23–02–2019 को एक लीज एग्रीमेन्ट दिनांक 01–1–2011 से 31–12–2039 तक 2000/– रुपये प्रतिमाह की दर से निष्पादित किया गया था। प्रतिवादी सं0 1 व 2 दुर्भिसंधि कर वादी को वादग्रस्त सम्पत्ति से जबरदस्ती बिना विधिक प्रक्रिया अपनाये हुये बेदखल करना चाहते हैं।*** *यदि प्रतिवादीगण ऐसा करने में सफल हो जाते है तो वादी को अपूर्णनीय क्षति कारित होगी और उसका वाद दायर करने का उद्देश्य ही विफल हो जायेगा।*

वादी की ओर से अपने कथन के समर्थन में लीज एग्रीमेन्ट दिनांकित 01–08–2010 9ग/6 लगायत 9ग/9, असिस्मेन्ट 9ग/10 व 9/11, किरायानामा दिनांकित 23–02–2019 9ग/13 से 9ग/16, सार्टिफिकेट आफ इनकारपोरेशन 9ग/17, रजिस्ट्रेशन सार्टिफिकेट 9ग/18 लगायम 9ग/20, ई0 एन0 ए0 टी वी नेटवर्क से संबंधित प्रपत्र 9ग/21 लगायत 9ग/24, स्वयं के आधार कार्ड 9ग/25 व 9ग/26, सहा0 अभियन्ता सम्पत्ति, आगरा विकास प्राधिकरण द्वारा श्रीमती रुपा सिंह को लिखा गया पत्र दिनांकित 19–07–18 9ग/27, चालान फार्म 9ग/28, रुपा सिंह द्वारा श्रीमान जिलाधिकारी/तहसीलदार सदर को लिखे पत्र 9ग/29, शपथपत्र 9ग/30, बयान संतोष गुप्ता 9ग/31, बयान पवन सारास्वत 9ग/32, रुपा सिंह द्वारा सचिव आगरा विकास प्राधिकरण को लिखे पत्र दिनांकित 01–07–10 9ग/33, समाचार पत्र की कटिंग पग/34, ई0 एन0 ए0 केबल टी वी नेटवर्क के नाम पंजीकृत वाहन के पंजीयन प्रमाण पत्र 9ग/35 व फोटोग्राफ 9ग/36 व 37, किराया प्राप्ति की रसीदें 9ग/38 व 9ग/39 की छायाप्रतियां दाखिल की गयी है।

पत्रावली पर उपलब्ध प्रपत्रों के अवलोकन से वर्तमान प्रकरण में वाद के तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए तथा वादग्रस्त सम्पत्ति को सुरक्षित व संरक्षित रखने के उद्देश्य से वादग्रस्त सम्पत्ति के संबंध में यथास्थिति कायम रखने का आदेश पारित किया जाना न्यायोचित होगा।

–आ दे श–

तदनुसार पक्षकारों को आदेशित किया जाता है कि वे वादग्रस्त सम्पत्ति के संबंध में यथास्थिति कायम रखेंगे।

वादी आदेश 39 नियम 3 सीपीसी की अनुपालन अविलम्ब करें। पत्रावली वास्ते निस्तारण 8ग दिनांक 21–12–2020 को पेश हो।"

18. **We are unable to understand that how and under what circumstances the afore-quoted interim order has been passed when the Civil Judge (Senior Division), Agra who himself has noted that the alleged unregistered lease agreement dated 01.08.2010 executed by Roopa Singh in favour of her husband Pawan Kumar Singh conferring right to him to mortgage and sublet etc. The alleged unregistered rent deed is hit by the provisions of Section 17 read with Section 49 of the Registration Act, 1908. The aforesaid interim order could not have been passed as the secured asset in question was mortgaged with the bank and the jurisdiction of civil court was barred by Section 34 of the SARFAESI Act, 2002. Thus, the aforesaid O.S. No.1258 of 2020 could not have been entertained by the Civil Judge.**

19. Although all the facts as noted in forgoing paragraphs of this judgment were well within the knowledge of the respondent No.2 and yet he passed the impugned order dated 17.02.2022 on the alleged legal advice of the District Government Counsel (Civil), Agra dated 05.01.2022.

20. For all the reasons afore-stated, the impugned order dated 17.02.2022 passed by the respondent No.2 in Case No.03247 of 2020 (Computerised Case No.D202001010003247) (Bank of Baroda vs. M/s Gayatri Development well Private Limited) under Section 14 of the SARFAESI Act, 2002, cannot be sustained and is hereby quashed. The respondent No.2 is directed to pass an order afresh for physical possession over the secured asset in question to the petitioner under Section 14 of the SARFAESI Act, 2002 within 30 days from the date of production of a certified copy of this order. Since the O.S. No.1258 of 2020 is barred by provisions of Section 34 of the SARFAESI Act, therefore, to meet the ends of justice, the aforesaid O.S. No.1258 of 2020 pending in the court of Civil Judge/ Additional Civil Judge (Senior Division) Agra, is herby dismissed.

21. **The writ petition is allowed** to the extent indicated above.

(2022) 8 ILRA 419
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2017

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE SARAL SRIVASTAVA, J.

Civil Misc. Writ Petition No. 52727 of 2008

Smt. Ganga Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Hitesh Pachori

Counsel for the Respondents:
C.S.C., Sri Nirpendra Mishra, Sri Rajesh Tripathi

A. Civil Law - Electricity Act, 2003- Sections 53& 161 - Electricity Rules, 2005-claims-deceased died due to electrocution by a live electricity wire-the petitioners reported the same following the procedure u/s 161 of the Act-but the Department absolves the officials responsibilities as per section 53 of the Act and termed the accident as vis major-there cannot be any doubt as regards the sole cause of demise of the deceased being electrocution-Since the distribution line was maintained and owned by the UPPCL, the UPPCL, in any event, cannot avoid liability thereof-claimants are entitled for award of Rs. 1 lac in view of the circular issued by State Government dated 19 june 2008.(Para 1 to 17)

B.The law is well-settled that, even in Tort, if not in statutes, the remedy of compensation is available to a victim or his family in the event of an accidental death like electrocution. That, coupled with the strict liability principle formulated by the Supreme Court in various cases, clearly indicates that, in the present case, the UPPCL was liable for payment of adequate compensation to the petitioner.(Para 2 to 13) (E-6)

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
&
Hon'ble Saral Srivastava, J.)

1. Heard learned counsel for the petitioners and Sri Niprendra Mishra, learned counsel for the respondent nos. 2 and 3 and learned Standing Counsel for the respondent no.1.

2. This writ petition prays for a mandamus directing the respondent-Electricity Department to pay damages/compensation to the tune of Rs. 6

lakhs on account of the death of one Ghanshyam Sharma to his heirs who are the petitioners herein.

3. The claims appears to have been made in respect of an accident that occurred on account of Ghanshyam Sharma having been electrocuted by a live electricity transmission wire of a 11,000 K.V. A. Line.

4. The accident is dated 24.12.2007. The accident appears to have been reported where after the petitioners moved applications and a report appears to have been called for. This is evident from the letter issued by the Executive Engineer of the Electricity Distribution Division, I, copy whereof is annexure no. 5 to the writ petition.

5. A counter affidavit on behalf of the respondent-Electricity Department has been filed and annexure no. 1 thereto is the report dated 31st October, 2008 entailing therein the details of the accident resulting in the death of the deceased. However, the report dated 31st October, 2008 indicates that it appears that the Ghanshyam Sharma, the deceased had somehow the other come into contact with the live wire as a result whereof he died immediately. The defence taken in the report is that there is no fault on the part of any departmental official or the concerned inspector and according to them this was an accident that can be termed as vis major.

6. We have gone through the provisions as also the facts on record and it will be appropriate to deal with the report which has been submitted by the respondents. The report indicates that there is a presumption raised about the accident having taken place on account of some divine intervention. We do not find any material either in the counter affidavit or in the report that may even suggest any natural cause or otherwise that resulted in the snapping of high tension wire resulting in the accident. Thus, by no stretch of imagination can it be said that the wire had snapped bringing into contact to the deceased as a result of any such natural disaster. It is obvious that the wire snapped which might have been either on account of a technical defect or the strength and weakness of the transmission line which is exclusively the responsibility of the Electricity Department. The fact remains it was a live wire. In the absence of any evidence of any such external element causing the accident, the report having come to a conclusion of the accident having taken place on account of any natural disaster is without any substance. The accident is admitted and the death is also admitted on account of the electrocution of the deceased person who came into contact with a live wire. It is the duty of the respondent-department to maintain and secure the transmission lines that are already energized. A live wire if snaps, causes an interruption of supply and is taken care of by equipments for immediately de-energizing the wire in the span of transmission where such fault has occurred. The snapping of the wire in the instant case ought to have resulted in putting off the electric current thereby de-energizing the wire that had fallen down after having snapped. Even, otherwise, the inspection and maintenance staff of the said area was under an obligation for ensuring a safe maintenance of the transmission lines. It was, therefore, the duty of the respondent-department to ensure safe maintenance and up keep of the said lines in which there appears to be a fault. The accident, therefore, has occurred which

could have been prevented had all precautions been taken by the respondent-department. The report absolves the officials and the department without adverting to it's responsibilities and obligations as per Section 53 of the 2003 Act and the Safety Requirements as per the Electricity Rules 2005.

7. Coming to the procedure and the rules applicable to the controversy, it would be apt to bring on record that such accidents occurring on account of Distribution, Supply or Use of electricity is taken care of under Section 161 of the Electricity Act, 2003 which is extracted hereinunder:-

"161. Notice of accidents and inquiries.- (1) If any accident occurs in connection with the generation, transmission, distribution, supply or use of electricity in or in connection with, any part of the electric lines or electrical plant of any person and the accident results or is likely to have resulted in loss of human or animal life or in any injury to a human being or an animal, such person shall give notice of the occurrence and of any such loss or injury actually caused by the accident, in such form and within such time as may be prescribed, to the Electrical Inspector or such other person as aforesaid and to such other authorities as the Appropriate Government may by general or special order, direct.

(2) The Appropriate Government may, if it thinks fit, require any Electrical Inspector, or any other person appointed by it in this behalf, to inquire and report--

(a) as to the cause of any accident affecting the safety of the public, which may have been occasioned by or in connection with, the generation, transmission, distribution, supply or use of electricity, or

(b) as to the manner in, and extent to, which the provisions of this Act or rules and regulations made thereunder or of any licence, so far as those provisions affect the safety of any person, have been complied with.

(3) Every Electrical Inspector or other person holding an inquiry under sub-section (2) shall have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 Of 1908) for the purpose of enforcing the attendance of witnesses and compelling the production of documents and material objects, and every person required by an Electrical Inspector be legally bound to do so within the meaning of section 176 of the Indian Penal Code (45 of 1860)."

8. The said provision is referable to the Rules that had already been framed under the Indian Electricity Act, 1910 being the Indian Electricity Rules 1956, Rule 44-A of the 1956 Rules is extracted hereinunder:

*"**[44A. Intimation of Accident**.-- If any accident occurs in connection with the generation, transmission, supply or use of energy in or in connection with, any part of the electric supply lines or other works of any person and the accident results in or is likely to have resulted in loss of human or animal life or in any injury to a human being or an animal, such person or any authorised person of the State Electricity Board/Supplier, not below the rank of a Junior Engineer or equivalent shall send to the Inspector a telegraphic report within 24 hours of the knowledge of the occurrence of the fatal accident and a written report in the form set out in Annexure XIII within 48*

hours of the knowledge of occurrence of fatal and all other accidents. Where practicable a telephonic message should also be given to the Inspector immediately the accident comes to the knowledge of the authorised officer of the State Electricity Board/Supplier or other person concerned.]"

9. The said Rules provide for a Form meant for reporting electrical accidents. The said Form is extracted hereinunder:

FORM FOR REPORTING ELECTRICAL ACCIDENTS

[Rule 44A]

1. Date and time of accident.

2. Place of accident. (Village/Town, Tehsil /Thana, District and State).

3. System and voltage of supply. (Whether EHV /HV /L V Line, sub-station/ generating station/ consumer's installations/ service lines/ other installations).

4. Designation of officer in charge of the supplier in whose jurisdiction the accident occurred.

5. Name of owner / user of energy in whose premises the accident occurred.

6. Details of victim(s):

(a) Human:

Sl. No	Name	Father's Name	Sex of victim	Full Postal Address	Approximate	Fatal/non-fatal
1	2	3	4	5	6	7

(b) Animal:

Sl. No	Description of animal (s)	Number(s)	Name (s) of owner(s)	Address(es) of owner (s)	Fatal/non-fatal
1	2	3	4	5	6

7. In case the victim(s) is/are employee(s) of supplier:-

(a) designation of such person(s).

(b) brief description of the job undertaken if any.

(c) whether such person/persons was/were allowed to work on the job.

8. In case the victim(s) is / are employee(s) of a licensed contractor:-

(a) did the victim(s) possess any electric workmen's permit(s) supervisor's certificate of competency issued under rule 45? If yes, give number and date of issue and the name of issuing authority.

(b) name and designation of the person who assigned the duties of the victim(s)

9. In case of accident in the supplier's system, was the permit to work (PTW) taken?

10. (a) Describe fully the nature and extent of injuries, e.g. fatal/ diablement (permanent or temporary) of any portion of the body or burns or other injuries.

(b) In case of fatal accident, was the post-mortem performed ?

11. Detailed causes leading to the accident.

(To be given in a separate sheet annexed to this form)

12. Action taken regarding first-aid, medical attendance, etc. immediately after the occurrence of the accident (give details).

13. Whether the District Magistrate and Police Station concerned have been notified of the accident (if so, give details).

14. Steps taken to preserve the evidence in connection with the accident to extent possible.

15 Name and designation(s) of the person(s) assisting, supervising the person(s) killed or injured.

16. What safety equipments were given to and used by the person(s) who met with this accident (e.g. rubber gloves, rubber mats, safety belts and ladders, etc.)?

17. Whether isolating switches and other sectionalising devices were employed to deaden the sections for working on the same? Whether working section was earthed at the site of work?

18. Whether the work on the live lines was undertaken by authorised person(s)? If so, the name and the designation of such person(s) may be given.

19. Whether artificial resuscitation treatment was given to the person(s) who met with the electric accident? If yes, how long was it continued before its abandonment?

20. Names and designations of persons present at and witnessed the accident.

21. Any other information/remarks."

10. With the coming into force of the 2003 Act, a further provision was made by the promulgation of the Intimation of Accidents (Form and Time of Service of Notice) Rules, 2005. This also contains the Form for reporting electrical accidents. The said Rules of 2005 are extracted hereinunder together with the Form prescribed therein.

"In exercise of the powers conferred by clause (w) of sub-section (2) of section 176 of the ElectricityAct, 2003 (36 of 2003) the Central Government hereby makes the following rules regarding the form and time of service of notices of electrical accidents, namely:-

1. Short title and commencement. - [(1) These rules may be called the Intimation of Accidents

(Form and time of Service of Notice) Rules, 2005.]

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions- (1) In these rules, unless the context otherwise requires,-

(a) "Act" means the Electricity Act, 2003 (36 of 2003)

(b) "Inspector" means the Chief Electrical Inspector or the Electrical Inspector appointed under subsection

(1) of section 162 of the Act.

(2)Words and expression used and not defined in these rules but defined in the Electricity Act, 2003 (36 of 2003), shall have the meanings respectively assigned to them in that Act.

3. Intimation of accidents- (1) If any accident occurs in connection with the generation,

transmission, supply or use of electricity in or in connection with, any part of the electric lines or

other works of any person and the accidents results in or is likely to have resulted in loss of human or

animal life or in any injury to a human being or an animal, such person or

any authorised person of the generating company or licensee, not below the rank of Junior Engineer or equivalent shall send to the Inspector a telegraphic report within 24 hours of the knowledge of the occurrence of the fatal accident and a report in writing in Form A within 48 hours of the knowledge of occurrence of fatal and all other accidents. Where possible a telephonic message should also be given to the Inspector immediately, if the accident comes to the knowledge of the authorised officer of the generating company/licensee or other concerned.

(2) For the intimation of the accident, telephone numbers, fax numbers and addresses of Chief Electrical Inspector or Electrical Inspectors, District Magistrate, police station, fire brigade and nearest hospital shall be displayed at the conspicuous place in the generating station, sub-station, enclosed sub-station/switching station and maintained in the office of the in-charge/owner of the Medium Voltage (MV)/High Voltage (HV)/Extra High Voltage (EHV) installations."

FORM A

FORM FOR REPORTING ELECTRICAL ACCIDENTS

1. Date and time to accident.

2. Place of accident.

(Village/Town, Tehsil/Thana, District and State).

3. System and voltage of supply [Whether Extra High Voltage (EHV)/High Voltage (HV)/Low Voltage (LV) Line, sub-station/generation station/ consumer's installations/service lines/other installations].

4. Designation of the officer-in-charge of the generating company/licensee in whose jurisdiction the accident occurred.

5. Name of owner/user of energy in whose premises the accident occurred.

6. Details of victim(s):

(a) Human

Sl. No	Name	Father's Name	Sex of victim	Full Postal Address	Approximate	Fatal/non-fatal
1	2	3	4	5	6	7

(b) Animal

Sl. No	Description of animal(s)	Number(s)	Name (s) of owner(s)	Address(es) of owner (s)	Fatal/non-fatal
1	2	3	4	5	6

7. In case the victim(s) is /are employee(s) of supplier:-

(a) Designation of such person(s);

(b) brief description of the job undertaken, if any:

(c) Whether such person/persons was/were allowed to work on the job.

8. In case the victim(s) is/are employees(s) of a licensed contractor,-

(a) did the victim(s) possess any electric workmen's permit(s), supervisor's certificate of competency?

If yes, give number and date of issue and the name of issuing authority;

(b) name and designation of the person who assigned the duties of the victim(s).

9. In case of accident in the system of the generating company/licensee, was the permit to work

(PTW) taken?

10.(a) Describe fully the nature and extent of injuries, e.g., fatal/disablement (permanent or

temporary) of any portion of the body or burns or other injuries.

(b) In case of fatal accident, was the post mortem performed?

11. Detailed causes leading to the accident.

(To be given in a separate sheet annexed to this form).

12. Action taken regarding first aid, medical attendance etc. immediately after the occurrence of the

accident (Give details).

13. Whether the District Magistrate and Police Station concerned have been informed of the accident

(If so, give details).

14. Steps taken to preserve the evidence in connection with the accident to extent possible.

15. Name and designation(s) of the person(s) assisting, supervising the person(s) killed or injured.

16. What safety equipments were given to or used by the person(s) who met with this accident (e.g. rubber gloves, rubber mats, safety belts and ladders etc.)?

17. Whether isolating switches and other sectionalizing devices were employed to deaden the sections for working on the same. Whether working section was earthed at the site of work.

18. Whether the work on the live lines was undertaken by authorised person(s)? If so, the name and the designation of such person(s) may be given.

19. Whether artificial resuscitation treatment was given to the person(s) who met with the electric accident. If yes, how long was it continued before its abandonment?

20. Names and designation of persons present at, and witnessed, the accident.

21. Any other information / remarks.

11. The accident which has been reported in the present case is in the Form as provided for in Rule 44-A as is evident from perusal of C.A-1 to the counter affidavit.

12. Thus the entire procedure and the formality either as per the old Rules or the 2005 Rules was carried out by the respondents and the report was submitted on 31st October, 2008 about the death of the deceased in the accident caused by electrocution on 24.12.2007.

13. The power to award compensation and the maximum limit thereof is governed by the Circulars of the Board. Now the Board of the U.P. Power Corporation Ltd. has enhanced the previous amount of Rs. 50,000/- which was fixed as the minimum vide Boards circular dated 19th June, 2008 to Rs. 1 lakh. A copy of the said circular dated 19th June, 2008 has been produced before the Court which is extracted hereinunder:

उ0प्र0 पावर कारपोरेशन लिमिटेड
उ0प्र0 सरकार का उपक्रम
U.P. POWER CORPORATION LIMITED
(Govt. Of Uttar Pradesh Undertaking)
शक्ति भवन विस्तार, 14 अशोक मार्ग, लखनऊ–226001

संख्या 2400 औ0स0 2008–09 (125) ए0एस/2008
दिनांक 19 जून 2008

कार्यालय– ज्ञाप

उ0प्र0 पावर कारपोरेशन लिमिटेड के त्रुटिपूर्ण विद्युतीय अधिष्ठापन के सम्पर्क में आने से बाहरी व्यक्तियों की घातक एवम् साधारण दुर्घटना से हुई अपंगता पर अनुग्रह धनराशि अनुमन्य किये जाने सम्बन्धी कार्यालय ज्ञाप सख्या–1780–औस0सं0–17/पाकालि 2006–19 (125)ए0एस/2001, दिनांक 19.4.06 में निम्नवत् संशोधन तत्काल प्रभाव से लिये जाते है :–

(क) वर्तमान में घातक मानव विद्युत दुर्घटना के फलस्वरूप अनुमन्य देय अनुग्रह धनराशि रू0 50,000/– (रूपया पचास हजार) के स्थान पर रू0–1,00,000/– (रूपया एक लाख) प्रति व्यक्ति होगी।

(ख) बाहरी व्यक्ति/ व्यक्तियों की साधारण दुर्घटना में हुई पूर्ण अपंगता की स्थिति में वर्तमान में अनुमन्य क्षतिपूर्ति रू0– 50,000/– (रूपये पचास हजार) से बढ़ाकर रू0–1,00,000/–(रूपये एक लाख) प्रति व्यक्ति तथा आंशिक अपंगता की स्थिति में रू0 1,00,000/– (रू0 एक लाख) की धनराशि की अर्जन क्षमता में चिकित्सीय प्रमाण पत्र के आधार पर हुए प्रतिशत ह्रास के अनुसार गणना कर अनुपाति अनुग्रह धनराशि अनुमन्य की जायेगी जिसकी अधिकतम सीमा रू0 एक लाख होगी।

(ग) पशुओं की घातक दुर्घटना हेतु अनुमन्य अनुग्रह धराशि रू0 5000/–(रूपये पॉच हजार) अनुमन्य की जायेगी।

प्रत्येक विद्युत दुर्घटना की विद्युत सुरक्षा निदेशालय अथवा अन्य संस्थानों द्वारा की गई जॉचों को संज्ञान में लेकर विभागीय जांच की जाये और क्षतिपूर्ति के रूप में भुगतान की गई घनराशि की वसूली विद्युत दुर्घटना हेतु उत्तरदायी (यदि कोई हो तो) कार्मिक (अधिकारी/कर्मचारी) से अनुशासनिक कार्यवाही के अतिरिक्त की जाये।

उक्त आदेश दिनांक 19.6.2008 अथवा इसके उपरान्त होने वाली विद्युत दुर्घटना के प्रकरण के सम्बन्ध में प्रभावी होगा।

अध्यक्ष

संख्या 2400 (1) औस–17 पाकालि/2008 तद्दिनांक

प्रतिलपिः– निम्नलिखित को सूचनार्थ एवम् आवश्यक कार्यवाही हेतु प्रेषित :–

(1) समस्त प्रबन्ध निदेशक पूर्वांचल/पश्चिमांचल .....
निगम लिमिटेड कारपोरेशन .....

(2) मुख्य अभियन्ता जल विद्युत,उ0प्र0 पावर कारपोरेशन लिमिटेड

(3) समस्त मुख्य अभियन्ता (वितरण) उ0प्र0 पावर कारपोरेशन लिमिटेड को इस आशय से कि वे अपने स्तर से उक्त आदेश की प्रति अधिनस्थ अधिकारियों/इकाईयों को उपलब्ध करा दें।

(4) समस्त उप महाप्रबन्धक, उ0प्र0 पावर कारपोरेशन लिमिटेड।

(5) समस्त अधिशासी अभियन्ता उ0प्र0 पावर कारपोरेशन लिमिटेड।

(6) महाप्रबन्धक, लेखा एवम् सम्प्रेक्षा उ0प्र0 पावर कारपोरेशन लिमिटेड

(7) उप महाप्रबन्धक (लेखा), उ0प्र0 पावर कारपोरेशन लिमिटेड।

(8) समस्त वरिष्ठ कार्मिक अधिकारी/कार्मिक अधिकारी, उ0प्र0 पावर कारपोरेशन लिमिटेड।

(9) अनुसचिव, कार्मिक वित्त नीति, उ0प्र0 पावर कारपोरेशन लिमिटेड।

(10) कारपोरेशन (मु0), शक्ति भवन के समस्त अधिकारी/अनुभाग/शिविर।

(11) कम्पनी सचिव, उ0प्र0 पावर कारपोरेशन लिमिटेड।

(12) कट फाइल/ पत्रावली संख्या–8–एम/92 ।

आज्ञा से
ह0अप0
19/6/08
(अशोक कुमार)
उप महाप्रबन्धक (औ0स0)

14. It is thus evident that according to the Board itself, in such accidents, apart from any other claim that one can make under the provisions aforesaid the Board has taken a decision to award Rs. 1 lakh as the compensation to the claimants.

15. The petitioners have, therefore, made out a clear case on the admitted facts as per the report submitted by the respondents and in view of the same having been interpreted by us hereinabove for the award of Rs. 1 lakh.

16. We accordingly, allow this petition and direct the respondent nos 2 and

3 to forthwith release a sum of Rs. 1 lakh to the petitioners, keeping in view the aforesaid circular of the Board leaving it open to the petitioners to seek further remedy that may be available to them in respect of any enhanced amount of compensation if permissible in accordance with law.

17. The payment shall be made within two months of the date of production of a certified copy of the order.

(2022) 8 ILRA 427
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-Tax No. 955 of 2022

M/s ASP Traders ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rahul Agarwal

Counsel for the Respondents:
C.S.C.

A. Tax Law – Central Goods and Services Tax Act, 2017 read with IGST Act - Sections 129(3) & 129(5) - Central Goods and Services Tax Rules, 2017 - Rule 142(3) - Once the proceedings in respect of notice u/s 129(3) of the Act stood concluded in terms of Section 129(5) of the Act read with Rule 142(3) of the Rules, no mandamus can be issued to the Assistant Commissioner, State Goods (respondent No. 3) to pass an order u/s 129(3) of the CGST/UPGST/IGST Act. (Para 7)

Admittedly, a notice u/s 129(3) of the CGST Act was issued by the respondent No. 3 to the petitioner. Pursuant thereto the petitioner deposited the amount on his own in form GST DRC-03 and intimated it to the respondent No. 3. Therefore, the respondent No. 3 has issued an order in form GST DRC-05. Thus, proceedings in respect of the aforesaid notice u/s 129(3) of the CGST Act stood concluded in terms of mandate of sub-section (5) of S.129. Hence, relief sought by the petitioner cannot be granted since the matter is concluded as per legislative mandate. (Para 6)

Writ petition dismissed. (E-4)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Shri Rahul Agarwal, learned counsel for the petitioner and Shri Nimai Das, learned Additional Chief Standing Counsel along with Shri B.P. Singh Kachhawaha, learned Standing Counsel for the State-respondents.

2. This writ petition has been filed praying for the following relief:

"(a) issue a writ, order or direction in the nature of Mandamus directing the respondent no. 3 to make available the copy of the order passed under Section 129(3) in due compliance of Section 129(4) of the U.P. Goods and Services Tax Act pertaining to the seizure of goods covered by notice dated 21.01.2022 issued under Section 129(3) of the U.P. Goods and Services Tax Act in form GST MOV. 07 (Annexure-3 to the writ petition);

(b) issue a writ, order or direction in the nature of Mandamus directing the respondent no. 3 to pass consequential orders under Section 129(3) of the U.P.

Goods and Services Tax Act after affording an opportunity of hearing to the petitioner;"

3. Briefly stated facts of the present case are that the petitioner is a consignor of certain goods. While the goods were being transported through vehicle no. UP 78 GN 7563 under invoice no. 15 dated 14.1.2022, valued at Rs. 51,72,930/- and e-Way bill no. 141424463403, it was intercepted by the respondent no. 3 on 17.1.2022 and the goods were detained. The statement of driver of the vehicle was recorded in form GST MOV-01 followed by physical inspection of the goods and issuance of form GST MOV-04 on 20.1.2022. Certain discrepancies were found by the respondent no. 3 which gave rise to issuance of detention order dated 20.1.2022 in form GST MOV-06, which was followed by a notice dated 21.1.2022 under Section 129(3) of the CGST, 2017 read with IGST Act, fixing date for 28.1.2022. In the meantime, although the petitioner submitted a reply, but immediately thereafter, on his own, deposited the sum demanded in the notice under Section 129(3) amounting to Rs. 7,20,440/- in form **GST DRC-03**. Thereafter, the respondent no. 3 issued an order dated 27.1.2022 in GST MOV-05 and released the goods and vehicle.

4. Sub-section (3) and (5) of Section 129 of the CGST Act and sub-rule (3) of Rule 142 of the CGST Rules, 2017 are relevant for the purposes of the present case which are reproduced below:

"129(3) The proper officer detaining or seizing goods and conveyance shall **issue a notice** within seven days of such detention or seizure, specifying the penalty payable, and **thereafter, pass an order** within a period of seven days from the date of service of such notice, for payment of penalty under clause (a) or clause (b) of sub-section (1).

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded."

5. Sub-rule (3) of Rule 142 of the CGST Rules, 2017 reads as under:

"142(3) Where the person chargeable with tax makes payment of tax and interest under sub-section (8) of Section 73 or, as the case may be, tax, interest and penalty under sub-section (8) of Section 74 within thirty days of the service of a notice under sub-rule (1), **or where the person concerned makes payment of the amount referred to in sub-section (1) of Section 129 within [seven days of the notice issued under sub-section (3) of Section 129** but before the issuance of order under the said sub-section (3)], **he shall intimate the proper officer of such payment in FORM GST DRC-03** and the proper officer shall issue an order in **FORM GST DRC-05 concluding the proceedings in respect of the said notice.**"

6. Admittedly a notice under Section 129(3) of the CGST Act was issued by the respondent no. 3 to the petitioner. Pursuant thereto the petitioner deposited the amount on his own in form GST DRC-03 and intimated it to the respondent no. 3. Therefore, the respondent no. 3 has issued an order in form GST DRC-05. Thus, proceedings in respect of the aforesaid notice under Section 129(3) of the CGST Act stood concluded in terms of mandate of sub-section (5) of Section 129. Hence, relief sought by the petitioner cannot be granted since the matter is concluded as per legislative mandate.

7. Once the proceedings in respect of notice under Section 129(3) of the Act stood concluded in terms of Section 129(5) of the Act read with Rule 142(3) of the Rules, no mandamus can be issued to the respondent no. 3 to pass an order under Section 129(3) of the CGST/UPGST/IGST Act.

8. The contention of the petitioner that a copy of the order under Section 129(3) of the CGST/UPGST/IGST, Act be provided to him, is wholly misconceived inasmuch as the proceedings stood concluded in terms of sub-section (5) of Section 129 read with Rule 142 (3) of the Rules and, therefore, no mandamus contrary to law can be issued in exercise of powers conferred under Article 226 of the Constitution of India.

9. For all the reasons aforestated, the writ petition is **dismissed**.

(2022) 8 ILRA 429
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters under Art. 227 No. 3093 of 2022

Durga Prasad & Ors. ...Petitioners
Versus
Smt. Manju Singh & Anr. ...Respondents

Counsel for the Petitioners:
Sri Rishikesh Tripathi

Counsel for the Respondents:
Ms. Rama Goel Bansal, Ms. Shalini Goel

A. Civil Law – Practice and Procedure - Code of Civil Procedure, 1908 - Order XXVI Rule 10(2) - There is no requirement in law, nor the legal provision permits any of the parties to ask for summoning of the Court Commissioner along with his instruments to make actual demonstration about the procedure followed by him in conducting the survey. (Para 14)

Perusal of the Order 26 Rule 10 (2) of C.P.C., clearly demonstrate that the said provision provides for cross-examination of Court Commissioner on any of the point including the point as to the manner and procedure which had been followed or adopted by the Court Commissioner in conducting the survey. **The aforesaid provision does not permit any of the parties to submit application for summoning the Court Commissioner along with instruments to make actual demonstration in the Court as regards the procedure adopted by him in conducting the survey.** If any of the party is not satisfied with the survey report submitted by the Survey Commissioner, it may put a question in cross-examination regarding the manner and procedure adopted by him in conducting the survey. The issue can be very much determined from the reply of the Court Commissioner to the question put by any of the parties in cross-examination regarding the procedure adopted by the Court Commissioner in conducting the survey. (Para 13)

The cross-examination of the Court Commissioner is still continuing and has not yet closed. In such view of the fact, the petitioners have still an opportunity to put relevant question to the Court Commissioner to prove that the report of the Survey Commissioner is wrong or incorrect. (Para 15)

B. This Court finds that the finding of the revisional court that the application filed by the petitioners has been filed only to linger on the suit is based upon proper appreciation of facts on record. The petitioners have instituted the suit in the year 2007 and first application for Survey Commissioner was filed in the year 2011 and uptill 2017 two more applications, i.e., total three applications for appointment of Survey Commissioner have been filed by the petitioners and more than 15 years have passed, yet the suit has not proceeded because of the lingering device adopted by the petitioners, so that the Court may not proceed to decide the suit. (Para 16)

Writ petition dismissed. (E-4)

Present petition assails order dated 22.02.2022, passed by Civil Judge (Junior Division), Jhansi.

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

1. Heard learned counsel for the petitioners and Ms. Rama Goel, learned counsel for the respondents.

2. The petitioners, by means of the present writ petition, have assailed the order dated 22.02.2022 passed by the Civil Judge (Junior Division), Jhansi in Original Suit No.69 of 2007, by which the application of the petitioners being application No.493D for summoning the Survey Commissioner with 'Guniya and Prakar (Compass)' to demonstrate the procedure before the Court as to how he had measured the property in question during survey has been rejected and the order dated 22.03.2022 passed by the District Judge, Jhansi in Civil Revision/Misc. Case No.35 of 2022 affirming the order passed by the trial Court dated 22.02.2022.

3. The petitioner no.1 instituted an Original Suit No.69 of 2007 (Durga Prasad Vs. Smt. Manju Singh and another) praying for cancellation of sale deed dated 22.03.2007 in respect of plot No.675/6 and permanent injunction restraining the respondents from interfering with the peaceful possession of the petitioners in the property in dispute.

4. It appears that in the suit, three times Survey Commissioner has been appointed. The last Survey Commissioner was appointed in the year 2017 for surveying the property in dispute on the application of the petitioners. The Survey Commissioner submitted his report on 31.03.2017.

5. The petitioners being dissatisfied with the Survey report submitted by the Survey Commissioner, filed objection under Order XXVI Rule 10 (2) of C.P.C. The Survey Commissioner was summoned for cross examination and the cross examination of the Survey Commissioner is continuing and has not yet closed. During the cross examination of Survey Commissioner, the petitioner submitted application 493D praying that the Survey Commissioner be summoned with 'Guniya and Prakar (Compass)' to demonstrate as to what procedure he had adopted in surveying the property in question.

6. The said application of the petitioners has been rejected by the trial Court vide order dated 22.02.2022 holding that the Survey Commissioner is of 74 years of age and he is old, therefore, it is not proper to summon him with 'Guniya and Prakar (Compass)' to demonstrate as to how he surveyed the property in question. Consequently, the trial Court found no merit in the application and dismissed the same.

7. The revisional court by order dated 22.03.2022 affirmed the order passed by the trial Court dated 22.02.2022. The revisional court while rejecting the revision gave an independent finding holding that the first Survey Commission application was filed on behalf of the petitioners in the year 2011 and the same was allowed and this is the third Survey Commissioner Report which was submitted on 31.03.2017 and is pending for disposal since then.

8. The revisional court further held that it is not in dispute that petitioners

submitted application for cross-examination of Survey Commissioner under the provisions of Order 26 Rule 10 (2) of C.P.C. and the cross-examination of the Survey Commissioner started on 18.09.2021 and is still continuing. The revisional court further held that it is clear from the record that it is still open to the parties to cross-examine the Survey Commissioner as per the provisions of Order 26 Rule 10 (2) of C.P.C. as the cross examination of Survey Commissioner has not yet been closed, therefore, the opportunity to cross-examine the Survey Commissioner has not been closed. Accordingly, it held that appropriate question may be asked by the petitioners in cross-examination from the Survey Commissioner regarding procedure followed by the Survey Commissioner, and the application has been filed only to delay in disposal of the suit.

9. Challenging the said order, learned counsel for the petitioners has submitted that the reading of Order 26 Rule 10 (2) of C.P.C. clearly demonstrates that any party can ask for Court Commissioner to demonstrate the manner and procedure which he had followed in conducting the survey, so that true facts may come on record before the Court in order to ascertain whether the Court Commissioner has followed the right procedure in conducting the sruvey.

10. Per contra, learned counsel for the respondents would contend that perusal of Order 26 Rule 10 (2) of C.P.C. would demonstrate that the Court Commissioner can be cross-examined by any party on any of the questions or points as referred in Order 26 Rule 10 (2) of C.P.C. The said provision does not permit any of the parties to move an application to summon the Court Commissioner along with his instruments to demonstrate the manner and procedure which he had followed in conducting the survey.

11. It is contended that the Order 26 Rule 10 (2) of C.P.C. clearly provides that any question in respect of the manner and procedure adopted by the Court Commissioner in conducting the survey can be asked, and on being asked such question if answer to such question reflects that correct procedure has not been followed by the Survey Commissioner, it can be proved that the report of Survey Commissioner is not correct.

12. Be that as it may, to appreciate the controversy in hand, it would be apt to refer the Order 26 Rule 10 (2) of C.P.C. which reads as under:-

"10 (2) ***Report and depositions to be evidence in suit****- The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation."*

13. Perusal of the Order 26 Rule 10 (2) of C.P.C., quoted above, clearly demonstrate that the said provision provides for cross-examination of Court Commissioner on any of the point including the point as to the manner and procedure which had been followed or adopted by the Court Commissioner in conducting the survey. The aforesaid

provision does not permit any of the parties to submit application for summoning the Court Commissioner along with instruments to make actual demonstration in the Court as regards the procedure adopted by him in conducting the survey. If any of the party is not satisfied with the survey report submitted by the Survey Commissioner, it may put a question in cross-examination regarding the manner and procedure adopted by him in conducting the survey. The issue can be very much determined from the reply of the Court Commissioner to the question put by any of the parties in cross-examination regarding the procedure adopted by the Court Commissioner in conducting the survey.

14. In the opinion of the Court, there is no requirement in law, nor the aforesaid provision permits any of the parties to ask for summoning of the Court Commissioner along with his instruments to make actual demonstration about the procedure followed by him in conducting the survey.

15. Learned counsel for the petitioners could not dispute that the cross-examination of the Court Commissioner is still continuing and has not yet closed. In such view of the fact, the petitioners have still an opportunity to put relevant question to the Court Commissioner to prove that the report of the Survey Commissioner is wrong or incorrect.

16. At this stage, it is pertinent to mention that the petitioners have instituted the suit in the year 2007 and first application for Survey Commissioner was filed in the year 2011 and uptill 2017 two more applications, i.e., total three applications for appointment of Survey Commissioner have been filed by the petitioners and more than 15 years have passed, yet the suit has not proceeded because of the lingering device adopted by the petitioners, so that the Court may not proceed to decide the suit. Thus, this Court finds that the finding of the revisional court that the application filed by the petitioners has been filed only to linger on the suit is based upon proper appreciation of facts on record. Accordingly, this Court does not find any infirmity in the order passed by the revional court as well as trial court.

17. Thus, for the reasons given above, the writ petition lacks merit. It is accordingly, **dismissed** with no order as to costs.

(2022) 8 ILRA 432
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE VIVEK KUMAR SINGH, J.

Crl. Misc. Anticipatory Bail Appl. No. 340 of 2021

Gaurav Khanna & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Mithilesh Kumar Shukla, Sri Avanish Kumar Shukla

Counsel for the Opp. Party:
G.A., Sri Sharad Kumar Srivastava, Sri Sharad Kumar Srivastava

A. Criminal Law - Code of Criminal Procedure, 1973 – Section 438 - Anticipatory Bail is to continue only till the court summons the accused based on charge sheet. Hence, application u/S 438(1) Cr.P.C. is not maintainable and it is open for the applicants to seek regular bail u/S 439 Cr.P.C.

Application rejected. (E-12)

List of Cases cited:-

1. Vinod Kumar Vs St. of U.P. 2010(1) JIC 1(Allahabad)

2. Satpal Singh Vs St. of Pun. (2018) SCC Online SC 415

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

1. Counter affidavit filed on behalf of opposite party no. 2, is taken on record.

2. Heard Sri Mithilesh Kumar Shukla, learned counsel on behalf of applicants, Sri Sharad Kumar Srivastava, learned counsel on behalf of opposite party and Sri Sanjay Singh, learned AGA-I for the State.

3. The instant anticipatory bail application has been filed on behalf of the applicants, Gaurav Khanna and Saurabh Khanna, with a prayer to grant them anticipatory bail in Case Crime No. 0038 of 2019, under Sections 406, 420, 467, 468, 471, 120-B I.P.C., Police Station- Kotwali, District- Kanpur Nagar, during pendency of trial.

4. It has been contended by learned counsel on behalf of applicants that applicants have not committed any offence as mentioned in the first information report lodged by the opposite party no. 2. The applicants and opposite no. 2 both are the partners of the firm in the name and style of M/s Khas Polymer. The applicants tried to get loan from the concern bank namely Punjab National Bank, the concern bank after verification of the documents and consent with the partners of the firms granted the loan of Rs. 16,85,840/- in favour of the firm on 20.11.2017.

5. The applicants as partners of the aforesaid firm have deposited installments of the loan amount continuously in the concern bank, thereafter some dispute arose between the applicants and opposite party no. 2, both are the partners of the aforesaid firm and had resigned from the partnership vide letter dated 06.08.2018, a copy of resignation letter dated 06.08.2018 has been annexed as Annexure no. 5 to the affidavit filed in support of bail application.

6. It is next contended that only on account of some dispute of partnership of the aforesaid firm opposite party no. 2 illegally lodged the first information report against the applicants with the malafide intention only to harass them. The applicant nos. 1 and 2 being aggrieved with the first information report approached this Hon'ble Court by way of the Criminal Misc. Writ Petition No. 5230 of 2019 (Gaurav Khanna Vs. State of U.P. and others) and Criminal Misc. Writ Petition No. 5280 of 2019 (Saurabh Khanna Vs. State of U.P. and others), and the Hon'ble court disposed off the petition providing that the investigation shall continue and be brought to its logical conclusion but, subject to petitioner's cooperation in the investigation, he shall not be arrested in the aforesaid case till submission of police report under section 173(2) Cr.P.C.

7. The matter was investigated by Investigating Officer, charge sheet submitted against the applicants and other co-accused persons and learned Magistrate has taken cognizance vide order dated 26.08.2019. It is further submitted that opposite party no. 2 after lodging the first information report on 09.02.2019 against the applicants again filed a complaint against the applicants and other accused persons on similar circumstances under section 406/420 IPC before the Special Chief Judicial Magistrate, Kanpur Nagar. Thereafter, the learned Magistrate recorded the statement u/s 200 and 202 Cr.P.C. and

summoned the applicants. Against the summoning order dated 06.04.2019 the applicants have approached this Hon'ble Court by way of Criminal Misc. Application under section 482 Cr.P.C. and this Hon'ble Court vide its order dated 21.01.2020 stayed the further proceedings of complaint case. The applicants have also moved anticipatory bail application under section 438 Cr.P.C. for grant of anticipatory bail before the learned Additional Sessions Judge which was rejected on 07.03.2020 in an arbitrary manner. Being aggrieved with charge sheet dated 18.08.2019 the applicants approached this Hon'ble Court by way of Criminal Misc. Application No. 1614 of 2020 (Gaurav Khanna and another Vs. State of U.P. and another) and the same was disposed off vide order dated 14.01.2020. After rejection of the anticipatory bail application of the applicants by the learned Additional Sessions Judge, the applicants approached this Hon'ble court by way of Anticipatory Bail Application No. 3857 of 2020 which was dismissed as not pressed vide order dated 08.07.2020. It is also submitted that the aforesaid first information report was lodged only due to malafide intention, ulterior motive and to blackmail the applicants. There is no criminal history against the applicants. Several other submissions in order to demonstrate the falsity of the allegations made against the applicants have also been placed 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 applicants that they are ready to cooperate with the process of law and shall faithfully make themselves available before the court whenever required.

8. Learned AGA vehemently opposed the prayer for bail and submitted that this is the second anticipatory bail application on behalf of the applicants before this court. The first anticipatory bail application was dismissed by this Hon'ble Court on 08.07.2020 (annexure no. 14) but in para 5 of the affidavit filed in support of anticipatory bail application, the applicants have deposed that 'this is the first anticipatory bail application before this court' as such the present anticipatory bail application is liable to be dismissed on this ground alone. Though the first anticipatory bail application was dismissed as withdrawn but no liberty was given to the applicants to file second anticipatory bail application. it is further submitted that anticipatory bail is to continue only till the court summons the accused based on charge sheet, it is open for the applicants to appear and seek the regular bail in accordance with the provisions made in section 439 Cr.P.C. in view of law laid down in the case of **Vinod Kumar Vs. State of U.P. reported in 2010 (1) JIC 1(All) and Satpal Singh Vs. State of Panjab, reported in (2018) SCC online SC 415**. Here in the present case charge sheet has been submitted on 18.08.2019, under section 406, 420, 467, 468, 471 & 120B IPC and on 26.08.2019, the learned Magistrate had taken cognizance of offence and summoned the applicants, hence application under section 438 Cr.P.C. is not maintainable and it is open for the applicants to seek regular bail under section 439 Cr.P.C. It is also submitted that applicants had obtained huge amount of loan from PNB Housing Finance Limited by preparing forged signature of the complainant as manufactured documents such as Declaration Demand, Promissory Note, Power of Attorney, Disbursement Request Form, Cheque Submission Form/receipt etc. as such the applicants committed grave offence and are not entitled for grant of anticipatory bail.

9. After hearing the learned counsel for the applicant and learned A.G.A., and after perusing the averments made in the present anticipatory bail application, this Court is of the opinion, that learned counsel for the applicants could not point out any good ground for grant of bail to the applicants.

10. Accordingly, the anticipatory bail application filed on behalf of the applicants is hereby **rejected**.

(2022) 8 ILRA 435
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.06.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Crl. Misc. Anticipatory Bail Appl. No. 780 of 2022

Ram Bahadur Sahani ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Mrs. Shaili Ganguly, Sri R. Krishnamurti, Vijaylaxmi Krishnamorthi

Counsel for the Opp. Parties:
G.A., Sri Uma Nath Pandey, Sri Shiv Ram Dubey

A. It is mandatory on the part of Investigating Officer to record reasons for making arrest as well as not making arrest in respect of a cognizable offence for which the maximum sentence is upto 7 years. Arrest is not required to be made under sub clause (1) of the amended section 41 of the code, the Police is bound to issue a notice of appearance to the accused person. Even in such a case, failure to comply with the notice of appearance or unwillingness to identify himself may be grounds for the Police to arrest a person to whom a notice under section 41-A of the Code has been issued.

Application disposed of. (E-12)

List of Cases cited:-

1. Arnesh Kumar Vs St. of Bihar (2014)8 SCC 273

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Heard Mr. R. Krishnamurti, holding brief of Mrs. Shaili Ganguly, learned counsel for applicant, learned Additional Government Advocate for the State, Mr. Shiv Ram Dubey, holding brief of Mr. Uma Nath Pandey, learned counsel for opposite party no.3 and perused the material available on record.

2. The present anticipatory bail application under Section 438 Cr.P.C. has been filed for grant of anticipatory bail as the accused-applicant is apprehending her arrest in connection with Case Crime No.505 of 2021, under Sections 420, 406 IPC, Police Station Kasana, District Gautam Budh Nagar.

3. Learned counsel for the applicant has submitted that the applicant has been falsely implicated in the present case. Due to civil litigation pending between applicant and complainant, the complainant has lodged FIR through an application under Section 156 (3) Cr.P.C. just to create pressure upon the applicant. The applicant has no criminal antecedents. During arguments, learned counsel for the applicant has submitted that since all the offences are punishable with less than seven years of imprisonment, therefore, ratio of law laid down by Supreme Court in case of ***Arnesh Kumar Vs. State of Bihar, (2014) 8 SCC 273*** should have been invoked.

4. On the other hand, learned AGA states that the offence allegedly committed by the applicant entail a sentence up to seven years. In such circumstances, the investigating officer shall ensure compliance of provisions of Section 41 and Section 41-A of the Code of Criminal Procedure as provided by Hon'ble Supreme Court of India in ***Arnesh Kumar (supra)*.**

5. Section 41 of the Code deals with the power of the police officer investigating the commission of a cognizable offence, to arrest a person without an order from the Magistrate and without a warrant.

6. Section 41-A of the Code inserted vide Act 5 of 2009 w.e.f. 1-11-2010, reads as follows:

"41-A. Notice of appearance before police officer.-(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

7. A perusal of Section 41 shows that there is no absolute bar against arresting a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend up to seven years with or without fine. Section 41(1)(a), however, provides that an investigating officer shall not arrest a person accused of such offences in a routine manner and the arrest be made, only after following the restrictions imposed under Section 41(1)(b).

8. In **Arnesh Kumar (supra)**, the Apex Court while dealing with the power of the police to arrest a person under Section 41 of the Code, has held that the said power is to be exercised only after the conditions enumerated in the said Section are satisfied. Relevant paragraph of the said judgment is extracted below:

"From a plain reading of the aforesaid provision, it is evident that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from

making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 Cr.P.C."

9. Thus, it is mandatory on the part of the investigating officer to record reasons for making arrest as well as for not making arrest in respect of a cognizable offence for which the maximum sentence is up to seven years.

10. However, arrest is not required to be made under Sub-Clause (1) of the amended Section 41 of the Code, the police is bound to issue a notice of appearance to the accused person. Even in such a case, failure to comply with the notice of appearance or unwillingness to identify himself may be grounds for the police to arrest a person to whom a notice under Section 41-A of the Code has been issued.

11. The statutory protection under Section 41 and 41-A of the Code is already available, which the police authorities are bound to comply in this case also.

12. Considering the facts and circumstances of the case, the present anticipatory bail application is disposed of directing the Investigating Officer to strictly comply with the provisions of Section 41 and Section 41-A of the Code of Criminal Procedure as provided by Hon'ble Supreme Court of India in ***Arnesh Kumar (supra).***

13. The anticipatory bail application is finally disposed of with the above noted directions.

(2022) 8 ILRA 437
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.08.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Bail Appl. No. 1612 of 2022

Sidhique Kappan ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Ishan Baghel

Counsel for the Opp. Parties:
G.A.

Unlawful Activities (Prevention) Amendment Act, 2019 - Section 43(D)(5) -

The section prohibits a Court from granting bail to accused if on a perusal of a final report filed under Section 173 Cr.P.C., the Court is of the opinion that there are reasonable grounds to believe that the accusations against such person are prima-facie true. The Court is not supposed to delve into the admissibility and inadmissibility of documentary and oral evidence at the stage of bail.

Bail Application dismissed. (E-12)

List of Cases relied upon:-

1. National Investigation Agency Vs Zahoor Ahmad Shah Watali

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri I.B. Singh, learned Senior Counsel assisted by Sri Ishan Baghel and Avinash Singh Vishen, learned counsel for the applicant, Sri Vinod Kumar Shahi, learned Additional Advocate General assisted by Sri Shivnath Tilahari, learned A.G.A. and perused the material available on record.

2. Applicant seeks bail in Crime No.199 of 2020, under Sections 153-A, 295-A, 120B I.P.C., Sections 17, 18 of U.A.P. Act and Sections 65 and 72 of I.T. Act, Police Station Mant, District Mathura, during the pendency of trial.

PROSECUTION STORY:

3. As per prosecution story, the applicant alongwith three co-accused persons, namely, Athikurrehman, Alam and Masood, were lodged at the Police Station Mant vide G.D. No.41/20:52 hours on 05.10.2020 and six smart phones, one laptop and pamphlets were recovered from them. After an inquiry, it came out that the applicant and other co-accused persons were travelling to disturb the harmony of the area. It is alleged in the F.I.R. that the applicant and other co-accused persons were heading to Hathras where the ill-fated incident of rape and murder had been committed with an intention to create caste struggle and to incite riots. The said persons are said to have been collecting funds and running a website 'Carrd.com'. It was also revealed that the said collected funds were used to break the social harmony and incite violence. The pamphlets read as 'AM I NOT INDIAS DAUGHTER MADE WITH Carrd' etc. It was also found that the incident of mob lynching, exodus of labourers and the Kashmir issues were also highlighted through the same website. The website also imparts training pertaining to concealing one's identity during demonstrations and to ways to incite violence. The website was found to be full of misinformation thereby distorting true facts. There was another website operated by the laptop which had the heading 'Justice For Hathras'. The matter was registered under various sections of I.P.C., U.A.P. Act and I.T. Act.

RIVAL CONTENTIONS:

4. Learned Senior Counsel for the applicant has stated that the applicant is innocent and has been falsely implicated in the case. No pamphlets or printing papers were being carried out by the applicant or other co-accused persons in the car. The applicant is unaware of any website with the name of 'Carrd.com' and 'Justice For Hathras'. The applicant was going to Hathras to discharge his duty as a professional journalist and was illegally detained by Mant Police, District Mathura in violation of his fundamental rights. The applicant is not a member of P.F.I. and was not acting at the behest any of their office bearers. Learned Senior Counsel has further stated that the applicant was not

going to Hathras on the directions of P.F.I. and furthermore that P.F.I. is not banned organization altogether. The applicant has never used any platforms to spread disharmony or further class/communal conflict. The applicant only used to post his journalistic writings and links pertaining to his job of mass communication.

5. Learned Senior Counsel has further stated that the applicant has never ever participated in any secret workshop with an aim of furthering caste conflict in India. So, no question arises of applicant being involved with any other persons to commit violence under the guise of class/communal conflict across the State. The applicant had himself conducted a workshop on wikipedia editing which were open to all and related to journalistic and non-political activities. The applicant is an honest and law abiding journalist and has not received any funds from abroad. The applicant had himself interviewed including Ansad Badruddin, the State President of B.J.P. Kerala, Central Minister from Kerala and the Members of Muslim League and B.J.P. etc. Learned Senior Counsel has further stated that the acquaintance of the applicant with Ansad Badruddin does not make him a criminal. There is no iota of evidence available on record to suggest that he was involved in illegal activities taken up by Ansad Badruddin or any other person. There is nothing on record to suggest that the applicant had ever written an article on social media promoting terrorist Gulzar Ahmed Wani. He had not made any video whatsoever of Hathras incident.

6. Learned Senior Counsel has also stated that a friend of the applicant was writing a book on Ex-SIMI leaders and sent a draft of his book to the applicant. The said friend had also requested the applicant to conduct interviews of Ex-SIMI leaders who were now MP's from Trinamool Congress. This is an open secret. The applicant is an honest journalist and does not post any biased reports on the basis of his political leanings. He has never been directed by any P.F.I. leader to report in a biased manner. The applicant has no acquaintance with any terrorist named Professor Jilani. Learned Senior Counsel has further stated that the applicant was a former employee of Tejas Weekly Newspaper which is associated with P.F.I., as such, he was in touch with many P.F.I. activists, but has nothing to do with the organization. The money transferred to his account is his hard earned money and has nothing to do with any offence whatsoever. Some allegations were levelled against the applicant by one website 'Indus Scroll' whereby the applicant had sent a legal notice to the website for their defamatory and false averments. The applicant has written several journalistic reports on the plights of dalits and minorities, but none of them promotes any sort of rivalry between the communities. The applicant had no prior association with co-accused Alam, who happens to be the driver of the car.

7. Learned Senior Counsel for the applicant has also stated that the provisions of U.A.P.A. Act are not applicable to the applicant as the amended sanction under the Act has been taken by the Department on 08.06.2021. The said sanction is ipso facto illegal at the outset and has been challenged by the applicant by filing a petition under Section 482 Cr.P.C. in the High Court which is still sub-judice. The applicant was first of all produced before the S.D.M. Mant, Mathura and was sent for judicial custody till 19.10.2020. Learned Senior Counsel has vehemently argued that the Kerala Union of Working Journalist

filed a Habeas Corpus Petition on 05.10.2020 in the Supreme Court, which was to be taken up on 07.10.2020 and the same day, F.I.R. No.199 of 2020 was registered against the applicant and other co-accused persons under Sections 153-A, 295-A, 124A, 120B I.P.C., Sections 17, 18 of U.A.P. Act and Sections 65 and 72 of I.T. Act. Learned Senior Counsel has stated that at the time of filing of charge-sheet, sanction was not produced alongwith it rather it was produced later on. The sanction for prosecution was taken by the A.T.S. on 31.03.2021 and was filed on 09.04.2021, which had come on record on 12.04.2021 after an application moved by the prosecution. Learned Senior Counsel has further stated that later, on 24.08.2021, the State notified for creation of a Competent Authority to grant sanction under U.A.P. Act, thus sanction granted earlier to that is illegal. The case was transferred to the Special Court Lucknow in December, 2021. Learned Senior Counsel has further stated that there is no criminal history of the applicant.

8. Per contra, Sri Vinod Kumar Shahi, learned Additional Advocate General assisted by Sri Shivnath Tilhari, learned A.G.A. for the State has vehemently opposed the bail application on the ground that the applicant is a resident of Kerala and has nothing to do with the incident of Hathras and had deliberately with malafide intent come with the co-accused persons and was arrested at Mathura.

9. Sri Shivnath Tilhari, learned A.G.A. for the State has categorically stated that the applicant was found carrying pamphlets 'How To Escape' while inciting riots and he and other co-accused persons were received financial assistance through illegal means to go to Hathras alongwith other terrorist persons with a plan to spread social disharmony and incite class war. The applicant had conducted a secret workshop with other persons with an aim to furthering the caste conflict across the country.

10. Learned A.G.A. has further stated that the co-accused persons had collected funds from foreign national mediums which was utilized by co-accused persons for illegal activities. The applicant was in regular touch with co-accused persons, namely, Rauf Sharif and Athikurrehman, and there are call detail records (CDRs) to corroborate the same, which has been filed in the counter affidavit as annexure SCA-3. Learned A.G.A. has further stated that on the analysis of the mobile recovered from the applicant, there is an F.S.L. report which suggests that there are WhatsApp chats wherein the applicant was a member of hit squad of Ansad Badruddin, which have also been filed by the State. It is also pertinent to note that the co-accused persons, namely, Ansad Badruddin and Firoz, were arrested by the police in F.I.R. No.4 of 2021, under Sections 121A, 120B I.P.C., 13, 16, 18 and 20 of U.A.P. Act, Sections 3, 4 and 5 of Explosive Substances Act and 3/5 Arms Act by the A.T.S. Lucknow and a heavy amount of explosives were recovered from them. There are number of WhatsApp chats of the applicant with the General Secretary of P.F.I. Kamal K.P., which also revealed about the alleged workshop having been conducted by the applicant and other co-accused persons. The said workshop is stated to have been conducted to incite riots across the country, by raking up issues of C.A.A. and Babri Masjid demolition. In all, 45 papers pertaining to banned organization 'SIMI' have been recovered from the laptop of the applicant. He has also received tainted money which is on record.

11. Learned A.G.A. has further stated that during the search of the house of the applicant at New Delhi on 11.11.2020, 47 papers in Malyalam language were recovered pertaining to SIMI. Two AK-47 guns were also shown in the said documents, which also contains the popular slogan of SIMI 'Welcome Mohammad Gajni'. Learned A.G.A. has further stated that the present offence is covered by Section 43(D)(5) of U.A.P. Act. Learned A.G.A. has fairly conceded the fact that he does not press the arguments pertaining to Section 124A owing to the latest judgment of the Apex Court. Learned A.G.A. has further stated that no proper cause has been shown by the applicant pertaining to his presence near Hathras at such crucial time when State was going social unrest, rather he has used journalism as a cover to fulfill his ulterior motives.

CONCLUSION:

12. It has come up in the investigation that the applicant had no work at Hathras. The State machinery was at tenterhooks owing to the tension prevailing due to various types of information being viral across all forums of media including the internet. The said sojourn of the applicant with co-accused persons who do not belong to media fraternity is a crucial circumstance going against him.

13. The defence taken by the applicant that he is a journalist and only owing to his professional duty, he wanted to visit the place of Hathras incident stands nullified by the averments in the charge-sheet and the persons, he was arrested with, while travelling in a car. The tainted money being used by the applicant and his colleagues cannot be ruled out.

14. The legislature has framed the U.A.P. Act to control such instances. The Courts interpret the laws enacted by the legislature which becomes functus officio after the framing of the statute.

15. In the matter of ***National Investigation Agency vs. Zahoor Ahmad Shah Watali***1, the Apex Court, while overturning the High Courts order of granting bail to the accused, has stated that Section 43(D)(5) prohibits a Court from granting bail to accused if on a perusal of a final report filed under Section 173 Cr.P.C., the Court is of the opinion that there are reasonable grounds to believe that the accusations against such person are prima facie true. The Apex Court has also observed that the High Court had applied an altogether wrong approach by examining and evaluating the evidence in detail. The Court is not supposed to delve into the admissibility and inadmissibility of documentary and oral evidence at the stage of bail.

16. A perusal of the charge-sheet and documents adduced, *prima facie* reveal that the applicant has committed the offence.

17. Considering the facts and circumstances of the case, submissions advanced by learned counsel for the parties, nature of offence, evidence on record, considering the complicity of accused, severity of punishment and the settled law propounded by the Apex Court in the case of ***Zahoor Ahmad Shah Watali (supra)***, at this stage, without expressing any opinion on the merits of the case, this Court is not inclined to release the applicant on bail.

18. The bail application is found devoid of merits and is, accordingly, ***dismissed***.

19. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

(2022) 8 ILRA 442
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.07.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Crl. Misc. Anticipatory Bail Appl. U/S 438 Cr.P.C. No. 3532 of 2022

Suresh Babu ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Akhilesh Srivastava, Sri Saksham Srivastava, Sri V.P. Srivastava (Sr. Adv.)

Counsel for the Opp. Party:
G.A., Sri Anuj Srivastava, Sri Ravendra Singh, Sri Siddharth Saran, Sri Akhilesh Kumar Mishra

A. Criminal Law - Code of Criminal Procedure, 1973 – Section 438 (1) - As per section 438 Cr.P.C. the Anticipatory Bail Application may be filed either before Sessions Court or before High Court in as much as both the aforesaid courts are having the concurrent jurisdiction. Section 438 (1) Cr.P.C. clearly mandates that if any anticipatory bail application is filed, either it may be rejected forthwith or any interim order may be passed. In other words if the court wants to know some information from the other side, the case may be posted for another date and if the applicant has got prima facie case and his apprehension of arrest appears to be bonafide in a case where the allegations prima facie do not corroborate with material available on record may grant interim anticipatory bail.

B. Code of Criminal Procedure, 1973 – Section 82 -Sneither creates any rider nor imposes any restrictions in filing anticipatory bail application by the proclaimed offender inasmuch as the Hon'ble Apex Court has used the word 'Normally' in re: Lavesh (supra), meaning thereby normally the anticipatory bail application of the proclaimed offender should not be entertained. It has nowhere been indicated u/s 438 Cr.P.C. that the proclaimed offender would be barred to file such application. As to whether such proclaimed offender would be granted anticipatory bail or not would depend upon the facts and circumstances of the particular issue.

C. If the physical relation has been established on the false promise of marriage and the physical relation was consensual in nature and it lasted for long time, prima facie it may not be treated as rape but it may be considered as breach of promise.

Application allowed. (E-12)

List of Cases cited:-

1. Lavesh Vs State (NCT of Delhi) (2012)8 SCC 730

2. St. of M.P. Vs Pradeep Sharma (2014)2 SCC 171

3. Prem Shankar Prasad Vs St.of Bihar (Criminal Appeal No. 1209 of 2021(SC))

4. Sonu@Subhash Kumar Vs St. of U.P. & anr. (Criminal Appeal No. 233 of 2021(SC)) arising out of SLP (Criminal) No. 11218 of 2019

5. Sushila Agarwal Vs St. (NCT of Delhi) 2020 SCC Online SC 98

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Akhilesh Srivastava and Sri Saksham Srivastava, learned counsel for the applicant, learned AGA and Sri Siddharth Saran and Sri

Akhilesh Kumar Mishra, learned counsel who have filed 'Vakalatnama' for the informant / complainant, same is taken on record.

2. Learned counsel for the applicant has filed one second supplementary affidavit enclosing therewith the true copy of the anticipatory bail application filed before the sessions court, the same is taken on record.

3. The present applicant is apprehending his arrest in Case Crime No. 02 of 2021 u/s 323, 504, 506, 313, 376, 377 IPC, P.S. Baghpat, District Baghpat (U.P.). It has been submitted that the applicant has been falsely implicated in this case as he has not committed any offence as alleged in the F.I.R.

4. The learned AGA as well as learned counsel for the informant / complainant have raised preliminary objection regarding maintainability of the present anticipatory bail application on the ground that the proclamation u/s 82/83 Cr.P.C. has been issued against the applicant, so his anticipatory bail application may not be entertained and no order in such application can be passed. Therefore, I would firstly advert to such objection regarding maintainability.

5. As per second supplementary affidavit the Annexure S.A.-1 is anticipatory bail application of the present applicant filed before the sessions court u/s 438 Cr.P.C. on 16.3.2022 and such application has been rejected on 5.4.2022. While rejecting the anticipatory bail application the sessions court has indicated that the proclamation under section 82 Cr.P.C. has been issued against the accused. It has been informed at the Bar that such proclamation u/s 82 Cr.P.C. has been issued on 24.3.2022. Therefore, when the present applicant filed his anticipatory bail application he was not declared as proclaimed offender but he was declared proclaimed offender during the pendency of his anticipatory bail application before the learned sessions court.

6. As per section 438 Cr.P.C. the anticipatory bail application may be filed either before sessions court or before High Court inasmuch as both the aforesaid courts are having a concurrent jurisdiction. Section 438 (1) Cr.P.C. clearly mandates that if any anticipatory bail application is filed, either it may be rejected forthwith or any interim order may be passed. In other words if the court wants to know some information from the other side, the case may be posted for another date and if the applicant has got prima facie case and his apprehension of arrest appears to be bonafide in a case where the allegations prima facie do not corroborate with material available on record may grant interim anticipatory bail. However, in the present case the proclamation u/s 82 Cr.P.C. has been issued during the pendency of the application. Apex Court in re: ***Lavesh vs. State (NCT of Delhi) (2012) 8 SCC 730, State of Madhya Pradesh vs. Pradeep Sharma reported in (2014) 2 SCC 171 and Prem Shanker Prasad vs. State of Bihar (Criminal Appeal No. 1209 of 2021)*** has imposed bar to entertain such application if filed by the proclaimed offender. In the present case at the time of filing anticipatory bail application the applicant was not proclaimed offender.

7. Learned AGA has also informed that on 13.5.2022 the further proclamation of section 83 Cr.P.C. has been issued against the present applicant.

8. Be that as it may, at the time of filing anticipatory bail application on 16.3.2022 the present applicant was not proclaimed offender, therefore, the bar so imposed by the Apex Court would be considered in the light of intent and purport of said judgments wherein the proclaimed offender has been restrained to get any relief in the application of anticipatory bail. In the present case the applicant was not declared as a proclaimed offender on 16.3.2021, the date of filing anticipatory bail, therefore, to me such bar could not restrain the present applicant to file his anticipatory bail application before this Court under same section i.e. section 438 Cr.P.C. and, therefore, his anticipatory bail application may be heard and disposed of finally on merits.

9. Notably,sub-section 6 of section 438 Cr.P.C. provides as under :

438(6)Cr.P.C.*: Provisions of this section shall not be applicable.-*

(a) to the offences arising out of .-

(i) the Unlawful Activities (Prevention) Act,1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act,1986.

(b) in the offences, in which death sentence can be awarded.

Besides, section 82 Cr.P.C. neither creates any rider nor imposes any restrictions in filing anticipatory bail application by the proclaimed offender inasmuch as the Hon'ble Apex Court has used the word '***Normally'*** in re: ***Lavesh (supra)***, meaning thereby normally the anticipatory bail application of the proclaimed offender should not be entertained. Therefore, only in the aforesaid case / cases the provisions of anticipatory bail application would not be applicable. It has nowhere been indicated u/s 438 Cr.P.C. that the proclaimed offender would be barred to file such application. As to whether such proclaimed offender would be granted anticipatory bail or not would depend upon the facts and circumstances of the particular issue and also on the basis of bar, so imposed by the Apex Court in re: ***Lavesh (supra), Pradeep Sharma (supra)*** and P***rem Shankar Prasad (supra)***. Therefore, in view of the facts and circumstances of the issue in question, I do not accept the objection, so raised by the learned counsel for the opposite parties regarding maintainability of the present application for the reason that the proclamation u/s 82/83 Cr.P.C. has been issued against the applicant.

10. Before adverting to the merits of the case, I am of the considered opinion that the process of law should not be flouted and the person against whom the investigation is going on, he / she must cooperate with the investigation strictly in accordance with law.

11. In the present case the learned counsel for the applicant has submitted that the false and misconceived allegations have been levelled against the present applicant by the informant by lodging F.I.R. after a delay of one year three months and twenty three days and no explanation of such delay has been given in the F.I.R. The allegations are that on the pretext of false promise of marriage the applicant has exploited and established physical relation with the informant, however, the applicant is now denying for the marriage. Recently the Apex Court in re; **Sonu @ Subhash Kumar vs. State of U.P. & another**

passed in Criminal Appeal No. 233 of 2021 arising out of SLP (Crl.) No. 11218 of 2019 has made distinction as to what would be a 'rape' in such circumstances and what would be the 'breach of promise'. As observed by the Apex court, if the physical relation has been established on the false promise of marriage and the physical relation was consensual in nature and it lasted for long time, prima facie it may not be treated as rape but it may be considered as breach of promise.

12. It is made clear here that I am not giving any finding on that aspect for the reason that the investigation is going on and it is expected that the investigating officer shall conduct and conclude the investigation strictly in accordance with law without being influenced from any finding of this order.

13. Learned counsel for the applicant has drawn attention of this Court towards one F.I.R. it has been enclosed as Annexure no. 13 bearing No. 0315 of 2016 u/s 420, 376, 354(B),147, 323, 504, 506, 452 IPC, P.S. Baghpat, District Baghpat, wherein the informant of the present case is also informant of that case and there are five accused persons in such case. In that case almost similar allegations relating to rape etc. have been leveled.

14. Learned Senior Advocate has submitted that in such F.I.R. the informant / complainant has disclosed her name as Jyoti d/o Saheb Singh whereas in the present case she has disclosed her name as Smt. Rakhi @ Jyoti d/o Jaipal Singh, however, both the persons are same. Further, she is saying herself as a divorcee of one Mr. Deepak whereas she has not shown the decree of divorce. As per statements of independent witnesses which are enclosed as Annexure no. 5, she is living in her house with her husband and she has earlier implicated some more persons also on the same allegations. Learned Senior Advocate has further submitted that the aforesaid fact creates doubt on the prosecution story. He has further submitted that as a matter of fact this is a case of false implication of the present applicant who is a government servant, serving on the post of Junior Engineer in the Electricity Department at Baghpat. He was the tenant of the informant / complainant and having ulterior motive and extraneous design in her mind she implicated the applicant falsely. One fact has come to the notice of this Court that there was one more case against the present applicant bearing Case Crime No. 300 of 2019 u/s 409, 120B IPC, P.S. Baghpat, District Baghpat, wherein he has been granted bail by this Court on 21.1.2020 in Crl. Misc. Bail Application No. 43820 of 2019.

15. On account of apprehension of arrest being a government servant he could not properly cooperate with the investigation because if he is arrested and sent to judicial custody, he would suffer irreparable loss in his service. However, he has assured that if the liberty of the present applicant is protected, he shall definitely cooperate with the investigation properly and shall abide by the directions, so issued by the investigating officer relating to the investigation.

16. Learned AGA as well as learned counsel for the informant / complainant has vehemently opposed the prayer of anticipatory bail and have submitted that just after rejection of anticipatory bail application by the learned sessions court the applicant has filed his surrender

application before the court concerned on 25.4.2022 but he did not surrender. Further, despite the proclamation u/s 82/83 Cr.P.C. having been issued the present applicant is avoiding the process of law, therefore, he is not entitled for any protection.

17. Having heard learned counsel for the parties and having perused the material available on record and also considering the fact that one more F.I.R. was lodged by the informant / complainant against the other persons more or less on the same allegations of rape etc. wherein her name and her father's name is different, the instant F.I.R. has been lodged after the unexplained delay of one year three months and twenty three days and the undertaking of the applicant that he shall cooperate with the investigation, I find it appropriate that the liberty of the present applicant be protected till filing of the charge-sheet, if any in view of dictum of "***Sushila Aggarwal Vs. State (NCT of Delhi)-2020 SCC online SC 98"***. However, considering the facts and circumstances of the present case and the fact that the present applicant has not appeared before the investigating officer as yet, therefore, I hereby fix the date as 25.7.2022 directing the applicant to appear before the investigating officer on that date, failing which the benefit of this order will not be available to the applicant. He shall further abide by the directions of the investigating officer for the purposes of investigation and shall not misuse the liberty of bail. If at any time it is found that applicant is misusing the liberty of bail, any appropriate application may be filed by the opposite parties including State for seeking cancellation of this anticipatory bail.

18. Therefore, it is directed that in the event of arrest, applicant- **Suresh Babu**, shall be released on anticipatory bail in the aforesaid case crime number on his furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the arresting authority/ court concerned with the following conditions:-

1. that the applicant shall make himself available for interrogation by a police officer as and when required;

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

3. that the applicant shall not leave India without the previous permission of the court;

4. that in default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant;

5. that the applicant shall not pressurize/ intimidate the prosecution witness;

In view of above, the present anticipatory bail application is **disposed of**.

(2022) 8 ILRA 446
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.07.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Appl. No. 3722 of 2022

Ram Sajeevan @ Babu ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Atul Kumar Singh Gaur

Counsel for the Opp. Parties:
G.A., Aditya Vikram Singh, Yash Pandey

A. The allegation of rape is not supported by the medical evidence as the doctor in the medical examination report of the victim has opined that there is no external or internal injury found on the person of victim nor there is any dead or live spermatozoa seen. The radiological age of the victim was 19 years. Thus, she is major and she knew her consequences very well and therefore, the applicant is entitled for bail.

Bail Application allowed. (E-12)

List of Cases relied upon:-

1. Dataram Singh Vs St. of U.P. & anr., reported in (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Counter affidavit and rejoinder affidavit filed by the learned AGA and learned counsel for the applicant respectively are taken on record.

2. Heard Sri Atul Kumar Singh Gaur, learned counsel for the applicant, Sri Aditya Vikram Singh, learned counsel for the informant and Sri Sushil Kumar Panday, learned AGA and perused the record.

3. The applicant, Ram Sajeevan @ Babu has moved the present bail application seeking bail in Case Crime No. 0499 of 2021, under Sections 376,504,506 IPC, section 3/4 POCSO Act, 2012, Police Station Fatehpur, District Barabanki, during trial.

4. Learned counsel for the informant does not propose to file any counter affidavit on behalf of the informant despite time being given to him. Today, also when the Court asked him to file the counter affidavit, he submits that inspite of several intimations the informant is not turning up to file counter affidavit, therefore, he submits that he will argue the case in absence of the counter affidavit. As such, this Court proceeds in the matter for final hearing.

5. Learned AGA and learned counsel for the applicant have no objection.

6. Learned counsel for the applicant submits that the applicant is innocent and has falsely been implicated in the present case due to village party bandi. No such incident took place as alleged by the prosecution. The entire prosecution story was levelled only with the intention to falsely implicate the applicant and to defame the image of the applicant and his entire family in the society.

7. Learned counsel for the applicant further submits that the victim in her statement recorded under section 161 Cr.P.C. has stated that the applicant has made physical relation and also the victim and applicant solemnized their marriage in a temple whereas in her statement recorded under section 164 Cr.P.C. she has neither made any allegation of physical relation against the applicant nor has admitted this fact that the victim and applicant have solemnized their marriage.

8. Learned counsel for the applicant further submits that the parents of the victim are creating pressure on the applicant to solemnize the marriage with the victim. On refusal by the applicant and his family members, this false case has been roped against the applicant and he was

falsely implicated in the present case and allegation of rape was levelled against him.

9. Learned counsel for the applicant further submits that the allegation of rape as levelled by the victim also got demolished after perusal of the medical examination report of the victim as the doctor has opined therein that the age of the victim was 19 years and her vaginal and cervical smear is negative for spermatozoa and gonococci. No definite opinion can be given about sexual assault. The doctor further opined that there is no external or internal injury seen on the person of the victim.

10. Learned counsel for the applicant further submits that the victim has also given an application before the investigating officer, in which she has not made any allegation of rape against the applicant.

11. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 04.01.2022 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

12. Learned counsel for the informant and learned AGA while opposing the prayer for bail submitted that except the fact that in the statement recorded under section 164 Cr.P.C. no allegation of rape was levelled by the victim against the applicant but the crime has been committed, therefore, the bail application may be rejected.

13. After perusing the record in the light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, considering the fact that there is vast contradiction in the statements of the victim recorded under sections 161 and 164 Cr.P.C. as well as in the version of the first information report. The allegation of rape is not supported by the medical evidence as the doctor in the medical examination report of the victim has opined that there is no external or internal injury found on the person of victim nor there is any dead or live spermatozoa seen. The radiological age of the victim was 19 years. Thus, she is major and she knew her consequences very well and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another, reported in (2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

14. The prayer for bail is granted. The application is allowed.

15. Let the applicant Ram Sajeevan @ Babu involved in case crime no. 0499 of 2021, under Sections 376,504,506 IPC and section 3/4 POCSO Act, 2012, Police Station Fatehpur, District Barabanki be enlarged on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

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

(5) In case, the applicant misuses the liberty of bail 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.

(6) 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 default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

(7) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(8) 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.

16. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

17. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merit of the case.

(2022) 8 ILRA 449
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Crl. Misc. Anticipatory Bail Appl. No. 4645 of 2022

Manish Yadav ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Ramesh Chandra Yadav, Sri Ramashray Tripathi

Counsel for the Opp. Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 – Section 82 & 83 -If any person has filed any anticipatory bail application before the learned court below showing his reasonable apprehension of arrest in a case where the allegations of the prosecution prima facie do not corroborate with the material available on record and his/her anticipatory bail application is rejected, he or she has got a right to approach the High Court for such anticipatory bail and if the interregnum period any proclamation u/S 82 and 83 Cr.P.C. is issued it may be considered as a circumventive exercise being taken by the Investigating Officer. No one can be restrained from taking legal course strictly in accordance with law and such legal right may not be prevented even if any process is adopted by any authority which is not permissible under the law.

B. The court concerned must ensure before taking any coercive steps u/Ss 82, 83 Cr.P.C. that the summons, bailable warrants and non-bailable warrants have been duly served upon the person and he/she is deliberately avoiding the same. Mere issuing of summons, bailable warrants and non-bailable warrants would not suffice but what is most important is it's service upon the person because unless and until such process is served no further coercive step should be taken. Therefore, if the aforesaid process is avoided by the person any appropriate application for seeking proclamation u/Ss 82,83 Cr.P.C. can be filed by the I.O. supported with an affidavit to apprise the court concerned as to how despite the summons, bailable warrants and non-bailable warrants having been duly served upon the person he or she is deliberately avoiding to cooperate with the investigation and the court after having proper satisfaction on the averments of such application may issue proclamation. Only under these circumstances that person may be declared as proclaimed offender and his or her anticipatory bail application should not be heard.

Application allowed. (E-12)

List of Cases cited:-

1. Nanha Vs State of U.P. 1993 Crl.L.J. 938

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ramesh Chandra Yadav, learned counsel for the applicant and the learned Additional Government Advocate for the State.

2. By means of present anticipatory bail application, the applicant has shown his apprehension of arrest in Case Crime No. 240 of 2021 u/s 147, 323,354,504, 506, 376 I.P.C., P.S, Shadiyabad, District Ghazipur.

3. The attention has been drawn towards the impugned F.I.R. wherein the present applicant is not named and no allegation of any kind whatsoever has been leveled against him. Learned counsel for the applicant has submitted that having ulterior motive and extraneous design in her mind the informant has deliberately and intentionally not named the present applicant in the F.I.R. as she has stated herself as wife of the present applicant. At the time of lodging of F.I.R. she has given impression that she is wife of the present applicant.

4. The present applicant is an Army personnel serving in Indian Army, presently posted at Line of Control, China Border. He has got married with one Priya Yadav as certificate of marriage to that effect has been enclosed with the application as Annexure no. 4.

5. The learned counsel has further submitted that the present applicant is not married to the informant / complainant. Since the informant / complainant is not married wife of the applicant, therefore, she could have not entered into the house of the present applicant in his absence showing herself as his wife when his family members were fully aware that he is married to Priya Yadav.

6. However, while recording her statement u/s 164 Cr.P.C., as per para 10 of the anticipatory bail rejection order passed by the learned court below, the complainant / informant has stated that she was having affair with present applicant since long and they got married in one temple.

7. Sri Yadav has submitted that no credible evidence has been provided to the investigating officer by the informant / complainant and the investigation is still going on.

8. The present applicant is posted at Line of Control, China Border and he could not know about any investigation being pending. As a matter of fact no summon to cooperate with the investigation is served upon the applicant nor any bailable or non-bailable warrant has been served upon the present applicant to cooperate with the investigation.

9. This Court in re: ***Vinod Kumar Singh @ Vinod Singh vs. State of U.P. in Case No. 5195 of 2021*** vide order dated 10.12.2021 was pleased to set aside the proclamation issued u/s 82 Cr.P.C. for the reason that before seeking proclamation u/s 82 Cr.P.C. the investigating officer has not taken prior steps and has not filed such application before the learned court below on affidavit. Therefore, in the aforesaid case the direction was issued to Director General of Police, U.P. to issue appropriate circular fixing guidelines to the effect that the investigating officer shall file affidavit before the court concerned apprising that he has taken all necessary steps seeking cooperation of the accused but the accused is not cooperating with the investigation.

10. In the present case no such affidavit has been filed by the Investigating Officer and no material was shown to the court-below to convince that before issuing proclamation all prior necessary measures have been adopted by the Investigating officer concerned.

11. The Apex Court in re: ***Inder Mohan Goswami & another vs. State of Uttaranchal & others reported in (2007) 12 SCC 1*** has held that coercive process i.e. N.B.W. should not be issued lightly and it is incumbent upon the Court to verify such fact as to whether all prior necessory steps have been taken by the investigating officer or not. Therefore, as per Sri Yadav unless the prior necessary steps, so prescribed under the Cr.P.C., have not been taken by the investigating officer, the proclamation u/s 82 and 83 Cr.P.C. should not have been issued. The relevant paras of ***Inder Mohan Goswami (supra)*** are being reproduced herein below :

51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants

either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive."

(Emphasis Supplied) .

12. Therefore, as per Sri Yadav the proclamation, so issued against the present applicant is nonest in the eyes of law in view of the decision of Apex Court in re: ***Inder Mohan Goswami (supra).***

13. Sri Yadav has further submitted that the present applicant has filed anticipatory bail application before the learned court-below prior to issuance of proclamation issued u/s 82 and 83 Cr.P.C. inasmuch as his anticipatory bail application was filed in the month of April, 2022 and has been rejected on 30.4.2022. The proclamation u/s 82 Cr.P.C. has been issued by the court-below on 9.5.2022. Therefore, Sri Yadav has submitted that the bar so imposed by Apex Court to the effect that if the proclamation u/s 82 and 83 Cr.P.C. is issued, no anticipatory bail application can be entertained would not be attracted in the instant case inasmuch as when the present applicant has filed his anticipatory bail application before the court below, there was no proclamation u/s 82 Cr.P.C. Admittedly, such proclamation is issued after rejection of his anticipatory bail application by the learned court below.

14. The law is trite on the point that, if any person has filed any anticipatory bail application before the learned court below seeking anticipatory bail showing his reasonable apprehension of arrest in a case where the allegations of the prosecution prima facie do not corroborate with the material available on record and his / her anticipatory bail application is rejected, he / she has got a right to approach the High Court for such anticipatory bail and if in the interregnum period any proclamation u/s 82 & 83 Cr.P.C. is issued, it may be considered as a circumventive exercise being taken by the Investigating Officer. No one can be restrained from taking legal recourse strictly in accordance with law and such legal right may not be prevented even if any process is adopted by any authority which is not permissible under the law.

15. As per Sri Yadav since the present applicant is an Army personnel and presently posted at Line of Control, China Border, so the investigating officer / police concerned should have not harassed him and his family members in an issue wherein the allegations do not prima facie corroborate with the material available on record. Therefore, the liberty of the present applicant may be protected in view of dictum of Apex Court in re: ***Sushila Aggarwal Vs. State (NCT of Delhi)-2020 SCC online SC 98.***

16. Per contra, learned AGA has opposed the prayer of anticipatory bail but could not dispute the factual and legal submissions of Sri Yadav, learned counsel for the applicant. Learned AGA has submitted that the investigation is going on.

17. Heard learned counsel for the parties and perused the material on record.

18. The Hon'ble Apex Court in re: ***State of Madhya Pradesh vs. Pradeep Sharma reported in (2014) 2 SCC 171*** has held that a person against whom a

proclamation has been issued u/s 82/83 Cr.P.C. would not be entitled for the benefit of anticipatory bail.

19. Considering the aforesaid judgment i.e.: ***Pradeep Sharma (supra) the Apex Court in re: Prem Shanker Prasad vs. State of Bihar (Criminal Appeal No. 1209 of 2021)*** vide judgment and order dated October 21,2021 has observed that if anyone is declared as an absconder / proclaimed offender in terms of section 82 of the Code (Cr.P.C.), he is not entitled to get the relief of anticipatory bail.

20. In view of the aforesaid decision of Apex Court in re: ***Pradeep Sharma (supra) and Prem Shankar Prasad (supra)*** if any accused person is declared absconder by the competent court, he would not be entitled to get anticipatory bail.

21. In the present case the record reveals that when the applicant has filed the anticipatory bail application before the learned court below there was no proclamation u/s 82 Cr.P.C. Such proclamation has been issued after the rejection of anticipatory bail application of the present applicant by the learned court below, therefore, the bar to entertain anticipatory bail application after issuance of proclamation u/s 82 Cr.P.C. would not be attracted in the present case.

22. The anticipatory bail application can be filed u/s 438 Cr.P.C. either before the High Court or before the court of sessions. However, normally a person should approach the Court of sessions and if the anticipatory bail application is rejected, the High Court can be approached under same section i.e. section 438 Cr.P.C. Therefore, for filing anticipatory bail application both the aforesaid courts have got concurrent powers.

23. In the present case it appears that when the anticipatory bail application of the present applicant was rejected on 30.4.2022, an application for seeking proclamation order was filed by the Investigating Officer and such order has been issued on 9.5.2022. Further, the proclamation order dated 9.5.2022 does not disclose that the investigating officer has filed an affidavit before the learned court concerned to convince that all prior steps which are required under the law have been taken; as to whether the summons, bailable warrant and non-bailable warrant have been served upon the applicant or not; as to whether before issuing the non-bailable warrant against the present applicant the learned court below has convinced itself about the service of summons and bailable warrants.

24. In the present case the informant / complainant has not leveled any allegation against the present applicant in the F.I.R. As a matter of fact, the present applicant is not named in the F.I.R.. It is beyond any comprehension that if the informant / complainant was having any grievance, more so genuine grievance against the present applicant, any sort of allegation would have been leveled in the F.I.R., therefore, the allegations are subject to the investigation which is under progress and it is legitimately expected that such investigation shall be conducted and concluded strictly in accordance with law.

25. The Apex Court has restrained the proclaimed offender to seek anticipatory bail. The person who is not following the

process of law and deliberately avoiding the investigation despite all necessary steps have been taken by the investigating officer to apprise him to cooperate with the process of investigation, e.g. summons have been served but to no avail, thereafter bailable warrants have been served but again he / she is not cooperating with the investigation for no plausible and cogent reasons, lastly non-bailable warrant has / have been served but there is no heed thereon, then the investigation officer has got no option except to seek proclamation u/s 82 / 83 Cr.P.C. It is also relevant to note here that the court concerned must ensure before taking any coercive steps that all the aforesaid proceed, i.e. summons, bailable warrants and non-bailable warrants have been duly served upon the person and he / she is deliberately avoiding the same. Issuing summons, bailable warrant and non-bailable warrants would not suffice but what is most important is its service upon the person because unless and until such process is served no further coercive step should be taken in view of the dictum of Apex Court in re: ***Inder Mohan Goswami (supra)*** inasmuch as these coercive steps are directly related with the liberty of the person which is protected under Article 21 of the Constitution of India.

26. Therefore, if the aforesaid process is avoided by the person, any appropriate application for seeking proclamation can be filed by the investigating officer supporting with an affidavit to apprise the court concerned as to how despite the summon, bailable warrant and non-bailable warrant having been served upon the person he / she is deliberately avoiding to cooperate with the investigation and the court after having proper satisfaction on the averments of such application may issue proclamation. Only under these circumstances that person may be declared as proclaimed offender and his / her anticipatory bail application should not be heard. In other words, before filing anticipatory bail that person should be proclaimed offender and his / her anticipatory bail application will loose the right of hearing on merits.

27. In the present case when the applicant filed his anticipatory bail application, he was not a proclaimed offender. His right to file such application before this court was consequential as he could have approached the High Court u/s 438 Cr.P.C. after rejection of his application by the sessions court which was also filed u/s 438 Cr.P.C. Therefore, when the present applicant filed his application u/s 438 Cr.P.C. he was not a proclaimed offender so the bar imposed by the Apex Court entertaining anticipatory bail of the proclaimed offender would not attract in the present case.

28. Therefore, in view of what has been considered above and also in view of dictum of Apex Court in re: ***Sushila Aggarwal (supra)***, I find it appropriate that the liberty of the present applicant be protected till filing of the police report, u/s 173(2) Cr.P.C. and if any charge-sheet is filed, the liberty of the present applicant shall be protected till conclusion of trial.

29. Having heard learned counsel for the parties and having perused the material available on record, the present anticipatory bail application is **allowed.**

30. Therefore, it is directed that in the event of arrest, applicant- ***Manish Yadav*** shall be released on anticipatory bail in the aforesaid case crime number on his furnishing a personal bond of Rs. 50,000/-

with two sureties each in the like amount to the satisfaction of the arresting authority/ court concerned with the following conditions:-

1. that the applicant shall make himself available for interrogation by a police officer as and when required;

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

3. that the applicant shall not leave India without the previous permission of the court;

4. that in default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant;

5. that in case charge-sheet is submitted the applicant shall not tamper with the evidence during the trial;

6. that the applicant shall not pressurize/ intimidate the prosecution witness;

7. that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

8. that in case of breach of any of the above conditions the court below shall have the liberty to cancel the bail.

(2022) 8 ILRA 455
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2022

BEFORE

THE HON'BLE SIDDHARTH, J.

Crl. Misc. Anticipatory Bail Application No. 5286 of 2022

Amita Garg & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicants:
Sri Ram Kishore Pandey, Sri Ajay Kumar Bashist Singh

Counsel for the Respondents:
G.A.

Transit Anticipatory Bail- Transit bail is protection from arrest for a certain definite period as granted by the Court granting such transit bail. He mere fact that an accused has been granted transit bail, does not mean that the regular court, under whose jurisdiction the case would fall, would extend such transit bail and would convert such transit bail into anticipatory bail. Upon the grant of transit bail, the accused person who has been granted such transit bail, has to apply for anticipatory bail before the regular court. Thus, there is no fetter on the part of the High Court in granting a transit anticipatory bail to enable the applicants to approach the Courts including High Courts where the offence is alleged to have been committed and case is registered.

Application allowed. (E-12)

List of Cases cited:-

1. Teesta Atul Seetalvad & anr. Vs State of Mah. & ors., Anticipatory Bail Application No. 14 of 2014(Decided on 31.01.2014 by Bombay High Court)

2. Nikita Jacob Vs State of Mah. & ors., Anticipatory Bail Application No. 441 of 2021(Decided on 17.02.2021 by Bombay High Court)

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri Ram Kishore Pandey and Sri Ajay Kumar Bashist Singh, learned counsels for the applicants and learned A.G.A for the State.

2. The instant anticipatory bail application has been filed on behalf of the applicants, **Amita Garg, Vashudev Garg,**

Chaitanya Garg, Radhika, Sanjay Dixit, Mohd. Gulzar Joieya and **Vishan Singh**, with a prayer to release them on transit / anticipatory bail in F.I.R. No. 444 of 2022, Police Station- Mansarovar, Jaipur City (South) dated 10.05.2022, under Sections- 504, 506, 384, 467, 468, 120-B IPC, during pendency of trial.

3. The brief facts of the case are that the applicant no. 1 at present is aged about 58 years, the applicant nos. 2 and 3 are the sons and the applicant no. 4 is the daughter of applicant no. 1 and the applicant nos. 2 and 4 are the directors of several companies including the Rajdarbar Infotech Private Ltd. Head Office of Rajdarbar Infotech Pvt. Ltd., situated at Agra. The applicant nos. 5 and 7 are the employees of said company. The applicant no. 6 was earlier director of complainant's company. All the applicants have good reputation and high moral value in the society having business of real estate and construction of the township as well as colonies all over country in different cities.

4. Huge amount has been paid to the opposite party no. 3, who is director of Vastu Colonisers Private Ltd., having its office at Jaipur through the M/S Pink City Infrastructure Pvt. Ltd., for providing the land of 380 bighas at Jaipur for the development of Township and the colonies. However, till date only 80 bighas of land has been provided and the money has not been returned to the applicant's company through the Pink City Infrastructure Pvt. Ltd.

5. Pink City Infrastructure Pvt. Ltd., has lodged a First Information Report against the opposite party no. 4 (Gyanchand Agrawal) and other persons at Agra which has been registered as First Information Report No. 0508 of 2021 on 11.12.2021 at Police Station - Hari Parvat, Agra, under Sections - 120-B, 406, 420, 467, 468, 471 IPC as they have cheated the applicant's company and not provided the land as agreed therefore, as a counter blast First Information Report No. 444 of 2022 has been lodged by the opposite party no. 3 against the applicants and several other persons only to create pressure upon them to appear the court at Jaipur.

6. Learned counsel for the applicants has submitted that the FIR has been lodged at the Police Station- Mansarovar, Jaipur City (South), Rajasthan and the applicants are the residents of District - Agra in the State of U.P. They are willing to appear before the court concerned at Jaipur, Rajasthan for the purpose of getting bail. However, they may be granted transit anticipatory bail for short time so that they may appear before the competent court at Jaipur under limited protection granted by this court by way of time bound transit anticipatory bail.

7. Learned A.G.A has opposed the prayer made on behalf of the counsels for the applicants and has submitted that this Court has no jurisdiction to grant any protection to the applicants. The offence has taken place outside the state. They may appear before the court concerned and apply for bail / anticipatory bail and the present application is not maintainable before this Court.

8. After hearing counsels for the parties, this court finds that there is no legislation or law which defines "transit or anticipatory bail' in definitive or specific terms. The 41st Law Commission Report in 1969 recommended the provision of Anticipatory bail to safeguard the right to life and personal liberty of a person under

Article 21 of the Constitution of India. In the Code of Criminal Procedure 1973, on such recommendation, provision of Anticipatory Bail was inserted in Section 438. The term "transit' means the act of being moved from one place to another while the word "anticipatory bail' means a temporary release of any accused person who is anticipating arrest, therefore, transit anticipatory bail refers to bail granted to any person who is apprehending arrest by police of a State other than the State he is presently located in.

9. Section 438 of the Code of Criminal Procedure specifies direction for grant of bail to a person apprehending arrest and moreover confers power only upon the High Court and the Court of Sessions to grant anticipatory or transit bail if they deem fit. At the point when an individual has the motivation to accept that he might be arrested on an allegation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a grant of anticipatory bail. The Court may, as it thinks fit, direct that in case of such arrest, he will be released on anticipatory bail.

10. Nonetheless, transit anticipatory bill is different from ordinary bail. Ordinary bail is granted after arrest, releasing the accused from custody while anticipatory bail is granted in the anticipation of arrest i.e., it precedes detention of the accused and is effective immediately at the time of the arrest. In plain words, when an accused is arrested in accordance with the order of the court and whereas the accused needs to be tried in some other competent court having jurisdiction in the aforementioned matter, the accused is given bail for the transitory period i.e., the time period required for the accused to reach that competent court from the place he is arrested in.

11. It is to be noted that transit bail is protection from arrest for a certain definite period as granted by the Court granting such transit bail. The mere fact that an accused has been granted transit bail, does not means that the regular court, under whose jurisdiction the case would fall, would extend such transit bail and would convert such transit bail into anticipatory bail. Upon the grant of transit bail, the accused person, who has been granted such transit bail, has to apply for anticipatory bail before the regular court.

12. The regular court, would consider such anticipatory bail, on its own merits and shall decide such anticipatory bail application. Therefore, it could be easily said that transit bail is a temporary relief which an accused gets for certain period of time so that he/she could apply for anticipatory bail before the regular court.

13. In the judgment of the Bombay High Court in the case of ***Teesta Atul Setalvad & Anr. Vs. State of Maharashtra & Ors.*** (vide Anticipatory Bail Application No. 14 0f 2014, decided on January 31, 2014) it was held that the High Court of one State can grant transit bail in respect of a case registered within the jurisdiction of another High Court in exercise of power under Section 438 of the Code of Criminal Procedure. It appears from the said judgment that there is no fetter on the part of the High Court in exercising the power under Section 438 of the Code in granting anticipatory bail for a limited period to enable the applicant to move the appropriate Court as the gravity of pre-trial arrest and the loss of liberty of the individual cannot be compromised on the

anvil of the powers, competence and/or jurisdiction of the Court. The relevant excerpt of the judgment is quoted hereinbelow:-

*7. In the case of **N.K. Nayar (supra)** the Division Bench of the Bombay Court has held that if the arrest is likely to be affected within the jurisdiction beyond High Court, then the concerned person may apply to the High Court for anticipatory bail even if the offence is committed in soma state. However, the Division Bench in the said case while exercising power under Section 438 of the Code, granted anticipatory bail tor a peri0d or one month so as to enable the applicants to. appropriate Court. Thus, the Division Bench of this Court has considered the gravity of pre-trial arrest and loss of liberty of an individual it a person is likely to be falsely implicated in any other state and therefore, in the case of **N.K. Nayar (supra),** the Division Bench in the concluding para has granted relief of anticipatory bail for a limited period.*

8. Generally the powers f High Courts in the cases of anticipatory bail are limited to its territorial jurisdiction and the power cannot be usurp by disregarding the principle of territorial jurisdiction, which is in the interest of the comity of the Courts. However, temporary relief to protect liberty and to avoid immediate arrest can be given by this Court.

9. Thus, in view of the ratio laid down in the case of N.K. Nayar (supra), I grant transit bail for four weeks so as to enable the applicant to approach appropriate Court in Gujarat, on the terms and conditions imposed in the interim order dated 10th January, 2014, passed by this Court. This order granting transit bail shall remain in force till 28.02.2014. The application is disposed of.

14. The aforesaid judgment of the Bombay High Court was carried to the Supreme Court in a Special Leave Petition No. 1770 of 2014. The Apex Court declined to interfere with the said order by making the following observations :-

"The matter relates to grant of Anticipatory bail under Section 438 of the Code of Criminal Procedure. The Bombay High Court vide impugned order dated 31st January, 2014 allowed the petitioners to move before appropriate Court in Gujarat for said relief and granted Transit Bail for four weeks so as to enable the petitioner to approach before the appropriate Court at Gujarat. Having heard the learned Counsel for the petitioners, we are not inclined to interfere with the impugned order.

However, taking into consideration the nature of the case and submission made on behalf of the petitioners, we extend the Transit Bail in favour of petitioners upto 31st March, 2014 so as to enable the petitioners to approach the appropriate Court in Gujarat. If such petition is filed, the appropriate Court in Gujarat will consider the same independently without being influenced by any observation made by the Bombay High Court.

The question of law about jurisdiction of High Court is kept open. The special leave petition stands disposed of."

15. In a recent judgment the ***Bombay High Court in case of Nikita Jacob Vs. The State of Maharashtra (Anticipatory Bail Application No. 441 of 2021 decided on 17.02.2021) the Bombay High Court*** reiterated and adopted the same principle as has been laid down in the case of Teesta Atul Setalvad (supra) and passed the following order:

"1. Thus, pending reference also reliefs were granted by this Court in exercise of powers u/s 438 of Cr.P.c. As stated above, the Division Bench has also granted such relief. The decision of Dr. Augustine Francis Pinto and another (supra) and Sandeep Lohariya (supra) was considered by this Court, as stated above. The co-accused who is apprehending arrest in this case, is granted protection by Aurangabad Bench of this Court on 16th February 2021. The applicant has to make arrangements to seek appropriate reliefs in other State. Since the applicant would be ultimately approaching the Court having jurisdiction, it would not be appropriate to make any observation on the merits of the case. In the light of factual matrix of the case protection under Section 438 of Cr.P.C can be granted to the applicant for temporary period of three weeks.

2. Hence, I pass following order:

(i) In the event of arrest of applicant in connection with C.R. No. 49 of 2021 registered at Special Cell, New Delhi, the applicant be released on bail on executing P.R Bond in the sum of Rs. 25,000/- with one or more sureties in the like amount.

(ii) This protection is granted for a period of three weeks from today to enable the applicant to approach the competent court for seeking appropriate relief ;

(iii) Anticipatory Bail Application is disposed of."

16. In view of the law enunciated in the above referred cases, there is no fetter on the part of the High Court in granting a transit anticipatory bail to enable the applicants to approach the Courts including High Courts where the offence is alleged to have been committed and the case is registered. There is no doubt that the right to liberty is enshrined in Part-I1I of the Constitution of India and such rights cannot be impinged except by following procedure established by law. This court finds that the commercial transaction ensued between the applicants and the complainant and there are criminal cases lodged by the parties against each other. It is a fit case where the applicants should get the privilege of transit pre-arrest bail in the light of the order passed in the case of Nikita Jacob (supra).

17. Hence, this courts directs that in the event of arrest of applicants in connection with the F.I.R. No. 444 of 2022, Police Station- Mansarovar, Jaipur City (South) dated 10.05.2022, under Sections-504, 506, 384, 467, 468, 120-B IPC, they shall be released on transit bail on executing personal Bond of Rs. 50,000/- with two sureties of the like amount;

(i) This protection is granted for a period of four weeks from the date of this order, to enable the applicant to approach the competent Court for seeking appropriate relief.

18. The application is ***allowed.***

(2022) 8 ILRA 459
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.07.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Appl. No. 5798 of 2021

Malik Ram @ Dinesh ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Ashish Raman Mishra

Counsel for the Opp. Parties:

G.A.

A. Death whether suicidal or homicidal- One oblique ligature mark all around the neck no other injury was found on the person of the deceased, is identical to the definition of hanging given in Modi's Jurisprudence. Since the definition of hanging given in Modi's Jurisprudence and the post-mortem report of the deceased are identical, it appears a case of committing suicide by hanging and not the murder.

B. As general role has been assigned to all the accused perons including the applicant who is the husband of the deceased, therefore the case of the applicant is ot on the worse footing than that of the other co-accused who have been enlarged on bail, therefore applicant is also entitle for bail.

Bail Application allowed. (E-12)

List of Cases relied upon:-

1. Refer to Modi's Jurisprudence.

2. Dataram Singh Vs St. of U.P. & anr., reported in (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Ashish Raman Mishra, the learned counsel for the applicant, Shri Shiv Ram Tiwari, the learned A.G.A. for the State and perused the record.

2. The applicant, **Malik Ram @ Dinesh**, has moved the present bail application seeking bail in Case Crime No. 385 of 2020 (Session Trial No. 527 of 2021), under Sections 498-A, 304-B I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Rupaidiha, District Bahraich.

3. As per the version of F.I.R. dated 28.09.2020 the complainant alleges that marriage of her daughter, Arti Devi was solemnized with the applicant two years back, but the in-laws of her daughter were not satisfied with the dowry given at the time of marriage and they used to make demand of motorcycle in the form of additional dowry regularly, and on account of non fulfillment of the said demand, they used to meet cruelty and torture to the daughter of complainant. On 19.09.2020 the mother-in-law of the daughter of complainant informed him that his daughter has hanged herself.

4. Learned counsel for the applicant submits that applicant has falsely been implicated in the case. No such incident as alleged by the prosecution took place. Neither any further demand was made by the in-laws of the deceased including the applicant, nor any complaint was ever made after the marriage or prior to the date of incident. It has further been argued that case of the applicant is that the deceased had committed suicide as she was a short tamper lady and always pressurizing the applicant to live separately from his parents, which demand was used to refuse by the applicant, on account of which the deceased remained under mental pressure, and ultimately on the date of incident she committed suicide by hanging herself.

5. Learned counsel for the applicant further submits that on incorrect facts only with intention to implicate the applicant and his other family members the F.I.R. was lodged by the informant against the applicant and his two other family members by making general allegations of demand of additional dowry, even same allegation has been made in the statement of the complainant recorded under Section 161 Cr.P.C. There is no incriminating evidence against the applicant for demand of dowry and consequently, harassment or torture of the deceased.

6. Learned counsel for the applicant further submits that as per the postmortem report of the deceased cause of death is asphyxia due to ante mortem hanging. It has also been submitted that except one oblique ligature mark of size 28 c.m. x 2.5 c.m. all around the neck no other injury was found on the person of the deceased. In support of his argument learned counsel for the applicant placed reliance upon the extract of Modi's Medical Jurisprudence, wherein definition of hanging has been described and as per the postmortem report of the deceased it is identical to the definition of hanging given in Modi's Jurisprudence. Learned counsel for the applicant submits that since the definition of hanging given in Modi's Jurisprudence and the postmortem report of the deceased are identical, it appears a case of committing suicide by hanging and not the murder.

7. Learned counsel for the applicant further submits that on similar allegations the mother and father of the applicant have already been granted bail by a coordinate Bench of this Court vide orders dated 10.02.2021 and 08.04.2021 passed in Bail Nos. 1748 and 2073, both of the year 2021, copies of which have been annexed as Annexure-8 to the affidavit filed in support of the bail application. As general role has been assigned to all the accused persons including the applicant who is the husband of the deceased, therefore, the case of applicant is not on the worse footing than that of the other co-accused who have been enlarged on bail, therefore, the applicant may also be enlarged on bail by this Court sympathetically. .

8. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history, which fact has been stated in para-33 of the affidavit filed in support of the bail application. The applicant is in jail since 01.10.2020 and that in the wake of heavy pendency of cases in the Court, there is no blinking chances of any early conclusion of trial as till date not a single witness has been examined.

9. Learned A.G.A. while opposing the prayer for bail of applicant submitted that the death of the deceased had occurred within two years of her marriage and applicant is the husband of the deceased, therefore, he is not entitled to be released on bail, but he has not disputed that the father and mother of the applicant have been enlarged on bail.

10. After perusing the record in the light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, considering the fact that there is no specific allegation against the applicant; except only one ligature mark present all around the neck of the deceased no other injury found on the person of the

deceased; cause of death is asphyxia due to ante mortem hanging; father and mother of the applicant having similar allegation have already been granted bail by a coordinate Bench of this Court; and considering the fact that applicant has already undergone a substantial period of incarceration; as well as considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another**, reported in **(2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

11. The prayer for bail is granted. The application is allowed.

12. Let the applicant, **Malik Ram @ Dinesh** involved in Case Crime No. 385 of 2020 (Session Trial No. 527 of 2021), under Sections 498-A, 304-B I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Rupaidiha, District Bahraich, be enlarged on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

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

(5) In case, the applicant misuses the liberty of bail 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.

(6) 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 default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

(7) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(8) 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.

13. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

14. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merit of the case.

(2022) 8 ILRA 463
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.07.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Appl. No. 7404 of 2022

Fayanath Yadav ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Ramakar Shukla, Ashish Kumar, Ravindra Gupta

Counsel for the Opp. Party:
G.A.

A. Long Detention and Delay in Trial- If the accused perso is in jail for substantially long period and there is no possibility to conclude the trial in near future, the bail application may be considered.

Bail Application allowed. (E-12)

List of Cases relied upon:-

1. U.O.I. Vs K.A. Najeeb, AIR 2021 Supreme court 712

2. Paras Ram Vishnoi Vs The Director, CBI, [Criminal Appeal No. 693 of 2021 (Arising out of SLP (Crl) No. 3610 of 2020)]

3. Saudan Singh Vs St. of U.P., [Criminal Appeal No. 308 of 2022 (Arising out of SLP (Crl) No. 4633 of 2021)]

4. Brijesh Kumar @ Ramu Vs St. of U.P., [Criminal Appeal No. 540 of 2022 (SC)]

5. Vipul Vs St. of U.P., [SLP (Crl) No. 3114 of 2022]

6. Suleman Vs St. of U.P., [Criminal Appeal No. 491 of 2022 (SC)]

7. Kamal Vs St. of Har., 2004 (13) SCC 526

8. Takht Singh Vs St. of M.P., 2001 (10) SCC 463

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This case is taken up in the revised call.

2. Heard Sri Ramakar Shukla, learned counsel for the applicant as well as Sri Anirudha Singh, and Sri Shiv Ram Singh, learned A.G.A.-I for the State and perused the record.

3. The applicant, **Fayanath Yadav**, has moved this fourth bail application seeking bail in Case Crime 381/2011, under Sections 498-A, 304B I.P.C. and Section 3/4 Dowry Prohibition Act, Police Station Kurebhar, District Sultanpur.

4. This fourth bail application has been placed before this regular Bench in the light of Hon'ble The Chief Justice's order dated 13.11.2018.

5. Learned counsel for the applicant has submitted that the applicant is innocent and has been falsely implicated in the present case. He further submits that the applicant has almost completed more than eleven years in incarceration, but till date the trial of this case has not been concluded.

6. Learned counsel for the applicant further submits that the F.I.R. was lodged on 23.05.2011 and the applicant is named in the F.I.R. along with other co-accused persons and during investigation the complicity of four co-accused persons was not found, as such they were exonerated by the Investigating Officer. He further submits that there is no overt act assigned to the accused applicant and the allegation that the deceased was beaten in-front of

villagers and was taken around the village is not supported by any independent witness of the village. The entire prosecution story developped in the F.I.R. is false and fabricated with the intention to falsely implicate the applicant and his relatives.

7. Learned counsel for the applicant further submits that the mother of the applicant, namely, Smt. Kesh Pati was already granted bail by this Court vide order dated 13.09.2011 passed in Bail No. 6355 of 2011, but the applicant is languishing in jail since 01.06.2011 and his first bail application was rejected by Hon'ble Mr. Justice Ashok Pal Singh (now retired) vide order dated 27.05.2013 passed in Bail Application No. 5793/2012. The order dated 13.09.2011 is being reproduced as under:

"List revised.

None present for the petitioner.

This bail application is rejected for want of prosecution."

8. Learned counsel for the applicant further submits that thereafter the applicant has moved second bail application, which was also rejected by Hon'ble Mr. Justice Surendra Vikram Singh Rathore (now retired) vide order dated 27.08.2015 passed in Bail Application No. 8318/2014 and while rejecting the second bail application, Hon'ble Court however directed the trial court to expedite the trial strictly adhering to the provisions of Section 309 Cr.P.C. The order dated 27.08.2015 is being reproduced as under:

"Heard learned counsel for the applicant, learned A.G.A. and perused the record.

The applicant is involved in Case Crime No. 381 of 2011, under Sections 498-A & 304-B I.P.C. and Section 3/4 of the Dowry Prohibition Act, Police Station Kurebhar, District Sultanpur.

It is a case of dowry death. The applicant is the husband of the deceased. The victim died an unnatural death within a very short span of time after her marriage i.e. about one year. There is specific allegation of demand of dowry and consequential ill treatment.

Submission of learned counsel for the applicant is that the victim had committed suicide by pouring kerosene oil on her and the applicant made an effort for her rescue due to which he also received burn injuries. It is further submitted that in this case some other family members were also arrayed as accused persons, however, during investigation, their involvement was found to be false.

Learned A.G.A. has opposed prayer for bail.

Perusal of the record shows that the incident had taken place in the intervening night of 22/23-5-2014 and the applicant was medically examined after about eight days of the incident on 1.6.2014. During this period he remained absconding.

It is further submitted on behalf of the applicant that there is no dying declaration of the deceased.

Had there been any dying declaration, then the accused applicant would have been charge sheeted under Section 302 I.P.C.

Learned counsel for the applicant has informed the Court that PW-1 complainant has been examined during trial but his cross examination is not yet concluded.

Cross examination has to be done on behalf of the accused himself and not on behalf of the prosecution. It appears that

the applicant himself is delaying the disposal of the trial.

Keeping in view the short period within which the victim died an unnatural death and suffered cruelty in connection with demand of dowry, no case for bail is made out. Bail application is accordingly rejected as the husband is the main accused in such nature of cases.

However, the trial court is hereby directed to expedite the trial strictly adhering to the provisions of Section 309 Cr.P.C. "

9. Learned counsel for the applicant further submits that there was a specific direction of this Court to expedite the trial but the trial of the case was not concluded for three year. Thereafter, the applicant again moved the third bail application, which was also rejected by Hon'ble Mr. Justice Anant Kumar (now retired) vide order dated 25.07.2019 passed in Bail Application No. 3860/2018 with the direction that the trial court is directed to expedite the trial and take proper coercive steps against the witnesses to ensure that the trial will be concluded preferably within a period of six months. The order dated 25.07.2019 is being reproduced as under:

"This is the third bail application. The first bail application being Bail No.5793 of 2012 was rejected for want of prosecution. The second bail application being Bail No.8318 of 2014 was rejected on merits.

Supplementary affidavit filed today is taken on record.

Heard learned counsel for the applicant, learned A.G.A. for the State and perused the record.

The present bail application has been filed by the applicant in Case Crime No.381/2011, under Sections 498A, 304B I.P.C. & Section 3/4 D.P. Act, Police Station - Kurebhar, District - Sultanpur.

As an additional ground, it is stated by learned counsel for he applicant that the applicant is in jail since 2011 and the trial has not yet been concluded. It is also stated that during course of trial, statement of two witnesses has been recorded but they have not stated specifically about the demand of dowry.

Opposing the bail, learned A.G.A. has stated that the mother of the deceased Sumita has been examined as PW.1 before the trial court. She has clearly stated that even before the occurrence the deceased was badly beaten by the inlaws and the present applicant. She was roamed around the village. Her clothes were also torn. The death has been caused by burning. Kerosene oil was poured upon her and put her to fire.

All these facts have already been considered by the court while considering the second bail application. The trial is in progress. There is no good ground for granting bail.

Accordingly, the bail application is rejected.

The trial court is directed to expedite the trial and take proper coercive steps against the witnesses to ensure that the trial will be concluded preferably within a period of six months. "

10. Learned counsel for the applicant further submits that more than three years have been passed after the rejection of the third bail, but the trial of the present case till date has not been concluded and as per information received out of 18 prosecution witnesses only 06 prosecution witnesses have been examined till date. He further submits that there is a clear cut direction of this Court to expedite the trial of the case and the time prescribed by this Court i.e.

six months have already been expired and more than 11 years have been passed from the date of detention of the applicant, but the trial of the present case has been yet been concluded and further submits that it will take much time for conclusion of trial. Therefore, in the light of the dictum of the Hon'ble Apex Court in re; **Union of India vs. K.A. Najeeb** reported in **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) No.3610 of 2020)**, wherein it has been held that if the accused person is in jail for substantially long period and there is no possibility to conclude the trial in near future, the bail application may be considered. Besides, learned counsel for the applicant has referred the 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 and they were 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."

11. 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."

12. Learned counsel for the applicant has also placed reliance on the latest order of the Supreme Court dated 25th February, 2022 in **Criminal Appeal No.308/2022 (Saudan Singh vs. State of UP) arising out of SLP (Crl) No.4633 of 2021**. The relevant part of the order is reproduced herein below:-

"We have put to learned AAG and the learned counsel for the High Court that a list should be prepared of all cases where the person has served out a sentence of 14 years, is not a repeat offender, and in any case if in these cases at one go bail can be granted and cases remitted for examination under the Uttar Pradesh Prisoners Release on Probation Rules, 1938. In all these

cases, there is a high possibility that if these people are released, they may not be even interested in prosecuting their appeals.

The second category of cases can be one where the person has served out more than 10 years of sentence. In these cases also at one go bail can be granted unless there are any extenuating circumstances against him.

We are quite hopeful that the High Court will adopt the aforesaid practice and thus prevent the Supreme Court to be troubled with such matters"

Similar view has also been reiterated by Hon'ble the Apex Court in **Brijesh Kumar @ Ramu v. State of U.P**., Criminal Appeal No. 540 of 2022 in its judgment dated 01.04.2022 and in **Vipul Vs. State of U.P.**, Special Leave to Appeal (Crl) No (s). 3114 of 2022 in its judgment dated 08.04.2022 and in **Suleman Vs. State of U.P.**, Criminal Appeal No. 491/2022 in its judgment dated 09.05.2022.

13. Learned counsel for the applicant has also 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 applicant 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."

Learned counsel for the applicant further submits that ratio of law applicable in aforesaid cases is also applicable in the case of the applicant, therefore, the applicant be enlarged on bail by this Court sympathetically.

15. Several other submissions regarding legality and illegality of the allegations made in the F.I.R. have also

been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused, have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. The applicant undertakes that in case he is released on bail he will not misuse the liberty of bail and will cooperate in trial. It has also been pointed out that the applicant is not having any criminal history.

16. Sri Aniruddh Singh, learned A.G.A. opposed the prayer for bail, but does not dispute this fact that till date as per information furnished by the Investigating Officer, out of 18 prosecution witnesses only 06 prosecution witnesses have been examined, which is also mentioned in para 21 of the counter affidavit filed by the State and also does not dispute this fact that the applicant is languishing in jail since 01.06.2011 and has completed more than 11 years in incarceration.

17. After perusing the record in the light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, at the very outset, this Court anguish towards the poor progress of trial, the trial must have been concluded by now and the learned trial court is having powers to take coercive method to conclude the trial and also armed with the provisions of Section 309 Cr.P.C., therefore, this Court is unable to comprehend as to how there is no good progress in the trial, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, and considering that applicant is in jail since 01.06.2011 and has completed more than 11 years in incarceration and the trial has not yet been concluded and out of 18 witnesses only 06 witnesses have been examined as per the counter affidavit filed by the State as well as considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the cases of **Saudan Singh's case (supra)** and **Suleman (supra), K.A. Najeeb (supra), Paras Ram Vishnoi (supra), Gokarakonda Naga Saibaba (supra), Kamal (supra), Takht Singh (supra)** and **Dataram Singh vs. State of U.P.** and another, **reported in (2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

18. The prayer for bail is granted. The application is allowed.

19. Let the applicant, **Fayanath Yadav,** involved in Case Crime 381/2011, under Sections 498-A, 304B I.P.C. and Section 3/4 Dowry Prohibition Act, Police Station Kurebhar, District Sultanpur, be enlarged on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(i) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(ii) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(iii) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

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

(v) In case, the applicant misuses the liberty of bail 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.

(vi) 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 default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

(vii) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

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

20. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

21. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merit of the case.

22. Being a peculiar case, the trial court is directed to conclude the trial of this case preferably, within a period of four months from today without granting any unnecessary adjournment to either parties except there is any legal impediment or order of higher Court.

(2022) 8 ILRA 469
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.07.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Appl. No. 15184 of 2021

Alok ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Manoj Kumar Misra, Awadhesh Kumar Misra, Pawan Kishor Mishra

Counsel for the Opp. Parties:
G.A., Hemant Kumar Mishra

A. Criminal Law - Code of Criminal Procedure, 1973 – Section 319 since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion

which is to be formed requires stronger evidence than mere probability of his complicity.

Bail Application allowed. (E-12)

List of Cases relied upon:-

1. Hardeep Singh Vs St. of Pun. & ors., (2014) 3 SCC 92

2. Labhuji Amratji Thakor & ors. Vs The State of Guj. & anr., 2018 (0) Supreme (SC) 1147.

3. Brijendra Singh & ors. Vs St. of Raj., (2017) 7 SCC 706,

4. Periyasami & ors. Vs S. Nallasamy, (2019) 4 SCC 342

5. Dataram Singh Vs St. of U.P. & anr., reported in (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Manoj Kumar Misra, the learned counsel for the applicant, Shri Aniruddha Singh, the learned A.G.A.-I for the State as well as Shri Hemant Kumar Mishra, the learned counsel for the complainant/ opposite party No. 2, and perused the record.

2. The applicant, **Alok**, has moved the present bail application seeking bail in F.I.R. No. 0261 of 2019, under Section 376-D I.P.C. read with Section 5(g)/6 of Protection of Children From Sexual Offences Act, Police Station Maholi, District Sitapur.

3. Learned counsel for the applicant further submits that the applicant is not named in the F.I.R. and he is innocent and has falsely been implicated in the present case. There is no role of applicant in the commission of offence. His name has been taken with malicious intention to falsely implicate and to defame the image of applicant and his family members in the society. The applicant has not committed rape as alleged by the prosecution. The victim has taken the name of applicant in her statement recorded under Section 164 Cr.P.C., only on the pressure created by her family members but no allegation of rape was made therein against the applicant. During the course of investigation no material was found against the applicant, as such his name does not find place in the charge sheet.

4. Learned counsel for the applicant submits that the name of applicant was surfaced in the statements of P.W.1 and P.W.2 during the course of trial. Thereafter, informant moved an application under Section 319 Cr.P.C., whereupon the learned Magistrate, without considering the evidence available on record, in a cursory manner, passed an order dated 24.03.2021, summoning the applicant to face the trial, thereafter, applicant surrendered before the court concerned on 05.10.2021 and since then he is in jail.

5. Learned counsel for the applicant further submits that the main accused, namely, Shivam, Suraj and Girdhar have already been granted bail by different coordinate Benches of this Court vide orders dated 30.05.2022 and 06.07.2022 passed in Criminal Misc. Bail Application Nos. 49, 2961 and 673, all of the year, 2022, respectively. The case of the applicant is not on the worse footing than that of the aforesaid co-accused, where named in the F.I.R. and have been granted bail by this Court, whereas the applicant was not named in the F.I.R. and his name was maliciously taken by P.W.1. and P.W.2 only within intention to implicate him falsely.

6. Learned counsel for the applicant further submits that the summoning order dated 24.03.2021 is also against the spirit

of various judgments of Hon'ble Supreme Court. A Constitution Bench of Hon'ble Apex Court in paragraphs- 105 and 106 of its judgment in the case of **Hardeep Singh Vs. State of Punjab & others, (2014) 3 SCC 92** has observed as under:-

"105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

7. The above Constitution Bench judgment was duly considered by the Hon'ble Apex Court in the case of **Labhuji Amratji Thakor & others Vs. The State of Gujarat and another, 2018 (0) Supreme (SC) 1147**. Paragraph-9 of the aforesaid judgment reads as under:-

"9. The Constitution Bench has given a caution that power under Section 319 Cr.P.C. is a discretionary and extraordinary power, which should be exercised sparingly and only in those cases where the circumstances of the case so warrant. The crucial test, which has been laid down as noted above is "the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction." The present is a case, where the trial court had rejected the application filed by the prosecution under Section 319 Cr.P.C. Further, in the present case, the complainant in the F.I.R. has not taken the names of the appellants and after investigation in which the statement of victim was also recorded, the names of the appellants did not figure. After carrying investigation, the Charge Sheet was submitted in which the appellants names were also not mentioned as accused. In the statement recorded before the Police, the victim has named only Natuji with whom she admitted having physical relations and who took her and with whom she went out of the house in the night and lived with him on several places. The mother of victim in her statement before the Court herself has stated that victim girl returned to the house after one and a half months. In the statement, before the Court, victim has narrated the entire sequence of events. She has stated in her statement that accused

Natuji used to visit her Uncle's house Vishnuji, where she met Natuji. She, however, stated that it was Natuji, who had given her mobile phone. Her parents came to know about she having been given mobile phone by Natuji, then they went to the house of Natuji and threatened Natuji."

8. The Hon'ble Apex Court in paragraphs-13 and 15 of the judgment in the case of **Brijendra Singh and others vs. State of Rajasthan, (2017) 7 SCC 706**, has observed as under:-

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh?s case may be recapitulated:

Power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some ?evidence? against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The ?evidence? herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

xx xx xx

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the ?evidence? recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether ?much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High

Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

9. Hon'ble Apex Court in paragraphs-14 and 15 of its judgment in the case of **Periyasami and others vs. S. Nallasamy, (2019) 4 SCC 342** has observed as under:-

"14. In the First Information Report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description have not been given so as to identify them. The allegations in the FIR are vague and can be used any time to include any person in the absence of description in the First Information Report to identify such person. There is no assertion in respect of the villages to which the additional accused belong. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 of IPC in view of the judgment in Hardeep Singh case (supra). The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.

15. The High Court has set aside the order passed by the learned Magistrate only on the basis of the statements of some of the witnesses examined by the Complainant. Mere disclosing the names of the appellants cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the Complainant is a husband and has initiated criminal proceedings against family of his in-laws and when their names or other identity were not disclosed at the first opportunity."

10. Learned counsel for the applicant further submits that prosecution story as set up is totally false and fabricated. The allegation of rape as levelled by the victim against the accused persons got demolished by the medical report of the victim as the doctor does not find any sign of use of force nor any external or internal injury was found on the person of the victim, therefore, applicant should be released on bail by this Court sympathetically.

11. Several other submissions regarding legality and illegality of the allegations made in the F.I.R. have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused, have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. The applicant undertakes that in case he is released on bail he will not misuse the liberty of bail and will cooperate in trial. It has also been pointed out that the applicant is not having any criminal history, which fact has been stated in para-22 of the affidavit filed in support of bail application. The applicant is in jail since 05.10.2021 and that in the wake of heavy pendency of cases in the courts, there is no likelihood of any early conclusion of trial.

12. Learned A.G.A.-I as well as the learned counsel for the opposite party No. 2 opposed the prayer for bail, but have not disputed that applicant was not named in the F.I.R. and his name surfaced for the first time in the statements of P.W.1 and P.W.2.

13. After perusing the record in the light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, and considering the fact that the applicant is not named in the F.I.R.; his name was taken by P.W.1 and P.W.2 and he was summoned on an application moved on behalf of prosecution under Section 319 Cr.P.C., whereupon learned court below has not applied its judicial mind and in a cursory manner summoned the applicant to face the trial; the medical report of the victim does not support the allegation of rape, and the main accused, Shivam, Suraj and Girdhar, have already been granted bail; as well as considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the cases of **Hardeep Singh (supra), Labhuji Amratji Thakor (supra), Brijendra Singh (supra), Periyasami and others (supra)** and **Dataram Singh vs. State of U.P. and another**, reported in **(2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

14. The prayer for bail is granted. The application is allowed.

15. Let the applicant, **Alok**, involved in F.I.R. No. 0261 of 2019, under Section 376-D I.P.C. read with Section 5(g)/6 of Protection of Children From Sexual Offences Act, Police Station Maholi, District Sitapur, be enlarged on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

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

(5) In case, the applicant misuses the liberty of bail 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.

(6) 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 default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

(7) The party shall file computer generated copy of such order downloaded from the official website of High Court

Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(8) 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.

16. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

17. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merit of the case.

(2022) 8 ILRA 475
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.04.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Misc. Anticipatory Bail Appl. No. 20357 of 2021

Yogendra Kumar Mishra ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Dharmendra Shukla, Sri Anil Tiwari(Sr. Adv.)

Counsel for the Opp. Party:
G.A., Sri Subhash Chandra Tiwari

A. Criminal Law - Code of Criminal Procedure, 1973 – Section 82 -While considering anticipatory bail application this Court has to struck balance between two factors namely, no prejudice should be caused to the fair and free investigation and accused should not be subjected to harassment, humiliation and unjustified detention.

B. If anyone has been declared as absconder/ proclaimed offender under Section 82 Cr.P.C., he is not entitled for relief of anticipatory bail.

C. The power exercisable Under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person Accused of an offence is not likely to otherwise misuse his liberty.

Application rejected. (E-12)

List of Cases relied upon:-

1. Prem Shankar Prasad Vs St. of Bihar & anr., AIR 2021 SC 5125

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Applicant-Yogendra Kumar Mishra has approached this Court by way of filing this Criminal Misc. Anticipatory Bail Application under Section 438 Cr.P.C. after rejection of his anticipatory bail application vide order dated 30.11.2021 passed by Additional District and Additional District and Sessions Judge/Special Judge (POCSO Act), Allahabad, seeking Anticipatory Bail in Case Crime No. 324 of 2021, under Sections 376, 506, 328 IPC, 3/4 POCSO Act and 67 I.T. Act, Police Station Kotwali, District Prayagraj.

2. Sri Anil Tiwari, learned Senior Advocate has vehemently argued that it is a fit case for anticipatory bail. Undisputedly the applicant is a married person having a wife and son whereas Opposite Party No. 2 (Informant)

alongwith her daughter (a minor girl and victim) are living separately from her husband. The Informant is a Teacher in a School where applicant is working as Class-IV employee in same school. It is admitted case that applicant has consensual relationship with Informant and Informant and her daughter are staying with him. There are cordial relationship with the son of applicant with the daughter of First Informant as brother and sister. In support of this submission learned Senior Advocate has relied on the photographs and whatsapp chat history which are part of record. Learned Senior Advocate also submits that their relations were very cordial and he has purchased a land in his name as well as in the name of Opposite Party No. 2 and an agreement to sell is also on record. The relationship become strained when First Informant, though not legally divorced, insisted applicant to get merry which was not possible for applicant because he is a married person. In these circumstances, applicant withdrew the money deposited towards agreement to sell. All these circumstances made the First Informant annoyed and, therefore, a false FIR was lodged wherein false allegation of rape against applicant, not only with First Informant but with her minor daughter, was levelled. All the alleged incidents mentioned in FIR are very old. So far the allegation of rape with minor daughter is concerned, it is the case of First Informant that applicant himself communicated to her about the incident, therefore, considering that it is absolutely improbable, a case of anticipatory bail is made out. Learned Senior Advocate has also fairly submits that after the Trial Court rejected applicant's anticipatory bail, not only non-bailable warrant was issued against applicant but proceedings were also initiated under Sections 82 and 83 Cr.P.C.

3. Sri Munne Lal, learned A.G.A. appearing for State and Sri Subhash Chandra Tiwari, Advocate appearing for Opposite Party No. 2, have vehemently opposed the aforesaid submissions. They submitted that First Informant as well as her minor daughter have made a categorical statement against applicant in their statements recorded under Section 164 Cr.P.C. that they were raped on multiple times taking benefit of their separation and trust imposed by First Informant and her daughter with applicant. They also submitted that applicant is not cooperating with investigation process, therefore, not only non bailable warrant was issued but now proceedings under Sections 82 and 83 Cr.P.C. have also been initiated against applicant, therefore, no case for anticipatory bail is made out.

4. I have heard learned counsel for rival parties and perused the material available on record.

5. Few factors and parameters, which this Court has to consider for exercising discretion for grant or refusal of anticipatory bail are nature and gravity of accusation, exact role of the accused, his or her antecedents, possibility of the accused to flee from justice, likelihood to repeat similar or other offence. Whether accusation are made only with the object of injury and causing humiliation to the accused or case is of large magnitude with possible effect on a large number of people. Greater care and caution is required while considering cases under Section 34 and 149 IPC. Further consideration of threat to complainant and witnesses and tempering of evidences are other relevant factors.

6. While considering anticipatory bail application this Court has to struck balance between two factors namely, no prejudice should be caused to the fair and free investigation and accused should not be subjected to harassment, humiliation and unjustified detention. This Court is justified to impose conditions spelt out in Section 437 Cr.P.C. and also other restrictive conditions if deem necessary in the facts and circumstances of a particular case including limit of the anticipatory bail but not in routine manner. An Anticipatory Bail Application has to be based on concrete facts (and not vague or general allegations) relatable to offence and why the applicant reasonably apprehends his or her arrest, as well as his version of the facts.

7. Before considering the case of applicant on merit with regard to prayer for anticipatory bail, I have to consider that since there are proceedings initiated against applicant under Sections 82 and 83 Cr.P.C., whether in the facts and circumstances of present case, the applicant is entitled for anticipatory bail or not.

8. In this regard it is relevant to rely upon the judgment passed by Supreme Court in **Prem Shankar Prasad vs. State of Bihar and another, AIR 2021 SC 5125** where in similar facts since proceedings under Sections 82 and 83 Cr.P.C. were initiated, the Supreme Court has relied on the judgment passed in **State of Madhya Pradesh v. Pradeep Sharma, (2014) 2 SCC 171** and reiterated that if anyone has been declared as absconder/ proclaimed offender under Section 82 Cr.P.C., he is not entitled for relief of anticipatory bail. The relevant paragraphs of the judgement in **Prem Shankar Prasad (supra)** are reproduced as under:

"7.2. Despite the above observations on merits and despite the fact that it was brought to the notice of the High Court that Respondent No. 2-Accused is absconding and even the proceedings Under Sections 82-83 of Code of Criminal Procedure have been initiated as far as back on 10.01.2019, the High Court has just ignored the aforesaid relevant aspects and has granted anticipatory bail to Respondent No. 2-Accused by observing that the nature of accusation is arising out of a business transaction. The specific allegations of cheating, etc., which came to be considered by learned Additional Sessions Judge has not at all been considered by the High Court. Even the High Court has just ignored the factum of initiation of proceedings Under Sections 82-83 of Code of Criminal Procedure by simply observing that "be that as it may". The aforesaid relevant aspect on grant of anticipatory bail ought not to have been ignored by the High Court and ought to have been considered by the High Court very seriously and not casually.

7.3. In the case of State of Madhya Pradesh v. Pradeep Sharma (Supra), it is observed and held by this Court that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of Code of Criminal Procedure, he is not entitled to relief of anticipatory bail. In paragraph 14 to 16, it is observed and held as under:

14. In order to answer the above question, it is desirable to refer to Section 438 of the Code which reads as under:

438. Direction for grant of bail to person apprehending arrest.--(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this Section

that in the event of such arrest he shall be released on bail; and that court may, after taking into consideration, inter alia, the following factors, namely--

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this Sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

The above provision makes it clear that the power exercisable Under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person Accused of an offence is not likely to otherwise misuse his liberty.

15. In Adri Dharan Das v. State of W.B. (2005) 4 SCC 303 this Court considered the scope of Section 438 of the Code as under: (SCC pp. 311-12, para 16)

16. Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power Under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' shows that the belief that the applicant may be arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief' for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out for granting of the relief sought. The provisions cannot be invoked after arrest of the Accused. A blanket order should not be generally passed. It flows from the very language of the Section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail 'whenever arrested for whichever offence whatsoever'. Such 'blanket order' should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order Under Section 438 is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield

against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of the legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed.

16. Recently, in Lavesh v. State (NCT of Delhi) (2012) 8 SCC 730, this Court (of which both of us were parties) considered the scope of granting relief Under Section 438 vis-a-vis a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under: (SCC p. 733)

12. From these materials and information, it is clear that the present Appellant was not available for interrogation and investigation and was declared as 'absconder'. Normally, when the Accused is 'absconding' and declared as a 'proclaimed offender', there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail.

It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail.

Thus the High court has committed an error in granting anticipatory bail to Respondent No. 2-Accused ignoring the proceedings Under Section 82-83 of Code of Criminal Procedure."

(emphasis supplied)

9. In the present case, Trial Court vide order dated 10.01.2022 has noted that despite proclamation for applicant being absconder issued under Section 82 Cr.P.C. and in this regard publication was also made in newspaper, the applicant remained absconding, therefore, by the said order Trial Court issued order for attachment of property, movable or immovable or both, belongs to proclaimed person, i.e., applicant, under the provisions of Section 83 Cr.P.C. Therefore, the facts and circumstances of present case squarely covers by the judgment passed by Supreme Court in **Prem Shankar Prasad (supra).**

10. At this stage, this Court also deals with the rival submissions made by parties on merit.

11. On the basis of record available it appears that applicant first inspired confidence of victims and when they imposed complete trust on him, not only applicant violated the trust of First Informant but her minor daughter also. The averments made in the statements recorded under Section 164 Cr.P.C. also depict that applicant not only raped the First Informant but also raped her minor daughter. There are allegation that applicant has certain unsolicited video clips also and he has put threat to viral it and blackmailed the victim and her mother.

12. In view of above discussion the applicant is not entitled for anticipatory bail on the ground that applicant was not only declared proclaimed offender under Section 82 Cr.P.C. but proclamation of attachment of property was also issued under Section 83 Cr.P.C. and, therefore, as held in **Prem Shankar Prasad (supra)** applicant is not entitled for anticipatory bail. Even otherwise, on merit also, considering the specific averments made under Section 164 Cr.P.C. by First Informant as well as her minor daughter, there are very serious

allegations against the applicant and, therefore, no case for anticipatory bail is made out on merit also.

13. The application is accordingly rejected.

14. However, two weeks time is granted to applicant to surrender before Trial Court and to move an application for bail. In case such an application is filed by applicant, Trial Court is directed to decide the same expeditiously considering the judgment passed by Supreme Court in **Satender Kumar Antil vs. Central Bureau of Investigation and another, (2021) 10 SCC 773.**

(2022) 8 ILRA 480
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Bail Application No. 54497 of 2021

Nitin Verma ...Applicant
Versus
Union of India & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Kaustubh Srivastava, Sri Kandarp Srivastava, Sri Ashish Deep Verma, Sri Azad Khan

Counsel for the Respondents:
A.S.G.I., Sri Dhananjay Awasthi

Civil Law - Central Goods & Services Tax Act , 2017 - Section 132(1) B(1) : Applicant implicated on the statement of a co-accused-who has already been granted bail -earlier the applicant had been granted anticipatory bail - department had initiated proceedings-Applicant not in a position to influence the case.

Bail Application allowed. (E-9)

List of Cases cited:

1. St. of Bihar Vs Amit Kumar, 2017 (13) SCC 751

2.Y.S. Jagan Mohan Reddy Vs C.B.I., (2013) 7 SCC 439,

3.Chhaya Devi Vs U.O.I., 2021 (52) GSTL 390 (Alld.),

4.Dataram Singh Vs St. of U.P. & anr., (2018) 3 SCC 22

5.Sanjay Chandra Vs C.B.I., (2012) 1 SCC 40:

6. P. Chidambaram Vs Directorate of Enforcement, (2020) 13 SCC 791

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Ashish Deep Verma and Sri Azad Khan, Advocates, the learned counsel for the applicant and Sri Dhananjay Awasthi, the learned counsel for the C.G.S.T. and Customs.

2. The instant application has been filed seeking release of the applicant on bail in Case No. IV - CE (9) CP / Agra / Nitin / 25119 251/2019, under Sections 132 (1) (B) (I), Central Goods & Services Tax Act, 2017 (which will hereinafter be referred to as "the CGST Act'), Police Station Hari Parvat, District Agra during pendency of trial in the Court below.

3. As per the prosecution case, the officials of Central Goods & Services Tax & Central Excise, Commissionerate Agra were investigating a case of huge evasion of GST on the basis of an intelligence input that the applicant is indulging in issuing bogus invoices without supply of goods, in the name of fake firms created by him. On 20.12.2019, a team of certain officers of Anti Evasion Branch, CGST & Central Excise, Commissionerate Agra conducted a

search at four different locations belonging to the applicant.

4. It is stated that during search of the residential premises of the applicant, a mobile phone alongwith a SIM card, 6 PAN cards, 5 Voter Identity Cards, 10 debit/credit cards, 8 cheque-books and several other documents were recovered. An analysis of the data contained in the aforesaid mobile phone revealed several fake tax invoices, ledgers, a list of 38 bank accounts and Form GSTR-3B etc. Analysis of the mobile data revealed communication of the applicant with other persons directing them to issue invoices, e-way bills etc. and hundreds of invoices issued in the name of various firms, were found in the mobile phone. In a laptop computer recovered from another premises of the applicant, tax calculations of various firms were there, the mention whereof was found in the mobile phone data. A person present at the location had introduced himself as Chandra Prakash Kriplani and he stated that he was an employee of the applicant and he produced the electricity bill of the building in the name of the applicant. Two laptop computers, 10 mobile phones and some rough papers having details of many fake firms viz, the name of the proprietor and GSTIN addresses etc. were also recovered. It is said that the mobile phones were used to receive one time password (OTP) at the time of GST registration and the aforesaid details matched with the data available in the mobile phone of the applicant, indicating the applicant's control over the fake firms. A currency note counting machine, a printer and a router were also recovered from the premises of the applicant.

5. As a result of the simultaneous searches conducted at 4 locations of the applicant on 20.12.2019 and also upon investigation, it was found that 126 fake firms have been created by the applicant and Chandra Prakash Kriplani and bogus invoices were issued by the aforesaid firms for passing on inadmissible input tax credit to various purchasers, without any actual supply of goods.

6. As per the prosecution case, it has been revealed during investigation that the total invoice value of the fake supplies made by the aforesaid 126 bogus firms is Rs. 691.35 Crores and the total GST evasion involved in it is Rs. 100.30 Crores.

7. In his statement recorded on 20.12.2019, the aforesaid Chandra Prakash Kriplani stated that he was working as an employee of the applicant for the past 6-7 months and the applicant used to pay him Rs. 20,000/- per month as salary; that he had studied upto class-X only and that he used to generate e-way bills on the directions of the applicant. In his further statement recorded on 24.12.2019 and 27.01.2020, Chandra Prakash Kriplani has stated that all the firms were created by the applicant and a forged PAN and a Voter Identity Card had been prepared by the applicant in the name of one Pushpendra Kumar Gupta and on both the aforesaid documents, Kriplani's photographs had been used.

8. Out of the 126 bogus firms, proprietors of two such firms were examined and their statements were recorded, who gave statements implicating the applicant.

9. The prosecution also claims that during investigation and examination of the documents recovered from the applicant's premises, it has been found that he had invested huge amounts in purchasing

properties either in his own name or in the name of his wife - Jyoti Verma. The applicant had booked two flats in Anthela Project of M/s Bharat Nagar Housing, Agra and he had paid a sum of Rs. 42,25,656/- for the said flat during February 2019 to November 2019 from the third party bank accounts belonging to M/s Moon Stars Traders and M/s Kamal Trading Company. In respect of a flat booked in the name of the applicant's wife Jyoti Verma, the payments were made by M/s New India Pesticide, M/s R. S. Trading and M/s Moon Stars Traders.

10. During investigation, it has also come to light that while booking his flat in Bharat Nagar Housing, Agra, the applicant had given his mobile number as 9319709362 and it was found that four bogus firms, namely, Moon Star Traders, Arihant Corporation, JES Trading Company, R. S. Steel Trading Company are registered in GST department with the aforesaid mobile number. Rovin Sharma the proprietor of M/s R. S. Steel Company had stated in his statement recorded on 03.01.2020 that the applicant had taken his PAN card and Aadhar card etc. and that he had registered the firm.

11. As per the prosecution case, the applicant is the main master-mind behind issuance of bogus invoices without supply of goods, only to pass on inadmissible / fraudulent input tax credit, because of which the Government exchequer has suffered a huge loss of Revenue to the tune of more than Rs. 100 Crores. On 22.11.2021, the Investigating Officer, Central Goods & Services Tax & Central Excise, Commissionerate Agra has filed a complaint in the Court of Special Chief Judicial Magistrate, Agra against the applicant under Sections 132 (1) (b) of the CGST Act, 2017.

12. In the affidavit filed in support of the bail application, it has been stated that the applicant was engaged in the business of property dealing through his firm Shri Shanti Associates. On 31.12.2019, a summons under Section 70 read with Section 174 of CGST, 2017 was issued against the applicant directing him to appear at the Anti Evasion Branch, Central Goods & Services Tax & Central Excise, Commissionerate Agra on 03.01.2020. A similar notice was issued against the applicant's wife and her statement was also recorded. The applicant claims that Chandra Prakash Kriplani was his tenant and a copy of an affidavit dated 14.01.2020 of Chandra Prakash Kriplani has been annexed with the affidavit filed in support of the bail application wherein he has stated that he was a tenant of the applicant, that he could not pay rent of the house for the past two months because of which a quarrel took place between him and the applicant, that on 16.12.2019 when the applicant had come to recover the rent, the dispute escalated and the applicant had taken away a bag of Kriplani which contained some documents and Kriplani's mobile phone and the documents and the mobile phone recovered by the officers of CGST on 20.12.2019 were the aforesaid documents and the mobile phone. He also stated that his landlord (the applicant) is engaged in property dealing and finance business.

13. In the affidavit filed in support of the bail application, it has been claim that the applicant is involved in business of property dealing for a long time and that he has been falsely implicated in the present case by his tenant Chandra Prakash Kriplani.

14. A counter affidavit has been filed on behalf of the Union of India, wherein it has inter-alia been stated that the applicant was not engaged in the business of property dealing and the certificate of registration of Shri Shanti Associates, proprietor Nitin Verma, issued under Section 69 of the Finance Act, 1994, a copy where of has been filed alongwith the affidavit filed in support of the bail application on behalf of the applicant himself, mentions the services "Franchise Services". Another document annexed with the affidavit filed in support of the bail application is a welcome letter / ID card dated 27.02.2009 issued by TLC Insurance (India) Pvt. Ltd., which reads thus - "We are happy to welcome you to be a part and parcel of the TLC family. Please find enclosed your TLC Membership ID Card. We are extremely confident that you will expand and promote your business to newer horizons." It has been averred in the counter affidavit that the aforesaid documents belie the applicant's claim of being engaged in the business of property dealing.

15. A copy of an affidavit dated 04.08.2021 affirmed by Chandra Prakash Kriplani has been annexed with the counter affidavit wherein he has inter-alia stated that he had signed his earlier affidavit dated 27.01.2020 under influence of the applicant's wife and because of the aforesaid affidavit, he had to suffer incarceration for one full year. It is further stated in his affidavit that the applicant's wife had assured that if Kriplani would act as per her directions, she will get her absolved of the present case and for this reason, he had signed a pre-typed affidavit, without having read the same.

16. The learned counsel for the applicant has submitted that the alleged offence under Section 132 (I) (b) CGST Act, 2017 is triable by a Magistrate and the maximum prescribed punishment is 5 years' imprisonment and, therefore, the applicant ought not to have been arrested for the aforesaid offence and that he is entitled to be released on bail on this ground also.

17. The learned Counsel for the applicant has further submitted that earlier, this Court had granted anticipatory bail to the applicant by means of an order dated 05-01-2021 passed in Anticipatory Bail Application No. 4116 of 2020, for a period of six weeks or till conclusion of the enquiry under Section 70 (1) of the CGST Act, whichever was earlier.

18. The Learned counsel for the applicant has also submitted that the co-accused Chandra Prakash Kriplani, from whose possession the alleged incriminating material was recovered, has already been released on bail and, therefore, the applicant is also entitled to be released on bail on the ground of parity.

19. The learned Counsel for the applicant has further submitted that in para 2.3 of the complaint, it has been alleged that a currency note counting machine, a printer and a router were also recovered from the premises of the applicant, where the co-accused Chandra Prakash Kriplani was found present and from the aforesaid recovery the Prosecution assumed that black money generated from the alleged fake firms was counted by the note counting machine and the printer was used to print bogus e-way bills and invoices. He has submitted that neither any bogus invoice nor any bogus e-way bill has been recovered from the applicant's possession. Moreover, as per the averments made in complaint itself, the applicant had booked

two flats and he had paid a sum of Rs. 42,25,656/- for the flat during February 2019 to November 2019 from bank accounts belonging to M/s Moon Stars Traders and M/s Kamal Trading Company. His submission is when the payment has been made through banking channel, no black money was involved in the transactions. He has further submitted that no alleged fake invoice claiming input tax credit has been placed on record and no such invoice has been verified so as to prove that it is fake. Based on the aforesaid submissions, the learned Counsel for the applicant claims that the applicant has been falsely implicated in the present case and he is entitled to be released on bail.

20. Opposing the prayer for grant of bail, the learned counsel appearing for the Union of India has submitted that the applicant is an economic offender and he has caused a loss of Government Revenue to the tune of more than Rs. 100 Crores by creating fake firms and by issuing bogus invoices and by wrongly claiming input tax credit.

21. The learned counsel for the Union of India has submitted that from the material recovered from the premises of the applicant during the search conducted on 20.12.2019 and from the analysis of the data available on the mobile phone recovered during the search, it is established that the applicant was the master-mind behind the large scale evasion of GST by issuing fake invoices and thereby wrongly claiming Input Tax Credit and that he was in control of 126 bogus firms that had been created by him for issuing fake invoices.

22. The learned counsel for the Union of India has placed reliance upon a judgment of Hon'ble Supreme Court in the case of **State of Bihar Vs. Amit Kumar, 2017 (13) SCC 751** in which the Hon'ble Supreme Court has held that "***socio-economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. Usually socio-economic offence has deep rooted conspiracies affecting the moral fiber of the society and causing irreparable harm, needs to be considered seriously."***

23. The learned counsel for the Union of India has placed reliance on a judgment in the case of **Chhaya Devi Vs. Union of India, 2021 (52) GSTL 390 (Alld.)**, wherein a coordinate Bench of this Court held as follows: -

"14. The offence alleged against the applicant is economic offence in which the evasion of duty amounting Rs. 62,10,28,165/- is made against the applicant. Although the offence is punishable with imprisonment of five years yet the evasion of huge amount of duty is a great loss to the Government Exchequer. As such the alleged offence is economic.

15. The Hon'ble Apex Court in State of Gujrat Vs. Mohanlal Jitamalji porwal and others (1987) 2 SCC 364 in para-5 held that the entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to books. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without

fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest .... "

16. The Hon'ble Apex Court in Y.S. Jagan Mohan reddy Vs. CBI (2013) 7 SCC 439 held: the economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country ....."

24. In ***Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439***, relied upon by this Court in Chhaya Devi (Supra), the Hon'ble Supreme Court was dealing with an application for grant of bail in a case under Section 120-B read with Sections 420, 409 and 477-A of the Penal Code, 1860 and Section 13 (2) read with Sections 13 (1) (c) and (d) of the Prevention of Corruption Act, 1988 against Y. S. Jagan Mohan Reddy, Member of Parliament and 73 others, the Hon'ble Supreme Court held has follows: -

"34.Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35.While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, 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 interests of the public/State and other similar considerations."

25. In **Y. S. Jagan Mohan Reddy (supra)**, the Hon'ble Supreme Court was dealing with allegations of offences which were punishable with upto life imprisonment, but in the present case, the maximum punishment that can be imposed upon the applicant is five years' imprisonment. Moreover, the offence is compoundable as per the provision contained in Section 138 of the CGST Act, sub-Section (1) whereof provides that "*Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed".*

26. The learned counsel for the applicant has placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Dataram Singh Vs. State of Uttar Pradesh and another, (2018) 3 SCC 22**, wherein the Hon'ble Supreme Court was pleased to reiterate the law of bail in the following words: -

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus

has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

* * *

5. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered inNikeshTarachand Shah v. Union of India[(2018) 11 SCC 1] going back to the days of the Magna Carta. In that decision, reference was made toGurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565]in which it is observed that it was held way back inNagendra v. King-Emperor [AIR 1924 Cal 476] that bail is not to be withheld as a punishment. Reference was also made toEmperor v. Hutchinson [AIR 1931 All 356]wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days. "

27. In a recent decision in the case of Satender Kumar Antil versus Central Bureau of Investigation, 2022 Scc OnLine SC 825, the Hon'ble Supreme Court has summarized and reiterated the law regarding grant of bail in economic offences, as laid down in its earlier decisions, in the following words: -

"66.What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in the case ofP. Chidambaramv.Directorate of Enforcement,(2020) 13 SCC 791, after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence. ***After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis.*** *Suffice it to state that law, as laid down in the following judgments, will govern the field:--*

Precedents

-P. Chidambaramv.Directorate of Enforcement,(2020) 13 SCC 791:

*23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that t****he basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial.*** *However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the*

application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. ***One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so.*** *Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.*

-Sanjay Chandrav.CBI,(2012) 1 SCC 40: .

"39. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds : the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. ***It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.***

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. ***But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.***

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46. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail

pending trial on stringent conditions in order to ally the apprehension expressed by CBI." ***(emphasis supplied)***

28. Analyzing the facts of the case in light of the law laid explained in the case of ***Y.S. Jagan Mohan Reddy, Dataram Singh and Satender Kumar Antil*** (Supra), it has to be taken into consideration that (1) the applicant has been implicated on the basis of the statement of a co-accused Chandra Prakash Kriplani, who has already been granted bail by this Court; (2) earlier, the applicant himself had been granted anticipatory bail by this Court; (3) the applicant has no criminal history; (4) the department had initiated proceedings on 31.12.2019 by issuing a summons under Section 70 of CGST Act and after completion of the investigation, on 22.11.2021 the department has filed a complaint in the Court of Special Chief Judicial Magistrate, Agra and, therefore, it cannot be said that now the applicant is in a position to influence the investigation of the case; (5) the applicant is languishing in jail since 26-09-2021; (6) the maximum punishment that can be imposed upon the applicant is five years' imprisonment and (7) the offence is compoundable as per the provision contained in Section 138 of the CGST Act, I am of the considered view that the applicant is entitled to be released on bail.

29. In light of the preceding discussion and without making any observation on the merits of the case, the instant bail application is ***allowed.***

30. Let the applicant **Nitin Verma** be released on bail in Case No. IV - CE (9) CP / Agra / Nitin / 25119 251/2019, under Sections 132 (1) (B) (I), Central Goods & Services Tax Act, 2017, Police Station Hari Parvat, District Agra on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below, subject to the following conditions:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

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

31. In case of breach of any of the above condition, the prosecution shall be at liberty to move an application before this Court seeking cancellation of the bail.

(2022) 8 ILRA 488
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.06.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Crl. Misc. Writ Petition No. 7101 of 2022

Ajay Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri B.S. Pandey, Sri Arvind Yadav

Counsel for the Respondents:
G.A.

(A) Criminal Law – Constitution of India, 1950 - Article - 226 - Prevention Of

Corruption Act, 1988 - Sections 7, 13, 19(3)(b) & 5(4) - Indian Penal Code, 1860 - Sections 120-B, 409, 419, 420, 467, 468, 471, 474, 465 & 477 -A : - Writ Petition – for quashing of FIR on the ground of opportunity of hearing - offence of cheating, forgery and complicity in corruption - complaint against government servants for corruption practice - directions of departmental enquiry committee - interpretation of statutes - difference explained - between Mandatory & Directory statutes - if the violation or omission is invalidating, the statute is mandatory; if not, it is directory. (Para 14)

(B) Criminal Law – Constitution of India, 1950 - Article - 226, - Prevention Of Corruption Act, 1988 - Sections 7, 13 & 19 (3) (b), - Indian Penal Code, 1860 - Sections - 120-B, 409, 419, 420, 467, 468, 471, 474, 465 & 477 -A : - Writ Petition – for quashing of an F.I.R. - on the ground of opportunity of hearing - offence of cheating, forgery and complicity in corruption - complaint against corruption practice - departmental enquiry committee - prima facie - finding returned against petitioner - intent & purpose of Govt. orders to shield and protect the Government servants form false & vexatious complaint - the tenor of Govt. orders is directory - if nay defect in the fact finding enquiry/departmental enquiry would have no bearing on the vigilance enquiry - an order for lodging FIR based on prima facie finding cannot be said to prejudice to the govt. servant - accordingly writ petition dismissed.

(Para – 17, 18, 24, 26)

Writ Petition Dismissed. (E-11)

List of Cases cited: -

1. Ajai Kumar Vs St. of U.P. & ors. - order dated 08.06.2022 - Writ-A No. 8868 of 2022,

2. Zubair Bin Sagir Vs St. of U.P & ors., Writ - A No. 2894 of 20223,

3. Chandrika Prasad Yadav Vs St. of Bihar, 2004 6 SCC 331,

4. U.O.I. Vs Prakash P. Hinduja - (2003) 6 SCC 195,

5. Vineet Narain & ors. Vs U.O.I., 1998 (1) SCC,

6. H.N. Rishbud v. St. of Delhi, 1955 SCR 1150,

7. Prabhu Vs Emperor, AIR 1944 SC 73,

8. Lumbhardar Zutshi Vs The King, AIR 1950 PC 26

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

1. Heard learned counsel for the petitioner and learned A.G.A. for the State respondents.

2. This writ petition has been filed with the prayer to quash the First Information Report dated 25.05.2002, registered as Case Crime No. 0122 of 2022 under sections 120-B, 419, 420, 467, 468, 471, 474, 465, 477-A, 409 I.P.C. and Section 7 & 13 of Prevention of Corruption Act, 1988, at Police Station Sahjanwa, District Gorakhpur. Further prayer has been made not to arrest the petitioner in the aforesaid case.

3. The Writ Petition is being decided finally on the consent of the parties without calling for counter affidavit.

4. It is submitted that pursuant to an advertisement issued in August 2021, by the Block Development Officer, Sahjanwa, District Gorakhpur, inviting tender for construction and maintenance of road including installation of street lights, mast light and installation of R.O. plant etc. The work came to be allotted to a firm and upon completion of the work order, petitioner, a Junior Engineer, measured the construction work of the road and installation of street light, mast light and installation of R.O. plant. Petitioner submitted the measurement report and certified the quality of work by making entry in the

measurement book. Consequently, the Accounts Officer acted upon the report and after approval of the Block Development Officer, payment was released to the firm.

5. It appears, thereafter, a complaint came to be filed by the members of Kshetra Panchayat with regard to the quality and irregularity committed in the construction work and installation of street light etc. The District Magistrate, Gorakhpur, constituted an Enquiry Committee on 12.04.2022, consisting of District Social Welfare Officer, Gorakhpur, and Assistant Engineer, District Rural Development Agency, Gorakhpur. The Enquiry Committee after inspection and verification of the work submitted an inquiry report dated 13.05.2022, wherein, complicity of the petitioner, as well as, other officers was found with regard to the poor quality of construction of road etc. On the report, the impugned F.I.R. came to be lodged by the Assistant Development Officer (Panchayat), Block Sahjanwa, District Gorakhpur.

6. In the aforenoted factual background, learned counsel for the petitioner submits that the petitioner was not given an opportunity of hearing by the Committee i.e. version of the petitioner was not sought by the Committee. Reliance has been placed on an interim order dated 08.06.2022 passed in Writ-A No. 8868 of 2022 (Ajai Kumar v. State of U.P. and 4 others). It is further submitted that disciplinary inquiry should have been initiated at the first instance against the petitioner and at the most the loss caused to the State could have been recovered from the salary of the petitioner. It is finally urged that the complaint on face value is of civil nature, lodging F.I.R. was not called for as the matter was within the domain of employer-employee relation.

7. In rebuttal, learned A.G.A. submits that the Government Orders, issued from time to time, pertaining to disposal of complaint of corruption, received against the government servant was duly complied. Departmental Enquiry was instituted on the complaint and on the findings returned by the Enquiry Committee, complicity of the petitioner and other officials was found indulging in corrupt practices. Consequently, F.I.R. was lodged after approval of the Competent Authority, therefore, petition is liable to be dismissed.

8. Rival submissions fall for consideration.

9. The facts inter-se parties is not in dispute.

10. The sole question for consideration is as to whether a government servant is required to be given an opportunity of hearing by the Departmental Enquiry Committee before directing lodging of F.I.R. for corrupt practise, or in the alternative as to whether mandate of Government Orders pertaining to enquiry against government servant has been flouted.

11. The crux of the argument of learned counsel for the petitioner is that the Government Orders issued from time to time governing enquiry on a complaint filed against the government servant was not complied in the given facts. Hence, it is urged that the directions for initiating vigilance enquiry and the consequent prosecution is bad, not being in conformity with the mandate of the Government Orders. Reliance has been placed on an interim order1 dated 08.06.2022, to urge that opportunity of hearing was not given to the petitioner, therefore, the order directing

lodging the impugned F.I.R. is having civil consequence.

12. This Court in **Zubair Bin Sagir v. State of U.P & 3 others**2, had an opportunity to the examine the Government Orders pertaining to complaint filed against a government officer. It would be apposite to refer the Government Orders noted in Zubair Bin Sagir (supra).

(a) Government Order dated 14 April 1981, addressed to all the Head of the departments, directing that on receiving complaint against a government servant, it should be ensured that during the discreet enquiry the copy of the complaint should not be supplied to the delinquent government servant and neither the name of the complainant should be disclosed. Upon disclosure, the purpose of the enquiry and secrecy gets compromised. In other words, the delinquent employee should not be made aware of the complaint or the enquiry. If possible the enquiry should be got conducted by an officer two rank higher.

(b) Government order dated 9 May 1997, is addressed to all the Principal/Secretaries and Secretaries. The Government order notes that against Class-I officers fraudulent and false complaints are being received. Accordingly, the Government Order to safeguard the interest of Class-I officers, inter alia, provides: (i) complaints received on the letter pad of Member of Parliament and/or Legislative Assembly, before proceeding on the complaint, the contents should be got verified from the Members; (ii) on complaints received from other sources/persons, before proceeding to enquire, an affidavit of the complainant and the material/evidence in support of complaint must be obtained.

(c) Government Order dated 01 August 1997, provides the procedure for entertaining and acting on the complaints of subordinate officers. The procedure is similar to the Government Order dated 9 May 1997.

(d) Government Order dated 19 April 2012, came to be issued on the directions of the writ Court order passed in Kumdesh Kumar Sharma Versus State of U.P. (Writ Petition No. 4372(SS) of 2011) dated 3 January 2012. The Government directed all the Secretaries/Head of departments/Commissioners to strictly comply the Government Order dated 9 May 1997 and 1 August 1997 while dealing with complaints received against government servants. The direction was again reiterated vide Government Order dated 6 August 2018.

(e) With regard to lodging of F.I.R. it is provided in Government Order dated 19 July 2005, and reiterated by Government Order dated 24 May 2012, that disciplinary proceedings/departmental enquiry, in the first instance, should be initiated against the government servant and upon a prima facie finding being returned in the enquiry with regard to the culpability of the officer, F.I.R. thereafter should be directed to be lodged.

13. On bare perusal of the Government Orders, it is evident that the directions/instructions provided therein is to shield the government servant from frivolous and false complaints. But, at the same time, the government orders nowhere restricts the State authority from carrying out a discreet/confidential enquiry having regard to the nature of allegations made in the complaint, though, the whereabouts of the complainant, his identity or affidavit is not available. It is always open for the competent authority/Government to

conduct discreet enquiry on any information received depending upon the nature of allegations. The directions in the Government Orders, primarily, seeks to protect the government servants from the onslaught of frivolous complaints. But that would certainly not mean that the government servants can take shelter under the Government Orders to escape enquiry and prosecution for their corrupt acts. It is not open to the government servant to contend that the vigilance enquiry would vitiate for the reason of defect, either with the fact finding enquiry/departmental enquiry initiated on a fictitious complaint or no opportunity of hearing was given to the petitioner.

14. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others. The difference between mandatory and directory statutes is one of effect only. If the violation or omission is invalidating, the statute is mandatory; if not, it is directory.

15. The Supreme Court of India has been stressing time and again that the question whether statute is mandatory or directory is not capable of generalization and that in each case the court should try and get at the real intention of the legislature by analyzing the entire provisions of the enactment and the scheme underlying it.

16. In **Chandrika Prasad Yadav v State of Bihar**3, it was held that, the question as to whether a statute is directory or mandatory would not depend upon the phraseology used therein. The principle as regards the nature of the statute must be determined having regard to the purpose and object the statute seeks to achieve.

17. The principle, though applicable to a provision of a statute, applied to the Government Orders under consideration, it is evident that the intent and purpose of the Government Orders is to shield and protect the Government servants from false and vexatious complaints. The Government Orders, however, do not mandate that in the event of non compliance of the provisions therein would vitiate the fact finding enquiry, followed by the vigilance enquiry and prosecution, provided there is material to support the decision of the Government.

18. Further, the Government Order dated 19 July 2005, reiterated by Government Order dated 24 May 2012, provides that before lodging an F.I.R. against the government servant, a disciplinary proceedings/departmental enquiry should necessarily be conducted and in the enquiry culpability of the government servant is found only then F.I.R. should be lodged. In the facts in hand a departmental enquiry was constituted by the District Magistrate returning a prima facie finding with regard to the involvement and culpability of petitioner and other officers noted in the enquiry report. In any case, as noted herein above, the tenor of Government Orders is directory, therefore, any defect in the fact finding enquiry or departmental enquiry would have no bearing on the vigilance enquiry/prosecution. The Government Order dated 14 April 1981, specifically prohibits opportunity of hearing to the government servant at the fact finding stage.

19. In **Union of India v. Prakash P. Hinduja**4, though the facts therein are not

similar but an analogy can be drawn. Supreme Court rejected the argument that since the directions issued by the Court in **Vineet Narain and others v. Union of India**5, was not followed by the CBI and Chief Vigilance Commissioner (CVC) before filing of the charge sheet, the consequential proceedings of prosecution would be a nullity. The Supreme Court declined to quash the proceedings merely on the defect of not complying the directions.

20. The High Court held that in terms of directions issued in **Vineet Narain (supra)**, CVC is not entrusted with the responsibility of CBI function. CBI was to report to CVC about all cases taken up by it for investigation; progress of the investigation; cases in which charge-sheets are filed and their progress. CBI was bound to place the final results of its investigation along with all material collected before the CVC for the purposes of review. CBI had not placed before the CVC the results of its investigations and had by-passed it by filing a charge-sheet before the Special Judge. The High Court in view of the mandate in **Vineet Narain (supra)** not being complied by the CBI allowed the writ petition and quashed the cognizance taken by the Special Judge and all consequential proceedings. The Supreme Court reversed the decision of the High Court.

21. In **H.N. Rishbud v. State of Delhi**6, the Supreme Court was called upon to consider the effect of investigation having been done by a police officer below the rank of a Deputy Superintendent of Police contrary to the mandate of Section 5(4) of Prevention of Corruption Act, 1947. The Court held as follows:

".....Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises. ***A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial."***

22. Supreme Court referring **Prabhu v. Emperor7 and Lumbhardar Zutshi v. The King**8, held that if cognizance is in fact taken on a police report initiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial, which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice and that an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial.

23. Further, Sub-clause (3) (b) of Section 19 of Prevention of Corruption Act, 1988, prohibits that no court shall stay the proceeding under this Act on the ground of any error, omission or irregularity in the sanction for prosecution. Section 19 (3)(b) is extracted:

"19. ***Previous sanction necessary for prosecution.****--(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction 1 [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)]--*

(a).....

(3) ***Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--***

(a) .....

(b) ***no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;"***

24. Insofar, interim order dated 08.06.2022 (Writ-A No. 8868 of 2022) directing lodging of the first information report was stayed by this Court on the gorund of having drastic civil consequence and the order being passed without opportunity of hearing being given to the petitioner. The interim order does not bind this Court, as the same appears to have been passed, in the given facts. It appears that the learned counsel for the petitioner had not brought to the notice of the learned Single Judge of the Government Orders, wherein, it has been categorically provided that at the stage of fact finding enquiry neither the identity of the complainant would be disclosed to the government servant against whom the discreet inquiry is directed, nor, the delinquent government servant would be informed or given an opportunity in an enquiry that is being conducted against him on the allegations of the complaint. Status of the inquiry on the complaint received against the government servant for corrupt practices is merely a fact finding inquiry so as to ascertain the veracity and prima facie truthfulness of the allegations made in the complaint. Therefore, submission of the learned counsel for the petitioner that petitioner should have been given an opportunity of hearing is unfounded. Further, petitioner does not dispute the fact that he was a Junior Engineer and had undertaken the measurement of the works which was found by the Departmental Enquiry Committee of being substandard, therefore, prima facie causing loss to the State Ex-chequer. In view of the Government Orders referred earlier, the authorities were justified in lodging the F.I.R. against the delinquent government officials for indulging in acts and omission of corruption. An order of the authority direction lodging of first information report based on prima facie finding returned by a Departmental Enquiry cannot be said to prejudice the government servant. The FIR merely sets in motion the criminal process which is as per law.

25. Having regard to the facts and circumstances, learned counsel failed to make out a case for quashing of the impugned F.I.R.

26. The writ petition is, accordingly, dismissed.

(2022) 8 ILRA 494
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 26 of 2021

State of U.P. ...Appellant

Versus

Anuj & Ors. ...Opp. Parties

Counsel for the Appellant:
A.G.A.

Counsel for the Opp. Parties:
Sri Birendra Singh Khokher, Sri Vijay Kumar

Criminal Law – Criminal Procedure Code, 1973 - Sections 378 & 378(3), - Indian Penal Code,1860 - Sections 147, 148, 149, 307, 332, 353 & 504 - Government Appeal – against order of Acquittal – a written complaint moved by the Constable (PW-1) before the Sub Inspector (PW-2) - registered as an *FIR* - informant (PW-1) claimed - during investigation of another case crime PW-1, PW-2 & PW-3 (police personnel) visited house of PW-5 (wife of one of accused) where alleged incident was happen so - court bears in mind that - it is a well settled law that minor contradiction cannot be a ground to discredit the testimony of the prosecution witnesses - but, while separating chaff from the grain, court finds that - there were major contradictions in the testimonies of the PWs regarding injuries sustained, time of occurrence, presence of parents of PW-5 at place of incident as well as occurrence of the incident too - *held* - this is not a fit case wherein this court should take a different view - trial court cannot be said to be perverse while passing judgment of acquittal - Leave to appeal rejected, even though same is not a case worth granting leave to appeal - consequently, Government Appeal stands dismissed.(Para –26, 27, 29, 32, 36, 37, 38, 40, 42, 43)

Appeal Dismissed. (E-11)

List of Cases cited: -

1. Tota Singh & anr. Vs St. of Pun. (1987) 2 SCC 529,

2. Ramesh Babulal Doshi Vs St. of Guj. (1996) 9 SCC 225,

3. Rajasthan Vs St. of Guj. (2003) 8 SCC 1870,

4. St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755,

5. Chandrappa & ors. Vs St. of Karn. (2007) 4 SCC 415,

6. Ghurey Lal Vs St. of U.P. (2008) 10 SCC 450,

7. Siddharth Vashishta @ Manu Sharma Vs St. (NCT of Delhi) (2010) 6 SCC 1,

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

9. Ganpat Vs St. of Har. (2010) 12 SCC 59,

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Mah. (2010) 13 SCC 657,

11. St. of U.P. Vs Naresh (2011) 4 SCC 324,

12. St. of M.P. Vs Ramesh (2011) 4 SCC 786,

13. Jayaswamy Vs St. of Karn. (2018) 7 SCC 219,

14. Narayan Chetanram Chaudhary & anr. Vs St. of Mah. (2008 (8) SCC 457),

15. Shyamal Ghose Vs St. of W.B.I (2012 (7) SCC 646),

16. Kuriya & anr. Vs St. of Raj. (2012 (10) SCC 433),

17. Rohtash Kumar Vs St. of Har. (2013 (14) SCC 434).

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Ratan Singh, learned A.G.A. and Sri Vijay Kumar, learned counsel appearing on behalf of the accused-respondents.

2. In view of the unfortunate incident of fire that which had taken place in the office of Advocate General and an administrative order so passed by Hon'ble The Chief Justice, learned counsel for the accused-respondents Sri Vijay Kumar has supplied a copy of the records of the present appeal to learned A.G.A. and has received the paper book in the Court and both the side agreed to argue the matter on merits, therefore, we proceed to hear the matter.

3. State of U.P. has approached this Court while instituting appeal under Section 378 of the Criminal Procedure Code (In short Cr.P.C.) assailing the

judgment and dated 12.10.2020 passed by Additional Sessions Judge, Fast Track Court No.2, Baghpat in Sessions Trial No.161 of 2018 (State Vs. Anuj & 2 others) in Case Crime No.850 of 2017, under Sections 147, 148, 149, 307, 504, 332, 353 IPC, P.S. Badaut, District Baghpat acquitting the accused respondents.

4. While unfolding the prosecution case, it emerges that a written complaint was lodged before the Sub-Inspector Munesh Pal Pawar (PW2) which transformed into lodging of a first information report on 22.8.2017 in Case Crime No 849 of 2017, under Sections 323, 504, 506, 354A, 307, 34 IPC with the allegation that in order to investigate the said case PW2 being Munesh Pal Pawar proceeded from the Police Station and reached the Chowki at industrial area and thereafter while accompanying Constable 912 Omvir (PW1) and H.G. 276 Satyapal (PW5) went to the place of occurrence whereat they had to investigate the allegation which emanated from the FIR dated 22.8.2017, being Case Crime No.849 of 2017, under Sections 323, 504, 506, 354A, 307, 34 IPC.

5. As per prosecution when the aforesaid three persons reached the place of occurrence then the informant in the Case Crime No.849 of 2017 along with her parents were seen to have been subjected to hurling of abuses by certain persons uttering that the informant of the Case Crime No.849 of 2017 may make complaints before any authority but nobody can do anything adverse against unknown persons.

6. According to the prosecution, the informant being PW2 along with the above noted two police personnel tried to convince them not to indulge in such type of activities but as per the prosecution case the above mentioned unknown persons indulged into hurling of abuses and administered beating (Marpeet) and further tried to grab the licence pistol so possessed by the informant PW2 and with the help of one Boby son of Vijay Pal resident of Awas Vikas Badaut, Police Station Badaut, Mohit son of Suresh, Prakash and Jasvir son of Vishahambhar Sharma after great efforts could catch hold of one of the unknown persons and at the relevant point of time the said unknown person made firing upon the informant, however the informant could save himself from them.

7. Consequent to catching hold of unknown persons one was indentified as Annu son of Ravindra Singh accused respondent no.1 and it is further stated that from his possession a country-made pistol 315 bore containing one cartridge which was struck therein and was further smelling and from the right pocket of the shorts a live cartridge 315 bore was recovered. Second person so caught hold was Aunj son of Ravindra, however no recovery was made from him and so far as the third person is concerned he identified himself to be Krishnavir son of Begraj, resident of Pushar, P.S. Doghat district Baghpat and from his possession nothing was recovered. It has further been stated that one H.G.149 Ramesh Chandra the driver Sant Kumar H.G. 289 and Pravindra were also present who witness the said incident.

8. Accordingly, a first information report being Case Crime No.0850 of 2017 was registered before Police Station Badaut, district Baghpat on 22.8.2017 showing the commission of the incident at 14.15 hours against the three named accused who are respondents herein and

two unknown persons under Sections under Sections 147, 148, 149, 307, 332, 353, 504 IPC.

9. After lodging of FIR in question before the above noted police station PW7 being S.I. Satyavir Singh Bhati was nominated as I.O.

10. In order to bring home the charges the prosecution produced following witnesses namely PW1 Constable Omvir Singh, PW2 S.I. Munesh Pal Singh Pawar (Informant), PW3 Payal @ Meenakshi, PW4 Smt. Santosh, PW5 Head Constable 276 Satya Pal Singh, PW6 Mukesh Kumar and PW7 retired S.I. Satyavir Bhati. .

11. The prosecution produced following documents to prove the charges namely (a) Chik FIR (b) H.G. Satyapal medical report site plan (c) charge sheet (d) Medical Report of constable Omvir Singh (e) Medical Report of S.I. Mukesh Pal Singh (f) G.D.

12. The case was committed to Sessions. Charges were read over the accused herein. Accused claimed innocence and not guilty and claimed to be tried.

13. Since the present appeal is under Section 378 of the Cr.P.C. instituted by the State against the judgment of acquittal passed in favour of the accused, thus, this Court has to bear in mind the crucial fact that double presumption of innocence is available with the accused. To put it otherwise, the courts of law while exercising appellate jurisdiction are not supposed to interfere with the judgment of acquittal unless the same is perverse or miscarriage of justice is being meted to other party that too while keeping in mind the fact that there should compel and substantive reasons for interfering as couched in series of decisions namely ***Tota Singh and another vs. State of Punjab, (1987) 2 SCC 529, Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225, State of Rajesthan vs. State of Gujarat, (2003) 8 SCC 180, State of Goa vs. Sanjay Thakran, (2007) 3 SCC 755, Chandrappa and others vs. State of Karnataka, (2007) 4 S.C.C. 415, Ghurey Lal vs. State of U.P., (2008) 10 SCC 450, Siddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi), (2010) 6 SCC 1, Babu vs. State of Kerala, (2010) 9 SCC 189, Ganpat vs. State of Haryana, (2010) 12 SCC 59, Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra, (2010) 13 SCC 657, State of U.P. vs. Naresh, (2011) 4 SCC 324, State of M.P. vs. Ramesh, (2011) 4 SCC 786, and Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219.***

14. Bearing in mind the proposition of law so mandated by the Hon'ble Apex Court now the facts of the present case are to be analysed in order to determine as to whether the judgment of acquittal so passed in favour of the accused herein seeks interference or not.

15. Taking the clue from the testimony of prosecution witness it transpires that one constable 912 Omvir Singh appeared as PW1 and according to him he was posted as constable in the subject police station on 22.8.2017. He has further stated that S.I. Munesh Pal Singh PW2 came to the Industrial Chowki, whereat he was posted along with H.G. Satyapal Singh PW5 and all three of them proceeded to Kasba Awas Vikas Badaut from where a written complaint was also lodged and a first information report was registered by the informant therein Smt. Payal and when they reached the house of

the informant Smt. Payal then they witnessed that some unknown persons were hurling abuses upon Smt. Payal and her parents. All of them witnessing the said utterance tried to pacify them and at that relevant point of time the unknown persons created obstacles and hindrances in the duty so assigned and attached to them and hurled abuses and indulged in beating and tried to snatch the licenced weapon which they were possessing. In the said incident PW1 Omvir Singh, PW2 SI Munesh Pal Singh Pawar and PW5 Head Constable Satypal Singh also claim to sustain injuries and with the aid of the persons, who was standing being Boby son of Vijai Pal, Mohit son of Surya Prakash and Jasvir son of Vishambhar they could catch hold of the accused respondent no.1 Anoop son of Ravindra and from his possession country-made pistol 315 bore as well as a cartridge struck in the pistol and a live cartridge was found.

16. According to PW1 the said incident was witnessed by Ramesh Chandra (Driver), Sant Kumar (Home-Guard) and Pravendra. It was also stated that the two other persons, who were caught hold of were the accused opposite party no.2 Anuj son of Ravindra and accused opposite party no.3 Krishnavir son of Begraj, however no recovery was made from them.

17. S.I. Munesh Pal Singh Pawar, the first informant appeared as PW2, he in his examination-in-chief had narrated the fact that he along with the aforesaid two persons being PW1 and PW5 had gone to Payal's house wherein he also witnessed that some unknown persons were fighting Smt. Payal and are parents and when he tried to pacify then abuses were hurled and beating was administered, weapon which PW2 was sought to be snatched and with the aid of the commuters therein they could save themselves and even in fact firing was also resorted to with country-made pistol and they arrested the accused at 2.15 hours and in the possession of accused Anuj, a country-made pistol and cartridges were found. However, so far as rest accused are concerned, no recovery whatsoever was made from them and constable Omvir PW1 and PW5 H.G. Satyapal sustained injuries.

18. PW3 Smt. Payal @ Meenakshi appeared in witness box and according to her statement she was in a house on 22.8.2017. At that point of time her husband Annu was with him and they were certain altercation between her and the husband Annu. Police also came there, she had not called the police and there was no Marpeet or beating administered in between the police officials and her husband and no firing whatsoever was resorted to by her husband Annu and there was no recovery of any country-made pistol from him.

19. PW4 Smt, Santosh Kumar also appeared in the witness box according to her statement on 22.8.2017, she was not in the house, she had gone to her neighbours place, there was no beating or untoward incident which occurred.

20. PW5 H.G. 276 Satyapal appeared, he deposed that when he was in industrial Chowki on 22.8.2017 then constable Omvir Singh and SI Munesh Pal came and they proceeded to Payal's house when they tried to pacify the unknown persons, who are stated to be fighting with Smt. Payal @ Meenakshi and their parents then beating was administered and Annu accused herein made gun shot fire, however they could save themselves and they arrested the accused at 2.15 hours.

21. PW6 Mukesh Kumar has also appeared as a prosecution witness. According to him his daughter Payal got married with Annu son of Ravindra and on 22.8.2017 her daughter had come to his place and his son-in-law Annu had come to her away of his house. However, certain altercations took place between Payal @ Meenakshi and Annu and at that point of time police came. According to him, there was no Marpeet or hurling of abuses and no act was committed by the accused herein to create obstacle in the duties of the police officials and Krishnavir was not present.

22. As PW7 retired S.I. Satyavir Bhati appeared in witness box, he is the I.O. and according to him he conducted investigation and submitted charge sheet.

23. Coming to the medico legal injury report of the injured, it has come on record that so far as SI Munesh Pal Singh, the first informant PW2 all the injuries are simple in nature and according to the opinion of the doctor, the same may have been caused by hard blunt object and friction against tough surface.

24. So far as the injury report of (PW1) Omvir Singh is concerned, all the injuries were found to be simple in nature and caused by hard blunt object. Similarly, so far as the injury of PW5 Satyapal Singh is concerned, the injuries were found to be simple in nature and caused by hard and blunt object. Thus, it become apparently clear from perusal of the medico legal report that the injuries are simple in nature.

25. As per the first information report dated 22.8.2017 the time of the incident is 14.15 hours on 22.8.2017, PW1 being constable Omvir Singh is an eye witness and claims to be injured in the incident in question. In his cross-examination PW1 has deposed that the incident was at 12-1.00 in the noon on 22.8.2017. He has further stated in his cross-examination that when the accused Annu fired upon him it was 2.10 hours in the noon of 22.8.2017.

26. It is quiet paradoxical and amazing that the time of the occurrence so shown in the first information report is 14.15 hours, however, the incident is shown to be at 12-1.00 p.m. in the noon on 22.8.2017 and the firing so resorted by the accused is shown to be 2.10 hours. So much so far as PW2 S.I. Munesh Pal is concerned, according to him the time of the incident is 1.30 to 2.15 in the noon and further he is not aware about the time when the said incident occurred. The said contradictions in the testimony of PW1 and PW2 itself, discredits the testimony of the above noted two prosecution witness to point the accused towards commission of crime.

27. It is not the case wherein PW1 and PW2 were not the eye-witness and rather in the contrary PW1 and PW2 were eye-witness and claiming to be the injured and PW2 is the first informant having full knowledge about the incident.

28. An additional fact also needs to be considered which is with regard to the issue that PW1 being constable Omvir Singh in his cross-examination has deposed that all three of them being PW1, PW2 and PW5 sustained injuries in body, shoulder and face and they were subjected to medical examination. However, on the contrary PW5 being H.G.276 Satyapal Singh in his cross-examination has come up with a stand that he did not sustain any injuries.

29. The aforesaid contradictions are major contradictions and the same also

shows that a case has been engineered by the prosecution to falsely implicate the accused herein. Notably, PW1, PW2 and PW5 are the eye-witness of the incident and alleged commission of crime and thus in the wake of the medico legal report of PW5 showing injuries sustained by PW5 and denying the same by PW5 in his cross-examination itself shows that the entire prosecution theory is exaggerated so as to rope in accused herein.

30. So much so PW1 constable Omvir Singh in his cross-examination has deposed that he is not aware as to whether at the time of the occurrence of the said incident whether the parents of the Smt. Payal were there or not. However, PW2 SI Munesh Pal Singh the first informant in his cross-examination has deposed that he along with PW1 and PW5 had gone to the place of occurrence where large number of people had assembled and about 4 to 5 people were hurling abuses upon the parents of Payal. The said inconsistency in the statement of PW1 and PW2 itself creates a cloud that no such incident whatsoever occurred as obviously PW1 and PW2 both claimed to be eye-witness.

31. Nonetheless PW3 being Payal @ Meenakshi, PW4 Smt. Santosh and PW6 Mukesh Kumar themselves have given the statement despite being the prosecution witness that no such incident occurred on 22.8.2017.

32. The Hon'ble Apex Court has in umpty number of decisions laid down the proposition of law that minor contradiction cannot be a ground to discredit the testimony of the prosecution witness. However, Court has to adopt a pragmatic approach while considering the over all circumstances while separating chaff from the grain. Solely because there are minor contradictions and improvements cannot be only basis to demolish the prosecution version. In the case of **Narayan Chetanram Chaudhary and another Vs. State of Maharashtra (2000) 8 Supreme Court Cases 457** para 42 the Hon'ble Apex Court observed as under:-

42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the c testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if found d to be of trivial details, as in the present case, the same would not cause any dent in the testimony of PW 2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness. In this regard this Court in State of H.P. v. Lekh Raj[23] (in which one of us was a party), dealing with discrepancies, contradictions and omissions held: (SCC pp. 258-59, paras 7-8)

"Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incident there may

occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot-like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. This Court in Ousu Varghese v. State of Kerala²4 held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In Jagdish v. State of M.P. this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in State of Rajasthan v. Kalki26 held that in the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies 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 the like. Material discrepancies are those which are not normal, and not expected of a normal person.

Referring to and relying upon the earlier judgments of this Court in b State of U.P. v. M.K. Anthony27, Tahsildar Singh v. State of U.P.28, Appabhai v. State of Gujarat29 and Rammi v. State of M.P.30 this court in a recent case Leela Ram v. State of Haryana31 held:

'There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same C should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence...

The court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.'

33. In the case of **Shyamal Ghosh Vs. State of West Bengal (2012) 7 Supreme Court Cases 646** para 46 & 47 the Hon'ble Apex Court observed as under:-

46. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses inasmuch as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. It is true that there is some variation in the timing given by PW 8, PW 17 and PW 19. Similarly, there is some variation in the statement of PW 7, PW 9 and PW 11. Certain variations are also pointed out in the statements of PW 2, PW 4 and PW 6 as to the motive of

the accused for commission of the crime. Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation b may not be enough to adversely affect the case of the prosecution. a

47. The variations pointed out as regards the time of commission of the crime are quite possible in the facts of the present case. Firstly, these witnesses are rickshaw pullers or illiterate or not highly educated persons whose statements had been recorded by the police. Their statements in the court were recorded after more than two years from the date of the incident. It will be unreasonable to attach motive to the witnesses or term the variations of 15-20 minutes in the timing of a particular event as a material contradiction. It probably may not even be expected of these witnesses to state these events with the relevant timing with great exactitude, in view of the attendant circumstances and the manner in which the incident took place.

34. In the case of **Kuriya and another Vs. State of Rajasthan (2012) 10 Supreme Court Cases 433** para 30 the Hon'ble Apex Court observed as under:-

30. This Court has repeatedly taken the view that the discrepancies or b improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements.

35. In the case of **Rohtash Kumar Vs. State of Haryana (2013) 14 Supreme Court Cases 434** para 24 the Hon'ble Apex Court observed as under:-

24. 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 case of the prosecution, must not prompt the court to reject the evidence in its entirety. Therefore, unless irrelevant, details which do not in any way corrode the credibility of a witness should be ignored. The court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies. drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the

evidence is shaken, as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness. Thus, the court must read the evidence of a witness as a whole, and consider the case in light of the entirety of the circumstances, ignoring the minor discrepancies with respect to trivial matters, which do not affect the core of the case of the prosecution. The said discrepancies as mentioned above, should not be taken into consideration, as they cannot form grounds for rejecting the evidence on record.

36. Marshalling the testimonies of the prosecution witnesses and the evidences so adduced by them makes it crystal clear that there are material contradictions in the testimony of the prosecution witness as PW1, PW2 and PW5 who claimed themselves to be the eye-witness and injured also. However, PW5 has come up with a stand that he did not sustain any injuries.

37. Time of the occurrence of the incident is concerned the same also varies as PW1 in his cross-examination has deposed that the time of the occurrence is 12-1.00 noon on 22.8.2017 as well as the time of the occurrence of the incident in the FIR is shown to be 2.15 hours. More so PW2 in his statement has deposed that the time of the occurrence is 1.30 to 2.15 hours on 22.8.2017 he on being further asked has deposed in cross-examination that he is not aware about the time.

38. Lastly, but not the least PW1 in his cross-examination has made a statement that he is not aware as to whether on 22.8.2017 at the time of the alleged occurrence of the incident whether the parents of Smt. Payal @ Meenakshi were present or not, however PW2 in his cross-examination had stated that he along with PW1 and PW5 had gone to the place of occurrence and at that point of time about 4-5 persons were abusing the parents of the Smt. Payal @ Meenakshi.

39. Event the other prosecution witnesses being PW3 Payal @ Meenakshi, PW4 Smt. Santosh and PW6 Mukesh Kumar had gone recorded their deposition while making a statement that no such incident occurred on 22.8.2017.

40. Having bestowed anxious consideration over the judgment of acquittal passed by the trial court, this Court finds that the view taken by the trial court cannot be said to be perverse. However, the same is based upon the correct appreciation of the testimony of the prosecution witnesses and careful perusal of the evidences sought to be adduced.

41. The view so taken by the trial court is a possible, plausible view and this is not a fit case wherein this Court should take a different view. In absence of any perversity so sought to be shown by the learned AGA, this Court finds inability to exercise its jurisdiction under Section 378 of the Cr.P.C. while revering the judgment of acquittal into the judgment of conviction.

42. We find that it is not a case worth granting leave to appeal. The application for granting leave to appeal is rejected.

43. Since the application for granting leave to appeal has not been granted, consequently, present appeal also stands dismissed.

44. The records be sent back to the court-below.

(2022) 8 ILRA 504
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 259 of 2021

State of U.P. ...Appellant
Versus
Dhan Seth & Anr. ...Opp. Parties

Counsel for the Appellant:
G.A.

Counsel for the Opp. Parties:

(A) Criminal Law – Criminal Procedure Code, 1973 - Sections 154, 156-(3), 313, 378 & 378(3), - Indian Penal Code, 1860 - Sections 201, 304-(B) & 498-(A), - Dowry Prohibition Act,1961 - Section – 3/4 - Indian Evidence Act, 1872 - Section - 113-B: - Government Appeal – against order of Acquittal – complaint case - FIR - offence of dowry death - demand of additional dowry - PW-1 claimed that accused husband & mother-in-law were strangulated his daughter - power of appellate court - can only be exercised when there is gross misappreciation of the evidence coupled with erroneous interpretation and palpable illegality by trial court.**(**Para 16**)**

(B) Criminal Law – Criminal Procedure Code, 1973 - Sections - 154, 156-(3), 313, 378 & 378(3), - Indian Penal Code, 1860 - Sections 201, 304-(B) & 498-(A), - Dowry Prohibition Act, 1961 - Section – 3/4 - Indian Evidence Act, 1872 - Section - 113-B - Government Appeal – against order of Acquittal – complaint case - FIR - offence of dowry death - demand of additional dowry - PW-1 claimed that accused husband & mother-in-law were strangulated his daughter - - court finds that - prosecution theory proceeds on week premises as there were major contradiction in the St.ments of PW-1 & PW-2, occasioned with delay in lodging the FIR which sans explanation, absence of post-mortem report & facts regarding last rites as done itself by prosecution but blamed to be disposing of dead body put upon accused person and also there is no any independent eyewitness was produced - *held* - this is not a fit case wherein this court should take a different view - judgment of acquittal by trial court does suffer from any illegality or perversity - Leave to appeal rejected - resultantly, Government Appeal stands dismissed. (Para – 33, 34, 35, 36, 37, 39)

Appeal Dismissed. (E-11)

List of Cases cited: -

1. Rajesh Prasad Vs St. of Bihar & anr. reported in 2022 (3) SCC 471,

2. Apren Joseph @ Current Kunjukunju & ors. Vs The St. of Kerala, (1973) 3 SCC 114,

3. Tara Singh & ors. Vs St. of Punj. 1991 Supp (1) SCC 536

4. P. Rajagopal & ors. Vs St. of T.N. (2019) 5 SCC 403,

(Delivered by Hon'ble Vikas Budhwar, J.)

1. The present appeal at the behest of the State of U.P. emanates from the proceeding in Sessions Trial No. 445/2016 (Registration No. 473 of 2016) wherein the court of Additional Sessions Judge, (Fast Track Court) No. 2, Rampur by virtue of the judgment dated 28.01.2021 has acquitted the accused-respondent nos. 1 and 2 in Case Crime No. 108C/2016 u/s 498A, 304B, 201 IPC and Section ¾ of the D.P. Act, P.S. Patwai, District Rampur.

2. The present appeal was presented before this Court on 09.08.2021wherein the Stamp Reporter had reported delay of 81 day. On 07.08.2021 the Stamp Reporter had tendered its report which reads as under:-

"Although the instant Criminal Appeal is beyond time by 81 days till today. It should be considered with in time in light of the Hon'ble Supreme Court order Application 665/2021 in SMW (C) 3/2020"

3. On 25.08.2021 this Court passed the following order:-

"This appeal is reported to be filed beyond limitation by 81 days. It has been filed along with a delay condonation application.

Issue notice to the accused respondents on delay condonation application returnable at an early date.

Accused respondents shall file counter affidavit to the delay condonation application within three weeks. Appellant shall have a week thereafter to file rejoinder affidavit."

4. List/ put up in the additional cause list before the appropriate bench on 29.11.2021.

5. A recall application no. 1 of 2021 was preferred by the State-appellant for recalling of the order dated 25.08.2021 in the factual back drop that consequent to the passing of the order by the Hon'ble Apex Court in Misc. Application No. 665/2021 in SMW (C) No. 3/21 in the case of "In Re Cognizance For Extension of Limitation Vs. XXXX on 27.04.2021 wherein the delay which had occurred during the pandemic relating to Covid-19 was condoned and the limitation which fell due during the intervening period was extended.

6. Accordingly, in view of the office report dated 07.08.2021 the present appeal was treated to be within limitation and thus regular number was allotted. In view of the said background now there is no occasion for this Court to proceed with the recall application so preferred by the State-appellant. Thus, the recall application No. 1 of 2021 has rendered infructuous.

7. Though, in this appeal the State-appellant has arrayed two accused being respondent nos. 1 and 2 however, this Court finds that there is an office report dated 15.07.2022 accompanied with the letter dated 23.12.2021 of Chief Judicial Magistrate, Rampur address to the Section Officer (Criminal Appeal Section bearing No. 1188/2021) certifying the fact that so far as the accused-respondent no. 2 Naubat Ram S/o Mewa Ram is concerned, he expired on 10.05.2021. A copy of the death certificate issued by Registrar (Birth And Death) Gram Panchayat, Mandaiyan Kali is also on record showing the fact that the respondent no. 2 Naubat Ram S/o Mewa Ram has expired on 10.05.2021.

8. Resultantly, the present appeal stands abated against accused-respondent no. 2 Naubat Ram S/o Mewa Ram.

9. Prosecution story encompasses that one Som Pal who happens to be the father of the deceased Pushpa Devi is said to have solemnized marriage with accused-respondent no. 1 Dhan Seth S/o Naubat Ram on 27.11.2015. Though various gifts and offering were extended to accused side but as per the allegations the accused fractions were not happy with the gifts and the offering as the same were not commensurate to the expectations of the accused fraction. Consequently, demand of the additional amount of Rs. 2 lakhs was

sought to be made from the accused prosecution side. Even reconciliation were sought to be made and the matter was also put before the concerned panchayat, however, the same was of no avail as administering of beating as well as harassment was being sought to be meted to the deceased daughter. As per the prosecution case on 28.04.2015 at about 6 in the evening it is being stated that the accused being Dhan Seth (husband) Naubat Ram (father-in-law), Jaminiya (Mother-in-law) had the common intention to dispose of the deceased daughter and they strangulated her. Further allegation have been made that the deceased daughter Pushpa Devi was six months pregnant and at 06:30 in the evening on 24.08.2015 the accused who were marked in the FIR in question, made a phone call and thereafter apprised the informant that they had murdered the deceased daughter. On receiving the said information, the informant along with his close associates who were residing in the same village which obviously is of the informant being Mukhram, Harfool, Mangal Sen, Chhote Lal proceeded to the in-laws of the deceased and witnessed that the deceased was lying in a cot in dead condition. According to the informant the neighbours and the other inhabitants who were present over there, informed that his daughter on the date of the death in the morning was subjected to beating. Further allegation was made that the deceased sustained sever injuries. According to the informant he was apprised that nobody should disclose the said fact regarding the murder of the deceased daughter to anybody otherwise the accused will treat it as an enmity. According to the informant he thereafter in the next morning proceeded to police station for tendering his complaint for lodging of FIR however, the police so stationed in the concerned police station detained him till noon and thereafter, the informant without lodging of the FIR came back. Further it is also stated that threats were also administered to the informant that in case the informant does not enter into any settlement or compromise then the informant will be put in a very disasters condition and thereafter, faced with the circumstances, the informant again went to the police station, however, in between the accused along with accomplish who are stated to be resourceful and powerful came to the house and took away the dead body of the deceased and behind his back consigned the dead body of the deceased on flames and threw away the ashes in river Ganga. As per the prosecution proceedings purported to be u/s 156 (3) Cr.P.C. was undertaken on 27.11.2015 before the court of C.J.M., Rampur and the FIR has been lodged u/s 498A, 304B, 201 IPC and section ¾ Dowry Prohibition Act being Case Crime No. 108C/2016. It has come on record that investigation was put to motion and consequently charge sheet was also submitted u/s 498A, 304B, 201 IPC and Section ¾ D.P. Act. Case was also committed before the Sessions Court and on 22.01.2019 the learned trial court abated the criminal proceedings against the mother-in-law of the deceased Smt. Jaminiya consequent to the death.

10. In order to prove the charges, the prosecution produces the following witnesses namely, Som Pal- P.W. 1, Smt. Bhuri Devi-P.W. 2, Dinesh Kumar- P.W. 3, Constable Lokesh Kumar-P.W. 4.

11. Prosecution also produced the following documents to bring home the charges:- (i) Application u/s 156 (3) Cr.P.C. Ex. A-1, (ii) Affidavit Ex. A-2, (iii) Site Plan Ex. A-3, (iv) Charge Sheet Ex. A-4,

(v) F.I.R Ex. A-5, (vi) G.D. No. 039 Ex. A-6.

12. Further the prosecution also produces the following additional documents being the material Ex.-1 Photograph and material Ex.-2 Postal Receipt.

13. The proceedings u/s 313 of the Cr.P.C. was also undertaken and thereafter, charges were read over to the accused they claimed not guilty and innocence. The learned trial court by virtue of the order dated 28.01.2021 passed in Session Trial No. 445/2016 (Registration No. 473/2016) State of U.P. Vs. Dhan Seth and another, acquitted the accused with respect to section 304B, 498A, 201 IPC and section 3/4 D.P. Act.

14. Challenging the order of acquittal now the State-appellant is before this Court.

15. Heard Sri Ratan Singh, learned A.G.A. for the State-appellant and perused the record.

16. Before elucidating the controversy so sought to be raised in the present appeal u/s 378 of the Cr.P.C., this Court is to re-memorize itself the boundaries within which the frame work of the case is to be drawn. Meaning thereby that this Court has to remain oblivious to the limitations so envisaged while exercising appellate powers against the judgment of acquittal. The appellate Court while exercising appellate jurisdiction cannot act in a routine or cursory manner as the jurisdiction can only be exercised when there is gross misappreciation of the evidence coupled with erroneous interpretation and palpable illegality so as to suggest that no prudent person can comprehend the same. Even if the view taken by the learned trial court while acquitting the accused is found to be a plausible and possible view then there is no occasion for this Court while exercising appellate jurisdiction to reverse the judgment from acquittal to conviction while taking another view.

17. Nevertheless in the Case of **Rajesh Prasad Vs. State of Bihar And Another** reported in **2022 (3) SCC 471** the Hon'ble Apex Court in following paragraphs have observed as under:-

"21. Before proceeding further, it would be useful to review the approach to be adopted while deciding an appeal against acquittal by the trial court as well as by the High Court. Section 378 of the Cr.P.C deals with appeals in case of acquittal. In one of the earliest cases on the powers of the High Court in dealing with an appeal against an order of acquittal the Judicial Committee of the Privy Council in Sheo Swarup vs. R. Emperor, AIR 1934 PC 227(2) considered the provisions relating to the power of an appellate court in dealing with an appeal against an order of acquittal and observed as under:

"16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

But in exercising the power conferred by the Code and before reaching its

conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

It was stated that the appellate court has full powers to review and to reverse the acquittal.

22. In Atley vs. State of U.P., AIR 1955 SC 807, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same. To a similar effect are the following observations of this Court speaking through Subba Rao J., (as His Lordship then was) in Sanwat Singh vs. State of Rajasthan, AIR 1961 SC 715:

"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup case afford a correct guide for the appellate court's approach to a case disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons', (ii) "good and sufficiently cogent reasons', and (iii) "strong reasons' are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

The need for the aforesaid observations arose on account of observations of the majority in Aher Raja Khimavs. State of Saurashtra, AIR 1956 SC 217 which stated that for the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial court was wrong."

23. M.G. Agarwal vs. State of Maharashtra, AIR 1963 SC 200 is the judgment of the Constitution Bench of this Court, speaking through Gajendragadkar, J. (as His Lordship then was). This Court observed that the approach of the High Court (appellate court) in dealing with an appeal against acquittal ought to be cautious because the presumption of innocence in favour of the accused "is not certainly weakened by the fact that he has been acquitted at his trial."

24. In Shivaji Sahabrao Bobade vs. State of Maharashtra, (1973) 2 SCC 793, Krishna Iyer, J., observed as follows:

"In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set

the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

25. This Court in Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows:

"While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can thenand then only reappraise the evidence to arrive at its own conclusions."

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

26. In Ajit Savant Majagvai vs. State of Karnataka, (1997) 7 SCC 110, this Court set out the following principles that would regulate and govern the hearing of an appeal by the High Court against an order of acquittal passed by the Trial Court:

"16. This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court. These principles have been set out in innumerable cases and may be reiterated as under:

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person

would honestly and conscientiously entertain as to the guilt of the accused."

27. This Court in Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225 observed visvis the powers of an appellate court while dealing with a judgment of acquittal, as under:

"7. ... While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then--and then only--reappraise the evidence to arrive at its own conclusions."

28. This Court in Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415, highlighted that there is one significant difference in exercising power while hearing an appeal against acquittal by the appellate court. The appellate court would not interfere where the judgment impugned is based on evidence and the view taken was reasonable and plausible. This is because the appellate court will determine the fact that there is presumption in favour of the accused and the accused is entitled to get the benefit of doubt but if it decides to interfere it should assign reasons for differing with the decision of acquittal.

29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

30. In Nepal Singh vs. State of Haryana- (2009) 12 SCC 351, this Court reversed the judgment of the High Court which had set aside the judgment of acquittal pronounced by the trial court and restored the judgment of the trial court acquitting the accused on reappreciation of the evidence.

31. The circumstances under which an appeal would be entertained by this Court from an order of acquittal passed by a High Court may be summarized as follows:

31.1. Ordinarily, this Court is cautious in interfering with an order of acquittal, especially when the order of acquittal has been confirmed upto the High Court. It is only in rarest of rare cases, where the High Court, on an absolutely wrong process of reasoning and a legally erroneous and perverse approach to the facts of the case, ignoring some of the most vital facts, has acquitted the accused, that the same may be reversed by this Court, exercising jurisdiction under Article 136 of the Constitution. [State of U.P. v. Sahai, AIR 1981 SC 1442] Such fetters on the right to entertain an appeal are prompted by the reluctance to expose a person, who has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. [Arunachalam v. Sadhananthan, AIR 1979 (SC) 1284] An appeal cannot be entertained against an order of acquittal which has, after recording valid and weighty reasons, has arrived at an unassailable, logical conclusion which justifies acquittal. [State of Haryana v. Lakhbir Singh, (1990) CrLJ 2274 (SC)] B)

31.2. However, this Court has on certain occasions, set aside the order of acquittal passed by a High Court. The circumstances under which this Court may entertain an appeal against an order of acquittal and pass an order of conviction, may be summarised as follows:

31.2.1. Where the approach or reasoning of the High Court is perverse:

a) Where incontrovertible evidence has been rejected by the High Court based on suspicion and surmises, which are rather unrealistic. [State of Rajasthan v. Sukhpal Singh, AIR 1984 SC 207] For example, where direct, unanimous accounts of the eyewitnesses, were discounted without cogent reasoning; [State of UP v. Shanker, AIR 1981 SC 879]

b) Where the intrinsic merits of the testimony of relatives, living in the same house as the victim, were discounted on the ground that they were "interested' witnesses; [State of UP v. Hakim Singh, AIR 1980 SC 184]

c) Where testimony of witnesses had been disbelieved by the High Court, on an unrealistic conjecture of personal motive on the part of witnesses to implicate the accused, when in fact, the witnesses had no axe to grind in the said matter. [State of Rajasthan v. Sukhpal Singh, AIR 1984 SC 207]

d) Where dying declaration of the deceased victim was rejected by the High Court on an irrelevant ground that they did not explain the injury found on one of the persons present at the site of occurrence of the crime. [Arunachalam v. Sadhanantham, AIR 1979 SC 1284]

e) Where the High Court applied an unrealistic standard of "implicit proof' rather than that of "proof beyond reasonable doubt' and therefore evaluated the evidence in a flawed manner. [State of UP v. Ranjha Ram, AIR 1986 SC 1959]

f) Where the High Court rejected circumstantial evidence, based on an exaggerated and capricious theory, which were beyond the plea of the accused; [State of Maharashtra v. ChampalalPunjaji Shah,

AIR 1981 SC 1675] or where acquittal rests merely in exaggerated devotion to the rule of benefit of doubt in favour of the accused. [Gurbachan v. Satpal Singh, AIR 1990 SC 209].

g) Where the High Court acquitted the accused on the ground that he had no adequate motive to commit the offence, although, in the said case, there was strong direct evidence establishing the guilt of the accused, thereby making it unnecessary on the part of the prosecution to establish "motive.' [State of AP v. Bogam Chandraiah, AIR 1986 SC 1899]

31.2.2. Where acquittal would result is gross miscarriage of justice:

a) Where the findings of the High Court, disconnecting the accused persons with the crime, were based on a perfunctory consideration of evidence, [State of UP v. Pheru Singh, AIR 1989 SC 1205] or based on extenuating circumstances which were purely based in imagination and fantasy. [State of Uttar Pradesh v. Pussu 1983 AIR 867 (SC)]

b) Where the accused had been acquitted on ground of delay in conducting trial, which delay was attributable not to the tardiness or indifference of the prosecuting agencies, but to the conduct of the accused himself; or where accused had been acquitted on ground of delay in conducting trial relating to an offence which is not of a trivial nature. [State of Maharashtra v. ChampalalPunjaji Shah, AIR 1981 SC 1675] [Source : Durga Das Basu - "The Criminal Procedure Code, 1973" Sixth Edition Vol.II Chapter XXIX]"

18 . To begin with this Court finds appropriate to analye the ocular testimony of the prosecution witnesses.

19. P.W. 1 Sri Som Pal Singh entered into the witness box and had deposed that he had offered various gifts at the time of marriage of the deceased daughter which were as per his capacity, however, the same was found to be insufficient and additional demand of Rs. 2 lakhs was sought to be made and when the same was not fulfilled then on 24.08.2015 the accused disposed of her daughter while strangulating her showing it to be a suicide and informed about the said offence of 24.08.2015 at 06:30 in the evening. It has been further deposed that the first informant P.W. 1 immediately rushed to the in-laws place along with his wife and one Sri Harfool, Mukhram and Kafi who were his close associates and at that point of time he saw his daughter in a dead condition lying over a cot and the accused had run away from their house and were not traceable. It has been further deposed that the natives who were present in the site of occurrence apprised him that in the morning itself, the deceased was subjected to beating and they were further threatened that they should not disclose the said fact and rather the informant was also threatened. Even threat was also administered that in case, the first informant does not enter into settlement with the accused then the will have to face the music. According to P.W. 1 his daughter sustained several injuries and he on the next day in the morning proceeded to the police station for lodging of the FIR, however, he was detained till the noon but no FIR was lodged and then he came back and saw that the dead body of his daughter was missing and it was forcefully taken away by the accused and the accused have consigned the dead body of the deceased on flames and threw away the ashes in the Ganga river. As per the P.W. 1 proceedings were undertaken u/s 156 (3) Cr.P.C. on 27.11.2015 and the FIR has been lodged.

20. As P.W. 2 mother of the deceased Smt. Bhuri W/o of P.W. 1 Som Pal

appeared to give their testimony. According to the testimony of P.W. 2 she also deposed that the husband of the deceased being accused-respondent no. 1 called upon the P.W. 1 apprising the fact that the deceased had died and she along with her husband, P.W.1 and Bhoopram and other family members proceeded to the house of in-laws of their daughter and the accused has ran away from the place of occurrence and she returned along with her family members on the next day at 12 noon.

21. So far as P.W. 3 is concerned, he happens to be the Station House Officer, Kotwali and P.W. 4 is Constable Lokesh Kumar who are formal witnesses.

22. Before proceeding further, this Court has to bestow its consideration about the fact as to whether delay in lodging of FIR would demolish the case of the prosecution or not and whether the prosecution was able to prove beyond doubt that the ingredients so contained u/s 498A, 304B IPC and 113B of the Evidence Act stands attracted and lastly the fact as to whether the accused are liable to be chaired with the thrown of acquittal or put behind the bars while being convicted.

23. So far as the issue with regard in delay in lodging of the FIR and its effect on the prosecution theory is concerned, a remarkable fact need to be noticed that as per the prosecution they received the information regarding commission of crime on 24.08.2015 at 06:30 in the evening through telephonic call wherein it was stated that stated that the crime was committed on 24.08.2015 at 06:00 in the evening. Notably P.W. 1 Som Pal (father of the deceased) and P.W. 2 Smt. Bhuri (mother of the deceased) along with Harfool, Mukhram and kafi proceeded to the house of in-laws of the deceased whereat the dead body of the deceased was found lying over a cot. Meaning thereby, the P.W.1 and P.W. 2 had full knowledge about the death of the daughter and further as per prosecution, the accused herein were not in the house but they were absconding. As per prosecution, on the next day in the morning P.W. 1 Som Pal proceeded to concerned police station for lodging of FIR, however, the same was not lodged and he was detained till noon and when he came back, the dead body of the deceased was found missing. Normally, when the parents are confronted with a situation wherein their daughter had died and the allegation is that she had been strangulated that too in her in-laws place and the parents are witnessing the dead body of the deceased then it is highly implorable and inconceivable that FIR would not be lodged promptly and a person will wait for the next day to get the FIR lodged and in case FIR is also not lodged then he would wait for such a long time and undertake proceedings u/s 156 (3) Cr.P.C. that too after approximately more than three months. The learned trial court has analysed the said issue while recording findings that though it had been pleaded before it by the prosecution that applications were filed on 01.09.2015, 25.09.2015, 05.10.2015, 28.11.2015 for lodging of the FIR before the police station but when the same was not lodged then on 18.11.2015 a registered letter was sent to the Superintendent of Police for lodging of the FIR and proceedings were undertaken on 27.11.2015 u/s 156 (3) Cr.P.C.

24. Though it is well settled that delay in lodging of FIR cannot be the sole ground to demolish the prosecution case, however, what is to be seen is the explanation so offered by the prosecution. Even otherwise,

each and every case is to be judged according to its own fact. Additional fact needs to be noticed is this that according to the prosecution case on 24.08.2015 the P.W. 1 and P.W. 2 and others found the dead body of the deceased in her in-laws place. Further as per the prosecution the body itself was consigned to flames and ashes whereof was thrown in the Ganga river. The reaction of a normal person would be that a prompt FIR should be lodged, however, barring writing of letters there is nothing on record to give explanation regarding delay in lodging of FIR. More so, no independent witness has been put up in the witness box so as to prove the fact that the deceased died in the accused house and the body itself was consigned to flame and let of.

25. Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory has observed in the case of **(1973) 3 SCC 114 Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala** wherein para 11 following was mandated:

11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.

26. In the case of **Tara Singh and others Vs. State of Punjab 1991 Supp (1) SCC 536**, the Hon'ble Apex Court in paragraph 4 has observed as under:-

4. It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some

time to go to the police station for giving the report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case.

27. Yet, in the case of **P. Rajagopal and others Vs. State of Tamil Nadu** (2019) 5 SCC 403, the Hon'ble Apex Court in paragraph 12 has held as under:-

12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely.

28. Keeping aside the fact regarding the explanation so sought to be offered by the prosecution in delay in lodging of the FIR, another fact needs to be noticed that in case taking the prosecution case into face value another question arises that no proceedings what so ever either by filing a written complaint culminating into lodging of the FIR or undertaking any proceeding with respect to demand of dowry was restored to. The prosecution has in fact miserably failed to show any document or evidence so as to reinforce their stand that dowry was being sought to be demanded and the same become the basis for commission of the crime. As per the prosecution postal receipt of lodging of FIR with relation to the commission of the crime has been produced as material Ex.-2 however, the same is thoroughly insufficient to rope in the accused for commission of crime particularly in the light of the enactment so contained u/s 498A, 304B IPC read with section 113B of the Evidence Act.

29. The onus to prove that the accused has committed offence u/s 498A, 304B of the IPC is heavily upon the prosecution. Nonetheless, the same should be proved beyond doubt. The prosecution has completely failed to prove the same in this regard.

30. As per the testimony of the P.W. 1 and P.W. 2, they were present and they had seen the dead body of the deceased on 24.08.2015. Further according to P.W. 1 Som Pal who happens to be the father of the deceased, he witnessed that several injuries sustained by the deceased, however, so far as the P.W. 2 is concerned, she had taken the dead body of the deceased in her village Patariya and on 25.08.2015 according to the statement of P.W. 2, she in her deposition during the ritual of death ceremony while giving bath

to her deceased daughter she found certain marks on her neck and she apprised the said fact to her husband P.W.1 Som Pal. The aforesaid statement of P.W. 2 Bhuri Devi who happens to be mother of the deceased puts the last nail upon the coffin of the prosecution's case as once the mother of the deceased P.W. 2 had given bath to the deceased on the next day on 25.08.2015 in her own house and in her presence the ritual ceremony pertaining to death (cremation) was done then how it could be stated by the P.W. 1 Som Pal that the accused along with certain influential and daring persons disposed of the body of the deceased while consigning her to flames and throwing the ashes in river Ganga. Thus there appears to be material contradictions in the statement of P.W. 1 and P.W. 2 who happens to be the father and the mother of the deceased.

31. It is also inconceivable that in the death ceremony mother would be present and not the father. Thus the very basis of the allegation which forms the part of investigation itself is false, concocted and the story has been implanted just to implicate the accused herein.

32. The learned trial court has further found inconsistency in the statement and contradictions also between the P.W. 1 and P.W. 2 and according to P.W.1 Som Pal he received information on 24.08.2015 at 06:30 in the evening on telephone that the accused has killed the deceased however, on the other hand Bhuri Devi in her deposition has come up with stand that as per the version of the accused, the accused had stated that his daughter died. These are material contradictions which cannot be lightly ignored as they have to be considered together with the other factors also.

33. Another aspect which also assumes significance is the medical angle. Present case is a case wherein there has been no postmortem done, thus, the court below was denuded of its benefit to go through the postmortem report. Postmortem report is a vital document (evidence) which could be a game changer. Once it has come on record that P.W. 2 Bhuri Devi had taken the body of the deceased to her village and before cremation got the last ceremony of bathing done and further the fact that she noticed certain marks around her neck which could be the cause of strangulation then in that event the matter ought to have been reported to the police officials and postmortem done.

34. The entire series of events and sequence undisputedly point out that every attempt has been sought to be made by the prosecution to dispose of the body while putting blame upon the accused. Thus, this Court cannot take a different view from the view taken by the learned trial court that too in absence of any postmortem report.

35. Even otherwise, the prosecution has not produced any independent witness to step-in in the witness box to support their case as according to the prosecution case, Mukhram, Harfool, Mangal Dev and Chhote Lal were also present on 24.08.2015 when the P.W.1 Som Pal had gone to the in-laws place of the deceased. They could have come forward and deposed and the entire truth whatever surfaced. Nonetheless, it has come on record that the Investigating Officer during the course of investigation had made queries while asking questions from the nearby persons who are present on the place of occurrence and according to him statements were made that the deceased wanted to extract money from the accused

fractions and she was creating all sorts of dramas in that regard.

36. After marshalling the entire fact on record inclusive of ocular testimony of the witnesses as well as the documents and evidences so adduced thereon, this Court finds that the prosecution theory proceeds on weak premises. There are major contradictions in the statements of P.W.1 and P.W. 2 occasioned with delay in lodging of the FIR which sans explanation, absence of postmortem report and the fact that the last rites of the deceased was done by the prosecution itself though blame has been sought to be put upon the prosecution for disposing of the dead body in flames and throwing the same in the river Ganga, coupled with the fact that no independent witness has stepped into the witness box to support the case of the prosecution.

37. After bestowing anxious consideration, this Court finds that the judgment of acquittal passed by the learned trial court does not suffer from any illegality or perversity as the learned trial court has meticulously analysed the case from all corners of law while appreciating the ocular testimony and evidences so adduced by the prosecution. Notably, there does not exist any compelling or substantive ground to interfere with the judgment of acquittal while substituting it by conviction. The view so taken by the learned trial court is possible view and need not to interfere.

38. Resultantly, no ground is made as to accord leave to appeal and accordingly, the same is rejected.

39. As the leave to file the present appeal stands rejected thus, the present appeal so instituted at the behest of the State-appellant u/s 378 (3) of the Cr.P.C. stands **dismissed.**

(2022) 8 ILRA 517
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 294 of 2022

State of U.P. ...Appellant
Versus
Rajendra & Ors. ...Respondents

Counsel for the Appellant:
Sri Shiv Kumar Pal, Sri Ratan Singh, A.G.A.

Counsel for the Respondents:

Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 313 & 378(3) - Indian Penal Code,1860 - Sections 201 & 302: - Government Appeal – against order of Acquittal – offence of Murder - missing report - FIR against unknown - missing element of motive - no nay eye witness - no any recital of enmity - no recovery - chain to link the accused while commissioning the crime is itself missing - Names of accused persons were come up through an extra judicial confession alleged to be made before PW-11 - it is Court held that - an Extra Judicial Confession is a weak evidence and same cannot be the sole ground to hold conviction until unless circumstantial evidence & other materials do indicate and mark that offence has been committed Trial court has not committed any perversity in acquitting the accused - Court further finds that inability to take a different view from the view so taken by the learned Trial court in a shape of an appeal from the order of acquittal cannot be stretched too far in view of law laid down by the Hon'ble Apex Court thus, leave to appeal rejected even though same is not a case worth granting leave to appeal - Since, application for granting leave

to appeal is rejected - the Appeal stands dismissed. (Para – 34, 39, 40, 41, 42, 43)

Appeal Dismissed. (E-11)

List of Cases cited: -

1. Tota Singh & anr. Vs St. of Pun. (1987) 2 SCC 529,

2. Ramesh Babulal Doshi Vs St. of Guj. (1996) 9 SCC 225,

3. Rajasthan Vs St. of Guj. (2003) 8 SCC 1870,

4. St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755,

5. Chandrappa & ors. Vs St. of Karn. (2007) 4 SCC 415,

6. Ghurey Lal Vs St. of U.P. (2008) 10 SCC 450,

7. Siddharth Vashishta @ Manu Sharma Vs St. (NCT of Delhi) (2010) 6 SCC 1,

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

9. Ganpat Vs St. of Har. (2010) 12 SCC 59,

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Mah. (2010) 13 SCC 657,

11. St. of UP Vs Naresh (2011) 4 SCC 324,

12. M.P. Vs Ramesh (2011) 4 SCC 786,

13. Jayaswamy Vs St. of Karn. (2018) 7 SCC 219,

14. Jafarudheen & ors. Vs St. of Kerala (JT 2022 (4) SC 445,

15. Government Appeal No. 3804/2001 (St. of UP Vs Subedar & ors.)

16. Virendra Singh Vs St. of U.P. & ors. (2022 (3) ADJ 354,

17. Mohd. Azad @ Samin Vs St. of W. B., 2008 (15) SCC 449.

18. Sansar Chand Vs St. of Raj., 2010 (10) SCC 604,

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

20. Ram Lal Vs St. of H. P., 2019 (17) SCC 411.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is an appeal under Section 378(3) Cr.P.C., 1973 (hereinafter referred as Cr.P.C., 1973) at the behest of State of U.P. instituted against the judgment and order of acquittal dated 9.2.2022 passed by Additional District and Sessions Judge, Court No. 3, Aligarh in Sessions Trial No. 943 of 2010 (State of U.P. vs. Rajendra and others) arising out of Case Crime No. 32 of 2009, under Section 302 and 201 IPC, Police Station Lodha, District Aligarh.

2. The factual matrix of the case as worded in the present appeal are that one Munna Lal s/o Munshi Lal resident of village Kadauli, Police Station Lodha, District Aligarh is a watchman of village Kadauli. According to the prosecution case the resident villagers had gone in the north side of the pitch road towards the land of the Land Management Committee for showering water whereat babool trees were planted and in the bushes so enclosing the babool tree they saw a dead body of unknown woman. On being apprised of the said event Munna Lal s/o Munshi Lal proceeded to the site of occurrence whereat he witnessed that an unknown woman was lying over there and a piece of cloth was tied on the neck in a form of a ring, which according to him was for strangulating her and there was a piece of cloth so scattered on the body, which was in burnt condition so as to consign her in flames. According to the prosecution he approached the concerned police station on 16.2.2009 for lodging of first information report. Record further reveals that that one Sri Dev Dutt Sharma s/o Net Ram Sharma resident of Sarsaul Masjid lane, Police

Station Banna Devi, District Aligarh had approached the police station Lodha before the Station House Officer in District Aligarh with a statement that he had come to know while reading in a newspaper that a woman corpus was found. According to Dev Dutt Sharma s/o Net Ram Sharma he had gone to the mortuary, wherein he identified the lady as her mother-in-law and accordingly his wife being the daughter of the deceased being Smt. Tarawati on 16.2.2009 reported the matter before the Senior Superintendent of Police, Aligarh. As per the record the first information report was lodged against unknown persons, however, during course of the investigation the accused, who are four in number, were shown to have commissioned the crime and accordingly charge-sheet was submitted in Case Crime No. 32 of 2009 purported to be under Section 302 and 201 IPC.

3. In order to bring home the charges as many as following ten prosecution witnesses were examined:-

1.	Munna Lal	P.W.-1
2.	Rajendra	P.W.-2
3.	Anoop Kumar	P.W.-3
4.	Dev Dutt Sharma	P.W.-4
5.	Vishnu	P.W.-5
6.	S.I. Raj Kumar Singh	P.W.-6
7.	I.O. Ins. Jagpal Singh	P.W.-7
8.	Dr. Suresh Chandra Goel	P.W.-8
9.	S.I. Hariom Sharma	P.W.-9
10.	Ins. Madan Pal Singh	P.W.-10
11.	Veer Pal Singh	P.W.-11

4. The following documentary evidence were exhibited to bring home charges:-

1.	Written Complaint	Ex. A-1
2.	Supurdginama	Ex. A-2
3.	Complaint of Dev Dutt Sharma	Ex. A-3
4.	First Information Report	Ex. A-4
5.	Copy of the report	Ex. A-5
6.	Site Plan	Ex. A-6
7.	Postmortem report	Ex. A-7
8.	Panchayatnama of the deceased	Ex. A-8
9.	Letter no. 33 of Cons.	Ex. A-9
10.	Letter no. 13	Ex. A-10
11.	Letter of the Incharge Officer, Photography Field Unit, Aligarh	Ex. A-11
12.	Letter of the Incharge Officer, Finger Print Bureau, Aligarh	Ex. A-12
13.	Letter of the Reserve Inspector	Ex. A-13
14.	Letter of C.M.O.	Ex. A-14
15.	Letter of Incharge Postmortem Incharge	Ex. A-15
16.	Photo	Ex. A-16
17.	Letter of Postmortem duty mortuary	Ex. A-17
18.	Charge-sheet	Ex. A-18

5. The record further reveals that the medical report suggested that the deceased had sustained burn injuries on face, head,

neck and upper portion of both the hands and redning was present but bulla (fafola) was not present. As per the internal examination of the deceased it was reported that the ribs, which was on the right hand of the chest was fractured and redness was found in the breathing pipe as well as in both the lungs. According to medical report the cause of death was strangulation and the duration of the death was 2-4 days prior to the postmortem, which was conducted on 17.2.2009. As per the prosecution version there was no eye witness to the crime. Consequent to the submission of the charge-sheet the charges were read over to the accused, who pleaded innocence and claimed to be tried. Defence was taken by the accused, who are four in number, that they have been unnecessary implicated in the said case.

6. We have heard Sri Ratan Singh, learned A.G.A. for the State and perused the record.

7. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would be required to be discussed.

8. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **Tota Singh and another vs. State of Punjab,** reported in **(1987) 2 SCC 529**, the Hon'ble Apex Court in paragraph-6 has observed as under: -

"6. The High Court has not found in its judgment that the reasons given by the learned Sessions Judge for discarding the testimony of PW 2 and PW 6 were either unreasonable or perverse. What the High Court has done is to make an independent reappraisal of the evidence on its own and to set aside the acquittal merely on the ground that as a result of such reappreciation, the High Court was inclined to reach a conclusion different from the one recorded by the learned Sessions Judge. This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a reappreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."

9. Further, in the case of **Ramesh Babulal Doshi vs. State of Gujarat**, reported in **(1996) 9 SCC 225**, in paragraph

7, the Hon'ble Apex Court observed as under:

"7. Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above-quoted conclusions. This Court has repeatedly laid down that the mere fact that a 'view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."

10. In the case of **State of Rajasthan vs. State of Gujarat**, reported in **(2003) 8 SCC 180**, in paragraph 7, the Hon'ble Apex Court observed as under:

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.[1]) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra[2], Ramesh Babulal Doshi v. State of Gujarat[3] and Jaswant Singh v. State of Haryana."

11. In the case of **State of Goa vs. Sanjay Thakran**, reported in **(2007) 3 SCC 755**, in paragraph 15, the Hon'ble Apex Court observed as under:

"15. Further, this Court has observed in Ramesh Babulal Doshi v. State of Gujarat: (SCC p. 229, para 7)

"7.... This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then - and then only - reappraise the evidence to arrive at its own conclusions." and in State of Rajasthan v. Raja Ram8: (SCC pp. 186-87, para 7) -

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra 10, Ramesh Babulal Doshi v. State of Gujarat and Jaswant Singh v. State of Haryana11"."

12. Further in the case of **Chandrappa and others vs. State of Karnataka,** reported in **(2007) 4 S.C.C. 415**, the Apex Court has observed as under:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an

appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

13. In the case of **Ghurey Lal vs. State of U.P.,** reported in **(2008) 10 SCC 450**, in paragraph 43 and 75, the Hon'ble Apex Court observed as under:

"43. The earliest case that dealt with the controversy in issue was Sheo Swarup v. King Emperor. In this case, the ambit and scope of the powers of the appellate court in dealing with an appeal against acquittal has been aptly a elucidated by the Privy Council. Lord Russell writing the judgment has observed as under (at AIR p. 230): (IA p. 404)

"... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he b has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

The law succinctly crystallised in this case has been consistently followed by this Court. On proper analysis of the ratio and findings of this case, it is revealed that the findings of the trial court are based on the fundamental principles of the criminal jurisprudence. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the trial court. The appellate court undoubtedly has wide powers of reappreciating and re-evaluating the entire evidence but it would be justified in interfering with the judgment of acquittal only when the judgment of the d trial court is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.

...

75. On careful analysis of the entire evidence on record, we are of the view that the reasons given by the High Court for reversing the judgment of acquittal is unsustainable and contrary to settled principles of law. The trial court has the advantage of watching the demeanour of

the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable."

14. In the case of **Siddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi),** reported in **(2010) 6 SCC 1**, in paragraph 303(1), the Hon'ble Apex Court observed as under:

"303. Summary of our conclusions:

(1) The appellate court has all the necessary powers to re-evaluate the evidence let in before the trial court as well as the conclusions reached. It has a duty to specify the compelling and substantial reasons in case it reverses the order of acquittal passed by the trial court. In the case on hand, the High Court by adhering to all the ingredients and by giving b cogent and adequate reasons reversed the order of acquittal. ..."

15. In the case of **Babu vs. State of Kerala**, reported in **(2010) 9 SCC 189**, in paragraph 12 and 19, the Hon'ble Apex Court observed as under:

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P.[1], Shambhoo Missir v. State of Bihar2, Shailendra Pratap v. State of U.P.3, Narendra Singh v. State of M.P.4, Budh Singh v. State of U.P.5, State of U.P. v. Ram Veer Singh6, S. Rama Krishna v. S. Rami Reddy7, Arulvelu v. State8, Perla Somasekhara Reddy v. State of A.P.9 and Ram Singh v. State of H.P.10).

...

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

16. In the case of **Ganpat vs. State of Haryana**, reported in **(2010) 12 SCC 59**, in paragraph 14 and 15, the Hon'ble Apex Court observed as under:

"14. The only point for consideration in these appeals is whether there is any ground for interference against the order of acquittal by the High Court. This Court has repeatedly laid down that the first appellate court and the High Court while dealing with an appeal is entitled and obliged as

well to scan through and if need be reappreciate the entire evidence and arrive at a conclusion one way or the other.

15. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal: (i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. (Vide Madan Lal v. State of J&K[1], Ghurey Lal v. State of U.P.2, Chandra Mohan Tiwari v. State of M.P.3 and Jaswant Singh v. State of Haryana4.)"

17. In the case of **Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra**, reported in **(2010) 13 SCC 657**, in paragraph 38, 39 and 40, the Hon'ble Apex Court observed as under:

"38. It is a well-established principle of law, consistently reiterated and followed by this Court that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanour of the witnesses is the best judge of the credibility of the witnesses.

39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration. The appellate court should bear in mind the presumption of innocence of the accused, and further, that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference.

40. In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding material or by

taking into consideration irrelevant/ inadmissible material. A finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (See Balak Ram v. State of U.P.9, Shailendra Pratap v. State of U.P.10, Budh Singh v. State of U.P.11, S. Rama Krishna v. S. Rami Reddy¹2, Arulvelu v. State 13, Ram Singh v. State of H.P.14 and Babu v. State of Kerala¹5.)"

18. In the case of **State of U.P. vs. Naresh**, reported in **(2011) 4 SCC 324,** in paragraph 33 and 34, the Hon'ble Apex Court observed as under:

"33. We are fully aware of the fact that we are entertaining the appeal against the order of acquittal. Thus, the Court has to scrutinise the facts of the case cautiously and knowing the parameters fixed by this Court in this regard.

34. Every accused is presumed to be innocent unless his The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India. The law in this regard is well settled that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. An appellate court must also consider whether the court below has placed the burden of proof incorrectly or failed to take into consideration any admissible evidence or had taken into consideration evidence brought on record contrary to law? In exceptional cases, whether there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of acquittal. So, in order to warrant interference by the appellate court, a finding of fact recorded by the court below must be outweighed evidence or to suffer from the vice of guilt is proved. such finding if outrageously defies logic as irrationality. [Vide Babu v. State of Keralall and Sunil Kumar Sambhudayal Gupta (Dr.)8.]"

19. In the case of **State of M.P. vs. Ramesh**, reported in **(2011) 4 SCC 786**, in paragraph 15, the Hon'ble Apex Court observed as under:

"15. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to reappreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal."

20. The Apex Court recently in **Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,** has laid down the principles for laying down the powers of

appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"13. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

14. It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

21. The Apex Court recently in **Jafarudheen & Ors. vs. State of Kerala, JT 2022(4) SC 445** has observed as under:-

"DISCUSSION Scope of Appeal filed against the Acquittal:

25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. Precedents:

Mohan @Srinivas @Seena @Tailor Seena v. State of Karnataka, [2021 SCC OnLine SC 1233] as hereunder: -

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under : (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179])

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v.

Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

14.3. In the recent decision of Vijay Mohan Singh [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586], this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of this Court right from 1952 onwards. In para 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai [Umedbhai Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108]. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence.

This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case.'

31.1. In Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320], the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While

confirming the order of conviction passed by the High Court, this Court observed in para 8 as under:

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 : 1996 SCC (Cri) 972] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case.'

31.2. In K. Ramakrishnan Unnithan [K. Ramakrishnan Unnithan v. State of Kerala, (1999) 3 SCC 309: 1999 SCC (Cri) 410], after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653], in para 5, this Court observed and held as under:

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on

behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State [Surajpal Singh v. State, 1951 SCC 1207 : AIR 1952 SC 52]; Wilayat Khan v. State of U.P. [Wilayat Khan v. State of U.P., 1951 SCC 898 : AIR 1953 SC 122]) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.'

31.4. In K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305], this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."

N. Vijayakumar v. State of T.N., [(2021) 3 SCC 687] as hereunder: -

"20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325 has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432)

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. Further in the judgment in Murugesan [Murugesan v. State, (2012) 10 SCC 383: (2013) 1 SCC (Cri) 69] relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the

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23. Further, in Hakeem Khan v. State of M.P., (2017) 5 SCC 719 : (2017) 2 SCC (Cri) 653 this court has considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court. Para 9 of the judgment reads as under: (SCC pp. 722-23) "9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This reason, coupled with the fact that the only independent

witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned counsel for the respondent may be right in stating that the trial court went overboard in stating that the complainant party was the aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case. This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

24. By applying the abovesaid principles and the evidence on record in the case on hand, we are of the considered view that having regard to material contradictions which we have already noticed above and also as referred to in the trial court judgment, it can be said that acquittal is a "possible view". By applying the ratio as laid down by this Court in the judgments which are stated supra, even assuming another view is possible, same is no ground to interfere with the judgment of acquittal and to convict the appellant for the offence alleged. From the evidence, it is clear that when the Inspecting Officer and other witnesses who are examined on behalf of the prosecution, went to the office of the appellant-accused, the appellant was not there in the office and office was open and people were moving out and in from the office of the appellant. It is also clear from the evidence of PWs 3, 5 and 11 that the currency and cellphone were taken out from the drawer of the table by the appellant at their instance. There is also no reason, when the tainted notes and the cellphone were given to the appellant at 5.45 p.m. no recordings were made and the appellant was not tested by PW 11 till 7.00 p.m."

22. This Court had the occasion to consider the scope and the extent of interference in the cases, wherein this Court has to delve into the issues, which gets encompassed in the proceedings, where the judgment and the order under challenge is of acquittal and this Court in **Government Appeal no. 3804 of 2001 (State of U.P. vs. Subedar and others)**, has held that it is a settled principle of law that while exercising powers even if two reasonable views/conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court.

23. Recently, the Division Bench of this Court in the case of **Virendra Singh vs. State of U.P. and others reported in 2022(3) ADJ 354** had held that while deciding appeals against acquittal, the High Court has to first record its conclusion on the question whether approach of the Trial Court dealing with the evidence was patently illegal or the conclusion arrived was based on no evidence or it was equated by perversity and in case two views are possible then the High Court should detain itself from the order of acquittal.

24. On the contours of the decisions, referred to hereinabove, as well as the legal proposition so culled out, the judgment of the Trial Court is to be scanned and scrutinized.

25. In the present case in hand the prosecution produced as many as eleven witnesses in order to bring home the

charges. Sofar as P.W.-1 being Munna Lal is concerned, he had lodged the first information report on 16.2.2009 on the basis of information, which he received against unknown persons. P.W.-4, who happened to be the son-in-law of the deceased being Dev Dutt Sharma in his statement has come up with the stand that the deceased Smt. Ramshree used to stay with P.W.-4-Dev Dutt Sharma and in his examination-in-chief it was alleged that on 14.2.2009 the deceased Smt. Ramshree was approached by two unknown persons at 09 O'clock in the morning for the purpose of purchase of buffaloes and Smt. Ramshree being deceased proceeded with the aforementioned two unknown persons and did not return back despite constant search about her whereabouts. In the statement of P.W.-4-Dev Dutt Sharma it was stated that when the deceased did not return back to the house then on 16.2.2009 the wife of P.W.-4-Dev Dutt Sharma being Smt. Tarawati lodged a missing report on 16.2.2009 and the same was in the backdrop of the fact that P.W.-4-Dev Dutt Sharma read certain news in the newspaper, which according to him was referable to the discovery of a body of lady, which matched with his mother-in-law and accordingly, he went to the mortuary and identified the deceased.

26. The record further reveals that in the complaint so lodged before the police station by P.W.-4-Dev Dutt Sharma the accused was not marked so as to indicate the commission of the said offence and rather to the contrary the Exhibit 3 which happened to be a complaint also did not mention the fact that the deceased on 14.2.2009 had proceeded with two unknown persons at 09 O'clock for purchase of buffaloes. Sofar as P.W.-5 being Vishnu is concerned, he happens to son of P.W.-4-Dev Dutt Sharma and according to the deposition on 14.2.2009 at 09 O'clock in the morning one Santosh Kumar alongwith an unknown person had proceeded to his house and the mother-in-law of P.W.-4-Dev Dutt Sharma were with them. The record further reveals that P.W.-5, Vishnu is a student of 9th class. One of the other prosecution witness whose testimony is to be taken into account is Veer Pal Singh, who in his statement under Section 161 Cr.P.C., which Paper No. 13 on 6.7.2009 about four and a half month after lodging of the first information report has come up with the stand that one of the accused Rajendra, Smt. Meena and Santosh have given their extra judicial confession regarding commission of the crime. The testimony of the aforesaid prosecution witnesses was the basis for bringing home the charges while holding the accused guilty.

27. In order to delve into the question as to whether the order passed by the learned trial court acquitting the accused suffers from perversity or there is a strong case, which will lead to conviction of the accused, the relevant aspects of the matter needs to be considered.

28. The present case does not fall within the parameters of eye witness account as there is no witness, who had seen the commission of the crime by the accused. As a matter of fact, the deceased was staying with P.W.-4-Dev Dutt Sharma and the allegations so pointed out clearly shows that on 14.2.2009 two unknown persons approached the house of P.W.-4-Dev Dutt Sharma and took away the deceased in a motorcycle for the purpose of purchase of buffaloes.

29. Record further reveals that P.W.-4-Dev Dutt Sharma was not present at the time when the alleged incident took place. He was somewhere outside and the only witness, who saw and witnessed the fact that two unknown persons took away the

deceased is P.W.-5, Vishnu. P.W.-5, Vishnu in his statement has deposed that on 14.2.2009 at 09 O'clock in the morning Santosh Kumar alongwith an unknown person took away the deceased. The said fact was not even mentioned in the complaint so lodged by the P.W.-4-Dev Dutt Sharma when the same was also recorded in the case diary on 18.2.2009. The record further reveals that on 7.6.2009 in Parcha No. 11 of the case diary, after a period of three and a half month the theory regarding taking away of the deceased from the house of P.W.-4-Dev Dutt Sharma was pointed out. It is also come on record that on 14.2.2009 in the house, P.W.-5-Vishnu and daughter of P.W.-4-Dev Dutt Sharma being Jaimala were present. The record further reveals that on 14.10.2009 after a period of eight months the Investigating Officer in case diary being Parcha No. 29-A recorded the fact that one Santosh Kumar and Pappu, who happened to be accused nos. 3 and 4 had come on 14.2.2009 in the house of P.W-4, Dev Dutt Sharma and took away the deceased. The said fact even did not find mention in the statement purported to be under Section 161 Cr.P.C. In the deposition of P.W.-5 being Vishnu he has stated in cross that he had narrated the fact to his father being P.W-4, Dev Dutt Sharma that the deceased was taken away by the accused no. 3 and others.

30. Another aspect, which needs to be noticed is that the accused no. 3 being Santosh Kumar s/o Ram Narain happened to be uncle of P.W.-5 and it is highly improbable that he would not recognize and forget the close relative.

31. This Court has also to bear in mind that on 14.2.2009 the deceased when missing from 09 O'clock in the morning, however, first information report with regard to the same is being lodged on 16.2.2009 after enormous delay. The learned trial court has meticulously analyzed the matter with regard to lodging of complaint / missing report after enormous delay as according to the learned trial court no explanation worth consideration has been offered in that regard besides other relevant factors for determination as to whether crime was committed or not.

32. Insofar as the element of motive is concerned for commission of the crime P.W.-4, Dev Dutt Sharma has deposed that motive existed for commission of the crime as the accused Rajendra and Smt. Meena wanted to take away the share proceeds of the land so disposed of by the deceased being eight and a half bigha. According to P.W.-4, Dev Dutt Sharma the deceased was living with her son-in-law and she had kept the sale proceeds to the tune of Rs. 6 lakhs in bank and post office, which became the eyesore. He has further deposed that the deceased has lodged complaint against the accused in police station Gabhana that the accused used to beat the deceased and thus he was under suspicion that the accused has abducted her and disposed her. Taking clue from the deposition of P.W.-4, Dev Dutt Sharma onething is to be noticed that the accused Rajendra and Meena are resident of village Kalua as well as P.W.-4, Dev Dutt Sharma with the deceased used to live in village Sarsaul, which are two different villages. Making bald and vague allegations while threatening and administer beating no details of the date and time had been indicated. Even in the complaint so sought to be lodged by the prosecution there is no recital of any enmity or even an allegation of beating and usurping of an amount of Rs. 6 lakhs. However, the said allegations saw the light

of the day on 7.9.2009, which was reduced in writing in case diary Parcha No. 11 after a period of seven and a half month.

33. Coming to the deposition of P.W.-11, Veer Pal Singh, who has alleged that an extra judicial confession was sought to be made before him regarding commission of the crime and the same also got surfaced in Parcha No. 13 of the case diary on 6.7.2009 after four and a half month.

34. Extra judicial confession is a weak evidence and the same cannot be the sole ground to hold conviction until unless circumstantial evidence and other materials do indicate and mark that offence has been committed by the accused.

35. The Hon'ble Apex Court in the case of **Mohd. Azad @ Samin vs. State of West Bengal, 2008 (15) SCC 449**, in paragraphs 21 and 22 observed as under:-

21. A similar view was also taken in Jaswant Gir v. State of Punjab, 2005 (12) SCC 438 and Kusuma Ankama Rao's case, 2008 (13) SCC 257.

22. "18. Confessions may be divided into two classes i.e. judicial and extra- judicial. Judicial confessions are those which are made before a Magistrate or a court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or court. Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code of Criminal Procedure, 1973 (for short the `Code') or a Magistrate so empowered but receiving the confession at a stage when Section 164 of the Code does not apply. As to extra-judicial confessions, two questions arise: (i) were they made voluntarily? and (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person; or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24 of the Indian Evidence Act, 1872 (in short 'Evidence Act'). The law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage the question whether it is true or false does not

arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the court has to be satisfied with is, whether when the accused made the confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt. (See R. v. Warickshall) It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See Woodroffe's Evidence, 9th Edn., p. 284.) A promise is always attached to the confession alternative while a threat is always attached to the silence alternative; thus, in one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words "appear to him" in the last part of the section refer to the mentality of the accused.

19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the

evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of 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 of 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. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

36. In the case of **Sansar Chand vs. State of Rajasthan 2010 (10) SCC 604**, Hon'ble Apex Court in paragraph 29 observed as under:-

"29. There is no absolute rule that an extra judicial confession can never be the basis of a conviction, although ordinarily an extra judicial confession should be corroborated by some other material vide Thimma vs. The State of Mysore - AIR 1971 SC 1871, Mulk Raj vs. The State of U.P. - AIR 1959 SC 902, Sivakumar vs. State by Inspector of Police - AIR 206 SC 563 (para 41 & 42), Shiva Karam Payaswami Tewar vs. State of Maharashtra - AIR 2009 SC 1692, Mohd. Azad vs. State of West Bengal - AIR 2009 SC 1307."

37. Further, in the case of **Sahadevan and another vs. State of Tamilnadu 2012 (6) SCC 403**, Hon'ble Apex Court in paragraphs 14 to 16 observed as under:-

14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra- judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra- judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

15. Now, we may examine some judgments of this Court dealing with this aspect.

15.1. In Balwinder Singh v. State of Punjab [1995 Supp. (4) SCC 259], this Court stated the principle that an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

15.2. In Pakkirisamy v. State of T.N. [(1997) 8 SCC 158], the Court held that:

"8. .... It is well settled that it is a rule of caution where the court would generally look for an independent reliable

corroboration before placing any reliance upon such extra-judicial confession."

15.3. Again in Kavita v. State of T.N. [(1998) 6 SCC 108], the Court stated the dictum that:

"4. There is no doubt that conviction can be based on extrajudicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made."

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of State of Rajasthan v. Raja Ram [(2003) 8 SCC 180] stated the principle that:

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.

The Court, further expressed the view that:

"19. .... Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of 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 of attributing an untruthful statement to the accused....."

15.5. In the case of Aloke Nath Dutta v. State of W.B. [(2007) 12 SCC 230], the Court, while holding the placing of reliance on extra-judicial confession by the lower courts in absence of other corroborating material, as unjustified, observed:

"87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

X

89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof."

15.6. Accepting the admissibility of the extra-judicial confession, the Court in the case of Sansar Chand v. State of Rajasthan [(2010) 10 SCC 604] held that :-

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore, Mulk Raj v. State of U.P., Sivakumar v. State (SCC paras 40 and 41 : AIR paras 41 & 42), Shiva Karam Payaswami Tewari v. State of Mahasrashtra and Mohd. Azad v. State of W.B.]

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."

15.7. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in the case of Rameshbhai Chandubhai Rathod v. State of Gujarat [(2009) 5 SCC 740], held as under :

"53. It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true."

15.8. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. S.K. Yusuf v. State of W.B. [(2011) 11 SCC 754] and Pancho v. State of Haryana [(2011) 10 SCC 165].

The Principles

16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra- judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:

i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

ii) It should be made voluntarily and should be truthful.

iii) It should inspire confidence.

iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

vi) Such statement essentially has to be proved like any other fact and in accordance with law."

38. Further, in the case of **Ram Lal vs. State of Himachal Pradesh 2019 (17) SCC 411**, Hon'ble Apex Court in paragraphs 13 to 15 observed as under:-

"13. Extra-judicial confession is a weak piece of evidence and the court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. In order to accept extra-judicial confession, it must be voluntary and must inspire confidence. If the court is satisfied that the extra-judicial confession is voluntary, it can be acted upon to base the conviction. Considering the admissibility and evidentiary value of extra-judicial confession, after referring to various judgments, in Sahadevn and another vs. State of Tamilnadu (2012) 6 SCC 403, this court held as under:-

"15.1. In Balwinder Singh v. State of Punjab 1995 Supp (4) SCC 259 this Court stated the principle that:

"10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution.Where an

extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance."

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in State of Rajasthan v. Raja Ram (2003) 8 SCC 180 stated the principle that:

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made." The Court further expressed the view that:

"19. ... Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of 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 of attributing an untruthful statement to the accused...."

15.6. Accepting the admissibility of the extra-judicial confession, the Court in Sansar Chand v. State of Rajasthan (2010) 10 SCC 604 held that:

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimaa Raju v. State of Mysore (1970) 2 SCC 105, Mulk Raj v. State of U.P. AIR 1959 SC 902, Sivakumar v. State of Inspector of Police (2006) 1 SCC 714 (SCC paras 40 and 41 : AIR paras 41 and 42), Shiva Karam Pavaswami Tewari v. State of Maharashtra (2009) 11 SCC 262 and Mohd. Azad alias Shamin v. State of W.B. (2008) 15 SCC 449]"

14. It is well settled that conviction can be based on a voluntarily confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence. Extra-judicial confession of accused need not in all cases be corroborated. In Madan Gopal Kakkad v. Naval Dubey and another (1992) 3 SCC 204, this court after referring to Piara Singh and others v. State of Punjab (1977) 4 SCC 452 held that the law does not require that the evidence of an extra-judicial confession should in all cases be corroborated. The rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated.

15. As discussed above, if the court is satisfied that if the confession is voluntary, the conviction can be based upon the same. Rule of Prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused must be separately and independently corroborated. In the case at hand, as pointed out by the trial court as well as by the High Court, R.K. Soni (PW-2) and R.C. Chhabra (PW-3) were the senior officers of the bank and when they reached the bank for inspection on 23.04.1994, the accused submitted his confessional statement (Ex.-PW-2/A). Likewise, in the enquiry conducted by R.C. Chhabra (PW-3), the accused had given confession statement (Ex.-PW-3/A)."

39. The law so crystallized by Hon'ble Apex Court in the matters of extra judicial confession itself envisages that it is a weak evidence and it is to be supported by other factors like last seen theory, eye account, testimony, circumstantial evidence and motive. Here in the present case, the chain

to link the accused while commissioning the said crime is nowhere connected. Even otherwise, sofar as P.W-11, Veer Pal Singh is concerned, he had stated that the accused Rajendra has made an extra judicial confession before him that he has committed the crime but there happens to be no relationship between them so as to occasion the accused Rajendra to disclose and give details regarding commission of crime.

40. Apart from the same, no recovery whatsoever was made from the accused. The entire prosecution case, which starts from putting the proceeding under motion while lodging first information report or complaint does not contain any of the allegations referable to the commission of the crime by the accused. However, improvements have been sought to be made that too after lodging of first information report during the course of the investigation by adding certain things, which ought to have been the basis for lodging of the proceedings at the stage of first information report or complaints.

41. This Court after meticulously analysing the case in hand from the four corners of law while applying them to the facts of the case is not able to subscribe to the argument so sought to be raked up by learned A.G.A. as this Court finds that the trial court has not committed any perversity in acquitting the accused.

42. Moreover, this Court finds that the chain to link the accused while commissioning the crime itself is missing and the evidence so sought to be pressed into service, which includes testimony of the prosecution witness itself is weak. This Court further finds inability to take a different view from the view so taken by learned trial court as obviously while deciding the present case, which originates in a shape of an appeal from the order of acquittal cannot be stretched too far so as to even take a view once the view taken by the learned trial court is plausible. Nonetheless, presumption of double innocence is already available with the accused and in view of law laid down by Hon'ble Apex Court as referred to above this Court is not in a position to interfere with

43. We, therefore, find that it is not a case worth granting leave to appeal. The application for granting leave to appeal is rejected.

44. Since the the application for granting leave to appeal has not been granted, the appeal also stands dismissed.

(2022) 8 ILRA 542
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 312 of 2022

State of U.P. ...Appellant
Versus
Kuldeep & Anr. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
..

Criminal Law – Criminal Procedure Code, 1973 - Sections 156(3), 164, 313, 378 & 378(3), - Indian Penal Code, 1860 - Sections 34 & 364 - Government Appeal – against order of Acquittal – Complaint case - FIR

- offence of abduction - allegation that accused whom are in two numbers approached to the victim's father for taking services of his son aged about 15 years as helper in Tempo Carrier - trial court acquitted all the accused - Appeal - meticulous analyses of the ocular testimony as well as documents available on record - admittedly, in testimony of PW's - reveals that it is not a case of abduction but victim was let with accused with fee will - Appellants fails to point out any perversity or illegality in impugned acquittal order - they proceeds on weak evidence which also not make a complete chain to commission of office - held - leave to appeal rejected even though same is not a case worth granting leave to appeal - Since, application for granting leave to appeal rejected - the Appeal stands dismissed.(Para –33, 34, 37, 38, 39)

Appeal Dismissed. (E-11)

List of Cited cases: -

1. Tota Singh & anr. Vs St. of Pun. (1987) 2 SCC 529,

2. Ramesh Babulal Doshi Vs St. of Guj. (1996) 9 SCC 225,

3. Rajasthan Vs St. of Guj. (2003) 8 SCC 1870,

4. St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755,

5. Chandrappa & ors. Vs St. of Karn. (2007) 4 SCC 415,

6. Ghurey Lal Vs St. of UP (2008) 10 SCC 450,

7. Siddharth Vashishta @ Manu Sharma Vs St. (NCT of Delhi) (2010) 6 SCC 1,

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

9. Ganpat Vs St. of Har. (2010) 12 SCC 59,

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Maharashtra (2010) 13 SCC 657,

11. St. of UP Vs Naresh (2011) 4 SCC 324,

12. M.P. Vs Ramesh (2011) 4 SCC 786,

13. Jayaswamy Vs St. of Karn. 2018) 7 SCC 219,

14. Jafarudheen & ors. Vs St. of Kerala (JT 2022 (4) SC 445,

15. Government Appeal No. 3804/2001 (St. of UP Vs Subedar & ors.)

16. Virendra Singh Vs St. of UP & ors. (2022 (3) ADJ 354,

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is an appeal under Section 378(3) Cr.P.C., 1973 (hereinafter referred as "Cr.P.C., 1973') at the behest of State of U.P. instituted against the judgment and order of acquittal dated 19.2.2022 passed by Additional District and Sessions Judge, Hapur in Sessions Trial No. 56 of 2008 (State of U.P. vs. Kuldeep and another) arising out of Case Crime No. 01 of 2007, under Section 364 and 34 IPC, Police Station Hapur Dehat, District Hapur.

2. The factual matrix of the case as worded in the appeal are that the proceedings purported to be under Section 156(3) Cr.P.C. was instituted before the learned Magistrate, which transformed into lodging of first information report as Case Crime No. 01 of 2007, under Section 364 IPC, Police Station Hapur Dehat, District Hapur with an allegation that the informant, who happens to be the father of the victim, Indrajeet Singh, aged about 15 years was called upon and taken away by the accused herein, who are two in number being Kuldeep s/o Mahendra and Mahendra s/o Phool Singh and one Saurabh, who happened to be the resident of Mohalla Bheem Nagar under Police Station Hapur Dehat, District Hapur. On 2.4.2007 while offering an employment as a Cleaner of a Tempo Carrier while providing him food and lodging and an amount of Rs. 3,000/-

per month the informant on the assurance and with confidence that life, liberty and security of the victim, Indrajeet Singh, would be safeguarded by the accused herein allowed the accused to take away his son. As per the version contained in the first information report in question the son of the informant even after lapse of one month did not come back to his house and thereafter not only queries regarding the whereabouts of the victim was made at the instance of the prosecution but also constant search was made. Even infact as the per the first information report search of the victim was made from 3.5.2007 till 10.5.2007, however, the accused herein on one pretext or the other avoided presence of the victim. On the other hand, the accused herein apprised the parents of the victim that the victim was living with one Kuldeep and assured that when Kuldeep will come back with informant's son, then he would bring the victim to his parent's place. In the first information report it was also alleged that in a well planned design his son has been abducted. Pursuant to the lodging of the first information report and registration of Case Crime No. 01 of 2007 in the concerned police station, Investigating Officer was nominated to conduct investigation and thereafter site plan was also prepared and the statements of the witnesses were also recorded.

3. To bring home the charges the prosecution produced following witnesses, namely:-

1.	Sohanwati	P.W.-1
2.	Narendra	P.W.-2
3.	Indrajeet	P.W.-3
4.	Con. Kunwar Bhan Singh	P.W.-4
5.	S.I. Tilak Chand	P.W.-5

4. Consequent to the investigation so conducted by the Investigating Officer charge-sheet was submitted under Section 364 IPC read with Section 34 IPC, the case was committed to sessions, the charges were read over to the accused herein. The accused herein denied the charges and claimed to be tried.

5. In the proceeding under Section 313 Cr.P.C. the accused pleaded innocence and rather non-guilty and also came up with the stand that they are innocent and they have been falsely implicated in the said case.

6. Thereafter, the trial commenced and accordingly by virtue of the order dated 19.2.2022 the court of Additional District and Sessions Judge, Hapur in Session Trial No. 56 of 2008 acquitted the accused under Section 364 and 34 IPC.

7. Challenging the acquittal order now State of U.P. is before this Court assailing the order dated 19.2.2022 passed by Additional District and Sessions Judge, Hapur in Sessions Trial No. 56 of 2008 (State of U.P. vs. Kuldeep and another) arsing out of Case Crime No. 01 of 2007, under Section 364 and 34 IPC, Police Station Hapur Dehat, District Hapur.

8. We have heard Sri Ratan Singh, learned A.G.A., who appears for the State of U.P.

9. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would be required to be discussed.

10. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **Tota Singh and another vs. State of Punjab**, reported in **(1987) 2 SCC 529**, the Hon'ble Apex Court in paragraph-6 has observed as under: -

"6. The High Court has not found in its judgment that the reasons given by the learned Sessions Judge for discarding the testimony of PW 2 and PW 6 were either unreasonable or perverse. What the High Court has done is to make an independent reappraisal of the evidence on its own and to set aside the acquittal merely on the ground that as a result of such reappreciation, the High Court was inclined to reach a conclusion different from the one recorded by the learned Sessions Judge. This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a reappreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."

11. Further, in the case of **Ramesh Babulal Doshi vs. State of Gujarat**, reported in **(1996) 9 SCC 225**, in paragraph 7, the Hon'ble Apex Court observed as under:

"7. Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above-quoted conclusions. This Court has repeatedly laid down that the mere fact that a 'view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that

the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."

12. In the case of **State of Rajasthan vs. State of Gujarat,** reported in **(2003) 8 SCC 180**, in paragraph 7, the Hon'ble Apex Court observed as under:

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.[1]) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra[2], Ramesh Babulal Doshi v. State of Gujarat[3] and Jaswant Singh v. State of Haryana."

13. In the case of **State of Goa vs. Sanjay Thakran**, reported in **(2007) 3 SCC 755**, in paragraph 15, the Hon'ble Apex Court observed as under:

"15. Further, this Court has observed in Ramesh Babulal Doshi v. State of Gujarat: (SCC p. 229, para 7)

"7.... This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then - and then only - reappraise the evidence to arrive at its own conclusions." and in State of Rajasthan v. Raja Ram8: (SCC pp. 186-87, para 7) -

"7. There is no embargo on the appellate court reviewing the evidence

upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra 10, Ramesh Babulal Doshi v. State of Gujarat and Jaswant Singh v. State of Haryana11"."

14. Further in the case of **Chandrappa and others vs. State of Karnataka**, reported in **(2007) 4 S.C.C. 415**, the Apex Court has observed as under:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

15. In the case of **Ghurey Lal vs. State of U.P.,** reported in **(2008) 10 SCC 450**, in paragraph 43 and 75, the Hon'ble Apex Court observed as under:

"43. The earliest case that dealt with the controversy in issue was Sheo Swarup v. King Emperor. In this case, the ambit and scope of the powers of the appellate court in dealing with an appeal against acquittal has been aptly a elucidated by the Privy Council. Lord Russell writing the judgment has observed as under (at AIR p. 230): (IA p. 404)

"... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he b has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

The law succinctly crystallised in this case has been consistently followed by this Court. On proper analysis of the ratio and findings of this case, it is revealed that the findings of the trial court are based on the fundamental principles of the criminal jurisprudence. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the trial court. The appellate court undoubtedly has wide powers of reappreciating and re-evaluating the entire evidence but it would be justified in interfering with the judgment of acquittal only when the judgment of the d trial court is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.

...

75. On careful analysis of the entire evidence on record, we are of the view that the reasons given by the High Court for reversing the judgment of acquittal is unsustainable and contrary to settled principles of law. The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable."

16. In the case of **Siddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi),** reported in **(2010) 6 SCC 1**, in paragraph 303(1), the Hon'ble Apex Court observed as under:

"303. Summary of our conclusions: .

(1) The appellate court has all the necessary powers to re-evaluate the evidence let in before the trial court as well as the conclusions reached. It has a duty to specify the compelling and substantial reasons in case it reverses the order of acquittal passed by the trial court. In the case on hand, the High Court by adhering to all the ingredients and by giving b cogent and adequate reasons reversed the order of acquittal. ..."

17. In the case of **Babu vs. State of Kerala**, reported in **(2010) 9 SCC 189**, in paragraph 12 and 19, the Hon'ble Apex Court observed as under:

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The

appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P.[1], Shambhoo Missir v. State of Bihar2, Shailendra Pratap v. State of U.P.3, Narendra Singh v. State of M.P.4, Budh Singh v. State of U.P.5, State of U.P. v. Ram Veer Singh6, S. Rama Krishna v. S. Rami Reddy7, Arulvelu v. State8, Perla Somasekhara Reddy v. State of A.P.9 and Ram Singh v. State of H.P.10).

...

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

18. In the case of **Ganpat vs. State of Haryana**, reported in **(2010) 12 SCC 59**, in paragraph 14 and 15, the Hon'ble Apex Court observed as under:

"14. The only point for consideration in these appeals is whether there is any ground for interference against the order of acquittal by the High Court. This Court has repeatedly laid down that the first appellate court and the High Court while dealing with an appeal is entitled and obliged as well to scan through and if need be reappreciate the entire evidence and arrive at a conclusion one way or the other.

15. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal: (i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. (Vide Madan Lal v. State of J&K[1], Ghurey Lal v. State of U.P.2, Chandra

Mohan Tiwari v. State of M.P.3 and Jaswant Singh v. State of Haryana4.)"

19. In the case of **Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra,** reported in **(2010) 13 SCC 657**, in paragraph 38, 39 and 40, the Hon'ble Apex Court observed as under:

"38. It is a well-established principle of law, consistently reiterated and followed by this Court that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanour of the witnesses is the best judge of the credibility of the witnesses.

39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration. The appellate court should bear in mind the presumption of innocence of the accused, and further, that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference.

40. In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding material or by taking into consideration irrelevant/inadmissible material. A finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (See Balak Ram v. State of U.P.9, Shailendra Pratap v. State of U.P.10, Budh Singh v. State of U.P.11, S. Rama Krishna v. S. Rami Reddy[12], Arulvelu v. State 13, Ram Singh v. State of H.P.14 and Babu v. State of Kerala[15].)"

20. In the case of **State of U.P. vs. Naresh**, reported in **(2011) 4 SCC 324**, in paragraph 33 and 34, the Hon'ble Apex Court observed as under:

"33. We are fully aware of the fact that we are entertaining the appeal against the order of acquittal. Thus, the Court has to scrutinise the facts of the case cautiously and knowing the parameters fixed by this Court in this regard.

34. Every accused is presumed to be innocent unless his The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India. The law in this regard is well settled that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record so as to arrive

at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. An appellate court must also consider whether the court below has placed the burden of proof incorrectly or failed to take into consideration any admissible evidence or had taken into consideration evidence brought on record contrary to law? In exceptional cases, whether there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of acquittal. So, in order to warrant interference by the appellate court, a finding of fact recorded by the court below must be outweighed evidence or to suffer from the vice of guilt is proved. such finding if outrageously defies logic as irrationality. [Vide Babu v. State of Keralall and Sunil Kumar Sambhudayal Gupta (Dr.)8.]"

21. In the case of **State of M.P. vs. Ramesh,** reported in **(2011) 4 SCC 786**, in paragraph 15, the Hon'ble Apex Court observed as under:

"15. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to reappreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal."

22. The Apex Court recently in **Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219**, has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"13. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the

Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

14. It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

23. The Apex Court recently in **Jafarudheen & Ors. vs. State of Kerala, JT 2022(4) SC 445** has observed as under:-

"DISCUSSION Scope of Appeal filed against the Acquittal:

25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. Precedents:

Mohan @Srinivas @Seena @Tailor Seena v. State of Karnataka, [2021 SCC OnLine SC 1233] as hereunder: -

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of

India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity. 22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under : (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179])

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

14.3. In the recent decision of Vijay Mohan Singh [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586], this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of this Court right from 1952 onwards. In para 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai [Umedbhai Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108]. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence.

This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case.'

31.1. In Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320], the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under:

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 : 1996 SCC (Cri) 972] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by

it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case.'

31.2. In K. Ramakrishnan Unnithan [K. Ramakrishnan Unnithan v. State of Kerala, (1999) 3 SCC 309: 1999 SCC (Cri) 410], after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653], in para 5, this Court observed and held as under:

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should

attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State [Surajpal Singh v. State, 1951 SCC 1207 : AIR 1952 SC 52]; Wilayat Khan v. State of U.P. [Wilayat Khan v. State of U.P., 1951 SCC 898 : AIR 1953 SC 122]) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.'

31.4. In K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305], this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."

N. Vijayakumar v. State of T.N., [(2021) 3 SCC 687] as hereunder: -

"20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325 has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432)

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence

is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. Further in the judgment in Murugesan [Murugesan v. State, (2012) 10 SCC 383: (2013) 1 SCC (Cri) 69] relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction.

xxx xxx xxx

23. Further, in Hakeem Khan v. State of M.P., (2017) 5 SCC 719 : (2017) 2 SCC (Cri) 653 this court has considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court. Para 9 of the judgment reads as under: (SCC pp. 722-23)

"9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This reason, coupled with the fact that the only independent witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned counsel for the respondent may be right in stating that the trial court went overboard in stating that the complainant party was the aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case. This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

24. By applying the abovesaid principles and the evidence on record in the case on hand, we are of the considered view that having regard to material contradictions which we have already noticed above and also as referred to in the trial court judgment, it can be said that acquittal is a

"possible view". By applying the ratio as laid down by this Court in the judgments which are stated supra, even assuming another view is possible, same is no ground to interfere with the judgment of acquittal and to convict the appellant for the offence alleged. From the evidence, it is clear that when the Inspecting Officer and other witnesses who are examined on behalf of the prosecution, went to the office of the appellant-accused, the appellant was not there in the office and office was open and people were moving out and in from the office of the appellant. It is also clear from the evidence of PWs 3, 5 and 11 that the currency and cellphone were taken out from the drawer of the table by the appellant at their instance. There is also no reason, when the tainted notes and the cellphone were given to the appellant at 5.45 p.m. no recordings were made and the appellant was not tested by PW 11 till 7.00 p.m."

24. This Court had the occasion to consider the scope and the extent of interference in the cases, wherein this Court has to delve into the issues, which gets encompassed in the proceedings, where the judgment and the order under challenge is of acquittal and this Court in **Government Appeal no. 3804 of 2001 (State of U.P. vs. Subedar and others)** has held that it is a settled principle of law that while exercising powers even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court.

25. Recently, the Division Bench of this Court in the case of **Virendra Singh vs. State of U.P. and others** reported in **2022(3) ADJ 354** had held that while deciding appeals against acquittal, the High Court has to first record its conclusion on the question whether approach of the Trial Court dealing with the evidence was patently illegal or the conclusion arrived was based on no evidence or it was equated by perversity and in case two views are possible then the High Court should detain itself from the order of acquittal.

26. On the contours of the decisions, referred to hereinabove, as well as the legal proposition so culled out, the judgment of the Trial Court is to be scanned and scrutinized.

27. This Court had the occasion to consider the scope of interference and the extent to which the courts can dealt into the issues which gets encompassed in the proceedings, wherein there is a judgment and order of acquittal of the accused in **Government Appeal No. 3804 of 2001 (State of U.P. vs. Subedar and others)**, wherein this Court has held that it is a settled principle of law that while exercising jurisdiction in the matters of acquittal the Courts has to bear in mind that there is a double presumption of innocence in favour of accused and the appellate court has to be relatively slow in reversing the order of the trial court rendering acquittal. Notably, double presumption enures in favour of accused and it is not to be lightly disturbed until unless the view so taken by the trial court whose judgment and order is under challenge is perverse or the view so taken is not possible in the eyes of law.

28. Herein, in the present case, it is undisputed factual position as emerging from the prosecution case that pursuant to the proceeding so initiated under Section 156(3) Cr.P.C. a first information report was lodged with an allegation that the accused, who are two in number alongwith

one Saurabh had approached the informant while taking services of his son being Indrajeet Singh, aged about 15 years, for working as a cleaner / helper in a Tempo Carrier while providing not only food and lodging but also providing shelter and on the assurance of the accused on 2.4.2007 the informant and his wife allowed their son to accompany the accused. As per the version in the first information report as discussed hereinabove the son of the informant did not return back and even after constant search and request so sought to be made from 3.5.2007 to 10.5.2007 the informant's son was allowed to come back to his house but assured that the victim was with one Kuldeep and thereafter it was also assured that as soon as the victim comes back he will be made physically present before the informant.

29. Sofar as PW-1-Sonwati w/o Narendra being mother of the victim is concerned, she had supported the version as contained in the application under Section 156(3) Cr.P.C. and the first information report in question reiterating the same. However, in a statement PW-1 has deposed that the accused had enmity with them as the accused wanted the prosecution / informant fraction to sell away their house and go away and that became the very basis of commission of the crime. PW-1 in cross-examination at pages 4 and 5 had come up with the stand that while deposing that the son of PW-1 being the victim had the desire to do work by engaging himself for the services and the PW-1 also wanted that her son should work somewhere and according to her statement the victim had gone with the accused as per the wishes of PW-1 and PW-2 being Narendra, who happens to be father of the victim.

30. Similarly, sofar as PW-2 Narendra is concerned, he in his examination-in-chief has reiterated the narration of the fact so sought to be taken in the application under Section 156(3) Cr.P.C., however, he has further stated that when he has asked his son as to where he was working and station during the time when he had gone away from the house then his son being the victim had apprised him that he was working in a farmer's place. PW-2 being Narendra has not disputed the fact that according to his free wish he has sent the victim with the accused. PW-2 has further stated that the recovery of the victim was made from one of the villages being Shalda, Police Station Kithore, District Meerut, however, he has further stated that the farmer in whose place the victim was working was not produced before the court and he happens to be Pradhan of Gram Panchayat Shalda and further the fact that the victim did not sustain any sort of injuries and there was no medical examination so done in this regard.

31. PW-3 Indrajeet Singh in his statement under Section 164 Cr.P.C. had deposed that his mother being the PW-1 used to administer beating and not provide food on account whereof he remained hungry and the said factor occasioned to leave the house and he was staying with one Ompal, who used to keep him like a son. In the said statement of PW-3 Indrajeet Singh there is no recital of the fact that any beating was administered or there was anything adverse against the accused herein. PW-3 in his statement has further come up with the stand that the statement so recorded of his by the police officials were under threat and coercion.

32. From the meticulous analyses of the ocular testimony as well as the documents available on record we find that the learned trial court by virtue of the

judgment and order dated 19.2.2022 passed by Additional District and Sessions Judge, Hapur in Sessions Trial No. 56 of 2008 (State of U.P. vs. Kuldeep and another) arising out of Case Crime No. 01 of 2007, under Section 364 IPC, Police Station Hapur Dehat, District Hapur has not committed any perversity.

33. Admittedly, the statements of PW-1 i.e. Sonwati, PW-2 Narendra s/o Hoshiyar and PW-3, Indrajeet Singh, the victim clearly reveals that it is not a case wherein the accused had abducted the victim so as to attract provisions contained under Section 364 IPC as rather to the contrary the statements of the ocular witnesses itself points out beyond any reasonable doubt that according to free will of the parents being PW-1-Sonwati and PW-2-Narendra, the victim was let with the accused. Further, the victim himself has stated that he was at no point of time administered beating or subjected to any crime or offence as rather to the contrary he even had the desire to work and he was also provided all the facilities including food and lodging and care was also taken. Even otherwise, as per the statement of the prosecution witnesses no injury whatsoever was sustained by the victim and further medical report is also not available on record.

34. Learned A.G.A. though had made manifold submissions but he could not point out any perversity or illegality committed by the court below while acquitting the accused on the basis of the factual scenario so reduced in the judgment in question.

35. Moreover, sofar as recovery of the victim from Ompal s/o Gangaram resident of Shalda, Police Station Kithore, District Meerut is concerned, on 24.1.2008 after a period of nine months. Even otherwise, the crucial witness whose testimony could have changed the entire prosecution case as a game changer is the statement of PW-3 being Indrajeet Singh (victim).

36. Notably, PW-3 Indrajeet Singh himself has deposed that he had gone as per his wishes and he was not made subject matter of any sort of beating and even otherwise according to PW-3 he was given all facilities and was treated in a decent manner.

37. This Court bearing in mind the legal proposition of law so culled out by the Hon'ble Apex court in the decisions so referred to above with relation to the exercise of jurisdiction in an appeal against the order of acquittal does not find any perversity in the view taken by the court below as according to the court even otherwise no other view is possible vis-a-vis the view so taken by the learned court below. Learned trial court has meticulously considered each every aspect of the matter including the ocular witnesses and the documentary evidences on record and after recording finding which as per facts and law has proceeded to acquit the accused, who are two in number. The court further finds that the prosecution case proceeds on weak evidence and even otherwise the present case does not make a complete chain with regard to commission of offence.

38. Hence, in any view of the matter and in view of judgment of Hon'ble Apex Court we have no other option but to concur with the findings of sessions judge.

39. We, therefore, find that it is not a case worth granting leave to appeal. The

application for granting leave to appeal is rejected.

40. Since the application for granting leave to appeal has not been granted, the appeal also stands dismissed.

(2022) 8 ILRA 561
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 448 of 2022

State of U.P. ...Appellant
Versus
Nizamuddin ...Respondent

Counsel for the Appellant:
G.A.

Counsel for the Respondent:
..

Criminal Law – Criminal Procedure Code, 1973 - Sections – 378 & 378(3) - Indian Penal Code, 1860 - Sections 304 & 506: - Government Appeal – against order of Acquittal – offence of culpable homicide - *FIR* - informant (PW-1) claimed that his son was died due to ante-mortem several injuries caused during administered beating by the accused - court - finds that entire prosecution case proceeds on weak premises - informant was not the eyewitness, the actual eye-witnesses were PW-2 & PW-3 but said fact was not mentioned in the FIR - there is no any justification is given by the prosecution as to why delay of two days was caused in lodging the *FIR* and further what was doing by PW-1 in order to search whereabouts of his son as he claimed that his son was returned home after two days from the date of incident - further, injuries on the body of deceased was neither shown in the *Post-mortem report* nor in the *Panchayatnama* - as well as the date & cause of death was also not matched with the allegation so claimed - held that - it is the duty of the prosecution to prove that in all probabilities, the accused has committed the crime, but none of the factors so engineered by them marks or points out that the accused has committed crime - since, appellant fails to point out any perversity or illegality in the impugned acquittal order - thus, leave to appeal rejected, even though same is not a case worth granting leave to appeal - consequently Government Appeal stands dismissed.(Para –22, 25, 27, 29, 31)

Appeal Dismissed. (E-11)

List of Cases cited: -

Guru Dutt Pathak Vs St. of U.P. (2021 (6) SCC 116),

(Delivered by Hon'ble Vikas Budhwar, J.)

1. State of U.P. being aggrieved and dissatisfied against the judgment and order of the acquittal dated 23.11.2018 passed by Addl. Sessions Judge/ Special Judge (P.C. Act), Special Court No.1, Meerut in Sessions Trial No. 1181 of 2013 (State Vs. Nizamuddin), in Case Crime No. 233 of 2013, under Sections 304, 506 IPC, P.S. Kharkhauda, District Meerut, acquitting the accused respondents herein.

2. The present appeal centers around the prosecution case that the first informant Mohd. Shahib, resident of P.S. Kharkhauda, District Meerut had lodged a written complaint on 9.6.2013 at 1:30 in the noon, which transformed into a first information report with an allegation that his son Salman was called upon by one Nizamuddin (accused herein) son of Azimulla on 6.6.2013 at 9:00 in the morning on the pretext that the son of the first informant had directed Tabassum the daughter of the accused herein to press and massage his head and being aggrieved against the said act of the son

of the first informant, the accused herein along with his son Gulla attacked and pounced upon the son of the informant with kicks, fists and wooden stick, and the said fact was also witnessed by Shahid son of Abdul Hakeem and Saleem son of Sabir and other villagers, who were the neighbours and with their attempts, the matter was pacified, however the accused herein ran away and threatened that they will fire upon them. Faced with these circumstances, the son of the first informant being Salman ran away from the house and he returned on 8.3.2013 at 6:00 in the evening while complaining that there was severe stomach ache and as his situation was becoming bad to worst, he was taken to one Dr. Ashok Garg, Shastrinagar, Meerut, where he was detected to be suffering from severe problem and his condition was stated to be critical and thereafter he was taken to Sahara Hospital, Garh Road, Meerut, where he succumbed.

3. On the basis of written complaint so sought to be lodged, a first information report purported to be under Sections 304, 506 IPC against the accused and his son Gulla was lodged. Investigating Officer was nominated to conduct the investigation, who prepared site-plan, recorded the statement of witnesses, sent the body for post-mortem and thereafter submitted the charge sheet under Sections 304 & 506 IPC.

4. The case was committed to Sessions, charges were read over to the accused herein and the accused pleaded not guilty and claimed to be tried. The learned Trial Court by virtue of the judgment and order under challenge has acquitted the accused herein.

5. Challenging the judgment and order of acquittal, now the State is before this Court in the proceeding emanating under Section 378(3) CrPC.

6. The prosecution in order to support the version has produced the witnesses namely; PW-1 Shahib, PW-2 Shahid, PW-3 Saleem, PW-4 Dr. Yashveer Singh, PW-5 Dr. Ashok Garg, PW-6 Dinesh Kumar, S.I, PW-7 Neeraj Singh, Inspector and PW-8 HCP 194 Rajendra Singh.

7. We have heard Ms. Nand Prabha Shukla, learned A.G.A. for the State on the question of admission.

8. Before diving into the controversy in question, this Court is to remember that the present proceedings are at the behest of the State of U.P. under Section 378(3) of CrPC against the judgment and order of acquittal so passed in favour of the accused herein. To put it otherwise, this Court has to keep in mind the limitations, which are existing in exercise of the jurisdiction in the matter of the appeals against acquittal. The Courts of Law have been consistently mandating that invocation of jurisdiction while interfering against the judgment and order of acquittal should not be resorted to in routine manner, as they are to be taken as a devise to prevent miscarriage of justice that too in those situations when there are compelling and substantive circumstances occasioning the same. Perversity, palpable illegality and judgment being illegal and proceeding towards wrong direction are the grounds amongst others, which occasions this Court while exercising appellate jurisdiction in the matter of interference.

9. Recently, the Hon'ble Supreme Court in the case of ***Guru Dutt Pathak vs. State of U.P.*** reported in **(2021) 6 SCC 116**,

in paragraphs 14, 15, 16, 17, 18, 19, 20 and 21, has clearly observed as under:-

"14. We are conscious of the fact that this is a case of reversal of acquittal by the High Court. Therefore, the first and foremost thing which is required to be considered is, whether in the facts and circumstances of the case, the High Court is justified in interfering with the order of acquittal passed by the learned trial Court? 15. In Babu v. State of Kerala (2010) 9 SCC 189, this Court has reiterated the principles to be followed in an appeal against acquittal under Section 378 Cr.P.C. In paragraphs 12 to 19, it is observed and held as under:

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P (1975) 3 SCC 219, Shambhoo Missir v. State of Bihar (1990) 4 SCC 17, Shailendra Pratap v. State of U.P (2003) 1 SCC 761, Narendra Singh v. State of M.P (2004) 10 SCC 699, Budh Singh v. State of U.P (2006) 9 SCC 731, State of U.P. v. Ram Veer Singh (2007) 13 SCC 102, S. Rama Krishna v. S. Rami Reddy (2008) 5 SCC 535, Arulvelu v. State (2009) 10 SCC 206, Perla Somasekhara Reddy v. State of A.P (2009) 16 SCC 98 and Ram Singh v. State of H.P (2010) 2 SCC 445)

13. In Sheo Swarup v. King Emperor AIR 1934 PC 227, the Privy Council observed as under: (IA p. 404)

"... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

14. The aforesaid principle of law has consistently been followed by this Court. (See Tulsiram Kanu v. State AIR 1954 SC 1, Balbir Singh v. State of Punjab AIR 1957 SC 216, M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200, Khedu Mohton v. State of Bihar (1970) 2 SCC 450, Sambasivan v. State of Kerala (1998) 5 SCC 412, Bhagwan Singh v. State of M.P(2002) 4 SCC 85 and State of Goa v. Sanjay Thakran (2007) 3 SCC 755)

15. In Chandrappa v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under: (SCC p. 432, para 42)

"(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an

appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons', "good and sufficient grounds', "very strong circumstances', "distorted conclusions', "glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

16. In Ghurey Lal v. State of U.P (2008) 10 SCC 450, this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that: (SCC p. 374, para 20) "20. ... an order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused."

18. In State of U.P. v. Banne (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include: (SCC p. 286, para 28)

"28. ... (i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneo
us law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal."

A similar view has been reiterated by this Court in Dhanapal v. State (2009) 10 SCC 401.

19. Thus, the law on the issue can be summarised to the effect that in exceptional

cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference." (emphasis supplied)

16. When the findings of fact recorded by a court can be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under:

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn (1984) 4 SCC 635, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons 1992 Supp (2) SCC 312, Triveni Rubber & Plastics v. CCE 1994 Supp. (3) SCC 665, Gaya Din v. Hanuman Prasad (2001) 1 SCC 501, Aruvelu v. State (2009) 10 SCC 206 and Gamini Bala Koteswara Rao v. State of A.P (2009) 10 SCC 636)." (emphasis supplied)

It is further observed, after following the decision of this Court in the case of Kuldeep Singh v. Commissioner of Police (1999) 2 SCC 10, that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

17. In the decision of this Court in the case of Vijay Mohan Singh v. State of Karnataka (2019) 5 SCC 436, this Court again had an occasion to consider the scope of Section 378 Cr.P.C. and the interference by the High Court in an appeal against acquittal. This Court considered catena of decisions of this Court right from 1952 onwards. In paragraph 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai (1978) 1 SCC 228. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on re-appreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under: (SCC p. 233)

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence. This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case."

31.1. In Sambasivan v. State of Kerala (1998) 5 SCC 412, the High Court reversed the order of acquittal passed by the learned

trial court and held the accused guilty on re-appreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under: (SCC p. 416)

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Ramesh Babulal Doshi v. State of Gujarat (1996) 9 SCC 225 viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case."

31.2. In K. Ramakrishnan Unnithan v. State of Kerala (1999) 3 SCC 309, after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation

of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley v. State of U.P. AIR 1955 SC 807, in para 5, this Court observed and held as under: (AIR pp. 809-10)

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well- established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State AIR 1952 SC 52; Wilayat Khan v. State of U.P AIR 1953 SC 122) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.

31.4. In K. Gopal Reddy v. State of A.P. (1979) 1 SCC 355, this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule." (emphasis supplied)

18. In the case of Umedbhai Jadavbhai (supra), in paragraph 10, it is observed and held as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to re-appreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence. This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case."

19. In the case of Atley v. State of Uttar Pradesh AIR 1955 SC 807, this Court has observed and held as under:

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on

mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In Our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417, Criminal P. C. came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. The State 1952 CriLJ331; Wilayat Khan v. State of Uttar Pradesh, AIR 1953 SC 122. In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions."

20. In K.Gopal Reddy v. State of Andhra Pradesh (1979) 1 SCC 355, this Court has observed that where the trial Court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule.

21. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, it is to be considered whether in the facts and circumstances of the case, the High Court is justified in interfering with the order of acquittal passed by the learned trial Court?"

10. To begin with, the ocular testimony is to be first analyzed.

11. As PW-1, the first informant appeared in the witness box. According to him, Salman son of complainant was administered beating on 6.6.2013 at 9:00 in the morning by the accused and his son Gulla in connection with the fact that he committed an act, which according to the accused was not descent. The beating was administered with kicks, fists and wooden rod, according to the first informant, the said incident was witnessed not by him, but by Shahid son of Abdul Hakeem and Saleem son of Sabir and others and due to their intervention his son could be saved from further onslaught. According to PW-1, his son straightway ran away from the place of occurrence and returned on 8.6.2013 at 6:00 p.m, in the night and he complained stomach ache and thus he was taken to the hospital of Dr. Ashok Garg and

from there to Sahara Hospital, Garh Road, where, he succumbed.

12. One Shahid son of Abdul Hakeem appeared as PW-2 and he claims himself to be the witness of the said incident, as at 9:00 O'clock in the morning, he was selling certain items in the wooden cart and at that point of time, he saw accused and his son beating Salman and according to him, at that point of time, Saleem son of Sabir, Raja and Bunti was present.

13. So far as PW-3 is concerned, Saleem got himself examined. He also narrated the fact that at 9:00 O'clock in the morning, he was also selling certain items in the wooden cart and he saw the accused hurling abuses upon the son of the complainant and the accused along with his son administered beating, pursuant whereto Salman fell down on the surface and the by-standards also came there.

14. As PW-4, Dr. Yashveer Singh got himself examined, who claims himself to be at relevant point of time posted in P.L. Sharma District Hospital, Meerut. According to him, the root cause of the death of Salman, which surfaced during post mortem was shock and hemorrhage, which in fact were ante-mortem injuries and the possibility was also there that he was beaten by wooden sticks, kicks and fists. He has further deposed that the post mortem was done on 9.6.2013, but the death occurred one day ago.

15. PW-5, Dr. Ashok Garg also got examined. He claims himself to be a doctor stationed at Garg Nursing Home, where Salman son of complainant was got admitted on 8.6.2013 at 5:00 in the evening having high fever and breathlessness. According to him, he was sent for thorough check up and thereafter, referred to Sahara Hospital, Garh Road.

16. One Dinesh Kumar, Sub-Inspector examined as PW-6, who claimed himself to be the Investigating Officer, who conducted Panchayatnama and sent the dead body for post mortem. He also claims to have completed entire procedure, which is normally being resorted to post death.

17. As PW-7, Neeraj Singh got himself examined and he claims to be posted as S.I. in the Police Station-Kharkhauda. He proved the statements which were recorded.

18. As PW-8, HCP 194 Rajendra Singh got himself examined. He proved himself as scriber of the FIR.

19. Undisputedly, the entire genesis, which relates to the commission of the offences, stems from the event, which occurred on 6.6.2013 at 9 O'clock, wherein deceased is stated to have been beaten by the accused and his son and as per prosecution case, deceased ran away and came back to his house on 8.6.2013 at 6:00 in the evening.

20. As a matter of fact, the deceased died on 8.6.2013 in the hospital and the post mortem whereof was conducted on 9.6.2013, which was proved by PW-4, who happens to be Dr. Yashveer Singh. According to PW-4, post mortem of the deceased was done on 9.6.2013 at 2:30 in the noon and further as per the opinion of the doctor, the death occurred one day ago. Meaning thereby, the actual time of death ought to have been at 2:30 in the noon of 8.6.2013. As per the deposition of PW-1 being Shahib and PW-2 Shahid and the medical reports, the deceased was admitted

at 5:00 in the evening of 8.6.2013. Meaning thereby, it becomes highly implorable that a living person is admitted in a hospital, though as per the post mortem report, he ought to have been dead by that time. However, this Court also bears in mind that there is variation of two hours, plus or minus.

21. We may further delve into the issue, as it has come on record that in the post mortem report dated 9.6.2013, several injuries were shown to have been sustained by the deceased. However, PW-6, being S.I. Dinesh Kumar in his statement has proved the panchayatnama, wherein whereat, there was no mention of the injuries on the body of the deceased. Apart from the same, there is no recital about the fact that bandage was also wrapped over the portion of the dead body, which occasioned injury. Thus, by all probabilities, it becomes clear that when the body of the deceased was sealed during panchayatnama, there were no injuries available there at. To put it otherwise, possibility cannot be also ruled out that the deceased was administered beating just in order to make out a case.

22. Another additional aspect which needs to be noticed is the time-gap between the death of the deceased and running away of the deceased, particularly when as per the prosecution case, the deceased was inflicted injuries on 6.6.2013 at 9:00 in the morning and thereafter the deceased came back to his house after two days on 8.6.2013 at 6:00 o'clock complaining stomach ache and he was also admitted in the hospital. PW-5 Dr. Ashok Garg, who happens to be a prosecution witness has himself stated that the deceased when admitted at 5:00 in the evening of 8.6.2013 was suffering from high fever, breathlessness and body ache. Meaning thereby first of all there was no injury sustained by the deceased, as had the injury been inflicted upon the deceased, the same ought to have been disclosed in the medical prescription/ treatment papers.

23. Moreover, it is quite paradoxical that the injury, which is stated to be inflicted by the accused upon the deceased could be a factor for the death of the deceased, particularly, when there is nothing on record to suggest that the deceased was having such type of injuries, which became fatal, as according to the opinion of the Doctor, it was only fever and breathlessness, which cannot be one of the factors occasioned by injuries.

24. Even otherwise, the Investigating Officer was made available certain papers relating to the treatment of the deceased through Asif. However, PW-6, who happens to be Dinesh Kumar, S.I. has stated that these papers were sent by Dr. Ashok Garg from his Clinic, however, Asif has been stated to be unknown to Dr. Ashok Garg and he was further also not produced as witness. The said factor is also relevant, which can change the entire case, particularly, when there is nothing on record to suggest as to whether the said medical reports are genuine and how the same were made available to investigating officer.

25. The learned Trial Court has also analyzed the issue from another point of angle that PW-1 Shahib is not an eye-witness to the said incident, which occurred at 9:00 o'clock in the morning on 6.6.2013. However, the same was witnessed by PW-2 Shahid and PW-3 Saleem. In the FIR, there is no recital of the fact that the said information was made available to him by PW-2 and PW-3. None the less, it has also

come on record that, as per the statement of PW-1 and the FIR that after 6.6.2013 at 9:00 o'clock in the morning the deceased ran away and he returned back on 8.6.2013 at 6:00 o'clock. Meaning thereby, the accused might have obtained the knowledge on 8.6.2013 about the beating so administered by his son. None the less, the conduct of the prosecution being PW-1 is also apparent as no justification was given by the prosecution, as to why FIR was not lodged on 6.6.2013, 7.6.2013 and 8.6.2013. In case, it is derived that the information was received by the first informant on 6.6.2013, then what was the first informant was doing in order to search whereabouts of his son.

26. Another additional aspect of the matter, which needs to be considered is the fact that on 30.7.2013, a document was submitted before the court below being paper no. A-13, which is under the signatures of the complainant Shahib along with signatures of Bunti, Saleem, Raja and witness Shahid with thumb impression, addressed to SSP, wherein a pointed allegation was made that on 6.6.2013 at 9:00 o'clock in the morning, the accused in order to kill his son Salman along with Gulla called him outside the house and thereafter with the aid of kicks, fists and wooden sticks administered beating on 6.6.2013 and his son died on the said date. The said document itself also puts nail upon the coffin as according to the prosecution, the date of the death was 6.6.2013 at 9:00 o'clock and how can the same be said to be 8.6.2013. Moreover, the said document dated 30.7.2013 had been submitted after 24 days.

27. Viewing the present case from the four-corners of law, while applying it to the facts, this Court finds that the entire prosecution case proceeds on week premises. Not only there has been delay in lodging of the FIR, but also no explanation worth consideration in delay in lodging of the FIR has been shown. Even the time-gap of the allegations regarding beating so administered to the deceased and the actual date of death is so long and enormous and the same does not link the accused to have committed crime, particularly when in the Panchayatnama as well as in the statement of PW-5 Dr. Ashok Garg, there is no recital of the fact that the deceased sustained injuries, however, he was complaining high fever and breathlessness and body ache. The death of the deceased so claimed by the prosecution also does not match, as post mortem was done at 9.6.2013 at 2:30 in the noon and the death was stated to have been occurred one day ago, i.e, 8.6.2013, i.e, 2:30 hours, however, at that point of time, the deceased was already alive, as he got admitted in the hospital at 8.6.2013 at 5:00 in the evening. Moreso, the document dated 30.7.2013 submitted by the complainant contains the allegation that the deceased died on 6.6.2013, thus all the factors indicate that the accused has not committed crime. Moreso, it is the duty of the prosecution to prove that in all probabilities, the accused has committed the crime, but none of the factors so engineered by the prosecution marks or points out that the accused has committed crime.

28. As already discussed, the learned trial court has meticulously analyzed the entire case from all angles, while appreciating the evidences so adduced in the background of the ocular testimony.

29. Hence, in any view of the matter applying the principles of law so culled out by the Hon'ble Apex Court in the facts of

the present case, we have no option but to concur with the view taken by the learned Sessions Judge.

30. We find that it is not a case worth granting leave to appeal. The application for granting leave to appeal is rejected.

31. Since the application for granting leave to appeal has not been granted, consequently, present government appeal also stands **dismissed** at the admission stage itself.

32. Records of the present case be sent back to the concerned court below.

(2022) 8 ILRA 572
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2010

BEFORE

THE HON'BLE RAKESH TIWARI, J.

Second Appeal No. 579 of 2010

Sukh Ram & Ors. ...Appellants
Versus
Smt. Narbada Devi & Ors. ...Respondents

Counsel for the Appellants:
Sri S.S. Shukla, Sri Dharmendra Mishra

Counsel for the Respondents:
..

(A) Civil Law- Civil Procedure Code, 1908 - Section 100 - Order - I, Rule 8, Order XVII-Rule 3, Order XLI – Rule 27 - Plaintiff's Second Appeal – challenging the validity & correctness of - Judgment & decree respectively by court below - *Locus standi* - earlier property in suit was donated to a Sadhu/Saint (i.e. Baba Ganga Nath) who belongs to a Jatav community and died without issue - plaintiffs appellants claims title over there being they also belongs to Jatav Community - court held that, merely because Baba Ganga Nath belongs to Jatav Community will not vest with appellants any indefeasible right in the property in suit - they have no Locus standi - held - Encroachers cannot be vested with any legal right or title by any court - hence, Second Appeal fails and is dismissed. (Para – 11, 12)

(B) Civil Law- Civil Procedure Code, 1908 - Section 100, Order - I, Rule 8, Order XVII-Rule 3, Order XLI – Rule 27 - Plaintiff's Second Appeal – challenging the validity & correctness of - Judgment & decree respectively by court below - *substantial question of law* - in absence of substantial question of law arises from pleadings of the parties - hence, Second Appeal fails and is dismissed. **(**Para – 12**)**

Second Appeal Dismissed. (E-11)

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard learned counsel for the appellant and perused the record.

2. This second appeal has been preferred by the plaintiffs appellant challenging the validity and correctness of the judgment and decree dated 30.7.2002 and 14.8.2002 respectively passed by the Additional Civil Judge (Junior Division), Court No.3, Aligarh in Original Suit No. 475 of 1982 whereby the suit filed by the plaintiffs appellant was dismissed. The first appellate Court in Civil Appeal No. 136 of 2002 preferred against the aforesaid judgment and decree in the aforesaid Original Suit No. 475 of 1982 confirmed the findings recorded by the trial Court vide its judgment and decree dated 13.4.2010 and 28.4.2010.

3. The judgments and decrees passed by the courts below are assailed on the ground that the appellate Court has not approached the matter in controversy, properly and justly. It is stated that the Courts below have passed the judgments

and decrees under appeal in this second appeal on conjectures and surmises.

4. Learned counsel for the appellants has argued that in aforesaid suit no. 32 of 1971, Roshan Lal versus Ram Charan, he was not the representative of Jatav community and that the Courts below have failed to frame the proper issue, even though the specific pleading was taken, suit no. 32 of 1971 should have been filed against the defendants under the provision of Order I Rule 8 C.P.C. as it is not against an individual person. It is also stated that the property in question was not in possession of the defendants respondents when the suit was filed; that the Court below has not considered the Commissioner's report in the suit and that the findings recorded by the courts below are against the material and evidence on record.

5. It appears from the record that one Roshan Lal filed Original Suit No. 32 of 1971, Roshan Lal versus Ram Charan for possession and injunction interalia stating therein that the land in dispute was purchased by way of registered sale-deed from one Pratap Chand Jain, who had purchased the aforesaid land from one Sukh Ram alias Sukha.

6. Ram Charan contested the suit by filing written statement in which he denied the averments made in the plaint. However, the trial Court decreed the suit on the basis of oral and documentary evidence produced before it vide its judgment and order dated 31.7.1978 directing the defendants to handover the possession of the property in suit to the plaintiffs. Civil Appeal No. 250 of 1978 was filed against the judgment and order dated 31.7.1978 of the trial Court before the first appellate Court, which was dismissed vide judgment and order dated 6.11.1979; that the plaintiffs appellants came to know about the judgment and decree in suit no. 32 of 1971 in execution case, hence they filed original suit no. 475 of 1981, Sukh Ram versus Smt. Narbada Devi for cancellation of judgment and decree dated 31.7.1978 passed by Munsif in original suit no. 31 of 1971 as well as the judgment and decree dated 6.11.1979 passed by the lower appellate Court in Civil Appeal No. 250of 1978 on the ground that the aforesaid suit between Roshan Lal and Ram Charan was collusive.

7. The defendants respondents contested the suit by filing written statement in which they denied the averments made in the plaint and stated that the suit filed by the plaintiffs appellants was barred by resjudicata.It appears from the record that during the suit proceedings Amin Commissioner was appointed, who inspected the spot and submitted his report in both the suits i.e. Original suit no. 32 of 1971 as well as Original suit no. 475 of 1982 showing that the land in dispute is surrounded by boundary , trees and Chhapar etc.

8. It also appears that the case of the plaintiffs appellants before the Court below was that the property in suit was donated to Baba Ganga Nath, who was a Sadhu /Saint who had constructed a well on the property and that the Jatav community claim possession of the property in suit prior to 1996.

9. The claim of the plaintiffs appellants was contested on the ground that they have no cause of action to file suit against the defendants; that the suit was misconceived and based upon totally concocted allegations and wrong facts. In

defence it was stated by the defendants respondents that Roshan Lal, the Predecessor-in-interest of defendants Ist set was owner in possession of the property in suit which was part and parcel of his bhumidhari plot no. 516 area 1 bigha; that the defendants IInd set took unlawful possession of portion of the said plot 12 years back which compelled Roshan Lal to file suit no.l 32 of 1971 for possession of the said land. In the circumstances, the suit was decreed on 31.7.1978 and Civil Appeal No. 25 of 1978 of the defendants IInd set filed against the said decree was dismissed on 6.11.1979 by the first appellate Court. Review Application No. 65 of 1979 filed by the defendants IInd set against the judgment and order of the first appellate Court was also rejected on 23.10.1982. It was also denied that there was any contest between the defendants IInd set and Roshan Lal, the Predecessor-in-interest of the defendants Ist set and that the decree in Original Suit No. 32 of 1971, Roshan Lal versus Ram Charan and others had attained finality, which had been put for possession in Execution Case No. 43 of 1983 in the Court of Munsif Koil, Aligarh. It was also their case that the defendants had brought forward the present plaintiffs simply to resist the delivery of possession of the land in suit to the defendants Ist set and as a matter of fact the defendants IInd set, who had filed the suit in the name of the plaintiffs, had no concern whatsoever with the property in suit; that Roshan Lal purchased plot no. 518 along with other plots from Sri Pritam Chandra Jain and others through sale-deed dated 11.2.1960; that in their turn Sri Pritam Chandra Jain etc. purchased the property sold by them to said Sri Roshan Lal from one Sukhram alias Sukha, who was the bhumidhar in possession of plot no. 518 and other plots through sale-deed dated 12th August, 1959 registered on 30.8.1959 as such the defendants and their Predecessor-in-interest have all along been in possession of plot no. 518 Qasba Oil including the property in suit till the date when the defendants IInd set took unlawful possession of the same in the first week of January, 1971.

10. The Court has put a question to the learned counsel for the appellants as to what is their status and locus standi in the matter, it is replied by the learned counsel for the appellants that the plaintiffs appellants are belonged to Jatav community and Baba Ganga Nath also belonged to Jatav community, hence they have interest in suit property.

11. Having heard learned counsel for the appellants and on perusal of the record it appears that the defendants respondents have proved the purchase of plot no. 518 along with other plots by a registered sale-deed and has been in possession of it. The plaintiffs appellants have no locus standi in the matter. The land is said to have been donated to Baba Ganga Nath which could not be proved by the plaintiffs appellants. It was not inherited by any person either by way of will or by any other instruments nor was transferred by Baba Ganga Nath even if it is presumed to have been donated to him. Merely because Baba Ganga Nath belonged to Jatav community will not vest with the appellants any indefeasible right in the property in suit when they have no locus standi in the matter. No right or title has been passed to them by the said Baba Ganga Nath who was admittedly a Sadhu/Saint. In fact the plaintiffs appellants have utterly failed to sustain their claim made in the suit plaint that they are in possession over the property in suit as its rightful owners having legal title. Encroachers can not be vested with legal

right or title by any court. Both the Courts below have given concurrent findings of facts against the plaintiffs appellants.

12. For all the reasons stated above, in my considered opinion, no substantial question of law arises from the pleadings of the parties in this second appeal filed by the plaintiffs appellants. It is accordingly, dismissed.

(2022) 8 ILRA 575
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 997 of 2022

NABCO Prod. Pvt. Ltd., Delhi ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhinav Mehrotra, Sri Satya Vrata Mehrotra

Counsel for the Respondents:
A.S.G.I., Sri Gaurav Mahajan (Senior S.C.), Sri Sudarshan Singh

A. Tax Law – Violation of principles of natural justice - Income Tax Act, 1961- Sections 148 & 148A(d) - The system has been introduced and is being implemented by the respondents and, therefore, it is their primary duty to immediately remove short comings, if any, in the system. **For own wrongs of the respondents, the assessee can not be allowed to suffer and put to harassment.** Prevailing state of affairs clearly reflects that in the absence of any effective system of accountability of the erring officers, the harassment of the assessees and breach of principles of natural justice by the Officers is resulting in uncontrolled situation. The practice of frequently violating principles of natural justice, non consideration of replies of assessees under one pretext or the other or rejecting it with one or two lines orders without recording reasons for rejection, is gradually increasing which needs to be taken care of immediately by the respondents at the highest level, otherwise prevailing situation of arbitrary approach and breach of principles of natural justice may not only adversely affect the assessees who pay revenue to the Government, but also may develop a perception amongst people/assessees that it is difficult to get justice from the authorities in statutory proceedings. (Para 7)

Writ petition allowed. (E-4)

Present petition assails orders dated 30.03.2022 and 06.06.2022, passed by Income Tax Officer, Ward 2(3)(1), Kanpur.

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Jayant Banerji, J.)

1. Heard Sri Abhinav Mehrotra, learned counsel for the petitioner, Sri Sudarshan Singh, learned counsel for the respondent no.1 and Sri Gaurav Mahajan, learned Senior Standing Counsel for the respondent nos. 2 & 3.

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

"a) To issue a writ, order or direction in the nature of CERTIORARI quashing the IMPUGNED ORDER Dt. 30.03.2022 passed u/s 148A(d) of the Income Tax Act, 1961 by the Respondent No. 2;

b) To issue a writ, order or direction in the nature of CERTIORARI quashing the IMPUGNED ORDER Dt. 06.06.2022 passed u/s 154 of the Income Tax Act, 1961 by the Respondent No. 2;

c) To issue a writ, order or direction in the nature of CERTIORARI quashing the

IMPUGNED Notice Dt. 30.03.2022 u/s 148 of the Income Tax Act, 1961 by the Respondent No. 2."

3. On 26.07.2022 and 02.08.2022, this Court passed the following orders :

"**26.07.2022**

Heard Sri Abhinav Mehrotra, learned counsel for the petitioner, Sri Sudarshan Singh, learned counsel for the respondent No.1 and Sri Gaurav Mahajan, learned Senior Standing Counsel for the respondent Nos.2 and 3.

This writ petition has been filed praying for the following relief:

"a) To issue a writ, order or direction in the nature of CERTIORARI quashing the IMPUGNED ORDER Dt. 30.03.2022 passed u/s 148A(d) of the Income Tax Act, 1961 by the Respondent No.2;

b) To issue a writ, order or direction in the nature of CERTIORARI quashing the IMPUGNED ORDER Dt. 06.06.2022 passed u/s 154 of the Income Tax Act, 1961 by the Respondent No.2;

c) To issue a writ, order or direction in the nature of CERTIORARI quashing the IMPUGNED Notice Dt. 30.03.2022 u/s 148 of the Income Tax Act, 1961 by the Respondent No.2;"

Prima facie, from perusal of Annexure-3 to the writ petition, it appears that the petitioner has submitted a reply to the notice under clause (b) of Section of Section 148A of the Act, 1961 dated 22.03.2022. The reply was submitted on 29.03.2022. However, the impugned order under Section 148A(d) has been passed on the ground that no reply has been submitted. The application for rectification of the mistake submitted by the petitioner under Section 154 of the Act, 1961 has been rejected on the ground that no reply was received.

The petitioner has filed a copy of screen-shot of uploading his reply dated 29.03.2022, which appears at page 25 of the writ petition. Thus, the impugned order passed by the respondents, prima facie appears to be erroneous.

Sri Gaurav Mahajan, learned counsel for the ***respondent Nos.2 and 3 prays for and is granted a week's time to file short counter affidavit in which the respondents shall specifically state as to whether petitioner has submitted reply dated 29.03.2022 and whether it is available on the portal.***

As an interim measure, it is provided that the impugned notice under Section 148 and the impugned order under Section 148A(d) of the Act, 1961, shall be kept in abeyance till the next fixed.

02.08.2022

Heard Shri Abhinav Mehrotra, learned counsel for the petitioner and Shri Gaurav Mahajan, learned Senior Standing Counsel for the respondent nos.2 and 3.

An order under Section 148-A(d) of the Income Tax Act, 1961 has been passed by the respondent no.2, prima facie, without consideration to the reply dated 29.03.2022 filed by the petitioner and the assessee's application under Section 154 of the Act, 1961 has also been rejected in the same manner.

Despite order of the Court dated 26.07.2022, the respondent nos. 2 and 3 are not filing even short counter affidavit.

Therefore, ***we direct the respondent nos.2 and 3 to file short counter affidavit*** *by tomorrow, failing which both the respondents shall remain personally present before this Court on 03.08.2022 and shall show cause.*

Put up as a fresh case before the appropriate Bench tomorrow, i.e., on 03.08.2022 at 10:00 a.m."

4. Today, a short counter affidavit on behalf of the respondent nos. 2 & 3, dated 03.08.2022 has been filed. **In paragraph nos. 4, 5 an d 6 of the aforesaid short counter affidavit, the respondent nos. 2 and 3 have stated as under :**

"4. That at the same time the ***answering respondents are not in a position to / cannot deny the system generated e-proceedings response Acknowledgment dated 29.03.2022 issued to the petitioner vide Acknowledgement No. 469506221290322 by which the petitioner submits that it had e-filed its reply dated 29.03.2022 as has been annexed alongwith the Writ Petition.***

5. That since the reply dated 29.03.2022 of the petitioner was not reflecting in the case history/notings maintained digitally on the ITBA Portal of PAN AAFCA8426N of the petitioner assessee as accessed by the Respondent No. 2 on the date of passing of the order as such the Respondent No. 2, under the circumstances, had passed the order dated 30.03.2022 issued under Clause (d) of Section 148-A of the Act and the Rectification Application filed u/s 154 of the Act was also decided under the same circumstances.

*6. That under the circumstances as enumerated in the preceding paragraphs t****he answering respondents most respectfully admit that the orders dated 30.03.2022 and 06.06.2022 impugned in the Writ Petition have been passed without considering the reply of the petitioner dated 29.03.2022 which was placed before the respondent no. 2 alongwith the Application filed u/s 154 of the Act by the petitioner."***

5. Thus, from the facts as admitted in the short counter affidavit it is undisputed that the impugned order has been passed by the respondents arbitrarily and in gross violation of the principles of natural justice. Therefore, the impugned order dated 30.03.2022 under Section 148 A(d) and the impugned order dated 06.06.2022 under Section 154 of the Act, 1961 both passed by the respondent no.2 and the impugned notice dated 30.03.2022 under Section 148 of the Act, 1961, can not be sustained and are hereby quashed.

6. We are frequently coming across cases where Income Tax Authorities are giving complete go by to the principles of natural justice. The excuse orally being set up usually by the departmental counsels is that there is some problem in the computerisation system which is solely controlled by the respondent no.1 i.e. the Central Board of Direct Taxes, New Delhi, and they can not, at their own, correct the system.

7. Be as it may, the system has been introduced and is being implemented by the respondents and, therefore, it is their primary duty to immediately remove short comings, if any, in the system. For own wrongs of the respondents, the assessee can not be allowed to suffer and put to harassment. Prevailing state of affairs clearly reflects that in the absence of any effective system of accountability of the erring officers, the harassment of the assessees and breach of principles of natural justice by the Officers is resulting in uncontrolled situation. The practice of frequently violating principles of natural justice, non consideration of replies of assessees under one pretext or the other or rejecting it with one or two lines orders without recording reasons for rejection, is gradually increasing which needs to be taken care of immediately by the

respondents at the highest level, otherwise prevailing situation of arbitrary approach and breach of principles of natural justice may not only adversely affect the assessees who pay revenue to the Government, but also may develop a perception amongst people/assessees that it is difficult to get justice from the authorities in statutory proceedings.

8. For all the reasons aforestated, the impugned order and the notice as aforesaid are quashed. Liberty is granted to the respondents to pass an order afresh under Section 148A(d) of the Act 1961 after affording reasonable opportunity of hearing to the petitioner. The respondent no.1 is directed to take forthwith all required steps to remove shortcomings in the system and to develop a system of accountability of erring officers/employees.

9. The writ petition is **allowed to the extent indicated above, with cost of Rs. 50,000/-** which the respondents shall pay to the petitioner within two weeks by an account payee bank draft or RTGS.

(2022) 8 ILRA 578
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Civil Misc. Review Application No. 40 of 2022
in Writ A No. 38386 of 2017

Anil Kumar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Tejasvi Misra

Counsel for the Respondents:
Ms. Shruti Malviya

A. Civil Procedure Code – O. 47 R. 1 – Review – Scope – Apparent error – Any other sufficient ground – Writ petition was decided in term of Dharmendra Kumar's case, wherein the ground for rejecting the candidature was the suppression of material facts regarding pendency of a criminal case, whereas the case of applicant-petitioner stands on different footing that he had no knowledge about his criminal case – Held, non-disclosure or suppression of material facts would be covered in the category of 'any other sufficient cause', which furnishes a good ground for review and is wide enough to include such a cause – Held further, the case of the petitioner stands on a better and different footings from that of *Dharmendra Kumar's case,* hence the impugned judgment is liable to be reviewed and recalled – High Court remanded the matter back to the authority for fresh decision to be taken in the light of Avtar Singh's case and Pawan Kumar's case. (Para 27, 28, 33, 36 and 37)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Avtar Singh Vs U.O.I. & ors.; 2016(8) SCC 471

2. Nandkishore Lalbhai Mehta Vs New Era Fabrics P.Ltd.& Ors; (2015) 9 SCC 755

3. Special Appeal No. 2435 of 2011; Rama Kant Prasad & ors. Vs U.O.I. & ors. decided on 07.01.2013

4. Special Appeal No. 153 of 2019; Tej Bahadur Yadav Vs U.O.I. & ors. decided on 22.09.2021

5. Kamlesh Verma Vs Mayawati; (2013) 8 SCC 320

6. Perry Kansagra Vs Smriti Madan Kansagra; (2019) 20 SCC 753

7. Special Appeal No. 147 of 2016; St. of U.P. & ors. Vs Shyam Lal 425 (S.S) 2011 decided on 05.08.2021

8. S. Nagraj Vs St. of Karn; (1993) Supp. 4 SCC 595

9. M.M. Thomas Vs St. of Kerala & anr.; (2000) 1 SCC 666

10. Pawan Kumar Vs U.O.I. & anr.; 2022 0 Supreme (SC) 391

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Tejasvi Misra, learned counsel for the applicant-petitioner and Ms. Shruti Malviya, learned counsel for the opposite parties.

2. This review application has been filed by the applicant-petitioner against the judgment and order dated 21.01.2019 passed by Hon'ble Mr. Justice Yashwant Verma in WRIT - A No. - 38386 of 2017 (Anil Kumar vs. Union of India and 4 Others) alongwith an application for condoning the delay in filing of the review application. The review application has been placed before the regular Bench, dealing with the matter after the transfer of Hon'ble Judge (Hon'ble Mr. Justice Yashwant Verma) to another High Court as per the order of Hon'ble Acting Chief Justice dated 13.11.2018, therefore, the matter is being heard by this Bench, which is the regular Bench having jurisdiction to hear this matter.

3. The registry has reported the review application to be beyond time by 1037 days on the date of its presentation, i.e. 20.02.2019. The cause shown in the delay condonation application supported with affidavit is sufficient.

4. Application allowed. Delay condoned.

5. Brief facts of the case are that the writ petition bearing Writ-A No. 38382 of 2017 (Dharmendra Kumar Vs. the Union Of India And Others) was filed with a prayer to quash the impugned orders dated 29.07.2015 and 11.05.2017 passed by respondent no.4 and a further prayer was made to direct the respondent authorities to reinstate the service of petitioner and pay salary alongwith other benefits also. It is the case of the petitioner that the petitioner applied for the post of Constable in RPF pursuant to the advertisement No.1 of 2011 dated 23.02.2011 issued by respondent no.5, i.e. the Chief Secretary Commissioner, RPF, Northestern Railways (NER), Gorakhpur. The selection process for Constable GD Posts, against the aforesaid advertisement, consisted of written examination, physical examinations and thereafter, viva and document verification followed by medical examinations. The petitioner being eligible filled up the application form and appeared in the written examination as held pursuant to the aforesaid advertisement. The petitioner qualified the written examination and was called for physical efficiency test, which was held on 09.03.2014 at District-Gorakhpur. Thereafter, the petitioner was called for document verification and medical examination on 05.05.2014 as he had qualified in the written examination as well as physical eligibility test. Thereafter, as the petitioner qualified all the examinations as required, his role number was mentioned in the select list of finally selected candidate. In paragraph no.12 of the attestation form, he was required to fill up certain details. The petitioner filled up the attestation form on 12.05.2014 but he did not disclose about the criminal case, which was lodged against him alongwith three other persons being Case Crime No.4 of 2008, under Sections 323, 325, 504, 506 IPC, at P.S.-Sujanganj, District-Jaunpur. As the petitioner was residing at District-

Allahabad for pursuing his studies as well as appearing in competitive exams, he had no knowledge of the aforesaid criminal case and even otherwise, the Investigating Officer has told his father that investigation of the aforesaid case has concluded and petitioner's name has been dropped.

6. The petitioner received allotment letter from the authorities concerned in the month of October, 2014, by which the petitioner was allotted the post of Constable in RPSF and was sent for basic training at RPF training Centre in CISF Training Centre, Bhillai Utai Durg, Chhatisgarh.

7. The petitioner has joined his training on 01.11.2014 and while he was under training, he received letter dated 29.07.2015 and 11.05.2017 issued by respondent no.4, in which it was stated that during the verification, it was found that one criminal case being Case Crime No. 04 of 2008, U/s 323, 325, 504, 506 IPC, at P.S. Sujanpur, District-Jaunpur was lodged against the petitioner, disclosure of which was not done in the attestation form filled by the petitioner. The petitioner was discharged with immediate effect by order dated 29.07.2015 without taking into consideration the fact that the petitioner was not aware of pendency of any criminal case against him, therefore, he could not disclose about the same while filing the attestation form. Hence, the writ petition no. 52193 of 2015 was filed challenging the aforesaid orders.

6. The aforesaid writ petition was finally allowed by the Co-ordinate Bench of this Court vide order dated 14.12.2016 wherein while quashing the impugned discharge order dated 29.07.2015 liberty was granted to the respondents to pass fresh order in the light of judgment of the Apex Court in the case of ***Avtar Singh Vs. Union of Indian and others***, reported in ***2016(8) SCC 471***.

7. A certified copy of the aforesaid order was served upon the respondents through post alongwith covering letter. Pursuant to which, the respondent no.4 passed impugned order dated 11.05.2017 rejecting the representation of the petitioner, thus his candidature for appointment in the Government Service as Constable in RPF/RPSF was cancelled with immediate effect.

8. Learned counsel for the petitioner submits that the impugned order dated 29.07.2015 has been passed on the ground that the petitioner has suppressed the fact with respect to pendency of criminal case against him in the attestation form submitted by him, hence he is not fit to be appointed as government servant. Subsequently, the impugned order dated 11.05.2017 has been passed wherein the representation of the petitioner has been rejected on the ground of suppression of factual information in the attestation form rendering him unfit for appointment in the government service.

9. The aforesaid impugned orders have been challenged by the petitioner in the writ petition on the following grounds:-

(i) The petitioner has been discharge from service and his appointment has been cancelled in violation of directions by this Court and the guidelines as stated in para 38 of judgment of Hon'ble Apex Court in the case of ***Avtar Singh vs. Union of India and Ors.*** has not been taken into consideration. The Apex Court in paragraph

no. 38 of the judgment in Avtar Singh (supra) has held as under:-

"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:

38.1 Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2 While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3 The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4 In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted : -

38.4.1 In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2 Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3 If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5 In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6 In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

38.7 In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8 If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9 In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10 For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11 Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

(ii) The impugned orders have been passed without application of mind and without appropriation of facts and circumstances of the case.

(iii) while rejecting the claim of the petitioner, the respondents have not recorded any finding and given any logical reason for passing the same, hence the entire action of the respondents is illegal and arbitrary.

(iv) The entire exercise has been done without following the proper procedure as provided under law as well as without considering the facts that to the best knowledge of the petitioner's father, the proceeding of the criminal case against the petitioner were dropped.

10. However, in the counter affidavit filed by the respondent-opposite party, it has been stated that the impugned orders have rightly been passed on the ground of suppression of fact with respect to pendency of criminal case, in the attestation form so submitted by the petitioner, therefore, the orders impugned do not suffer any illegality.

11. The aforesaid writ petition was dismissed by order dated 21.01.2019 wherein the following order was passed:-

"Heard learned counsel for the petitioner. None appeared for the respondents.

Learned counsel for the petitioner fairly concedes that this petition would merit dismissal in light of the order passed in companion Writ-A No. 38382 of 2017 (Dharmendra Kumar Vs. The Union Of India And Others).

Accordingly and following the reasons assigned therein, this writ petition is also dismissed."

12. The aforesaid order dated 21.01.2019 passed by learned Single Judge was challenged by means of filing Special Appeal Defective No. 181 of 2021 on the ground that while dismissing the writ petition, though the learned Single Judge had placed reliance on certain principles culled out by the Apex Court in the case of ***Avtar Singh vs. Union of India and Others***, ***reported in (2016) 8 SCC 471*** but the fundamental amongst those principles is enshrined in paragraphs nos. 29 and 30 of the judgment whereunder, if there had been any kind of suppression, the employer has discretion to terminate the service or condone the omission/suppression of an employee dependent on the facts of the case, has not been taken into consideration. While challenging the order passed in the writ petition, learned counsel for the applicant-petitioner submits that learned Single Judge has not considered the fact that the railway authorities have kept in mind the fundamental principles as laid down in the judgment of ***Avtar Singh (supra)***, while deciding the case of Mukul Kumar and Sunil Kumar. Though the case of the applicant-petitioner falls at par that

of Mukul Kumar and Sunil Kumar, but while considering the discharge of the petitioner from service, a broad minded approach has not been taken as done in the case of Mukul Kumar and Sunil Kumar. The following order was passed in the aforesaid special appeal:-

"Learned counsel for the appellant has submitted that although the learned Single Judge while dismissing the writ petition has placed reliance on certain principles culled out by the Apex Court in Avtar Singh vs. Union of India and others, (2016) 8 SCC 471 but the fundamental amongst those principles is enshrined in paragraphs 29 and 30 of the judgment in Avtar Singh (supra) whereunder, if there had been any kind of suppression, the employer has discretion to terminate the service or condone the omission/suppression of an employee dependent on the facts of the case. By placing reliance on orders passed by Railway Authorities in similar matters of Mukul Kumar and Sunil Kumar, learned counsel for the appellant has submitted that the case of the appellant falls at par with those of Mukul Kumar and Sunil Kumar and therefore, while considering discharge of the petitioner-appellant from service, a broad minded approach ought to have been taken by the authority. He has also pointed out that judgment and order of acquittal of appellant reveals that there was no fault of the petitioner-appellant and the incident had occurred in some other manner, as was narrated by the prosecution witnesses during the course of trial.

The matter requires consideration.

Ms. Shruti Malviya, Advocate has accepted notice on behalf of respondents. She prays for and is allowed four weeks' time to file counter affidavit. The petitioner-appellant will have one week thereafter to file rejoinder affidavit, if any.

List this matter on 7th April, 2021."

13. Subsequently, on 04.08.2021, the aforesaid special appeal was dismissed as withdrawn as the Court opined that the applicant-petitioner should have filed review application against the judgment and order dated 21.01.2019 as once the learned counsel for the petitioner has conceded for dismissal of the writ petition, he has no right to challenge the writ court's order in special appeal, therefore, the present review application has been filed with the following grounds:-

(i) that the petitioner had never agreed to get his case dismissed on the ground of similarity with the case of ***Dharmendra Kumar (supra),*** rather the case of the petitioner stands on different footing.

(ii) that the petitioner had contested his case on its own merit and had never authorized the counsel to claim similarity with any other case. He further submits that at the time of submission of attestation form on 12.05.2014, the petitioner has not disclosed about the criminal case as the Investigating Officer had informed his father that the name of the petitioner has been dropped during the course of investigation.

(iii) similarly situated candidates has been reinstated his service and the petitioner has been discriminated from such candidates. In the special appeal, the Division Bench of this Court was pleased to call for an explanation from the respondents, as to why and how the case of the applicant-petitioner has been distinguished from various similarly placed candidates. Therefore, the present review application may be allowed on the aforesaid grounds.

14. Ms. Shruti Malviya, learned counsel for the respondent submits that there is no illegality in the order dated

21.01.2019 passed in writ petition as the details of pending criminal case was not disclosed by the petitioner in the attestation form. There was also no assertion that the petitioner had no knowledge of this case or that his statement was not recorded during the course of investigation. The issue of deliberate suppression was further highlighted from a reading of the contents of the writ petition in which it has been averred that the father of the petitioner was assured by the Investigating Officer that his name would be dropped from the investigation. The impugned order records that the criminal case is pending trial. This recital in the order is not disputed by the petitioner.

15. She further submits that ground with respect to discrimination from other similar situated persons, has been taken for the first time in the special appeal filed by the applicant-petitioner, which has been dismissed vide order 04.08.2021 and this ground has also been taken for the first time in the review application filed by the applicant-petitioner, therefore, the same has not been considered by this Court. In support of her contention, she relied upon the judgment of the Apex Court in the case of ***Nandkishore Lalbhai Mehta vs New Era Fabrics P.Ltd.& Ors reported in (2015) 9 SCC 755***, wherein it has been held that in absence of specific pleading and document, relief otherwise claimed will not be considered by the Court. Relevant paragraphs are as under:-

"20. ***.....unless and until there is an amendment of the pleadings, no evidence with regard to the facts not pleaded can be looked into,.....***

.....

(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

.....

"6. ... It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out

whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal."

17. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contain the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta referred to above and several other decisions of this Court following the same cannot be construed as diluting the well-settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu"."

16. She has also relied upon the judgment of this Court in the case of ***Rama Kant Prasad and Others vs. Union of India and others***, decided on 07.01.2013 passed in Special Appeal No. 2435 of 2011, wherein the Court has held that no indulgence is required, in case of submission of false affidavit by the candidate.

17. She has further relied upon the judgment of this Court passed in ***Special Appeal No.153 of 2019 (Tej Bahadur Yadav vs. Union of India and 4 Ors.)*** along with bunch of appeals so filed, which have been dismissed vide order dated 22.09.2021 as the applicants therein have failed to bring out a case within the four corners of the conclusions recorded in the case of Avtar Singh (supra), then the issue of triviality or nature of the offence and subsequent acquittal loses its significance and the most glaring question staring in the eyes of the appellants is the question of trust.

18. She, therefore, further submits that the impugned judgment dated 21.01.2019 passed by learned Single Judge does not suffer from any illegality, therefore, the review application is liable to the dismissed.

19. I have considered the submissions made by learned counsel for the parties as well as perused the material brought on record.

20. Before considering the merits of the case, it would be proper to consider the scope of review application in facts and circumstances of the case. The basic

principles in which review application can be entertained and cannot be entertained have been eloquently laid down by Hon'ble the Apex Court in the case of ***Kamlesh Verma vs. Mayawati reported in (2013) 8 SCC 320.*** As has been enumerated in the aforesaid judgment, the review application will be maintainable on the following grounds:-

"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 third ground with respect to any other sufficient reason has been interpreted as a reason sufficient on grounds at least analogous to those specified in the rule.

21. The review application will not be maintainable on the following grounds:-

(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.

22. The Hon'ble Apex Court in the case of ***Perry Kansagra v. Smriti Madan Kansagra reported in (2019) 20 SCC 753***, on the scope and power of review, has reiterated the same principles.

23. The law on the subject-exercise of power of review, as propounded by the Apex Court and various other High Courts may be summarized as hereinunder:-

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.

(v) An application for review may be necessitated by way of invoking the

doctrine actus curiae neminem gravabit.' In our opinion, the principles of law enumerated by it, in the facts of this case, have wrongly been applied.

24. The settled position of law regarding scope and power of review has been laid down by the Division Bench of this Court in ***Special Appeal No.147 of 2016 [State of U.P. Thru. Secy. Revenue Civil Sectt. Lko. and Ors. vs. Shyam Lal 425(S.S)2011] decided on 05.08.2021***, wherein while deciding the review petition in para 17, it has been held as under:-

"(17) It has thus been settled in law that;

(i) the power of review may be necessitated by way of invoking the doctrine ''actus curiae neminem gravabit' which means that no act of the court in the course of whole of the proceedings does an injury to the suitors in the court. It has been held in Food Corporation of India and Another vs. M/s Seil Ltd. & Ors. [(2008) 3 SCC 440] that a writ court exercises its power of review under Article 226 of the Constitution of India itself and while exercising the jurisdiction it not only acts as a court of law but also as a court of equity. A clear error or omission on the part of the court to consider a justifiable claim would be subject to review, amongst others, on the ''actus curiae neminem gravabit'.

(ii) The mistake or error must be apparent on the face of record i.e. that it must strike one on more looking at the record and would not require any long drawn process of reasoning. It should not be an error which has to be fished out and searched. Such an error must also be material which undermines the soundness of the judgment or results in miscarriage of justice. An error which may be apparent but is of inconsequential import, that would not furnish a ground for review.

(iii) An application for review would also be maintainable for ''any other sufficient reason', which expression has been interpreted to mean a reason sufficient on grounds at least analogous to those specified in Order 47 Rule 1 C.P.C., which are wide enough to include a misconception of fact or law by a court or even an Advocate and what other grounds would constitute sufficient reason depends on the facts and circumstances of each case.

(iv) There are limitations on the exercise of review jurisdiction. Review proceedings are not by way of appeal. It cannot be treated like an appeal in disguise. A rehearing of the matter is not permissible in law. If there are two views possible, the power of review cannot be exercised to substitute the view already taken in the judgment under review. It is not for an erroneous decision to be ''reheard and corrected' in review jurisdiction."

25. In the present facts and circumstances of the case, wherein keeping in mind the above principles, this Court proceeds to consider as to whether the grounds on which the present review application has been filed exist, and if yes, whether on such grounds review would be permissible.

26. A perusal of the impugned judgment dated 21.01.2019 goes to show that learned counsel for the petitioner fairly conceded that the petition may be dismissed in the light of order passed in connected Writ-A No.38282 of 2017 (Dharmendra Kumar vs. Union of India and 5 Ors.), whereas in the review petition the learned counsel for the applicant-petitioner has submitted that he had never agreed to

get his case dismissed on the ground of similarity with the case of ***Dharmendra Kumar (supra)*** as the case of the applicant-petitioner stands of different footings.

27. In the case of ***Dharmendra Kumar (supra)***, though the ground for rejecting the candidature of the petitioner therein was the same, i.e. suppression of material facts regarding pendency of a criminal case in which he was named as an accused and trial was pending. But the petitioner therein while filing the aforesaid writ petition bearing Writ-A No.38282 of 2017 had not asserted that the petitioner had no knowledge of this case or that his statements were not recorded during the course of investigation. In his case, the issue of deliberate suppression was highlighted from a reading of the contents of paragraph no.17 of the writ petition, in which it was averred that the father of the petitioner therein was assured by the Investigating Officer that his name would be dropped from the investigation. The impugned order in the aforesaid case also recorded that the criminal case against the petitioner therein was pending. ***Dharmendra Kumar (supra)***, the petitioner therein did not dispute about the aforesaid fact in the writ petition also.

28. In the present case, in para 19 of the writ petition, the petitioner has clearly stated that he had no knowledge about his criminal case and that the Investigating Officer told his father that the name of the applicant-petitioner has been deleted in the charge sheet after concluding the investigation and assurance was also given by him that the name of the petitioner has to be deleted in the chargesheet. The aforesaid criminal case was lodged by real uncle of the applicant-petitioner and after investigation, charge sheet was submitted on 08.02.2008 against four persons, namely, Pradeep Kumar, Virendra Kumar, Santosh Kumar and Mahendra Kumar, therefore, in the month of June, 2014, on the assurance has been given by I.O. to the petitioner's father that the petitioner had not been charge sheeted, he did not disclose about the criminal case.

29. Therefore, in the special circumstances, wherein the charge sheet was already been submitted in the year 2008 against four named accused persons excluding the petitioner, the petitioner did not deliberately suppress the facts about pendency of criminal case while submitting the attestation form in the year 2014 as he had no knowledge about any chargesheet being filed against him later or pendency of criminal trial, hence the case of the petitioner stands on a different footings than that of ***Dharmendra Kumar (supra)***.

30. This Court also finds that while dismissing the case of ***Dharmendra Kumar (supra)***, the court concerned had discussed the judgment of the Apex Court in Avtar Singh (supra) case and as per the factual position of the aforesaid case, the Court finds that the case of the petitioner therein did not fall within the criteria as enunciated in para 38 of the aforesaid judgment of ***Avtar Singh (supra)***, whereas from perusal of the judgment of ***Dharmendra Kumar (supra)*** case, it is found that there is no discussion regarding the section in which the FIR was lodged against the petitioner therein hence, learned counsel for the petitioner in the present case is to be believed that in case, had an opportunity of arguing of the case on merits been given to the petitioner, his case would have been on a different footings from that of ***Dharmendra Kumar (supra)*** in view of principles enunciated in paras 38.2, 38.4,

38.8, 38.10 and 38.11 of the judgment of ***Avtar Singh (supra).***

31. Neither in the counter affidavit filed by the respondents nor in the impugned order, it has been specified, as to whether the petitioner has been charge sheeted, convicted or acquitted. In such circumstances, if the case of the petitioner is seen on its own merits, intervention by the Court would have been required, instead of dismissing the same in the light of ***Dharmendra Kumar (supra).***

32. So far as the second ground as taken by the applicant-petitioner that the petitioner has been discriminated from similarly situated candidates, this Court finds that plea raised for the first time in review application cannot be entertained.

33. As the case of the petitioner was on different footings from that of ***Dharmendra Kumar (supra)*** as discussed above, even if the learned counsel for the petitioner had conceded for dismissal of the case in the light of aforesaid judgment, it was the duty of the learned counsel for the respondents to point out the difference in the two matters. Non-disclosure or suppression of material facts would be covered in the category of "any other sufficient cause", which furnishes a good ground for review and is wide enough to include such a cause.

34. At this stage, it would be apt to refer the judgment in the case of ***S. Nagraj vs. State of Karnataka reported in (1993) Supp. 4 SCC 595***, wherein Hon'ble Apex Court has observed that it is the duty of the Court to rectify, revise and recall its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences. Again in the case of ***M.M. Thomas vs. State of Kerala & Another reported in (2000) 1 SCC 666***, the Hon'ble Apex Court has held that the High Court, as a Court of record, has a duty to itself to keep all the records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it, the High Court has not only power, but a duty to correct it.

35. This Court is of the opinion that mere suppression of material/false information in a given case does not mean that employer can arbitrarily discharge/terminate an employee from service. All matters cannot be put in a straight jacket and a degree of flexibility and discretion which vests with the authorities, must be exercised with care and caution taking all facts and circumstances into consideration including the nature and type of lapse. The aforesaid view has been followed by the Apex Court in the case of ***Pawan Kumar vs. Union of India & Another reported in 2022 0 Supreme (SC) 391***. Relevant paragraphs of the judgment in the case of ***Pawan Kumar (supra)***, reads as follows:-

"13. What emerges from the exposition as laid down by this Court is that by mere suppression of material/false information regardless of the fact whether there is a conviction or acquittal has been recorded, the employee/recruit is not to be discharged/terminated axiomatically from service just by a stroke of pen. At the same time, the effect of suppression of material/false information involving in a criminal case, if any, is left for the employer to consider all the relevant facts and circumstances available as to

antecedents and keeping in view the objective criteria and the relevant service rules into consideration, while taking appropriate decision regarding continuance/suitability of the employee into service. What being noticed by this Court is that mere suppression of material/false information in a given case does not mean that the employer can arbitrarily discharge/terminate the employee from service.

.....

18. The criminal case indeed was of trivial nature and the nature of post and nature of duties to be discharged by the recruit has never been looked into by the competent authority while examining the overall suitability of the incumbent keeping in view Rule 52 of the Rules 1987 to become a member of the force. Taking into consideration the exposition expressed by this Court in Avtar Singh (supra), in our considered view the order of discharge passed by the competent authority dated 24th April, 2015 is not sustainable and in sequel thereto the judgment passed by the Division Bench of High Court of Delhi does not hold good and deserves to be set aside."

(Emphasis supplied)

36. Keeping in mind the aforesaid principles, in the case in hand, when there is no whisper of the fact in the impugned order as well as in the counter affidavit filed by the learned counsel for the respondents as to whether the petitioner has been charge sheeted, convicted or acquitted and the nature and seriousness of the offence, the case of the petitioner stands on a better and different footings from that of ***Dharmendra Kumar (supra)*** case, hence for the aforesaid reasons, this Court is of the considered opinion that the impugned judgment dated 21.01.2019 is liable to be reviewed and recalled. The writ petition is to be restored to its original number.

37. Accordingly, this review application is allowed. The judgment dated 21.01.2019 is recalled and, therefore, this Court finds that the orders impugned dated 29.07.2015 and 11.05.2017 passed by respondent no.4 cannot be legally sustained and are hereby quashed. Matter is remitted back to respondent no.4 for decision afresh in light of the law laid down by the Apex Court in the cases of ***Avtar Singh and Pawan Kumar (Supras)***. While deciding the matter afresh, respondent no.4 shall pass a reasoned and speaking order, in accordance with law, after affording opportunity of hearing to the petitioner, preferably within a period of three months from the date a certified copy of this order is filed before him, if there is no other legal impediment.

38. The present writ petition, which is restored to its original number, is also allowed subject to the observations made above.

(2022) 8 ILRA 590
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-C No. 22096 of 2022

Mangal Batra ...Petitioner
Versus
Mohd. Rafeeq Visayati & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Tandon

Counsel for the Respondents:

Sri Arvind Kumar, Sri Rahul Sahai

A. Civil Law -Constitution of India, 1950-Article 226 - Motor Vehicles Act, 1988-Section 166(3)-claim petition-Return of claim petition holding its filing beyond prescribed period of limitation (six months) from, date of accident, not maintainable in view of section 166(3) of the Act-Amending provisions in question brought on statute vide Act No. 32 of 2019 were notified to be made operative in Official Gazette by Central Government on 25th February, 2022 to be effectively operative w.e.f. 1st April, 2022-Until such notification with respect to section 166 not brought into force-Since the Amending Act of 2019 did not make it retrospective from the date of its notification and did not prescribed any amendment/alteration in repeal and saving clause of the Act so as to make it applicable in respect of the accident that had taken place prior to the date of notification-Petitioner directed to represent the petition again before the Tribunal.(Para 1 to 20)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Sathi & ors. Vs Dileep I.S & ors. OP(MAC) No. 51 of 2022

2. St. of Punj. & ors. Vs Bhajan Kaur & ors. WP No. 3 of 2022

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

1. Heard Sri Manish Tandon, learned counsel for the petitioner, Sri Rahul Sahai, learned counsel for the respondent Nos. 3 & 5.

2. By means of this writ petition filed under Article 226 of the Constitution, petitioner has challenged the order dated 18th April, 2022 of the Motor Accident Claims Tribunal, whereby the claim petition of the petitioner has been returned on the ground that it came to be filed beyond the prescribed period of limitation i.e. six months from the date of accident and hence as per Section 166 (3) of the Motor Vehicles Act, 1988 as amended vide Act No.- 32 of 2019 and made effective from 1st April, 2022, the claim petition was held not maintainable.

3. The argument advanced by learned counsel for the petitioner is two fold:

(A). The Tribunal is not justified in returning the claim petition on the ground of delay in filing the claim petition because the amending Act was made effective only from 1st April, 2022 and even though the claim petition was filed on 12th April, 2022 but amendment incorporating period of limitation under the Motor Vehicles Act being only prospective in nature, application was maintainable. In support of his argument, he has placed reliance upon the judgment of Kerala High Court in the case of **Sathi and others v. Dileep I.S. and others** decided on 1st June, 2022 in OP (MAC) No.- 51 of 2022, wherein this legal aspect of the matter has been dealt with extensively and it has been held that amended provision of Motor Vehicles Act, 1988 was having only prospective effect from 1st April, 2022 in terms of the accident occurring on that day or subsequently; and

(B). Since the accident had taken place on 12th October, 2020 when the whole State was badly hit by the Covid-19, therefore, a general order condoning the delay for instituting judicial proceedings or for that matter quasi judicial proceedings, the Supreme Court took a pragmatic view that period during which the States and the nation were hit by the pandemic Covid-19, such period should be exempted from the

period of limitation, or in other words the period of limitation would stand extended for such a period. In this connection, petitioner has relied upon the judgment of Supreme Court dated 10th January, 2022 passed in Misc. Application No. 21 of 2022 in a Suo Moto writ petition C No.- 3 of 2022.

4. *Per contra,* learned counsel for the Insurer has sought to justify the order impugned for the reasons assigned therein.

5. Having heard learned counsel for the parties and their arguments raised across the bar, I find that Accident Claims Tribunal has rejected the claim of petitioner solely on the ground that the accident had taken place on 12th October, 2020 and when the petition was presented before the Tribunal the amendment had already intervened which prescribed for six month limitation for moving application for claim under the Motor Vehicles Act. Applying the amended provision, the Tribunal has held that claim petition was not maintainable and accordingly returned the claim petition to the claimant-applicant.

6. The judgment of the Kerala High Court, as is claimed to be still holding the field, has dealt with the provisions and held that the amended provisions would have prospective effect only. Vide paragraph 10 of the judgment, it has been held thus:

"10. Since while introducing the Act of 2019 effective from 1.4.2022, Legislature did not cause any amendment in the repealing and savings clause specifying its applicability in respect of the accidents occurred prior to the introduction of the amendment, in view of the provisions of Section 6 and the observations of the Supreme Court in the judgment in ***State of Punjab and others v. Bhajan Kaur and others (supra),*** *I am of the view that the applicability of the Act i.e., introduction of the old provisions of sub-Section (3) of Section 166, would have a prospective effect and the limitation period of six months would apply after introduction of the amendment i.e., post 1st April, 2022. In other words, in any accident occurred after 1.4.2022, provisions of the amendment caused in the Act prescribing the limitation to entertain a claim petition, the parties would be governed by the same but not in respect of the persons whom a right had already accrued and was available if the amendment had not been caused."*

7. Having gone through the judgment of Kerala High Court and amended provisions of the Motor Vehicles Act, I find that though the Act came to be amended in the year 2019 vide Act No.- 32 of 2019 but was made effective only from 1st April, 2022 and the Act does not make operation of the amended provision retrospective.

8. However, in order to appreciate the amendment made it would be appropriate to reproduce Section 166 of the Motor Vehicles Act, 1988 as it existed on the Statute book prior to 1st April, 2019:

"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 authorized by the person injured or all or any of the legal

representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

(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."

9. From the bare reading of the aforesaid provisions it is clear that there was no such limitation prescribed for, prior to 2019 as sub-Section (3) of Section 166 that prescribed period for limitation between 6 to 12 months earlier had been subsequently repealed.

10. Now I reproduce Section 166 of the Motor Vehicles Act, 1988 as it stood amended vide Amending Act No.- 32 of 2019:

"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 authorized 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.

Provided further that where a person accepts compensation under section 164 in accordance with the procedure provided under section 149, his claims petition before the Claims Tribunal shall lapse.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect

immediately before the signature of the applicant.

(3) No application for compensation shall be entertained unless it is made within six months of the occurrence of the accident.

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under section 159 as an application for compensation under this Act.

(5) Notwithstanding anything in this Act or any other law for the time being in force, the right of a person to claim compensation for injury in an accident shall, upon the death of the person injured, survive to his legal representatives, irrespective of whether the cause of death is relatable to or had any nexus with the injury or not."

(Emphasis added)

11. Upon the bare reading of the aforesaid provisions, I find that second proviso to sub-Section (1) of Section 166 has been added and further sub-Section (3) and (5) have been added. Sub-Section (3) which is newly added section provides limitation of a period of six months for moving a claim petition of the occurrence of the accident.

12. Now what is material and substantially important is that limitation would run from the date of occurrence of the accident.

13. Now it is necessary to examine the amending Act itself in order to decipher its mode of implementation. Short title and commencement of the amending Act No.- 32 of 2019 vide Section 1 and (2) of Chapter 1 of the said Act is relevant here and so is reproduced as under:-

"1. Short title and commencement - (1) This Act may be called the Motor Vehicles (Amendment) Act, 2019.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision."

(Emphasis added)

14. A close scrutiny of aforesaid provisions makes it evident beyond any doubt that the amending Act, 2019 shall come into force only from the date it is notified by the Central Government in the official Gazette and there may be different dates for different provisions to be brought into force.

15. Amending provisions in question brought on Statute vide Act No.- 32 of 2019, were notified to be made operative in the official Gazette by the Central Government on 25th February, 2022 to be effectively operative w.e.f. 1st April, 2022. It is clear that until such notification as noticed above, the amending provisions of the Act No. 32 of 2019 with respect of Section 166, were not brought into force and since the amending Act of 2019 did not make it retrospective from the date of its notification and did not prescribed any amendment/ alteration in repeal and saving clause of the Act so as to make it applicable in respect of the accident that had taken place prior to the date of notification, I find the view taken by the Kerala High Court to be justified and, therefore, do not find any reason to defer from the same.

16. As far as the other ground is concerned regarding condoning the delay during which limitation of six months' period is to be exempted on the ground of the impact of pandemic Covid-19 throughout the Nation in general and in State of Uttar Pradesh in particular, I find substance in the argument as well. However, since I am not able to uphold the order of the Tribunal on the very first ground alone, I need not go in detail into the second argument.

17. In view of the above, the order dated 18th April, 2022 passed by the Motor Accidents Claim Tribunal is hereby set aside.

18. The petitioner is directed to represent the petition again before the Tribunal within a period of three weeks from today and in the event if the same is presented within the period of three weeks, it shall be considered as such and the same shall be decided within a further period of three months as per procedure prescribed for.

19. Learned counsel for the petitioner has apprised the Court that Claims Tribunal in the State are refusing those claim petitions that have been preferred beyond the period of six months even in respect of claims of accident that occurred prior to 1st April, 2022. Learned Court for the Insurance Company could not dispute the above statement made at the bar.

20. Accordingly, I direct the Registrar General/ Compliance to send a copy of this order to every Motor Accident Claims Tribunal in the State immediately.

(2022) 8 ILRA 595
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 21.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal Defective No. 10 of 2022
(U/S 372 Cr.P. C.)

Triyugi Nath Tiwari ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Yogesh Dutta Mishra, Sri Manjulesh Kumar Shukla

Counsel for the Opposite Parties:
Govt. Advocate, Sri Prakash Dwivedi

Criminal Law - Indian Penal Code, 1860 - Sections 302 & 34-Appeal against acquittal-after delay of 21 years-challenging the judgment passed much prior to the amendment in 2009-not maintainable.

Appeal dismissed. (E-9)

List of Cases cited:

1. Prithvi Singh Vs St. of U.P. & ors, Criminal Appeal no. 329/2012

2. Mallikarjun Kodagali (dead) represented through Legal representatives Vs St. of Kar. & ors.

3. Hitendra Vishnu Thakur & ors. Vs St. of Mah. & ors. (1994) 4 SCC 602

4. Ramesh Kumar Soni Vs St. of M.P., (2013) 14 SCC 696

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

Re: Order on Criminal Appeal

1. Heard Sri Yogesh Dutta Mishra, learned counsel for the appellant and Mr. Shri Prakash Dwivedi, learned counsel appearing for the accused-respondents.

2. This is an appeal u/s 372 of the Code of Criminal Procedure (CrPC) seeking to challenge the judgement and order dated 2.12.2004 passed by the Sessions Judge, Mirzapur in S.T. No. 157 of 2003 (State vs. Devi Shankar Chaubey and others) whereby the accused-respondents were acquitted from the offences under Section 302/34 IPC, P.S. Lalganj, District Mirzapur, arising out of Case Crime No. 118 of 203.

3. The Stamp Reporter has reported delay of 6228 days in filing the present appeal. Apart from such huge delay, we find that the appeal itself is not maintainable.

4. Present appeal has been filed by the appellant under the Proviso to Section 372 Cr.P.C. The judgement under challenge is dated 2.12.2004 passed in S.T. No. 157 of 2003 (State vs. Devi Shankar Chaubey and others) whereby the accused-respondents were acquitted from the offences under Section 302/34 IPC.

5. Significantly, the incident had allegedly taken place on 1.5.2003 and the impugned judgement and order was passed on 2.12.2004. Proviso to Section 372 Cr.P.C. was added by way of amendment inserted by Act 5 of 2019 with effect from 31.12.2009 on the appointed date as notified by the Central Government by Notification No. SO 3313 (E) dated 30.12.2009. The Proviso to Section 372 Cr.P.C. is quoted as under:

The Code of Criminal Procedure, 1973

*"**372.** No appeal to lie unless otherwise provided.--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:*

[Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.] (added by Act No. 5 of 2009)

6. Right to appeal has been considered by this Court in **Prithvi Singh vs. State of UP and others** passed in Criminal Misc. Application u/s 372 Cr.P.C. (Leave To Appeal) No. 329 of 2012 on 21.4.2022, paragraphs 23, 24, 27, 28 and 29 whereof are quoted as under:

"23. Insofar as the statutes regulating appeal are concerned, the law is well established that the right to file an appeal is a statutory right and it can be circumscribed by the conditions of the statute granting it. As was observed in Government of Andhra Pradesh vs. P. Laxmi Devi, (2008) 4 SCC 720 and Super Cassettes Industries Ltd. vs. State of U.P., (2009) 10 SCC 531, it is not a natural or inherent right and cannot be assumed to exist, unless provided by a statute.

24. Therefore, the scheme of right of appeal under Chapter XXXIX of the Criminal Procedure Code, which provides the right to file appeals including abatement of appeals, has to be understood on the basis of the above golden rules of statutory interpretation.

27. Now on a comparison between Section 404 of Cr.P.C. 1898 and Section 372 of Cr.P.C. 1973, it is clear that the main provision is intact, insofar it provides that no appeal shall lie from any judgment or order of a criminal court, except as provided by this Code or by any other law for the time being in force. The significant development that has taken place in this provision is that a "proviso' was added by the Amending Act No. 5 of 2009, which provides that "the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction passed by such Court'.

28. Therefore, by the aforesaid provision a right has been created in favour of the victim, which was not existing earlier in the Code, that a victim shall have right to prefer an appeal against any order by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. If we have a glance over the statement of objects and reasons in paragraph 2, it is very much clear that while dealing with the right of the victims it has been noted that at present, the victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain "rights" and compensation, so that there is no distortion of the criminal justice system. This, by itself, is clear that the object of adding this proviso is to create a right in favour of the victim to prefer an appeal as a matter of right. It not only extends to challenge the order of acquittal but such appeal can also be filed by the victim if the accused is convicted for a lessor offence or if the inadequate compensation has been imposed.

29. It is, therefore, clear that as per the golden rule of interpretation, this "proviso' is a substantive enactment and it is not merely excepting something out of, or qualifying what was excepting or goes before. Therefore, by adding the "proviso' in Section 372 of Cr.P.C. 1973 by this amendment, a right has been created in favour of the victim."

(Emphasis supplied)

7. The Hon'ble Apex Court in the case of ***Mallikarjun Kodagali (Dead) represented through Legal Representatives vs. State of Karnataka and others***, (2019) 2 SCC 752, after discussing the judgements of Hon'ble Division Bench and Hon'ble Full Bench of various High Courts, in paragraph 72, observed as under:

"72. What is significant is that several High Courts have taken a consistent view to the effect that the victim of an offence has a right of appeal under the proviso to Section 372 CrPC. This view is in consonance with the plain language of the proviso. But what is more important is that several High Courts have also taken the view that the date of the alleged offence has not relevance to the right of appeal. It has been held, and we have referred to those decisions above, that the significant date is the date of the order of acquittal passed by the trial Court. In a sense, the cause of action arises in favour of the victim of an offence only when an order of acquittal is passed and if that happens after 31.12.2009 the victim has a right to challenge the acquittal, through an appeal. Indeed, the right not only extends to

challenging the order of acquittal but also challenging the conviction of the accused for a lesser offence or imposing inadequate compensation. The language of the proviso is quite explicit, and we should not read nuances that do not exist in the proviso."

(Emphasis supplied)

8. In ***Hitendra Vishnu Thakur and others vs. State of Maharashtra and others,*** (1994) 4 SCC 602, the Hon'ble Supreme Court has considered the ambit and scope of an amending Act, paragraph 26 whereof is quoted as under:

"26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the Court. From the law settled by this Court in various cases the illustrative though not exhaustive principle which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

(Emphasis supplied)

9. In ***Ramesh Kumar Soni vs. State of Madhya Pradesh,*** (2013) 14 SCC 696, the Hon'ble Supreme Court reiterated the aforesaid principle with approval.

10. In view of the aforesaid, it is very much clear that the amendments so made in Section 372 CrPC by adding a proviso in the year 2009 creating substantive right of appeal is not retrospective in nature. It is, therefore, clear that in the year 2004 when the impugned judgement under challenge was passed, the appellant herein who claims to be the victim had no right to challenge the impugned order dated 2.12.2004 by way of filing the appeal.

11. It is, therefore, held that the present appeal, which was filed after a delay of about more than 21 years challenging the impugned judgement dated 2.12.2004 passed much prior to the

amendment (adding the proviso in the year 2009 with effect from 31.12.2009) is clearly not maintainable.

12. Present appeal is accordingly dismissed as not maintainable.

Re: Order on Delay Condonation Application

13. Since the appeal itself is not maintainable, the question of consideration of delay condonation application, which was filed with delay of 6228 days, does not arise.

14. Delay condonation application is accordingly rejected.

15. Resultantly, appeal stands dismissed as not maintainable.

(2022) 8 ILRA 599
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 67 of 2022
(U/S 372 Cr.P. C.)

Netrapal ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Garun Pal Singh, Sri Vikas Sharma

Counsel for the Opposite Parties:
Govt. Advocate

Criminal Law - Criminal Procedure Code, 1973 - Section 372 - Indian Penal Code, 1860 - Sec 302 -The chain to link the accused-thoroughly missing and the evidences adduced are weak. Nonetheless presumption of double innocence is already attached to the accused - acquittal is liable to be affirmed.

Appeal dismissed. (E-9)

List of Cases cited:

1. Guru Dutt Pathak Vs St. of U.P. (2021) 6 Supreme Court Cases 116

2. Babu Vs St. of Ker. SCC pp. 196-199

3. Sheo Swarup Vs King Emperor (SCC OnLine PC : IA p. 404)

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Occasioning dissatisfaction the present criminal appeal purported to be under Section 372 of the Criminal Procedure Code, 1973 (Cr.P.C.) has been instituted by the appellant-informant against the judgment and order dated 6.1.2018 passed by Additional District & Sessions Judge, Court No.3, Hathras in Session Trial No.615 of 2005, (State Vs. Lekhraj & others) in Case Crime No.254 of 2004, P.S. Sikandarau, District Hathras purported to be under Section 302 IPC acquitting the accused herein, who are four in number.

2. The present appeal was presented before this Court on 4.4.2018 and on 6.4.2018 the records were summoned.

3. On 23.5.2018, 8.11.2021, 31.1.2022, 7.2.2022 and 11.2.2022, this Court passed the following orders:-

On 23.5.2018

"Passed over on the illness slip of Sri Garun Pal Singh, learned counsel for the applicant.

List after two weeks."

On 8.11.2021

"On the request of learned counsel for the applicant, list this case on 29.11.2021."

On 31.1.2021

"Perusal of the order sheet reflects that lower court record has been received.

Sri Garun Pal Singh, learned counsel for the applicant states that he was under the impression that the lower court record has not been received as yet. He is praying for adjournment of the case.

On his request, the case is passed over for the day.

List this appeal on 7.2.2022 in the additional cause list."

On 7.2.2022

"A prayer for adjournment has been made on behalf of Sri Mukesh Kumar Verma, Advocate holding brief of Sri Garun Pal Singh, learned counsel for the applicant.

We find that on the earlier occasions, the case was passed over on the prayer made by learned counsel for the applicant.

In the interest of justice, case is passed over for the day.
Lit this case again in the next cause list."

On 11.2.2022

No one is present on behalf of the applicant even in the revised call of additional cause list.

From perusal of the order sheet, we find that on most of the occasions the case was passed over on the illness slip sent by the learned counsel for the applicant or on his request.

As already held by this Court in number of cases that leave application filed under Section 378(3) Cr.P.C. is not required in the appeal filed by the victim under Section 372 Cr.P.C. like the present appeal. A reference may be made to the order dated 4.8.2021 passed in Criminal Appeal U/S 372 Cr.P.C. No. 123 of 2021 (Rita Devi vs. State of U.P. and another). As such, the application for leave to appeal stands rejected as not maintainable and / or not required.

List this case peremptorily on 22.2.2022 for admission.

It is made clear that in case on the next date no one is present on behalf of the applicant, this Court may proceed with the appeal with the assistance of learned AGA.

4. Perusal of the order so passed as extracted herein above reveals that the appellant is a avoiding hearing of the matter despite the fact that the appeal is yet to be admitted. Even on 11.2.2022 this case was marked peremptorily and it was made clear that in case on next date fixed nobody is present on behalf of appellant, this Court would proceed with the assistance of learned AGA.

5. Notably today also nobody appears to press the appeal and thus this Court has

option but to proceed with the appeal with the assistance of the learned AGA.

6. Briefly stated facts as unfolded in the prosecution story are that the first informant being Sri Kamal Singh had submitted a written complaint with an allegation that his mother being Smt. Goma Devi resident of village Garhiya on the intervening night on 25/26.6.2004 had gone to the field for answering the nature's call and about 10.00 p.m. in the night, the accused, who are four in number resorted to gun shot firing which was penetrated into the ears of the first informant his uncle being Chob Singh and Munna Lal son of Devi Ram and Hoti Lal son of Jahiri Singh along with the others and they thereafter proceeded to save her in the moonlight and they could easily recognise the faces of the accused therein.

7. As per the written complaint the aforesaid four accused while running away from the place of occurrence had threatened that they will not permit the complainant side to live in the village and after receiving gunshot injuries Smt. Goma Devi (since deceased) was taken to Malikhan Singh Hospital, district Aligarh for medication, however, as she is sustained grievous injury and she was suffering from critical situation she was referred to one of the hospital in New Delhi and thereafter the mother of the first informant along with his brother Lekhpal and other family members proceeded to New Delhi. However, it was further alleged that the mother of the deceased succumbed to gunshot injuries on 27.6.2004.

8. In between on the basis of the complaint so lodged by the first informant a first information report was lodged under Section 307 of the IPC. However, consequent to the death of the deceased, the same transformed into Section 302 IPC in Case Crime No.254 of 2004, Police Station Sikandrarau, District Hathras.

9. As per the prosecution the deceased suffered the following injuries:-

1. Multiple firearm wounds size - .5 cm x.5 cm .to .5 c.m. x .3 cm with traumatic swelling in an area of 10 cm x 6 cm on left side neck.

2. Multiple firearm wounds .....charring 0.5x0.5 c.m. to 0.2x0.2 cm in arm area of 30x12 c.m. a post aspect of left arm.

3. Multiple firearm wounds of only 0.5x0.5 c.m. to 0.2x0.2 c.m. ....laing charring in area of 27x20 cm as scapular area & adjacent area of chest below and right including right scapular region.

Pain : all injuries .....xray. All an afresh... All caused by fire arm.

10. A postmortem was also conducted on 28.6.2004 wherein the cause of the death was shown to be

A. Shotgun pellet wound in area of 36x 36 present over the back of chest on left size back of left arm and on left side of the neck. The pellets have pierced the lungs and left common candid in the neck of described in neck structure.

b. Abrasion 1X0.5 cm present over lower on the part of left side of chest.

Opinion -Death is due to hemorrhage and shock consequent upon injury to the neck structure via injury no.1. Injury no.1 is antemortem, around one day

old and is earned by smooth boned firearm. Injury no.1 is sufficient to cause death in ordinary course of nature.

11. Consequent to the lodging of the first information report one S.I. Netrapal Singh PW9 was nominated as the Investigating Officer. It is alleged that he conducted investigation while preparing site plan proceeded with recording of the statement of the prosecution witnesses and other independent witnesses while taking affidavits also and thereafter submitted the charge sheet against the accused herein, who are four in numbers under Section 302 of the IPC in Case Crime No.254 of 2004. The case was committed to trial before sessions charges were read over to the accused herein. The accused denied charges and claimed to be tried.

12. In order to bring home the charges the prosecution produced following witnesses namely PW1 Hotilal S/o Jahri, PW2 Chob Singh s/o Devi Ram, PW3 Netrapal s/o Dharmjeet, PW4 Munna Lal s/o Devi Ram, PW5 Panna Lal, PW6 Amar Singh PW7 Inspector Man Singh Yadav, PW8 S.I. Iqbal Ahmad, Delhi Police, PW9 S.I. Netrapal Singh and PW10 Dr. V.K. Gupta.

13. So far as the defence is concerned they submitted paper no. 216 along with an affidavit and paper no.217 being a sale deed.

14. The learned Trial Court by virtue of the judgment and order dated 6.1.2018 passed in Session Trial No.615 of 2005, (State Vs. Lekhraj and 3 others) acquitted the accused under Section 302 IPC in Case Crime No.254 of 2004.

15. Challenging the same now the appellant who happens to be the son of the deceased and the real brother of first informant is before this Court due to the reason being that the first informant who happens to be a real brother of appellant expired before the commencement of the trial.

16. This Court at the present moment is surrounded with a situation wherein the judgment of the acquittal is under challenge. Cautious approach is to be adopted while exercising appellate jurisdiction as the accused herein is benefited with double presumption of innocence. In other words this Court while re-appreciating evidence so sought to be adduced by the prosecution as well as ocular testimony is to find out the fact whether the learned trial court had committed palpable illegality while misreading the evidence and proceeds towards wrong direction nutritions perversity.

17. Without burdening the present judgment with the plethora of decision of the Hon'ble Apex Court, this Court finds necessary to only refer to certain paragraphs of the judgment in the case of Guru Dutt Pathak Vs. State of U.P. (2021) 6 Supreme Court Cases 116, wherein the Hon'ble Apex Court had summed up the extent of interference while exercising appellate jurisdiction. The Hon'ble Apex Court in paragraphs 14, 15, 16 have observed as under:-

14. We are conscious of the fact that this is a case of reversal of acquittal by the High Court. Therefore, the first and foremost thing which is required to be considered is, whether in the facts and circumstances of the case, the High Court is justified in interfering with the order of acquittal passed by the learned C trial court?

15. In Babu v. State of Kerala[3], this Court has reiterated the principles to be followed in an appeal against acquittal under Section 378 CrPC. In paras 12 to 19, it is observed and held as under: (SCC pp. 196-199)

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/ or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court.

13. In Sheo Swarup v. King Emperor[14], the Privy Council observed as under: (SCC OnLine PC : IA p. 404)

".... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

14. The aforesaid principle of law has consistently been followed by this Court. (See Tulsiram Kanu v. State [15], Balbir Singh v. State of Punjab[16], M.G. Agarwal v. State of Maharashtra[17], Khedu Mohton v. State of Bihar[18], Sambasivan v. State of Kerala [19], Bhagwan Singh v. State of M.P.20 and State of Goa v. Sanjay Thakran[21].) C

15. In Chandrappa v. State of Karnataka22, this Court reiterated the legal position as under: (SCC p. 432, para 42)

'42.... (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate e court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal,

there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.'

16. In Ghurey Lal v. State of U.P.23, this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh24, the Court again examined the earlier judgments of this Court and laid down that: (SCC p. 374, para 20)

'20. ... An order of acquittal should not be lightly interfered with even if the Court believes that there is some evidence pointing out the finger towards the accused."

18. In State of U.P. v. Banne25, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with judgment of acquittal by the High Court. The circumstances include: Banne case 25, SCC p. 286, para 28)

i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case; a

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.'

A similar view has been reiterated by this Court in Dhanapal v. State26. 19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further

that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference." (emphasis supplied) C

16. When the findings of fact recorded by a court can be held to be perverse has been dealt with and considered in para 20 of the aforesaid decision, which reads as under: (Babu case³, SCC p. 199) d

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. 27, Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons 28, Triveni Rubber & Plastics v. CCE2⁹, Gaya Din v. Hanuman Prasad³0, Arulvelu v. Statell and Gamini Bala Koteswara Rao v. State of A.P.31)"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police32, that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with."

18. Heard Sri Ratan Singh, learned AGA, who appears for the State of U.P. and with his assistance the present appeal is being decided.

19. Before driving into the present proceedings in order to determine as to whether the judgment of the acquittal passed by the court below is correct or not, the testimony of the prosecution witnesses is to be first analyzed.

20. One Sri Hoti Lal son of Jahri appeared as PW1, according to him he is the resident of the same village where the deceased resided and on the fateful day he had gone to the shop of Brhamchari for purchasing certain items and there at he heard a gunshot fire which was coming from western side and at that point of time, PW2 Chob Singh son of Devi Ram also shouted that firing has been resolved to and then PW1 proceeded towards the house of the PW2 Chob Singh and then he saw the accused who are four in numbers being present therein and so far as the accused opposite party no.3 Durjan Singh and accused opposite party no.5 being Yadram are concerned, they were in possession of cuddle and so far the rest of the accused opposite party No.2 and 4 are concerned, they were armed with country-made pistol.

21. According to PW1 the accused herein fired two times and administered threat that they will chase away PW1 and on account of resorting to gunshot fire the deceased fell down and from there she was taken to Malikhan hospital and referred to Delhi and he also accompanied the deceased till Aligarh from where he returned back and after 2 to 3 days he was apprised that the deceased died.

22. As PW2 Sri Chob Singh son of Devi Ram presented himself and according to him the incident took place in the intervening night of 25/26.6.2004 around 11-12 in the night when he was in his house along with one Sri Munna Lal and Kamal Singh and one Smt. Tara Devi was lying down in a separate Varanda and at that point of time the deceased had gone to answer nature's call and he was sleeping but he heard screams of the deceased when gunshot firing was resorted to which were 2-3 in number. However, he is not aware and who made firing and when he proceeded towards the place of occurrence, he found deceased lying down.

23. PW3 being Netrapal son of Dharmjeet and the real son of the deceased appeared as PW3 and according to him the incident took place around 10-12 in the intervening night of 25/26.6.2004 when his mother had gone to answer nature's call. According to PW3 litigation is going on regarding piece of land between him and the accused Lekhraj in which 26.6.2004 of the next date fixed and the accused herein had murdered her mother and Lekhraj along with Chandrapal resorted to gunshot fire and the other two accused were also present but he is not aware as to which weapon they were holding in their hand and the injuries through gunshot firing was witnessed by Hoti Lal, Kamal Singh, Munna Lal and Amar Singh. He has further deposed his mother had been taken to hospital in Aligarh then Delhi wherein she died.

24. PW4 Munna Lal also stepped into witness box and according to him on the fateful day at 10-11 hours he had gone to Hoti Lal, Kamal Singh's house and and he listened to the noise of gunshot firing from the agricultural field owned by Om Prakash. It was a moonlight night and Lekhraj, Chandrapal had administered gunshot firing and Durjan and Yadram were also there, they had in their hand country-made pistol (Chandrapal and Lekhraj).

25. PW5 Panna Lal also came in the deposition box and he proved the FIR as he is the scriber of the FIR.

26. PW6 Amar Singh in his examination-in-chief had deposed that the deceased had gone to answer nature's call and 12 in the night and she was subjected to gunshot firing and injury was sustained by the deceased herein and she was taken to the hospital at Aligarh from where she was referred to Delhi and wherein she died on 27.6.2004.

27. PW7 Inspector Man Singh conducted the investigation took the statement of the witnesses and he proved the site plan and constable Suresh Mishra proved the written Chik FIR.

28. PW8 S.I. Iqbal Ahmad Delhi Police has come up with a stand that he had gone to the to Lok Nayak Jai Prakash hospital whereat the body was taken for postmortem. He is also a formal witness.

29. PW9 SI Netrapal Singh is also a Investigating Officer who conducted investigation being a successor of the earlier investigating officer and according to him he took statements and also made physical presence while going to the place whereof the site plan was also prepared.

30. PW10 Dr. V.K. Gupta had proved the medico legal injury report.

31. Undisputedly the entire prosecution case hinges upon being alleged

commission of crime in the intervening night of 25/26.4.2004 wherein accused have been marked to have committed offence while resorting to gunshot fire.

32. As per first information report so lodged by the first informant the time of the occurrence has been shown to be 22 hours i.e. 10.00 p.m. in the intervening night on 25/26.6.2004. According to PW1 being Sri Hoti Lal the time of the incident was 10.00 p.m. in the intervening night on 25/26/6.2004 when he had gone to purchase certain articles being local cigarette (Bidi). According to him at that point of time he noticed the gunshot firing. However, in his cross-examination PW1 Hoti Lal come up with a stand that the incident took place 10-11 in the intervening night dated 25/26.6.2004.

33. So far as PW3 being Netrapal, who happens to be son of the deceased in his examination-in-chief has come up with a stand that the time of the occurrence is 10-12 in the intervening night of 25/26.6.2004. PW3 has further deposed that he had given his statement at Lok Nayak Jai Prakash Hospital before the doctor whereat he had given the time of the incident 10-12 hours in the intervening night of 25/26.6.2004 however, he is not aware as to why the doctor has written the time of the occurrence being 12.00 p.m. in the night.

34. PW4 being Munna Lal son of Devi Ram, who is also one of the close relative of the deceased has stated that the time of the occurrence was 10-11 in the intervening night of 25/26.6.2004. Further, PW4 in internal page 2 of his cross-examination dated 24.1.2014 has further come up with a stand that the deceased had gone to answers nature's call at 11.00 p.m. in the intervening night of 25/26.6.2004.

35. Net analyses of the deposition of the prosecution witnesses itself show that there are material contradictions in the statement of prosecution witness with respect to the time of the occurrence as in the first information report the time of the occurrence has been shown 10 p.m. in the intervening night of 25/26.6.2004 whereas the prosecution witnesses have given different time in this regard.

36. Moreso, it is come on record that so far as the PW1 Hoti Lal is concerned he claims himself to be a eyewitness of the entire incident. As according to him at 10 in the night he had gone to purchase certain articles and the shop in the subject village closes at between 9-10 in the night. According to PW1 Hoti Lal near the house of Amar Singh and the accused Lekhraj in between there is a wall and from the place of occurrence at about 40 meters there exist shop of Gyan Singh whereat he had gone to purchase local cigarette (Bidi) and he noticed gunshot firing. In the cross-examination PW1 has come up with a stand that he is not aware as to who had resorted to gunshot firing. However, subsequently, they were two round of gunshot firing. According to PW1 he was standing in the shop but firing was done by the accused Chandra Pal and Lekhraj which he was witnessing from shop in question.

37. It is has further come on record that between the place of occurrence and the shop of Gyan Singh, there is a room constructed therein from where the place of occurrence is not visible.

38. In cross-examination a further statement has been made by the PW1 that in the shop of Gyan Singh a Chakki is also established and the boundary is 10 feet high and between the Chakki of Gyan Singn and the shop in question house belong to PW2

Chob Singh is there and in front of the shop Kanchan and Om Prakash have built their houses and the road towards Kanchan is 15 feet long. However, there is no wall but a Chabootra is there and the house also which is 10-12 feet high.

39. Further In cross-examination PW1 Hoti Lal has stated that when he was going to purchase local cigarette then he saw Satya Prakash the son of Gyan Singh and Gyan Singh and in between on road he met Ramchandra, Parsadi and Itwari. However, he did not have any conversation with them. Even further in the cross-examination PW1 has come up with a stand that he had not seen the deceased going for answering nature's call and he is not aware as to who is the husband of Goma Devi. PW1 has further stated that when he went to the place of occurrence, he found the deceased lying down and the accused was standing but they were not resorting to gunshot firing. He has further deposed that he did not see the accused resorting to first gunshot fire however he could see the second and the third gunshot fire being administered by the accused that too from 60-70 feet.

40. The learned trial court has disbelieved the deposition of PW1 Hoti Lal while observing that on one hand in cross-examination dated 28.7.2009 the PW1 has come up with a stand that he did not see the accused firing upon the deceased but on the other hand a contradictory statement is being sought to be made that though he had not seen the first gunshot fire but so far as second and third gunshot fire is concerned he had seen. The trial court has further analysed the said aspect of the matter while recording a categorical finding that as per the statement of the PW1 their happens to be a wall and constructions so raised from where the PW1 while standing in the shop in question could not see anybody standing or committing some act in the agricultural field particularly 10 in the night itself as the boundary wall is 10 feet high.

41. Contradictions in the statement of PW1 also assume significance particularly in the fact that the PW1 as per his own admission has stated that he had not seen the deceased going to answer nature's call and once according to his statement if taken into face value, he could see the deceased lying down from 20 meters away and the accused standing there and not firing. The Trial Court has further observed that as per the statement of PW1 the second and the third firing was witnessed by him from 60-70 feet.

42. The court below has analysed the deposition of PW1 Hotilal while observing that it is highly improbable that in case the story so built up by the PW1 if taken its face value then it will result to inconceivable situation as a culprit who has resorted the gunshot firing will remain at a place and wait for the villagers to come and to catch them.

43. More so as per the statement of PW1 Hoti Lal, he met Gyan Singh, his son Satya Prakash, Ramchandra, Parsadi and Itwari, however none of these whiteness came to give their statement and further as per the statement of PW1 he did not narrate the said incident to any of them.

44. Similarly, so far as PW2 Chob Singh is concerned, he in his examination-in-chief has come up with a stand that he is not aware as to who had administered firing

and when he went to the place of occurrence huge rush of villagers were there, as according to him he was sleeping in his house and he became hostile witness while not supporting the prosecution case.

45. PW3 Netrapal being the son of the deceased and the brother of the first informant has supported the prosecution theory as according to him he had gone to Lok Nayak Jai Prakash Hospital wherein he had given statement that too before a doctor. He has further admitted in his statement that he has not named Amar Singh, Munna Lal and others who had witnesses the gunshot firing by the accused. He has further deposed in his cross-examination that his brother Kamal Singh in the FIR has not narrated the fact that Munna Lal, Chob Singh, Amar Singh and Tara Devi were not present at the time of the commission of the crime. He has further stated that the first information report has not been lodged by the husband of the deceased Amar Singh and according to him no litigation is going on between him and accused Lekhraj and no statement has been taken by police from him.

46. Thus, PW3 who happens to be the real son of the deceased has not proved the prosecution story so as to put a nail of conviction against the accused.

47. PW4 being Munna Lal has deposed that Chob Singh is his real brother and Amar Singh happens to be the husband of the deceased, who is also a real brother of him. PW4 in his cross-examination has further deposed that from the shop in question whereat PW1 Hoti Lal was standing the visibility is zero in so far as the place of occurrence is concerned as there happens to be a house in between.

48. Though PW4 Munna Lal had deposed that Hoti Lal PW1, Chob Singh PW2 and Kamal Singh since deceased (first informant) had seen the deceased going to the field for answering the nature's call, however PW1 Hoti Lal in his cross-examination has come up with a stand that he is not seen the deceased going to the field for answering nature's call. PW4 in his cross-examination had further stated that he was lying down in the cot on the fateful day and was sleeping and he heard gunshot firing and thereafter he proceeded towards the place of the incident and he did not call PW2 Chob Singh, PW3 Netrapal and Amar Singh. According to him when he rushed to the place of occurrence and the accused ran away and he witnessed the same. He has further deposed that the place where he was standing the visibility of the place of occurrence was not clear.

49. So far as PW6 Amar Singh is concerned though he has come up with a stand that the deceased had gone to answers nature's call at 12 but he also does not support the prosecution theory.

50. Meticulous analyses of the statement of the prosecution witnesses puts a serious cloud over the prosecution case particularly in view of the fact that not only there is material contradictions in the statements vis-a-vis the time of occurrence but also the fact that the place from where PW1 Hoti Lal is stating to have witnessed the commission of the crime from his own eyes is highly improbable as the intervening night 25/26.6.2004 was a moonlight night where the visibility is quiet poor i.e. 10-10-30. Meaning thereby the visibility was opaque and nobody from 60-70 feet can see or identify a person standing that too in a agricultural field.

51 . Nonetheless the case if it is taken into its face value though disputed is the case referable to circumstantial evidence. In order to link the accused with respect to the commission of the crime the chain of the events should be in such a position so as to pointedly mark that the accused herein had committed crime and none else beyond doubt and nobody else.

52. Here in the present case, this Court finds that there are not only material contradictions as discussed herein above but also the fact that in case the deceased had gone to answer nature's call then a vessel (Lota) ought to have been recovered from the place of occurrence particularly when the prosecution witnesses are coming up with a stand that the accused were standing near the injured lady (deceased) when PW1 Hoti Lal went there. Additional fact also need to be noticed at this stage is that none of the villagers came in support of the prosecution theory particularly when as per statement PW1 Hoti Lal, Gyan Singh, Satya Prakash, Ram Chandra, Parsadi, Itwari were also present after hearing the noise of gunshot firing proceeded there at. More so in the first information also no names of the witnesses who had seen the commission of the crime finds place.

53. Notable the Hon'ble Apex Court in the case of Chandrapal Vs. State of Chhattisgarh AIR 2022 SC 2542 in paragraph 14, 15, 16, 17 have observed as under:-

"14. In this regard it would be also relevant to regurgitate the law laid down by this court with regard to the theory of "Last seen together".

15. In case of Bodhraj and Ors. v. State of Jammu and Kashmirs, this court held in para 31 that:

"31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible...."

16. In Jaswant Gir v. State of Punjab', this court held that in absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "Last seen together", even if version of the prosecution witness in this regard is believed.

17. In Arjun Marik and Ors. v. State of Bihar ¹0, It was observed 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."

54. Considering the case in totality this Court finds that the chain to link the accused with respect commission of crime itself is thoroughly missing and the evidences so sought to be pressed into service which obviously includes testimony of the prosecution witnesses and the documents so adduced therein are itself weak. This Court further finds its inability to take a different view from the view so taken by the trial court as obviously while deciding the appeal under Section 372 of the Cr.P.C. from an order of acquittal once the view taken by the learned trial court is possible and plausible view then it will be highly unjustifiable to take another view. Nonetheless presumption of double innocence is already attached to the

accused herein and thus this Court finds the order of acquittal is liable to be affirmed.

55. In view of foregoing discussion, the present appeal is liable to be dismissed and is accordingly **dismissed.**

55. The records be sent back to the court-below.

(2022) 8 ILRA 611
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.07.2022

BEFORE

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

Criminal Appeal No. 138 of 2019

Putan ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Soniya Mishra, Sri O.P. Tiwari, Sri Rajendra Singh, Sri Rajiv Mishra

Counsel for the Opposite Party:
G.A.

Criminal Law- Dowry Prohibition Act, 1961- Section 2 - In the present case, there is alleged demand of tractor - Interpretation of the word "dowry"- The demand of tractor certainly come within the purview of dowry.

Dowry is giving or receiving of any property or valuable security in connection with the marriage of the parties would include a tractor also.

Indian Penal Code, 1860- Section 304- B - Indian Evidence Act, 1872- Section 113-B- The word "soon before" - It is not denied that the deceased was married to the accused-appellant barely, two months before the alleged incident. Thus, in a brief period of about two months' marital life, any demand of tractor by the accused-appellant is necessarily a demand "soon before" the death of the deceased.

The expression "soon before" contemplates a reasonable time and does not mean immediately before. Hence demand of dowry two months before the death of the wife would come within the purview of the expression "soon before".

Indian Penal Code, 1860 - Section 304- B - On the basis of cogent and reliable testimonies of P.W.-1, P.W.-2 and P.W.-4, the prosecution has been able to prove that the accused-appellant used to make demand of tractor and due to non-fulfillment of such demand, he treated the deceased with cruelty and ultimately caused her death. The cause of death of deceased, according to post-mortem report, is strangulation and her hyoid bone is also found to be fractured. The death of the deceased occurred in the house of the accused-appellant within a period of two months from the date of marriage of the deceased with the accused-appellant.

Where the prosecution proves that the deceased died an unnatural death within seven years of her marriage and was subjected to cruelty soon before her death in pursuance of demand of dowry, then the same would invite conviction u/s 304-B of the IPC. (Para 19, 24, 25)

Criminal Appeal rejected. (E-3)

Judgements/ Case law relied upon-:

1. Nallam Veera Stayanandam & ors Vs Public Prosecutor, High Court of A.P. (2004) 10 SCC 769

2. Satvir Singh & ors Vs St. of Punj. & anr (2001) 8 SCC 633

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

4. Rajinder Singh Vs St. of Punj. (2015) 6 SCC 477

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

6. Sher Singh Vs St. of Har. 2015 (1) SCALE 250

7. Dinesh Vs St. of Har. 2014 (5) SCALE 641

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

1. Heard Sri O. P. Tiwari, learned counsel for the accused-appellant, Sri Rajesh Kumar Singh and Sri Alok Saran, learned A.G.A. for the State and perused the record.

2. Challenge in this appeal is to the judgment and order dated 04.09.2018 passed by learned Additional Sessions Judge, Court No.9, Unnao in Sessions Trial No.54/2015, arising out of Crime No.1902 of 2014, under Sections 498A, 304B I.P.C. & Section 4 of D. P. Act, Police Station Gangaghat, District Unnao whereby the appellant has been convicted and sentenced for a period of three years' rigorous imprisonment with a fine of Rs.8,000/- for the offence under Section 498-A I.P.C. and in default of payment of fine, he has further been directed to undergo three months' additional imprisonment. He has also been convicted and sentenced for a period of ten years' rigorous imprisonment for the offence under Section 304B I.P.C. He has also been convicted and sentenced for a period of two years' rigorous imprisonment with a fine of Rs.6000/- for the offence under Section 4 of D. P. Act and in default of payment of fine, he has further been directed to undergo two months' additional simple imprisonment. All the sentences were directed

3. Brief facts of this case are that the first informant, Pyare Lal submitted a written report, Ex. Ka-1 to Kotwali, Unnao stating therein that his sister, Phoolmati was married to the appellant, Putan two months' ago according to Hindu Rites and they resided in Mohalla Srinagar, Police Station-Gangaghat. His sister was being treated with cruelty quite offenly by the accused-appellant and his family members for non-fulfillment of demand of dowry. This fact was communicated to the first informant by his sister telephonically. The appellant also used to extent threat to the deceased due to non-fulfillment of a tractor. On 01.10.2014, the landlord of his sister, Smt. Sushila informed the first informant on telephone that his sister has been burnt.

4. On the basis of aforesaid written report, Ex. Ka-1, Crime No.1902 of 2014, under Sections 498A and 304-B I.P.C. read with ¾ Dowry Prohibition Act came to be lodged against the accused-appellant on 01.10.2014 at 12:15 P.M. at Police Station Gangaghat.

5. Investigating Officer, P.W.-7, S. I. Manoj Kumar Awasthi recorded the statements of witnesses under Section 161 Cr.P.C. He visited the place of occurrence and prepared a site plan, Ex. Ka-12. Due to transfer of said Investigating Officer, P.W.-6, C. O., Sri Gopi Nath Soni under took the investigation. He also recorded the statements of some of the prosecution witnesses under Section 161 Cr.P.C. and upon conclusion of investigation, he submitted the charge sheet, Ex. Ka-6 against the accused-appellant.

6. In order to bring home guilt of the accused-appellant, the prosecution has examined P.W.-1, Pyare Lal, P.W.-2, Bachhu, P.W.-3, Nayab Tehsildar, Renuka Awasthi, P.W.-4, Dr. Sanjay Kumar, P.W.-5, Rampal Singh, P.W.-6, Investigating Officer, Sri Gopi Nath Soni and P.W.-7,

Investigating Officer, Manoj Kumar Awasthi.

7. The accused-appellant, in his statement recorded under Section 313 Cr.P.C., has stated himself to be innocent and has also stated to have been falsely implicated in this case. The accused-appellant was charged under Sections 498A, 304B I.P.C. & 4 D. P. Act and also charged, in alternate, under Section 302 I.P.C. to which he denied and claimed to be tried.

8. In defence, a copy of judgment of A.C.J.M., Court No.5 rendered in Criminal Case No.1017 of 2013 "Phoolmati vs. Pradeep Kumar & Ors.", under Sections 498, 323, 504, 506 I.P.C. read with Section ¾ Dowry Prohibition Act, P.S.-Kotwali Sadar, Unnao was filed.

9. The post-mortem on the cadaver of the deceased was conducted by a panel of doctors consisting of Dr. Sanjay Kumar, P.W.-4 and Dr. R. K. Raman on 02.10.2014.

10. According to post-mortem report, Ex. Ka-3, the entire body of the deceased was having superficial to skin deep burn injuries and hyoid bone was found to be fractured. The cause of death of deceased, according to post-mortem report, Ex. Ka-3. is strangulation due to injury no.2 i.e. broken hyoid bone.

11. Learned counsel for the accused-appellant has submitted that the accused-appellant is innocent, who has been falsely implicated in this case. He never demanded dowry nor did he treat the deceased with cruelty. She further submits that the deceased committed suicide due to frustration and depression. She also submits is that the conviction of the accused-appellant recorded by learned trial Court is against the weight of evidence available on record which is perverse and deserves to be set aside.

12. Per contra, Sri Rajesh Kumar Singh and Sri Alok Saran, learned A.G.A. for the State have vehemently submitted that the accused-appellant is husband of the deceased. The deceased was living with the appellant in Mohalla Srinagar, Police Station-Gangaghat. She was done to death within two months from her marriage by the accused-appellant due to non-fulfillment of demand of dowry. The cause of death of the deceased, according to post-mortem report, is strangulation and broken hyoid bone which cannot be caused by the deceased herself. The offence was committed in a brutal manner. The deceased was reported to be pregnant also. Since the deceased died in the house of the accused-appellant, therefore, the presumption under Section 106 of Indian Evidence Act is also to be drawn against the accused-appellant. They have submitted that the prosecution has successfully proved its case against the accused-appellant under Sections 498A & 304B I.P.C. and Section 4 D. P. Act. Thus, the impugned judgment and order is well discussed and reasoned wherein no interference by this Court is warranted.

13. Hon'ble the Apex Court in the case of ***Nallam Veera Stayanandam and others vs. Public Prosecutor, High Court of A.P.*** reported in ***(2004) 10 SCC 769*** has held as under :-

"We have heard learned counsel and also perused the records. It is true from the evidence led by the prosecution it has been able to establish that the appellants were demanding dowry which was a

harassment to the deceased. It is also true that the death of the deceased occurred within 7 years of the marriage, therefore, a presumption under Section 113-B of the Evidence Act is available to the prosecution, therefore, it is for the defence in this case to discharge the onus and establish that the death of the deceased in all probability did not occur because of suicide but was an accidental death."

14 . In the case of ***Satvir Singh and others vs. State of Punjab and another*** reported in ***(2001) 8 SCC 633*** the Hon'ble Apex Court has held as under:-

""The essential components of Section 304-B are: (i) Death of a woman occurring otherwise than under normal circumstance, within 7 years of marriage, (ii) Soon before her death she should have been subjected to cruetly and harassment in connection with any demand for dowry. When the above ingredients are fulfilled, the husband or his relative, who subjected her to such cruelty or harassment, can be presumed to be guilty of offence Under Section 304-B. To be within the province of the first ingredient the provision stipulates that "where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstance". It may appear that the former limb which is described by the words "death caused by burns or bodily injury" is a redundancy because such death would also fall within the wider province of "death caused otherwise than under normal circumstances". The former limb was inserted for highlighting that by no means death caused by burns or bodily injury should be treated as falling outside the ambit of the offence".

15. The Hon'ble Apex Court in the case of **Hira Lal and others vs. State (Govt.NCT) Delhi** reported in ***(2003) 8 SCC 80*** has held as under:-

"A conjoint reading of Section 113-B of the Evidence Act and Section 304-B Indian Penal Code shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B Indian Penal Code are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by the prosecution".

16. The Hon'ble Apex Court, while proceeding further and interpreting the expression ***"soon before"***, opined thus:-

"The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence".

17. It is relevant to refer here the provision of **Section 113-A and 113-B of the Evidence Act,** which read as under:-

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

Section 113-B, which provides for presumption as to dowry death, was inserted with a view to fight against the plague of dowry death. The said provision is as follows:-

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."

18. The Hon'ble Apex Court in a recent judgment rendered in ***Rajinder Singh vs. State of Punjab*** reported in ***(2015) 6 SCC 47***7 has interpreted the word "dowry" as defined in Section 2 of Dowry Prohibition Act, 1961 as follows:-

"A perusal of this Section shows that this definition can be broken into six distinct parts.

1) Dowry must first consist of any property or valuable security - the word "any" is a word of width and would, therefore, include within it property and valuable security of any kind whatsoever.

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

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

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

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

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

19. In the present case, there is alleged demand of tractor. In view of the

aforesaid interpretation of the word "dowry", the demand of tractor certainly come within the purview of dowry.

20. As far as ingredients of offence under Section 304-B I.P.C. are concerned, it is settled law that there are four ingredients and Hon'ble Apex Court in ***Rajinder Singh vs. State of Punjab (supra)*** has again reiterated the said settled principles of law, which is as follows:-

"The ingredients of the offence under Section 304B have been stated and restated in many judgments. There are four such ingredients and they are said to be:

(a) death of a woman must have been caused by any burns or bodily injury or her death must have occurred otherwise than under normal circumstances;

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

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

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

This has been the law stated in the following judgments:

Ashok Kumar vs. Stateof Haryana, (2010) 12 SCC 350 at pages 360-361; Bachni Devi & Anr. v. State of Haryana, (2011) 4 SCC 427 at 431, Pathan Hussain Basha v. State of A.P., (2012) 8 SCC 594 at 599, Kulwant Singh & Ors. v. State of Punjab, (2013) 4 SCC 177 at 184-185, Surinder Singh v. State of Haryana, (2014) 4 SCC 129 at 137, Raminder Singh v. State of Punjab, (2014) 12 SCC 582 at 583, Suresh Singh v. State of Haryana, (2013) 16 SCC 353 at 361, Sher Singh v. State of Haryana, 2015 1 SCALE 250 at 262."

21. The word "soon before" appearing in Section 113-B of Indian Evidence Act, 1872 also in Section 304-B I.P.C. have also been the subject matter of challenge in every case of dowry death. Hon'ble the Apex Court in ***Surinder Singh v. State of Haryana*** reported in ***(2014) 4 SCC 129***, has again interpreted the said "soon before" as under:

"17. Thus, the words "soon before" appear in Section 113-B of the Evidence Act, 1872 and also in Section 304-B IPC. For the presumptions contemplated under these sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words "soon before" is, therefore, important. The question is how "soon before"? This would obviously depend on the facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing

pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, "soon before" is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.

18. In this connection we may refer to the judgment of this Court in Kans Raj v. State of Punjab, [(2000) 5 SCC 207 : 2000 SCC (Cri) 935] where this Court considered the term "soon before". The relevant observations are as under: (SCC pp. 222- 23, para 15) "15. ... 'Soon before' is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term 'soon before' is not synonymous with the term 'immediately before' and is opposite of the expression 'soon after' as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be 'soon before death' if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough.

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

22. Hon'ble the Apex Court in ***Sher Singh vs. State of Haryana*** reported in ***2015 (1) SCALE 250,*** has further held as under:

"We are aware that the word 'soon' finds place in Section 304-B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304-B or the suicide under Section 306 of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of

innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt."

23. Hon'ble the Apex Court in ***Rajinder Singh vs. State of Punjab (supra)*** has distinguished the law laid down in ***Dinesh vs. State of Haryana reported in 2014 (5) SCALE 641***, in the following terms:

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

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

24. Adverting to the facts of the case at hand, upon a survey of prosecution evidence, this Court finds that the P.W.-1, Pyare Lal, who is brother of the deceased and P.W.-2, Bachhu Lal who is father of deceased, have very clearly stated that the accused-appellant used to make demand of tractor and due to non-fulfillment of such demand, the decease was treated with cruelty by the accused-appellant. The deceased used to tell her brother and father about this fact. This Court is conscious of the fact that it is not denied that the deceased was married to the accused-appellant barely, two months before the alleged incident. Thus, in a brief period of about two months' marital life, any demand of tractor by the accused-appellant is necessarily a demand "soon before" the death of the deceased. The cause of death of the deceased, according to post-mortem report, Ex. Ka-3 which has been duly proved by P.W.-4, Dr. Sanjay Kumar is strangulation. Her hyoid bone is also reported to be fractured. This injury cannot be caused by the deceased herself.

25. P.w.-4, Dr. Sanjay Kumar has also stated that in case of anti mortem hanging the thyroid cartilage cannot get fractured. Thus, on the basis of cogent and reliable testimonies of P.W.-1, P.W.-2 and P.W.-4, the prosecution has been able to prove that the accused-appellant used to make demand of tractor and due to non-fulfillment of such demand, he treated the deceased with cruelty and ultimately caused her death. The cause of death of deceased, according to post-mortem report, is strangulation and her hyoid bone is also found to be fractured. The death of the deceased occurred in the house of the accused-appellant within a period of two months from the date of marriage of the deceased with the accused-appellant.

26. Accordingly, this Court does not find any illegality or perversity in the impugned judgment and order dated 04.09.2018. The findings of guilt of the accused-appellant under Sections 304-B & 498A I.P.C. and Section 4 of D. P. Act are liable to be affirmed, which are accordingly affirmed.

27. However, keeping in view the fact that there is nothing on record to suggest that the accused-appellant had any previous

criminal history and also that he is aged about 40 years and having regard to the fact that the accused-appellant is in jail since conviction and is serving out the sentence awarded to him, the sentence awarded to the accused-appellant under Section 304-B I.P.C. is liable to be modified from ten years' rigorous imprisonment to seven years' rigorous imprisonment only.

28. Accordingly, the sentence awarded to the accused-appellant under Section 304-B I.P.C. is modified from ten years' rigorous imprisonment to seven years' rigorous imprisonment only. The conviction under Section 498A I.P.C. and awarding of sentence for three years' rigorous imprisonment with a fine of Rs.8000/-, ten years' rigorous imprisonment under Section 304B I.P.C. and two years' rigorous imprisonment with a fine of Rs.6000/- under Section 4 Dowry Prohibition Act are also affirmed.

29. With the aforesaid modification, the instant jail appeal deserves to be partly allowed.

30. The instant jail appeal is **partly allowed as indicated above.**

31. Let the appellant be released forthwith, if he has already undergone the sentences awarded to him as aforesaid provided he is not wanted in any other criminal case.

31. Let a copy of this judgment along with lower Court record, if any, be sent to learned trial Court for information and necessary compliance.

(2022) 8 ILRA 619
APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 26.08.2022

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Criminal Appeal No. 549 of 1983

Kanta ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
Sri H.R. Misra, Amicus Curiae, Sri Pankaj Kumar Asthana, Sri Vrindavan Mishra

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

Criminal Law- Indian Evidence Act, 1872- Section 3- It is to be noted that the absence of blood on the spot is of no consequence in the facts and circumstances of the case where there is no doubt with regard to actual occurrence having taken place and about the place where it took place. It is emerging from the record that the place was an open public place accessible to the public at large and plausible explanation has been given by Prosecution Witness No. 1 with regard to non-availability of blood stains when the Investigating Officer visited the place of occurrence and as such the prosecution story cannot be discarded on the aforesaid ground.

Merely because no blood stains were recovered from the place of the occurrence, which was an open public place, would not affect the case of the prosecution.

Section 134- 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 relative would be the last to screen the real culprit and falsely implicate an innocent

person. It is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested-Merely because the witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. There is no bar in law on examining family members as witness. Evidence of a related witness can be relied upon provided it is trustworthy.

Settled law that merely because the witness is related would not mean that he is interested and therefore his testimony should be discarded. A related witness would be a natural witness and will have no reason to falsely implicate some other person and his evidence can be relied upon if the same is credible and trustworthy.(Para 9, 16, 17, 23)

Criminal Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Narendra Nath Khaware Vs Parasnath Khaware & ors, (2003) 5 SCC 488

2. Hari Har Singh & ors. Vs The St. of U.P., (1975) 4 SCC 148

3. Gaya Yadav & ors Vs St. of Bih. & ors, (2003) 9 SCC 122

4. St. of Raj. Vs Satyanarayan, (1998) 8 SCC 404

5. Ram Swaroop & ors Vs St. of U.P., (2000) 2 SCC 461

6. Kartik Malhar Vs St. of Bih., (1996) 1 SCC 614

7. St. of U.P Vs Samman Dass, (1972) 3 SCC 201

8. Khurshid Ahmed Vs St. of J & K (2018) 7 SCC 429

9. Mohd. Rojali Ali & ors Vs St. of Assam, (2019) 19 SCC 567

10. St. of Raj. Vs Kalki .(1981) 2 SCC 752 : 1981 SCC (Cri) 593

11. Amit Vs St, of U.P. [(2012) 4 SCC 107 : (2012) 2 SCC (Cri) 590]

12. Gangabhavani Vs Rayapati Venkat Reddy [(2013) 15 SCC 298 : (2014) 6 SCC (Cri) 182]

13. Ganapathi Vs St. of T.N. [(2018) 5 SCC 549 : (2018) 2 SCC (Cri) 793]

14. Kulwinder Singh & anr. Vs St. of Punj, (2015) 6 SCC 674

15. Surinder Kumar Vs St. of Punj., AIR 2020 Supreme Court 303

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard Sri Pankaj Kumar Asthana, learned Amicus Curiae for the appellant, learned A.G.A. for the State and perused the record.

2. The present appeal is filed challenging the judgement dated 18th February, 1983 passed by the Special and Additional Sessions Judge, Ghazipur in Sessions Trial No. 143 of 1982 (State Vs. Kanta and others), whereby the Appellant - Kanta has been convicted under Section 304 of the IPC and has been sentenced for three years rigorous imprisonment under Section 304 (II) of the IPC.

3. As per the prosecution case, on 27th October, 1981, at about 11:00 a.m., complainant - Chandrajeet lodged a First Information Report at Police Station Qasimabad, District Ghazipur being Case Crime No. 161 under Section 304 of the IPC against Kanta Yadav (Appellant), Rama Shankar Yadav and Sudarshan. The prosecution case as per the First Information Report is to the effect that the complainant was resident of Village Bhatpura under Police Station Qasimabad. On 26th October, 1981, at about 12 noon, there was heated argument between the complainant and his nephew Sudarshan with regard to selling of agricultural land jointly belonging to the complainant and his nephew Sudarshan. The nephew of the complainant was selling the agricultural land and the complainant was asking him not to sell the land and there was heated argument between them and even abusive language was used. In the meantime, the Appellant - Kanta Yadav and Rama Shankar Yadav who are sympathisers of Sudarshan came and started abusing the complainant in favour of Sudarshan and when the complainant asked them not to use abusive language then the mother of Laxmi Shankar came to defuse the situation. Sudarshan caught the mother of Laxmi Shankar and Rama Shankar caught the complainant. Thereafter, Appellant - Kanta Yadav took "Faruhi' in his hand to assault the complainant, however, Laxmi Shankar came in between to save the complainant and as such "Faruhi' hit Lakshmi Shankar on his head. Laxmi Shankar on being hit on the head fell down and was taken to Dr. Shreekant who gave him first aid and thereafter Laxmi Shankar was talking normally and as such the complainant thought that he was out of danger and did not take him to hospital. At about 11:00 p.m. Laxmi Shankar died on account of injury. As the death occurred in the late night as such the police could not be informed and the First Information Report was lodged on 27th October, 1981.

4. The First Information Report was scribed by Ram Chandra, son of Sri Kishun and the same was lodged as Case Crime No. 161 under section 304 IPC. The Panchayatnama of the deceased (Laxmi Shankar) was held on 27th October, 1981 and according to the Panchayatnama the death of the deceased has occurred on account of head injuries.

5. The post-mortem examination of the deceased was held on 28th October, 1981 at 1:45 p.m. The post-mortem examination was conducted by Dr. K.K. Srivastava. As per the post-mortem report, the deceased died due to head injury caused by anti-mortem injury no 1. The deceased sustained the following external injuries as per the post-mortem report :-

"1. Horizontal incised wound 5cm x 1cm x brain deep on the left side of skull, 8 cm above the root of left ear. Blood clot and a little brain substance present. The wounds painted yellow and is unstitiched."

6. After investigation, the Investigating Officer has submitted a chargesheet against the accused person under Section 304 IPC. The trial court on 3rd December, 1982 framed charge against the appellant under Section 304 IPC. It is to be noted that the charge against co-accused Ramashankar and Sudarshan was also framed under Section 304 read with section 34 IPC. However in the impugned judgment, the aforesaid two accused person namely Ramashankar and Sudarshan have been acquitted of the charge under Section

304 read with Section 34 IPC. The Appellant denied the charges and claimed to be tried.

7. The prosecution produced five witnesses in support of the prosecution case :-

a) Chandrajeet (P.W.-1) : Chandrajeet is the informant and the eyewitness of the alleged incident. He has stated before the trial court that he is a resident of Village Bharpura. The door of his house is towards east. Adjacent to his house is Neem tree and Mariaya. In the north of his house, the house of Shambhoo and Sudama exists. He has stated that they are brothers and their names are Kishun, Doodhnath, Chandrajeet and Shiv. The son of Shri Kishun is Ram Chander (Scribe of FIR). Laxmi Shankar - deceased is son of his brother Shiv. Rama Shankar is nephew of accused-appellant Kanta. He has also stated that Kanta and Rama Shankar are friend of Sudarshan. He has further deposed that in the village consolidation operation has been concluded. Joint Chak was carved out in the name of complainant and his brothers. Sudarshan wanted to sell the agricultural land and the complainant did not want Sudarshan to sell the joint ownership land. About 14 to 15 months prior to the deposition there was heated arguments and abusive language used between the complainant and Sudarshan with regard to the selling of the agricultural field, in front of the house of the complainant and in the meantime the co-accused Rama Shankar and Kanta came to the aforesaid place and started using abusive language and the witness asked them not to use abusive language and thereafter Laxmi Shankar and his mother came to the place and Kanta hit Laxmi Shankar with "Faruhi' on his head. It is further stated that the "Faruhi' was used by Kanta to attack the complainant, however, the same hit Laxmi Shankar as he tried to save the complainant. The "Faruhi' hit the head of Laxmi Shankar. On receiving injuries on the head, Laxmi Shankar fell down and deceased was provided medical aid by Dr. Shreekant and Laxmi Shankar was speaking but later on his condition became serious and he died at 11:00 p.m. in the night. He further stated that the First Information Report was scribed by his nephew Ramchandra on the dictation of the complainant. The written report is Exhibit Ka-1.

b) Dr. K.K. Srivastava (P.W.-2) : The said witness has stated that on 28th October, 1981 he was posted at Sadar Hospital Ghazipur. At about 1:45 p.m. the body of the deceased Laxmi Shankar was brought by Sepoy Hardev Singh. He has conducted the post-mortem of the deceased on the said day and the following injuries were found on the body of the deceased :-

"1. Horizontal incised wound 5cm x 1cm x brain deep on the left side of skull, 8 cm above the root of left ear. Blood clot and a little brain substance present. The wounds painted yellow and is unstitiched."

He has further deposed that the deceased would have died on 26th October, 1981 at 11:00 p.m. and has proved the post-mortem report being Exhibit Ka-2. He has further stated that the injuries could have been sustained by "Faruhi'.

c) Banarsi (P.W.-3) : the said witness was declared hostile by the trial court as initially the said witness

corroborated the prosecution case however later on he has stated that he reached after the occurrence.

d) H.C. Shri Niwas Mishra (P.W.-4) : The said witness has stated that he was posted at the concerned police station as Head Constable. He has further submitted that he had received the First Information Report being Exhibit Ka-1. On the basis of the aforesaid First Information Report, he had prepared Chik FIR and same was marked as Exhibit Ka-3. The said witness has proved the First Information Report.

e) Suryabali Singh (P.W.-5) : The said witness has stated that in October 1981 he was posted as Station House Officer, Police Station - Qasimabad. On 26th October, 1981 at 11.00 a.m. he was present at the police station when the FIR was lodged. The statement of the informant was recorded on the same day. He reached the place of occurrence at 1:20 p.m. The Panchayatnama of the deceased was done on the same day. The said witness has proved the contents of the Panchayatnama as Exhibit Ka- 5. The body of the deceased was sent for post-mortem. The site plan of the incident was prepared on 27th October, 1981. The chargesheet was filed against the said accused.

8. It is submitted on behalf of the learned Amicus Curiae that the Prosecution Witness No. 1 has stated that the deceased sustained injury by "Faruhi' which was made of wood but he could not know about "Faruhi' after the incident and as such the presence of Prosecution Witness No. 1 on the spot is doubtful. It is to be noted that the place of occurrence was a public place and as per the statement of the Prosecution Witness No. 1 the "Faruhi' was lying at the place of occurrence and the aforesaid was not brought by the accused person. After the alleged incident, the deceased was taken for medical aid by the Prosecution Witness No. 1 and as such the fact that the aforesaid witness has no knowledge with regard to whereabouts of the "Faruhi' after the occurrence will not demolish the prosecution case where the testimony of the Prosecution Witness No. 1 is trustworthy and reliable. It is further submitted by learned Amicus Curiae that during investigation "Faruhi' (weapon used for assault) was not recovered from the place of occurrence by the Investigating Officer. It is to be noted that "Faruhi' was taken by the accused person from the place of occurrence and was not brought by the accused person with premeditated mind. The alleged occurrence took place on 26th October, 1981 at 12:00 noon and the death of the deceased occurred on the same day at 11:00 p.m. and the First Information Report was lodged on 27th October, 1981 and thereafter the Investigating Officer visited the site on 27th October, 1981 at 12:00 noon and prepared the site plan. The place of occurrence was a public place and as such the scene of occurrence would have changed and on the aforesaid grounds, the prosecution case cannot be rejected. It is also to be noted that where the prosecution evidence is otherwise reliable mere non-recovery of the weapon of assault would be of no consequence.

9. It is further submitted by learned Amicus Curiae on behalf of the appellant that no blood was found on the spot where the incident is alleged to have occurred and as such the manner in which occurrence has taken place is highly doubtful. He submits that as per the prosecution case the "Faruhi' was wielded on the deceased and as a result of the same, the deceased suffered injuries

including injuries in the head. He submits that from perusal of the injuries sustained by the deceased would indicate that the blood would have oozed out from the injury sustained by the deceased. However, the Investigating Officer has neither declared the spot where the blood stains were found in the site plan nor any blood stain soil was recovered from the place of occurrence and the same is indicative of the fact that the manner in which the occurrence has been stated by the prosecution to have taken place is highly doubtful. It is to be noted that the place of occurrence is a public place and the incident is alleged to have taken place on 26th October, 1981 at 12:00 noon and the First Information Report was lodged on 27th October, 1981 and thereafter the Investigating Officer has visited the place of occurrence on 27th October, 1981 i.e. after 24 hours of the alleged occurrence. The aforesaid time gap is of material significance as the place of occurrence was a public place and the scene of occurrence would have changed with the lapse of time. It is further to be noted that the Proseuction Witness No. 1 in his testimony has stated that the blood stains were there on the soil of place of occurrence. However, he has stated that the blood was licked by the local dogs and as such the same was not found when the Investigating Officer visited the place of occurrence. It is to be noted that the absence of blood on the spot is of no consequence in the facts and circumstances of the case where there is no doubt with regard to actual occurrence having taken place and about the place where it took place. It is emerging from the record that the place was an open public place accessible to the public at large and plausible explanation has been given by Prosecution Witness No. 1 with regard to non-availability of blood stains when the Investigating Officer visited the place of occurrence and as such the prosecution story cannot be discarded on the aforesaid ground. In **Narendra Nath Khaware Vs. Parasnath Khaware and others, (2003) 5 SCC 488,** the Apex Court has taken note that where the place of occurrence was a courtyard open to sky and it was a rainy day, the blood stains could have washed away and as such non-recovery of blood stains from the place of occurrence will be of no consequence. In Hari Har Singh and others Vs. The State of U.P., (1975) 4 SCC 148, the Apex Court has observed that where the place of incident was a public place, by trampling of the feet of the passers-by, stains of blood must have vanished and as such the Apex Court has held that the non-recovery of the blood stains from the place of occurrence is of no consequence. The Apex Court in **Gaya Yadav and others Vs. State of Bihar and others, (2003) 9 SCC 122** has taken note that the incident had taken place in a public place and as such the trail of blood would get disintegrated when the incident had occurred at about 7:45 p.m. and the Investigating Officer arrived at the place of incident only at 11:30 p.m. and as such, the Supreme Court has held that there would be no trail of blood left on the arrival of the Investigating Officer.

10. In **State of Rajasthan Vs. Satyanarayan, (1998) 8 SCC 404** has held as under :-

"7. Merely because no blood was found near the house of the respondent, it cannot be said that no incident took place there. The fact that Kesar Lal had received a knife blow near his house was admitted by the accused though according to him the knife was with PW 2- Satyanarayan and not with him. As the trial court has pointed out,

the place was a public road and there was a lot of traffic on that road. That could have been the reason why no blood was found when the spot panchnama was made after a few hours. Moreover, the evidence discloses that intestines of Kesar Lal had come out and that could have blocked the flow of much blood. Some blood was absorbed by the clothes. Therefore, the circumstances that not sufficient blood was noticed when the spot panchnama was made should not have been utilised by the High Court for holding that the prosecution version was not correct and that the defence version was more probable."

11. In **Ram Swaroop and others Vs. State of U.P., (2000) 2 SCC 461** has held as under :-

"12. According to the learned counsel for the appellants, as no blood had collected or found on the platform, it is a serious infirmity in the case for the prosecution. This point was also urged before the High Court and the High Court rightly rejected this point on the ground that the victims were immediately taken to the police station and people were also moving here and there at the place of the occurrence. Therefore, by the time investigating officer went to the place, even if blood had fallen on the ground, the officer could not have collected the blood."

12. It is further argued by the learned Amicus Curiae on the behalf of the appellant that the injury could have been sustained from "Gandasa' and the prosecution case that the injury was sustained from "Faruhi' is highly doubtful. It is undisputed that Laxmi Shankar died due to head injury and the Prosecution Witness No. 2-Dr. K.K. Srivastava has deposed that Laxmi Shankar died due to head injury sustained and his death was possible on 26th October, 1981, at about 11:00 p.m. The post-mortem report (Exhibit Ka-2) shows that Laxmi Shankar had a horizontal incised wound which was 5 cm x 1 cm x brain deep and the Prosecution Witness No. 2 has further deposed that he has not seen the "Faruhi' but if it is a sharp instrument, the injury can be caused by it. The Prosecution Witness No. 1 and informant has stated that "Faruhi' was wielded by the appellant and the deceased Laxmi Shankar had sustained the injuries by "Faruhi'. It is to be noted that in "Faruhi' the blade is attached horizontally to the main handle which is generally a small "lathi' and in "Gandasa' the blade is vertical and parallel to the "lathi' in which it is attached. The incised wound could not have been caused by "Gandasa' when the assault is made from the front. It is further to be noted that the Prosecution Witness No. 2 has deposed that the bone was not found cut but it was fractured and the aforesaid facts and circumstances exclude the possibility of use of "Gandasa' as has been argued by the learned Amicus Curiae for the appellant. The fact that the Prosecution Witness No. 2 has stated that the injury in question was more probable by "Gandasa' does not appears to be correct as the skull of the deceased was found fractured and the Prosecution Witness No. 2 has himself stated that he has not seen the "Faruhi'. The trial court has recorded the finding that the injury in question was caused by "Faruhi' and the same is supported by deposition of Prosecution Witness No. 1-Chandrajeet and PW-2 - Dr K.K. Srivastava and as such there is no perversity in the finding of the trial court. The aforesaid submission of learned Amicus Curiae for the Appellant is not tenable in law.

13. It is submitted on behalf of the learned Amicus Curiae for the appellant that there is delay in lodging the First Information Report and the prosecution

case should be rejected on this ground alone. It is to be seen that the occurrence took place on 26th October, 1981 at about 12:00 noon and the First Information report was lodged on 27th October, 1981 at 11.00 a.m. As per the First Information Report the distance of the police station and the place of occurrence is about eight miles. It is further to be noted that as per the prosecution case after the alleged incident the deceased was taken for medical aid to a local doctor and the informant thought that since the deceased was talking normally, he was out of danger. However, the deceased died in the night of 26th October, 1981 at 11:00 p.m. and thereafter the First Information Report has been lodged on next day morning at 11.00 am. It is further to be noted that the complainant had to implicate his nephew and person with whom he had no direct enmity and the manner in which the occurrence have taken place and even subsequent thereof that the injured was taken for medical aid and was normal for sometime after providing medical aid and thereafter has died at 11.00 p.m. in the night. There is no inordinate delay and the delay has been duly explained by the prosecution and as such the argument of the learned Amicus Curiae for the appellant is not tenable under law.

14. It is further submitted by learned counsel for the Appellant that the First Information Report was prepared in consultation with the police and as such the same should be ignored. The Prosecution Witness No. 1-Chandrajeet has testified that he had dictated the First Information Report at his house after arrival of the police but not at the dictation of the police. The Prosecution Witness No. 4-H.C. Sri Niwash Misra had deposed that the First Information Report was made over at the police station and it was not prepared at the dictation of the police. The scribe of the First Information Report was Ramchander. Even if the First Information Report was scribed after arrival of the police that by itself would not make the First Information Report as has been prepared at the dictate of the police and the trial court has recorded a specific finding that the First Information Report was not lodged at the dictation or instigation of the police and no fault is found with the aforesaid finding of the trial court.

15. It is further submitted that there is no independent witness of the alleged occurrence. It is submitted that Prosecution Witness No. 1-Chandrajeet was relative of the deceased and as such there being no independent witness of the alleged occurrence, the prosecution story is not reliable and the evidence related witness is not trustworthy and is liable to be rejected.

16. 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 relative would be the last to screen the real culprit and falsely implicate an innocent person. It is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. 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 Apex Court in **Kartik Malhar Vs. State of Bihar, (1996) 1 SCC 614** 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.

17. Merely because the witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. There is no bar in law on examining family members as witness. Evidence of a related witness can be relied upon provided it is trustworthy.

18. The Supreme Court in **State of Uttar Pradesh Vs. Samman Dass, (1972) 3 SCC 201** observed as under :-

"23...It is well known that the close relatives of a murdered person are most reluctant to spare the real assailant and falsely involve another person in place of the assailant..."

19. In **Khurshid Ahmed Vs. State of Jammu and Kashmir (2018) 7 SCC 429**, the Supreme Court on the issue of evidence of a related witness observed as under :-

"31. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

20. The Apex Court in **Mohd. Rojali Ali and others Vs. State of Assam, (2019)** 19 SCC 567 in respect of related witness has observed as under :-

"13. As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested" and "related" witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593] ; Amit v. State of U.P. [(2012) 4 SCC 107 : (2012) 2 SCC (Cri) 590] ; and Gangabhavani v. Rayapati Venkat Reddy [(2013) 15 SCC 298 : (2014) 6 SCC (Cri) 182]. Recently, this difference was reiterated in Ganapathi v. State of T.N. [(2018) 5 SCC 549 : (2018) 2 SCC (Cri) 793], in the following terms, by referring to the three-Judge Bench decision in State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593] : (Ganapathi case [(2018) 5 SCC 549 : [(2018) 2 SCC (Cri) 793], (SCC p. 555, para 14).

"14. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation;

in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"."

14. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in *Dalip Singh v. State of Punjab [1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465], wherein this Court observed: (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 relative would be the last to screen the real culprit and falsely implicate an innocent person."

15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in *Jayabalan v. State (UT of Pondicherry) [(2010) 1 SCC 199 : (2010) 2 SCC (Cri) 966] : (SCC p. 213, para 23)*

"23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim." "

21. The Apex Court in **Kulwinder Singh and another Vs. State of Punjab, (2015) 6 SCC 674** held that the case of the prosecution cannot be rejected solely on the ground that independent witnesses have not been examined when, on the perusal of the evidence on record the Court finds that the case put forth by the prosecution is trustworthy. When the evidence of the official witnesses is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence.

22. It is held in recent judgement rendered in **Surinder Kumar Vs. State of Punjab, AIR 2020** Supreme Court 303 that merely because prosecution has not examined any independent witness, same would not necessarily lead to the conclusion that the appellant has been falsely implicated.

23. In view of the law laid down by the Apex court, the plea of the Appellant that there is no independent witness to support the prosecution case is not tenable in law and is liable to be rejected.

24. This court does not find any illegality, infirmity and perversity in the impugned judgement passed by the trial court convicting and sentencing the Appellant for the offence. The conviction

and sentence awarded by the trial court is in accordance with law and needs no interference.

25 . As a result, the present appeal lacks merit and is dismissed.

26. Registrar General of this Court is directed to pay an honorarium of **Rs. 20,000/-** to Sri Pankaj Kumar Asthana, learned Amicus Curiae for rendering effective assistance in the appeal.

27. The bail bond of the Appellant stands cancelled and the Appellant is directed to surrender before the court below for serving the sentence as per trial court judgment.

28. Let the lower court record be transmitted back to court below along with a copy of this order.

(2022) 8 ILRA 629
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 608 of 2014
WITH
Criminal Appeal No. 34 of 2019
(U/S 372 Cr.P. C.)

Ajeet Kumar ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Satyaveer Singh, Sri Ram Singh Kushwaha, Sri Ratan Singh

Counsel for the Opposite Party:
Govt. Advocate, Sri Satya Dheer Singh Jadaun

Criminal Law - Indian Penal Code,1860 - Section 302 & 498-A - Dowry Prohibition Act; 1961 - Section 3/4 - Indian Evidence Act, 1872 - Section 113-B- No direct evidence except chargesheet – not proved beyond reasonable doubts- presumption u/s 113-B of Indian Evidence Act does not arise. Criminal Appeal No.608 of 2014- allowed and Criminal Appeal No.34 of 2019.

Appeal dismissed. (E-9)

List of Cases cited:

1.Sharad Birdichand Sarda Vs St. of Mah., AIR 1984 SC 1622,

2.Sakatar Singh & ors. Vs St. of Har. : AIR 2004 SC 2570

3.Kalyan Kumar Gogoi Vs Ashutosh Agnihotri & anr. : AIR 2011 SC 760

4.Mukul Rani Varshhei Vs D.D.A. : (1995) 6 SCC 120

5.Standard Chartered Bank Vs Andhra Bank Finance Services Ltd. : (2006) 6 SCC 94 (Full Bench)

6.Madhu Vs St. of Kar., 2014 (84) ACC 329 (SC);

7.Prithipal Singh Vs St. of Pun., 2012 (76) ACC 680 (SC);

8.Mani Kumar Thapa Vs St. of Sikkim, AIR 2002 SC 2920

9.Lal Bahadur & ors. Vs St. of (NCT of Delhi) : (2013) 4 SCC 557;

10.Ram Gulam Chaudhary Vs St. of Bih. : 2001 (2) JIC 986 (SC)

11.Satvir Singh Vs St. of Pun. : 2001 Cr.L.J. 4625,

12.Major Singh & anr. Vs St. of Pun. : AIR 2015 SC 2081

13.Baijnath & ors. Vs St. of M.P., (2017) 1 SCC 734

14.Arvind Singh Vs St. of Bih., AIR 2001 SC 2124

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

1. Criminal Appeal No.608 of 2014 has been filed against the judgment and order of the Additional District & Sessions Judge, Court No.2, Firozabad by which the appellant Ajeet Kumar has been found guilty and punished under section 302 I.P.C. with life imprisonment along with a fine of Rs.10,000/-; under section 304-B I.P.C. with 10 years rigorous imprisonment; under section 201 I.P.C. with three years rigorous imprisonment along with a fine of Rs.5000/-; under section 498-A of I.P.C. with one year simple imprisonment along with fine of Rs.1000/- and under section 4 of Dowry Prohibition Act with six months' imprisonment along with Rs.2000/- as fine. It was further directed that all the punishments of imprisonment were to run concurrently. By the very same judgment the accused Yad Pal and Veda Devi were acquitted.

2. Against the acquittal of accused Yad Pal and Veda Devi, Criminal Appeal No.34 of 2019 had been filed by the appellant Jiledar Singh Verma with a prayer that the opposite party nos.2 and 3 in Criminal Appeal No.34 of 2019 be convicted for offences under sections 498-A, 304-B, 201, 302/34 of I.P.C. read with section 3/4 of Dowry Prohibition Act.

3. Heard Sri Ram Singh Kushwaha, learned counsel for the appellant, learned AGA Sri Vikas Goswami and Sri Satya Dheer Singh Jadaun, learned counsel for the first informant, in Criminal Appeal No.608 of 2014. Sri Satya Dheer Singh Jadaun, Advocate has made his submissions on behalf of the appellant in Criminal Appeal No.34 of 2019 whereas Sri Ram Singh Kushwaha appeared for opposite parties nos.2 and 3.

4. In brief, the facts of the case are as follows :-

5. Jiledar Singh Verma, PW-1 lodged a First Information Report on 31.7.2010 to the effect that his sister, under mysterious circumstances, had been made to disappear and thereafter killed. It has been stated that he had got his sister married to one Ajeet Kumar, son of Yad Pal, resident of Kadipur (Padham), Police Station Jasrana, District Firozabad on 9.2.2010 as per Hindu rituals. He has stated in the First Information Report that he had, at the time of marriage, given Rs.1,00,000/- in cash and had also given various other commodities worth Rs.1,00,000/-. These commodities were a Motorcycle, gold chain, gold ring, colour television, almirah, palang, sofa set, dressing table and a refrigerator etc. In the First Information Report, it has further been stated that eversince the marriage, the in-laws and the husband of his sister-Asha were demanding Rs.50,000/-for the purchase of a buffalo and a gas-stove. For this purpose, they had on various occasions beaten his sister and on one occasion his sister was also turned-out of the in-laws' house. On 19.6.2010, in the presence of various respected individuals and relatives, the first informant had taken his sister and had also left her there in the in-laws' house. However, despite the intervention of the respected villagers and the relatives, there was no improvement in the manner in which his sister was being treated. In the

month of July, 2010 when the daughter of his uncle was to get married, his brother-in-law Ajeet Kumar i.e. the husband of his sister along with his sister had come to the house of the first informant. After the marriage, the couple had gone back to their village. It has also been stated that during the marriage, when Ajeet Kumar and his sister had come to the village of the first informant, Ajeet Kumar had disclosed his evil intentions to various relatives and they had also told the first informant that Ajeet Kumar had told them about his evil intentions of actually murdering his sister after they went back home after the marriage. When the relatives had told the first informant about the evil intentions of Ajeet Kumar, he got worried and when on 20.7.2010 he tried to call Ajeet Kumar, his phone was switched off and when he tried to call his father Yad Pal, he also did not give a satisfactory reply and thereafter he also switched off his phone. The first informant tried to find out as to what had happened and had got information that his sister was taken out by Ajeet from her marital home and had been killed and, therefore, there was a suspicion that Ajeet Kumar had killed his sister. It was stated that prior to the lodging of the First Information Report, along with all the members of the family, Ajeet Kumar had killed his sister and had also made the dead body disappear. Upon realising that the sister of the informant had been killed on 20.7.2010, the father of the first informant had written to the Thana Prabhari, Police Station Jasrana on 24.7.2010. In the First Information Report, the first informant had stated that for killing his sister and for making the dead body disappear, Ajeet Kumar son of Yad Pal, Yad Pal son of Man Singh, Veda wife of Yad Pal, Bharat Singh son of Man Singh, Geetam Singh son of Rajaram, Mitthu Lal son of Tejpal, Jai Prakash son of Vishun Lal, Ram Babu son of Vishun Lal and Sher Singh Advocate son of Ram Chandra were all equally responsible and, therefore, he had prayed that his First Information Report be lodged and the guilty be punished.

6. After the lodging of the First Information Report, the police conducted its investigation and thereafter submitted a charge sheet against only three persons. The Court, therefore, charged Ajeet Kumar, Yad Ram and Veda Devi under sections 498-A, 304-B, 201 and 302/34 I.P.C. and section 3/4 of Dowry Prohibition Act on 4.5.2012. The charges were read over to the accused and they were made to understand the charges. However, the accused denied the charges and prayed for a trial.

7. From the side of the prosecution, Jiledar Singh Verma, the first informant was produced as PW-1, Kishan Lal, the father of the first informant was produced as PW-2, Ramesh Chandra, the uncle (Tau) of the deceased was produced as PW-3, Anand Kumar (stated to be the brother-in-law of the first informant) was produced as PW-4. Ramesh Bhardwaj, V.P. Singh, Purnendra Singh and Har Prasad Gautam who were Investigating Officers in the case were produced as PWs-5, 7, 8 and 9. PW-6 Shiv Raj Singh is the Constable writer who prepared the chik FIR Ex.-Ka-4 and Kayami G.D. as Ex.-Ka-5.

8. The accused Ajeet Kumar, Yad Ram and Veda Devi answered to the various questions under section 313 I.P.C. and denied having committed the offence as was alleged against them. One Kashmir Singh was produced as Defence Witness. By way of documentary evidence, the site plan with regard to the place where the accused lived was brought into evidence as

Exhibit-Ka-2 and the site plan as to where it was presumed that the dead body was thrown was produced in evidence as Exhibit-Ka-3.

9. From the perusal of the entire evidence on record, the following facts can be gleaned out :-

i. the alleged deceased was married to one Ajeet Kumar on 9.2.2010;

ii. Ajeet Kumar and deceased Asha apparently were not having a very good matrimonial relationship and as per the first informant, Ajeet Kumar with his father, mother and other relatives were constantly demanding dowry from the deceased;

iii. on many an occasion, there were conflicts between the husband Ajeet Kumar and the wife Asha and the first informant had tried to get the misunderstanding between the two resolved by the intervention of respected individuals of the village and various relatives;

iv. on 19.6.2010, it was the last time before the alleged deceased Asha disappeared that an intervention was tried by the first informant to get the relationship between the deceased and her husband amicable. Thus, the event is said to have occurred within 7 years from the marriage in respect of which there is a presumption about the commission of dowry death under section 113-B of Indian Evidence Act and section 8-A of the Dowry Prohibition Act and the burden of proof, therefore, falls on the accused that he had not committed the crime;

v. on 10.7.2010 when the daughter of Ramesh Chandra, the uncle of the first informant, was getting married, Ajeet Kumar and the alleged deceased Asha had come to the first informant's house to attend the marriage. Thereafter, Ajeet Kumar along with his parents had gone back to his own village at Kadipur (Padham), Police Station Jasrana, District Firozabad.

vi. when the "chauthi" ceremony of the girl who had got married was to be held on 16.7.2010, then Ajeet Kumar again came back to the house of the first informant.

vii. according to the first informant, thereafter his sister (deceased) along with Ajeet Kumar had gone back to the village of Ajeet Kumar on 19.7.2010.

viii. on 20.7.2010, when an information was received by one Gajendra, who was husband of another sister (Smt. Mithilesh) of the first informant, then the first informant along with his father tried to make efforts to contact Ajeet Kumar and his family but as per their assertion, Ajeet Kumar and his father disappeared and therefore, a suspicion was raised in their minds that the sister of the first informant had been murdered.

ix. the First Information Report was thereafter lodged; investigation was done by the police; charge sheet was submitted and thereafter the trial had commenced.

10. Upon the completion of the trial, when the accused were found guilty, Criminal Appeal No.608 of 2014 was filed assailing the judgment and order of conviction dated 25.1.2014. Learned counsel for the appellant has made the following submissions :-

a. The case is of circumstantial evidence and there is no direct evidence to come to a conclusion that the appellant-Ajeet Kumar had in fact killed the deceased-Asha.

b. When conviction is to be done as per the circumstantial evidence, then the chain of evidence should be such that leads to only conclusion that the accused and no one else had committed the crime. If there is any missing link, then the conviction cannot take place.

c. As per the judgment of the Supreme Court in **Sharad Birdichand Sarda vs. State of Maharashtra** reported in **AIR 1984 SC 1622,** there are five salient points which are to be seen for the conviction of the accused which are as follows :-

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

2. The fact so established should be consistent only with the hypothesis of the guilt of the accused;

3. The circumstances should be of 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.

11. These ingredients have to be necessarily there for the Court to come to a conclusion that the accused was guilty.

d. If the testimony of PW-1, who is the brother of the deceased, is seen, it is apparent that he only concludes that the accused had killed his sister when she was not to be found. Learned counsel for the appellant has made the Court go through the testimony of PW-1 which includes his examination-in-chief and cross-examination and stated that after the accused had gone back to his village upon having attended the marriage of his (informant's) cousin, he had again come back to the village of the informant to attend the 'chauthi' ceremony of the cousin (sister). He further states that the accused had gone back after attending the marriage on 19.7.2010. In his cross-examination, he has stated that while the accused was coming back on 16.7.2010, he had met with an accident at Padham which is around 25-30 kilometers away from the village of the first informant. Learned counsel for the appellant has stated that as per the statement of PW-1, upon hearing about the accident, even the parents of Ajeet Kumar had come to the village of the first informant. Learned counsel states that thereafter as per the cross-examination of PW-1, the appellant-accused had gone to the house of the uncle of the first informant. Learned counsel states that if the testimony of PW-1, the first informant, is perused, it becomes clear that there is absolutely no direct evidence which can lead to the conclusion that his sister was killed by Ajeet Kumar. In his testimony PW-1 had stated that after the ceremony of 'chauthi', the accused had taken away his sister in his presence on 19.7.2010 and thereafter because one Gajendra Singh, brother-in-law (Bahnoi) received an

information that Ajeet Kumar had killed his sister, he had presumed that his sister had been killed. Learned counsel for the appellant states that to Gajendra Singh, during the marriage ceremony, Ajeet Kumar had stated that he had an intention to kill his wife Asha. Learned counsel argued that if that was the case, then why this fact was not told by Gajendra to the informant and the parents of Asha. Learned counsel for the appellant states that Gajendra Singh was never examined in the Court and he was not produced as a witness.

e. To come to the conclusion that dowry was being demanded, the first informant as also the PW-2 i.e. the father of the deceased, had relied upon the statement of one Mithilesh who again was the sister of the first informant and Asha. As per the PW-1 and PW-2, Mithilesh had all through stated that in her presence, dowry was demanded from Asha. Learned counsel for the appellant states that even Mithilesh was never produced as a witness.

f. There is absolutely no direct evidence with regard to the fact that anyone had seen the commission of the crime. He also submits that there is no evidence which would make a Court to conclude that the deceased was in fact killed by Ajeet Kumar.

g. PW-3 Ramesh Chandra had also corroborated the story as was told by PW-1 that Ajeet Kumar had come back once again on 16.7.2010 to the village of the first informant to attend the 'chauthi' ceremony. Learned counsel states that the story which PW-3 gives is slightly different as he submits that after Ajeet Kumar had come from his village and he had met with the accident, he had never come to his house i.e. the uncle's house while PW-1 had stated that after coming from his village, Ajeet Kumar had lied down in the house of the uncle. To show the variance in the statements of PW-1 and PW-3, learned counsel for the appellant relied upon certain portions of their testimony which are reproduced as under :-

Statement of PW-1

"अजीत के माता पिता के बताने पर हमको अजीत के साथ एक्सीडेंट होने की जानकारी हुई थी। उससे पहले अजीत अपने घर पर नहीं आये थे मेरे ताऊ के घर पर लेटे थे। अजीत के माता पिता के बताने के बाद ही मैंने अजीत की तलाश किया था तो वह मेरे ताऊ के घर लेटे मिले थे और उस समय मेरी बहन आशा भी मेरे घर पर ही थी।"

Statement of PW-3

"मुझे नहीं मालूम कि अजीत मेरे भाई के घर कितने दिन रुके थे। अजीत किस तारीख को मेरे घर पर गए थे यह भी मुझको नहीं मालूम।"

h. For the proving of the case of the prosecution, it appears that PW-3 and PW-4 had also sworn affidavits on 11.10.2010. Those affidavits, learned counsel states, were absolutely unreliable because the witnesses had not stated anything with regard to the fact as to when they were sworn, before whom they were sworn and where they were sworn.

i. Learned counsel had also drawn the attention of the Court to the testimony of Anand Kumar-PW-4 in which the PW-4 states that he had attended the marriage on 10.7.2010 of the cousin of the first informant Pushpa and had remained in the marriage only for 5-6

hours and in those 5-6 hours he did not remember as to when exactly in Dhatari (the village of the first informant), Ajeet Kumar had met him, yet before the PW-4 Anand Kumar, Ajeet Kumar had made an extra judicial confession that he would take his wife to his village and there he would kill her. Learned counsel for the appellant states that if such a grave confession was being made before PW-4, Anand Kumar and if he was a friend of the first informant and also a brother-in-law (husband of a cousin), then he would have definitely told the informant about the evil intention of Ajeet Kumar then and there. The very fact that Anand Kumar had kept mum and had not spoken about the intentions which Ajeet Kumar had told him, shows that Anand Kumar was a witness who had been tutored and had been brought only to give a false evidence.

j. Learned counsel further states that PW-2 had stated that Ajeet Kumar had on 19.7.2010 taken his daughter to his village in his presence. The exact words of PW-2 in his testimony are being reproduced hereasunder :-

"19 जुलाई 2010 को मेरा दामाद अजीत मेरी पुत्री आशा को विदा कराकर ले गया था।"

12. However, in direct contravention of the statement of PW-2, PW-3 had stated that on 19.7.2010 Asha in the evening at around 4.00 PM had gone with him to Jasrana on a tempo. Then, he had also stated that from Shikohabad to Jasrana they were on a tempo at around 4.30 PM. He does not say that the accused Ajeet Kumar was also with him and was accompanying the alleged deceased Asha.

k. Learned counsel further states that if the testimony of the Investigating Officer PW-5 Ramesh Bhardwaj is taken into account then it would be evident that he had stated in his Case Diary that the whole incident appeared to be doubtful. He has stated in his testimony that witness Mohan Singh and Veere had also stated during investigation that they were aware of the fact that Ajeet Kumar had killed his wife. He has also stated that Veere had stated that Asha along with Ajeet Kumar had gone to her Maika to attend a marriage but had never come back. PW-5 is the witness who had arrested the appellant but he could not, despite best efforts, recover the dead body of the deceased. He also presumed that the appellant had killed the deceased and had thrown it in Hazara Nahar. Learned counsel for the appellant states that if Mohan Singh and Veere were such important witnesses of fact then their non-production as witnesses in the case would make the whole prosecution story doubtful.

l. Learned counsel for the appellant has also urged that from the statement of PW-6, 7 and 8 it is clear that the whole case was based upon hearsay evidence.

13. Statements of Prosecution Witnesses regarding fact of the incident is also relevant. PW-1 deposed at page 7 that "it is fair to say that I did not see Ajeet Kumar killing my sister and throwing the corpse while taking her. I don't know that after arrest of Ajeet Kumar, dead body of my sister, jewelry and clothes were recovered or not. I did not find any such person who told me that he had seen anyone killing my sister and throwing the dead body. I am saying according to the police that my sister has been murdered because she has not come to us till date. It is correct to say that before lodging this case, I did not make any complaint against the accused. It is also true

to say that Ajit Kumar left my sister and returned back to his village.

14. PW-2, in cross-examination, when was asked, "do you know that your daughter was murdered", the witness was unable to answer and remained silent.

15. Learned counsel for the appellant relied upon a decision of the Supreme Court in **Sakatar Singh & Ors. vs. State of Haryana : AIR 2004 SC 257**0 and stated that the Supreme Court made it clear that where the evidence of husband's cruelty or harassment leading to dowry death is not based on the personal knowledge of the witness, it cannot be made foundation for basing of conviction under section 304-B of the Penal Code.

m. Learned counsel for the appellant relying upon the evidence of PW-9 has also stated that Rakesh Kumar Pathak was a witness who had given his statement but Rakesh Kumar Pathak was also not produced as a witness.

n. Learned counsel for the appellant states that if there was a presumption that the appellant had thrown the dead body from a bridge into Hazara Nahar then the police ought to have made at least some effort to locate the dead body by putting nets etc. He further stated that all such canals are linked to various mini canals for the purposes of irrigation and if the dead body had been thrown from a bridge into that canal then there was every possibility that the dead body would have been recovered at one place or the other if proper nets etc. for searching out the dead body had been installed

16. Learned AGA, however, in reply has submitted that minor discrepancies in the statements of witnesses could not be made a ground for the acquittal of the accused. The first informant had tried his level best to prove the case and just because there were certain variations in the statements of PW-1 and PW-3 and thereafter in the statements of PW-2, such variations would not make the whole prosecution case doubtful. He submits that it made little difference if the PW-1 had stated that upon coming back to the informant's house, the accused had stayed in the house of the uncle (Tau) of the first informant on 19.7.2010 and on the contrary PW-3 had stated that the appellant had not stayed in his house. Learned AGA further submitted that the statement of PW-2 that the accused and the deceased had gone from his house was at variance with the statement of PW-3 (Tau of the first informant) that the deceased had in fact gone to Jasrana with him at around 4.30 PM in the evening would also not make any difference. Learned AGA further stated that if Gajendra, Mithilesh, Mohan and Veere who had given various statements on various occasions had not given their evidence would also not make any difference as the evidence of the family members was sufficient for convicting the accused persons.

17. Sri Satya Dheer Singh Jadaun also supported the judgment so far as the conviction of Ajeet Kumar was concerned and assailed the same so far as the judgment had acquitted Yad Pal and Veda Devi. For defending the judgment, so far as it convicted Ajeet Kumar, he submitted that there was evidence enough to come to the conclusion that Ajeet Kumar had killed his wife. He also adopted the arguments which the learned AGA had made.

18. To assail the judgment which acquitted Yad Pal and Veda Devi, Sri Satya Dheer Singh Jadaun, learned counsel

appearing for the appellant in Criminal Appeal No.34 of 2019 submitted that even if the Court relied upon the statements of PWs.-1, 2 and 3, it would become evident that the accused Yad Pal and Veda Devi were hands-in-glove with the accused Ajeet Kumar and they had all planned the murder of the deceased Asha and were, therefore, definitely to be punished with the help of the provisions of section 34 of the Indian Penal Code.

19. Having heard learned counsel for the appellant in Criminal Appeal No.608 of 2013, learned AGA for State and Sri Satya Dheer Singh Jadaun who has appeared for the first informant as well as the appellant in Criminal Appeal No.34 of 2019, the Court is of the view that the Court below erred in convicting the appellant-Ajeet Kumar in Criminal Appeal No.608 of 2014. However, the Court is convinced that the Court below rightly acquitted Yad Pal and Veda Devi. If the evidence in its totality as had come on record is seen, it would be evident that there is absolutely no direct evidence to come to the conclusion that Ajeet Kumar or his father Yad Pal or his mother Veda Devi had killed the deceased. The dead body was never found. The evidence is only circumstantial evidence. There is no direct evidence to prove that the appellant-Ajeet Kumar in Criminal Appeal No.608 of 2014 or his father Yad Pal or his mother Veda Devi had killed the deceased. There are number of contradictions in the statements of PW-1 and PW-3 and in the statements of PW-2 and PW-3 which makes their testimonies doubtful. Also the non-production of Mithilesh, the sister of the deceased; Gajendra, the brother-in-law of the first informant; Mohan and Veere, the residents of village Kadipur in the witness box makes everything doubtful. PWs-1, 2 and 3 are such witnesses who only stated about the murder, on the basis of presumption as they were unable to find their daughter. They are in no manner witnesses of fact. They have no direct knowledge as to who had killed the deceased and whether the deceased was actually killed or not. They only presumed that Ajeet Kumar and his family members had killed the deceased on the basis of the statements made by Gajendra. Under such circumstances, their statements can only lead to a suspicion and cannot in any manner lead to the conclusion that Ajeet Kumar had actually killed the deceased. Their statements also cannot be treated as statements of fact that in fact the deceased had died. Suspicion cannot take the place of proof. Suspicion is definitely not a proof and, therefore, when it is not proven that the accused were responsible for the death of the deceased, then on the basis of suspicion, no conviction can take place.

20. It is clear from the evidence of the witnesses of fact that they have deposed hearsay evidence which is not admissible in evidence. Under section 60 of the Indian Evidence Act, oral evidence must be direct as has also been observed by the Supreme Court in **Kalyan Kumar Gogoi vs. Ashutosh Agnihotri & Anr. : AIR 2011 SC 760 and Mukul Rani Varshhei vs. D.D.A. : (1995) 6 SCC 120.**

21. Some important discrepancies in oral evidence of witnesses of fact which demolishes the prosecution case are noted below :-

i) Regarding Demand of Dowry:

PWs-1, 3 and 4, brother, uncle and brother-in-law (husband of a cousin)

respectively state about the demand of Rs.50,000/-, a buffalo and a gas-stove;

PW-2 father of Asha states that there was a demand of gas and gas-stove only.

ii) Regarding Panchayat:

22. PW-1 on page 1 - "On June 19, 2010 I took many respectable persons and relatives to their home and talked about this".

23. But his presence on 19.6.2010 at home is doubtful as he is an army personnel. At page 3 of his evidence he says that "the wedding of my uncle's daughter was on 10th July 2010". He could not say with certainty as to for how many days and at which time, he had come on leave.

24. Again he says, "I do not remember that how many days before the wedding of my uncle's daughter, I had come home."

25. Thus, it is established that the informant PW-1 had not participated in any such panchayat.

26. PW-2 Kishan Lal (father) has not mentioned at all that with regard to demand of dowry, any panchayat ever took place but he says, "मैंने आशा की ससुराल में यह मालूम नहीं किया कि मृत्यु कैसे हुई। मुझे किसी ने बताया भी नहीं। मैंने अपनी लड़की आशा की हत्या करते हुए उसकी लाश को छिपाते हुए या दाह संस्कार करते हुए नहीं देखा न मेरे घरवालो ने देखा स्वयं कहा कि मैं तो अपने घर पर था। यह कहना सही है कि मुझे आज तक ऐसा कोई व्यक्ति नहीं मिला जिसने मेरी लड़की आशा की हत्या करते हुए उसकी लाश को फेंकते हुए या दाह संस्कार करते हुए देखा हो। यह कहना भी सही है कि मेरी लड़की की आज तक न तो लाश मिली न हड्डी मिली और न कपड़े मिले। ..... शादी से लेकर मेरी भतीजी की शादी होने तक मेरी पुत्री ने इस सम्बन्ध में कोई पत्र नहीं डाला कि उसकी ससुराल वाले दहेज़ की बात करते हैं। और दहेज़ के लिए प्रताड़ित करते हैं और न फोन किया था घर आने पर शिकायत करती थी।"

27. Contrary to the underlined deposition, further he says, " मैंने लड़की की शादी से लेकर मेरी भतीजी की शादी होने तक किसी प्रकार की कोई शिकायत ससुराल वालोँ के खिलाफ नहीं की थी और न मेरी लड़की ने की थी। मुझे नहीं मालूम कि मेरी लड़की की हत्या किस तारिख, कितने बजे और कहाँ पर हुई थी। .... अजीत ने ता॰ 20-07-2010 बताई थी। मैं रिश्तेदारो के बताये अनुसार कह रहा हूँ कि मेरी लड़की की हत्या हो गई है। ..... यह कहना सही है कि मैं लड़की की हत्या होने की बात दूसरोँ के कहने पर बता रहा हूँ।"

28. PW-3 Ramesh Chandra (Uncle) says at page 5, "I cannot tell the date, month or year of the panchayat. I did not attend the panchayat. ..... The panchayat was held on 19th June. The panchayat included Kishan Lal, Amrit Lal, Sanjay, Rajesh Pathak". Further he said that Asha complained to him when she came in his daughter's marriage but he admits that there is no such deposition in his affidavit and examination-in-chief. Such omission falsifies his claim regarding complaint by Asha Devi to him. No alleged member of the panchayat was examined.

PW-4 has not deposed about panchayat. Thus, this Court concludes that there was no demand of dowry and that no panchayat was held in regard to dowry.

29. In the instant case, except charge sheet, there is no other reliable, convincing

and acceptable evidence that Asha is not alive and has been murdered for dowry or for any other reason. Charge sheet itself is no evidence to prove the guilt. The Supreme Court in **Standard Chartered Bank vs. Andhra Bank Finance Services Limited : (2006) 6 SCC 94 (Full Bench)** held that a charge sheet submitted by an Investigating Officer under section 173(2) Cr.P.C. is a public document within the meaning of section 35 of the Evidence Act but it does not imply that all that is stated in the charge sheet is proved. All that can be said is that it is proved that the police had prepared a charge sheet in which some allegations had been made against the accused.

30. In this case, even the police was not relying upon the allegations of PW-1 and PW-2. In this context, statement of PW-6 - Constable Moharrir Shivraj Singh, at page 2, is relevant where he deposed that, "it is correct to say that the 'Special Report' in this case was not sent to the higher authorities as the incident of abduction of Asha was suspicious. ..... Inspector had recorded my statement. I had told the Inspector that due to the incident being suspicious, 'Special Report' was not sent".

31. It is also relevant that when the accused were produced for remand under sections 302 and 201 I.P.C., the remand was refused by the Chief Judicial Magistrate and a case was registered against the Investigating Officer which was rejected by the Revisional Court and order was sent to the superior authorities for perusal and compliance.

32. Thus, it could be anyone's conclusion that the officers who investigated, only made a false charge and that too because pretentiously they had to submit the charge sheet.

33. Further when the death of Asha itself was not certain on account of the fact that the dead body was not found, then it cannot again with certainty be said that the deceased was actually killed.

34. This Court is aware of the fact that recovery of the corpus is not necessary for conviction as has been held in several cases by the Supreme Court i.e. in **Madhu vs. State of Karnataka : 2014 (84) ACC 329 (SC); Prithipal Singh vs. State of Punjab : 2012 (76) ACC 680 (SC); Mani Kumar Thapa vs. State of Sikkim : AIR 2002 SC 2920; Lal Bahadur & Ors. vs. State of (NCT of Delhi) : (2013) 4 SCC 557; Ram Gulam Chaudhary vs. State of Bihar : 2001 (2) JIC 986 (SC) etc**. but in this case demand of dowry, torture, planning to kill Asha, taking away the alleged deceased by the accused from her parental house and killing and throwing her in canal, all have not been proved by direct or circumstantial evidence.

35. In **Satvir Singh vs. State of Punjab : 2001 Cr.L.J. 4625**, the Supreme Court held that in order to prosecute the accused under Section 304-B, there should be perceptible nexus between death of the deceased and torture or harassment caused to her. In the case cited, there was no evidence to show that the wife was subjected to cruelty soon before she attempted to commit suicide. The conviction of the accused under Section 304-B/306 read with section 113-B of Evidence Act, was therefore, set aside but conviction under Section 498-A was confirmed. The fine under Section 498-A was enhanced to rupees one lac for all the three accused.

36. The Supreme Court in **Major Singh & Anr. vs. State of Punjab : AIR 2015 SC 2081** held that in order to attract conviction under Section 304-B of IPC the prosecution should adduce evidence to show that "soon before her death" the deceased was subjected to cruelty or harassment. There must always be proximity and nexus between the effects of cruelty based on dowry demand and the resultant death.

37. In this case, the prosecution has not also been able to prove the case beyond reasonable doubt and to discharge its initial burden. Therefore, a presumption under section 113-B of the Indian Evidence Act does not arise.

38. In **Baijnath & Ors. vs. State of Madhya Pradesh : (2017) 1 SCC 734**, the Supreme Court reiterated that mere factum of unnatural death in matrimonial home within seven years of marriage is not sufficient to convict the accused under Sections 304B/498A. It is only when prosecution proves beyond doubt that the deceased (wife of the accused) was subjected to cruelty/harassment in connection with dowry demand soon before her death, the presumption under Section 113-B of the Evidence Act, 1872 can be invoked.

39. The Supreme Court in **Arvind Singh vs. State of Bihar : AIR 2001 SC 2124** observed that bride-burning and dowry deaths are no doubt a menace to society and need to be sternly dealt with but at the same time it does not mean that while dealing with such cases the Courts should ignore the fundamental principles of fair trial and hold the accused guilty on mere probability or possibility of their involvement in the offence.

40. Under such circumstances, the judgment and order dated 25.1.2014 so far as it convicts the appellant-Ajeet Kumar in Criminal Appeal No.608 of 2014 cannot be sustained in law and, therefore, is quashed and set-aside. Also, we find that there is no ground for reversing the judgment dated 25.1.2014 insofar as it had acquitted Yad Pal and Veda Devi.

41. Criminal Appeal No.608 of 2014, accordingly, stands allowed and Criminal Appeal No.34 of 2019 stands dismissed. The appellant of Criminal Appeal No.608 of 2014, who is in jail, may be released forthwith, if he is not required in any other criminal case.

(2022) 8 ILRA 640
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.08.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Appeal No. 967 of 2008
with
Criminal Appeal No. 1078 of 2008
with
Criminal Appeal No. 1202 of 2008

Ram Sajeevan Yadav & Anr. ....Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
S.B. Singh, Sri Mohd. Mustafa Khan, Sri Prabhakar Singh, Sri Shiv Shankar Singh

Counsel for the Opposite Party:
G.A.

Criminal Law- Indian Penal Code, 1860- Sections 34, 302 & 304 - Part II- The appellant, Kicchi @ Ram Surat, who was

armed with a ballam, inflicted only one blow on the chest of the deceased, Auhardeen from ballam which, according to postmortem report, Ex. Ka-9 ultimately proved to be cause of his death. The other co-accused, namely, Kundan Badhai along with Gaya Chamar and Ram Sajeevan Yadav have inflicted injuries to the injured persons, namely, Adalatdeen and Ramu by lathi only-This fact stands corroborated by the postmortem report of the deceased, Ex. Ka-9 wherein only one punctured wound has been reported on the body of the deceased-There is nothing on record to show and establish that the appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai had any prior meeting of mind with the appellant, Kicchi @ Ram Surat who had given fatal blow on the chest of the deceased, Auhardeen to kill the deceased. There is nothing on record to suggest that common intention amongst appellants developed on the place of occurrence-The incident of killing of Auhardeen appears to have occurred in a spur of moment wherein only one blow from ballam was given by the appellant, Kicchi @ Ram Surat to the deceased. The fact that he had knowledge that such blow from a sharp edged weapon could cause death of the deceased, cannot be ruled out in the facts of this case. Thus, in our considered view, the appellant, Kicchi @ Ram Surat is liable to be convicted under Section 304 Part-II I.P.C.

Where only a single blow has been inflicted by one accused, on the spur of the moment, to the deceased resulting in the fatal injury then it cannot be said that the offence was premeditated and with common intention, but as the accused had knowledge that the act could result in the death of the deceased hence the offence would be of culpable homicide not amounting to murder punishable under Section 304 Part II of the IPC instead of Section 302 IPC.

Indian Penal Code, 1860- Sections 34 & 302- So far as the case of the appellants, Gaya Chamar, Ram Sajeevan Yadav and Kundan Badhai are concerned their conviction under Section 302 I.P.C. with the aid of Section 34 in want of any evidence of sharing common intention with the appellant, Kichhi to kill the deceased, Auhardeen can also not be upheld. Resultantly, the conviction and sentence awarded to the appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai under Section 302 read with Section 34 I.P.C. deserves to be set aside. Their case, at most, falls under Sections 323/34 I.P.C. for which they deserve to be convicted and sentenced.

As the other co-accused who were wielding lathis did not assault the deceased, but only caused simple injuries to other injured, hence in absence of any evidence of common intention with the other accused to commit murder, the case of the co-accused would fall within the parameters of offences punishable under Section 323/34 of the IPC.

Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities)Act, 1995- Sections 3(i)(x) and 3(2)(v)-No caste based insult and intimidation by the appellants given with intent to humiliate the first informant, PW-1, Mansharam, deceased-Auhardeen and injured persons, in any place within public view. Therefore, mere fact that the first informant, PW-1-Mansharam, deceased-Auhardeen and the injured persons, belonged to the scheduled caste community, per se, does not constitute offence under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act.

As there is no evidence to show that any caste based insult and intimidation was given by the accused to the deceased and injured persons in public view hence no offence under Section 3(i)(x) and 3(2)(v) of the S.C./S.T Act is made out against the accused.

Scheduled Tribes (Prevention of Atrocities) Rules, 1995 – Rule 7- In terms of Rule 7 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (hereinafter referred to as "S.C./S.T. Rules), the offence committed under the S.C./S.T. Act shall be investigated by a police officer

not below the rank of a Deputy Superintendent of Police. The instant case has been investigated by S.I. Sher Bahadur Singh who is not an officer of the rank of Deputy Superintendent of Police as required by Rule 7 of S.C./S.T. Rules. Due to this reason also, the investigation of this case, insofar as, the same relates to offences under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act is vitiated.

Where the offence allegedly committed under the S.C/S.T Act has not been investigated by a police officer not below the rank of a Deputy Superintendent of Police, but by a subordinate Sub-Inspector of Police, then the investigation will stand vitiated. (Para 35, 39, 41, 46, 47, 49, 50)

Criminal Appeals partly allowed. (E-3)

Case Law/ Judgements relied upon:-

1. MANU/SC/033/2019 Kishan Singh Vs St. of U.K & ors.

2. The St. of M.P. Vs Mohar Singh MANU/SC/1065/2019

3. Mehraj Singh (L/ Nk.) Vs St. of U.P (1994) 5 SCC 188

4. S. Sudershan Reddy & ors. Vs St. of A.P (2006) 10 SCC 163

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

6. Ajmal Vs The St. of Ker. 2022 SCC OnLine SC 842

7. Mavila Thamban Nambiar Vs St. of Ker. (2009) 17 SCC 441

8. Takhaji Hiraji Vs Thakore Kubersing Chamansing & ors.(2001) 6 SCC 145

9. Ramkishan & ors. Vs St. of Raj. (1997) 7 SCC 518

10. Hitesh Verma Vs St. of U.K & anr. (2020) 10 SCC 710

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

1. Under challenge in these appeals is the judgment and order dated 29.03.2008 passed by the learned Additional Sessions Judge, Fast Track Court No.29, Barabanki in Sessions Trial No.340 of 1993 arising out of Case Crime No.08 of 1993, under Sections 302/34 of Indian Penal Code (hereinafter referred to as "I.P.C.") and Sections 3(i)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (hereinafter referred to as "S.C./S.T. Act"), Police Station Tikait Nagar, District Barabanki whereby **the appellants, namely, Ram Sajeevan Yadav and Gaya Chamar (in Criminal Appeal No.967 of 2008)** have been convicted and sentenced to undergo life imprisonment with a fine of Rs.5,000/- each for the offence under Section 302/34 I.P.C. and in default of payment of fine, the appellants have further been directed to undergo three months' additional rigorous imprisonment. The appellant No.1, Ram Sajeevan Yadav has also been convicted and sentenced to undergo three months' imprisonment for the offence under Section 323/34 I.P.C. **The appellant No.1, Ram Sajeevan Yadav** has also been convicted and sentenced to undergo life imprisonment with a fine of Rs.2,000/- for the offence under Sections 3(2)(v) S.C./S.T. Act and in default of payment of fine, the appellant No.1, Ram Sajeevan Yadav has further been directed to undergo one month's additional rigorous imprisonment. **The appellant No.1, Ram Sajeevan Yadav** has also been convicted and sentenced to undergo six months' imprisonment with a fine of Rs.1,000/- for the offence under Sections 3(i)(x) S.C./S.T. Act and in default of payment of fine, the appellant No.1, Ram Sajeevan Yadav has further been directed to undergo fifteen

days' additional rigorous imprisonment. **The appellant No.2, Gaya Chamar** has also been convicted and sentenced to undergo three months' imprisonment for the offence under Section 323 I.P.C. All the sentences are directed to run concurrently.

The appellant, Kundan Badhai (in Criminal Appeal No.1078 of 2008) has been convicted and sentenced to undergo life imprisonment with a fine of Rs.5,000/- for the offence under Sections 302/34 I.P.C. and in default of payment of fine, he has further been directed to undergo three months' additional rigorous imprisonment. He has also been convicted and sentenced to undergo three months' imprisonment for the offence under Sections 323/34 I.P.C. He has also been convicted and sentenced to undergo life imprisonment with a fine of Rs.2,000/- for the offence under Sections 3(2)(v) S.C./S.T. Act and in default of payment of fine, he has further been directed to undergo one month's additional rigorous imprisonment. He has also been convicted and sentenced to undergo six months' imprisonment with a fine of Rs.1000/- for the offence under Sections 3(i)(x) S.C./S.T. Act and in default of payment of fine he has further been directed to undergo fifteen days' additional rigorous imprisonment. All the sentences are directed to run concurrently.

The appellant, Kicchi @ Ram Surat (in Criminal Appeal No.1202 of 2008) has been convicted and sentenced to undergo life imprisonment with a fine of Rs.10,000/- for the offence under Section 302 I.P.C. and in default of payment of fine, he has further been directed to undergo six months' additional rigorous imprisonment. He has also been convicted and sentenced to undergo three months' imprisonment for the offence under Section 323/34 I.P.C. He has also been convicted and sentenced to undergo life imprisonment with a fine of Rs.2,000/- for the offence under Sections 3(2)(v) S.C./S.T. Act and in default of payment of fine, he has further been directed to undergo one month's additional rigorous imprisonment. He has also been convicted and sentenced to undergo six months' imprisonment with a fine of Rs.1,000/- for the offence under Sections 3(i)(x) S.C./S.T. Act and in default of payment of fine, he has further been directed to undergo fifteen days' additional rigorous imprisonment. All the sentences are directed to run concurrently.

2. Since the aforesaid criminal appeals have been preferred against the judgment and order dated 29.03.2008 passed by the learned Additional Sessions Judge, Fast Track Court No.29, Barabanki in Sessions Trial No.340 of 1993 arising out of Case Crime No.08 of 1993, under Sections 302/34 of Indian Penal Code and Sections 3(i)(x) S.C./S.T. Act, Police Station Tikait Nagar, District Barabanki, therefore, they have been heard together and are being decided by a common judgment.

3. The prosecution story as culled out from the first information report, Ex. Ka-3 is that the first informant, Mansharam submitted a written report, Ex. Ka-1 to Police Station Tikaitnagar, District Barabanki stating therein that road levelling work was being done in his village. This work was being got done by the Gram Pradhan. The accused/appellants, namely, Kicchi @ Ram Surat (in Criminal Appeal No.1202 of 2008) and Gaya Chamar (in Criminal Appeal No.967 of 2008) wanted that the excavation of earth for levelling of road should be done from the east side of existing road. The son of the first

informant, namely, Auhardeen insisted that he would do the excavation work on the west side of the road and he would also not allow excavation of east side of the road. Being annoyed, the accused/appellant, Kicchi @ Ram Surat had a scuffle with first informant's son, Auhardeen. Some villagers intervened and got the matter subsided.

4. On 27.01.1993 at about 03:30 PM, all of a sudden, the accused/appellant, Kicchi @ Ram Surat armed with ballam, Kundan Badhai armed with lathi along with Gaya Chamar and Ram Sajeevan Yadav came to the house of the first informant, Manshraram. The accused/appellant, Kicchi @ Ram Surat gave a blow from ballam on the chest of Auhardeen, son of the first informant who fell on the ground. The other co-accused, namely, Gaya Chamar, Ram Sajeevan Yadav and Kundan Badhai exhorted to kill Auhardeen. When the first informant, Mansharam and his other sons, namely, Adalatdeen and Ramu tried to save their injured brother, Auhardeen, the co-accused, Gaya Chamar, Ram Sajeevan Yadav and Kundan Badhai assaulted Ramu and Adalatdeen. The villagers, namely, Rajendra Prasad, Alkoo, Buddhai etc. reached on the spot who snatched ballam from the accused/appellant, Kicchi @ Ram Surat. All the accused thereafter fled toward their houses. The injured, Auhardeen was being taken to police station who breathed last near Tikaitnagar police station.

5. On the basis of aforesaid written report, Ex. Ka-1, the first information report, Ex. Ka-3 came to be lodged at Police Station Tikaitnagar, District Barabanki against the accused/appellants as Case Crime No.08 of 1993, under Section 302 I.P.C.

6. The Investigating Officer, S.I Sher Bahadur Singh, PW-11 recorded the statements of witnesses under Section 161 Cr.P.C. He visited the place of occurrence and prepared a site plan, Ex. Ka-17. He has also collected bloodstained earth from the place of occurrence and prepared a recovery memo, Ex. Ka-18. Upon conclusion of investigation, he has submitted a charge sheet, Ex. Ka-19 against the appellants. He has also submitted a supplementary charge sheet, Ex. Ka-20 against some of the appellants.

7. The appellants, Ram Sajeevan Yadav, Gaya Chamar, Kundan Badhai and Kicchi @ Ram Surat were charged for the offences under Sections 302 read with Section 34 I.P.C. and Section 323 read with Section 34 I.P.C. Except the appellant, Gaya Chamar, the appellants, Ram Sajeevan Yadav, Kundai Badhai and Kicchi @ Ram Surat were also charged for the offences under Sections 3(2)(v) and 3(i)(x) S.C./S.T. Act. The appellants denied the charges and claimed to be tried.

8. In order to prove its case, the prosecution has examined the first informant, Mansharam as PW-1, injured, Adalatdeen as PW-2, S.I. Ramdev Dwivedi as PW-3 who has prepared recovery memo, Ex. Ka-2 in respect of weapon of assault, ballam. Dr. G.P. Shukla has been examined as PW-4 who examined injured persons, Ramu and Adalatdeen and proved their injury reports as Ex. Ka-7 and Ex. Ka-8 respectively. Dr. Devendra Kumar Singh has been examined as PW-5 who conducted postmortem on the cadaver of the deceased, Auhardeen and prepared and proved the postmortem report as Ex. Ka-9. Retired C.P. Ravindra Nath Tripathi has been examined as PW-6. Constable No.1704 Sripal Verma has been examined as PW-7. S.I. Amar Singh has been examined as PW-8. Injured, Ramu has been examined as

PW-9. Ambar Prasad has been examined as PW-10 who was an independent witness of incident. The Investigating Officer, S.I. Sher Bahadur Singh has been examined as PW-11.

9. After the conclusion of prosecution evidence, statements of appellants under Section 313 Cr.P.C. were recorded. The appellants have stated that they have been falsely implicated in this case. According to them, The prosecution witnesses have deposed against them due to enmity. They have also stated that in fact the deceased, Auhardeen was having criminal antecedents who wanted to illegally grab the land belonging to Gaon Sabha. The deceased, Auhardeen was killed in a dispute with labourers during road levelling work.

10. DW-1, Mata Prasad has been examined by the appellants in their defence.

11. PW-4, Dr. G.P. Shukla has examined the injured, Ramu, who prepared an injury report of the injured, Ramu, and has proved the same as Ex. Ka-7. According to which, following injuries were reported on the person of the injured, Ramu:-

"1. Abrasion 0.5 cm x 0.5 cm, skin deep on the left lower arm 04 cm above the left wrist joint.

2. Contusion 3.00 cm x 2.00 cm on the right upper arm ten (10) cm below the right shoulder joint. Colour reddish."

12. PW-4, Dr. G.P. Shukla has also examined the injured, Adalatdeen who prepared an injury report of the injured, Adalatdeen and has proved the same as Ex. Ka-8. According to which, following injuries were reported on the person of the injured:-

"1. Abrasion 3.00 cm x 0.5 cm, skin deep on the root of the left thumb five (05) cm away from the left wrist joint."

13. PW-5, Dr. Devendra Kumar Singh has conducted the postmortem on the cadaver of the deceased on 28.01.1993 and has proved the same as Ex. Ka-9. According to postmortem report, Ex. Ka-9 following ante mortem injuries and cause of death of the deceased were reported as under:-

Oval Shaped punctured wound measuring size 2 cm x 1 cm cavity deep on the chest 15 sternal region, lower part 8 cm medial to the Rt. nipple at 2'0 clock position. Sternum ruptured and the cause of death was reported to be shock and haemorrhage as a result of ante-mortem injury.

14. The learned trial court vide impugned judgment and order dated 29.03.2008 convicted the appellants and sentenced them as aforesaid. Hence this appeal.

15. We have heard Shri Shiv Shankar Singh, learned counsel for the appellants (in Criminal Appeal No.967 of 2008), Shri Jaleel Ahmad, learned counsel for the appellant (in Criminal Appeal No.1078 of 2008), Shri Anurag Shukla, learned amicus curiae for the appellant (in Criminal Appeal No.1202 of 2008), Sri Chandra Shekhar Pandey, learned Additional Government Advocate appearing for the State-respondent and have perused the entire record available before us.

16. Learned counsel for all the appellants have submitted that the appellants are innocent who have been falsely implicated in this case due to prior enmity with the first informant, Mansharam.

17. Their further submission is that a scuffle took place during levelling of the road with the labourers who are resident of different places. The deceased, Auhardeen and other injured persons, Ramu and Adalatdeen received injuries in the aforesaid scuffle. The appellants were not involved in the incident.

18. Learned counsel for all the appellants have also submitted that the learned trial court has recorded the finding of guilt of the appellants against the weight of evidence which is not sustainable.

19. Shri Anurag Shukla, learned amicus curiae for the appellant, Kicchi @ Ram Surat (in Criminal Appeal No.1202 of 2008) has submitted that admittedly, only one blow is said to have been given by the accused/appellant, Kicchi @ Ram Surat to the deceased. This fact stands corroborated by the postmortem report, Ex. Ka-9 of the deceased, Auhardeen. There is nothing on record to show that the incident was premeditated either. Therefore, at most, the appellant, Kicchi @ Ram Surat could be convicted for the offence under Section 304 part-II I.P.C. No case under Section 302 I.P.C. is made out against the appellant, Kicchi @ Ram Surat. To substantiate his arguments, learned amicus curiae for the appellant, Kicchi @ Ram Surat has placed reliance upon the judgments rendered by the Hon'ble Supreme Court in **Kishan Singh vs. State of Uttaranchal and others1 and The State of Madhya Pradesh vs. Mohar Singh2** wherein the Hon'ble Apex Court has modified the conviction of the accused from Section 302 I.P.C. to Section 304 Part-II I.P.C. and has sentenced accordingly.

20. Shri Shiv Shankar Singh, learned counsel for the appellants (in Criminal Appeal No.967 of 2008), Shri Jaleel Ahmad, learned counsel for the appellant (in Criminal Appeal No.1078 of 2008) have submitted that the appellants, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai have been convicted with the aid of Section 34 I.P.C. There is nothing on record to show that these appellants were sharing common intention with the appellant, Kicchi @ Ram Surat to kill the deceased. Therefore, their conviction under Section 302 read with Section 34 I.P.C. is not sustainable. Learned counsel for these appellants contend that the appeal deserves to be allowed by setting aside the impugned judgment and order dated 29.03.2008 insofar as it relates to conviction of the appellants under section 302 read with Section 34 I.P.C.

21. Learned counsel for the appellants, namely, Ram Sajeevan Yadav, Kundan Badhai and Ram Surat @ Kicchi have also submitted that there is nothing in the testimonies of prosecution witnesses to show that alleged offence under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act was committed by these appellants only because the deceased, Auhardeen and injured persons, Ramu and Adalatdeen belonged to scheduled caste community. The alleged offence was not committed in public view also. Therefore, their conviction and sentences under Sections 3(2)(v) and 3(i)(x) S.C./S.T. Act are not sustainable.

22. Learned counsel for the appellants have also vehemently argued that in order

to prove its case against the appellants, the prosecution has examined Mansharam as PW-1 who is the father of the deceased, Auhardeen and injured persons, namely, Adalatdeen and Ramu have been examined as PW-2 and PW-9 respectively. Thus, only three witnesses of fact have been examined by the prosecution. PW-10, Ambar Prasad is a neighbour of the first informant, Mansharam, therefore, he was also an interested witness. Therefore, the three prosecution witnesses being related to the deceased and one being interested witness are not reliable. The learned trial court erred in placing reliance upon testimonies of such related/ interested witnesses.

23. Per contra, learned A.G.A. has refuted the submissions made by learned counsel for the appellants and has submitted that the appellants are named in the first information report, Ex. Ka-3. They have been assigned specific role in the first information report. The first information report, Ex. Ka-3 is prompt. There is nothing on record to show that the first information report, Ex. Ka-3 or written report, Ex. Ka-1 came to be lodged after consultation with someone else in order to falsely rope in the appellants. The prompt lodging of first information report itself rules out any possibility of false implication of the appellants. Therefore, they have rightly been convicted by means of impugned judgment and order dated 29.03.2008.

24. His further submission is that the appellant, Kicchi @ Ram Surat was armed with a deadly weapon, ballam and the other co-convicts were accompanying him. The appellant, Kicchi @ Ram Surat has given a blow from the ballam on the chest of the deceased, Auhardeen. The offence was committed near the house of the first informant, Mansharam where the appellants had gone to commit this offence. Therefore, their conviction and sentences therefor are just and proper.

25. Learned A.G.A. has also submitted that the impugned judgment and order dated 29.03.2008 is based on proper analysis and appreciation of prosecution evidence. It is a reasoned and well discussed judgment wherein no interference in exercise of power under Section 386 Cr.P.C. by this Court is warranted.

26. Having heard the learned counsel for the parties and upon survey of prosecution evidence, we are able to notice that the alleged incident occurred on 27.01.1993 at about 03:30 PM. A written report, Ex. Ka-1 in respect of this occurrence was submitted to the Police Station Tikaitnagar, District Barabanki and a first information report, Ex. Ka-3 came to be lodged on 27.01.1993 i.e., on the day of the incident itself, at Police Station Tikaitnagar, District Barabanki within a period of approximately two hours. The first information report, Ex. Ka-3 is, thus, found to be prompt.

27. The Hon'ble Supreme Court in **Meharaj Singh (L/Nk.) vs. State of U.P.3** in para-12 has held as under:-

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often

results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8."

28. We are also able to notice that the first informant, Mansharam who has been examined as PW-1 has stated in his testimony that road levelling work was being done in his village. This work was being got done by the Gram Pradhan. The accused/appellants, namely, Kicchi @ Ram Surat and Gaya Chamar wanted that the excavation of earth for levelling of road should be done from the east side of existing road. The son of the first informant, namely, Auhardeen said that he would do the excavation work on the west side of the road and he would also not allow excavation of east side of the road. Annoyed by this, the accused/ appellant, Kicchi @ Ram Surat had a scuffle with first informant's son, Auhardeen. Some villagers intervened and got the matter subsided. PW-2, Adalatdeen is not only an eye witness, he is an injured witness also who has also supported the prosecution case in its entirety. His injury report, Ex. Ka-8 which has been proved by PW-4, Dr. G.P. Shukla reveals that there was one injury on his person which was an abrasion. The duration of injury was reported to be fresh which corresponds to the time of occurrence i.e. on 27.01.1993 at about 03:30 P.M. PW-9, Ramu is another injured witness in this incident who, in his testimony, has also supported the prosecution case.

29. PW-10, Ambar Prasad is an independent witness of the incident who, in his testimony, has stated that on the date of incident, he was present on the spot and had seen the accused/appellant, Kicchi @ Ram Surat giving a blow on the chest of the deceased, Auhardeen from ballam. He, being, a neighbour of the first informant, Mansharam, his presence on the spot on the date of incident appears to be natural. The other prosecution witnesses, namely, PW-3,

S.I. Ramdev Dwivedi, PW-7, Constable No.1704 Sripal Verma, PW-8, S.I. Amar Singh and PW-11, S.I. Sher Bahadur Singh have proved various other prosecution papers.

30. From a perusal of record, we find that no such contradiction or anything adverse could be elicited in their detailed cross-examination of prosecution witnesses which, in any manner, adversely affects the case of prosecution. PW-1, Mansharam being father of the deceased, PW-2, Adalatdeen and PW-9, Ramu being brothers of the deceased and PW-10, Ambar Prasad being neighbour of the deceased, their presence on the spot appears to us to be natural whose testimonies too are consistent, cogent and believable.

31. The Hon'ble Supreme Court in **S. Sudershan Reddy and others vs. State of A.P.4** in paras-12 to 14. has held as under:-

"12. 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.

13. In Dalip Singh v. State of Punjab [1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465] it has been laid down as under : (SCR p. 152)

"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 relative 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 generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

14. The above decision has since been followed in Guli Chand v. State of Rajasthan [(1974) 3 SCC 698 : 1974 SCC (Cri) 222] in which Vadivelu Thevar v. State of Madras [1957 SCR 981 : AIR 1957 SC 614 : 1957 Cri LJ 1000] was also relied upon."

32. We, therefore, do not find substance in submissions of learned counsel for the appellants that the learned trial court has erred in placing reliance on testimonies of PW-1, Mansharam and PW-2, Adalatdeen, PW-9, Ramu and PW-10, Ambar Prasad while holding the appellants guilty.

33. The postmortem on the cadaver of deceased, Auhardeen was conducted by PW-5, Dr. Devendra Kumar Singh who has proved his postmortem report as Ex. Ka-9

which reveals following ante-mortem injuries on the body of the deceased:-

"Oval Shaped punctured wound measuring size 2 cm x 1 cm cavity deep on the chest 15 sternal region, lower part 8 cm medial to the Rt. nipple at 2'0 clock position. Sternum ruptured"

34. The cause of death according to postmortem report, Ex. Ka-9 is stated to be shock and haemorrhage due to aforesaid ante-mortem injury.

35. Thus, having regard to the aforesaid consistent and reliable testimonies of PW-1, Mansharam, PW-2, Adalatdeen, PW-9, Ramu and PW-10, Ambar Prasad, we find that on the date of incident, the appellant, Kicchi @ Ram Surat, who was armed with a ballam, inflicted only one blow on the chest of the deceased, Auhardeen from ballam which, according to postmortem report, Ex. Ka-9 ultimately proved to be cause of his death. The other co-accused, namely, Kundan Badhai along with Gaya Chamar and Ram Sajeevan Yadav have inflicted injuries to the injured persons, namely, Adalatdeen and Ramu by lathi only.

36. The injury report of Adalatdeen has been proved by PW-4, Dr. G.P. Shukla as Ex. Ka-8 which reveals that there was one injury on his person which was an abrasion on the date of occurrence whereas the injury report of injured, Ramu was prepared and proved by Dr. G.P. Shukla as Ex. Ka-7. According to injury report of injured, Ramu, he had also sustained an abrasion and a contusion on his person.

37. Thus, surveyed together, from the consistent and cogent testimonies of the first informant, PW-1, Mansharam and two injured, namely, PW-2, Adalatdeen and PW-9, Ramu and independent witness, PW-10, Ambar Prasad, in our considered view, the prosecution has been successful in proving the fact that on 27.01.1993, the accused/appellants came on the spot. The appellant, Kichchi gave a blow from ballam in the chest of the deceased, Auhardeen which according to postmortem report, Ex. Ka-9 caused death of the deceased, Auhardeen. The other co-appellants, namely, Kundan Badhai armed with lathi along with Gaya Chamar and Ram Sajeevan Yadav also came to the house of the first informant, Mansharam and they also inflicted injuries to the injured, namely, Adalatdeen and Ramu who were present on the spot.

38. Now, we propose to delve upon the issues as to whether conviction of appellant, Kicchi @ Ram Surat under Section 302 I.P.C. and conviction and sentences awarded to the other appellants, namely, Ram Sajeevan Yadav, Gaya Chamar, Kundan Badhai under Section 302 read with Section 34 I.P.C. and conviction and sentences awarded to the appellants, Ram Sajeevan Yadav, Kundan Badhai, Kicchi @ Ram Surat under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act were proper in the facts of the case at hand.

39. We find from the record that the deceased, Auhardeen was hit on his chest by the appellant, Kicchi @ Ram Surat only once. This is the case of prosecution also. This fact stands corroborated by the postmortem report of the deceased, Ex. Ka-9 wherein only one punctured wound has been reported on the body of the deceased. We also find that there is nothing on record to show and establish that the appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai had any prior

meeting of mind with the appellant, Kicchi @ Ram Surat who had given fatal blow on the chest of the deceased, Auhardeen to kill the deceased. There is nothing on record to suggest that common intention amongst appellants developed on the place of occurrence.

40. It is trite law that suspicion, howsoever grave, cannot take place of legal proof as held by the Hon'ble Supreme Court in **Upendra Pradhan vs. State of Orissa**5 in para-14 has held as under:-

"14. Taking the first question for consideration, we are of the view that in case there are two views which can be culled out from the perusal of evidence and application of law, the view which favours the accused should be taken. It has been recognised as a human right by this Court. In Narendra Singh v. State of M.P., [(2004) 10 SCC 699 : 2004 SCC (Cri) 1893], this Court has recognised presumption of innocence as a human right and has gone on to say that: (SCC pp. 708 & 709, paras 30-31 & 33)

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

xxxx xxxx xxxx xxxx xxxx

xxxx xxxx xxxx xxxx xxxx

xxxx xxxx xxxx xxxx xxxx"

(emphasized supplied by us)

41. Thus, in want of any evidence, whatsoever, to the effect that the appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai shared common intention to kill the deceased, Auhardeen with the appellant, Kicchi @ Ram Surat, it cannot be presumed that the appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai were sharing common intention with the other appellant, Kicchi @ Ram Surat to kill the deceased, Auhardeen.

42. It is also pertinent to refer to paras-22, 24 and 30 of a judgment rendered by the Hon'ble Supreme Court in **Ajmal vs. The State of Kerala6**, which are as under:-

"22. Having considered the submissions and having perused the material on record, we do not find any infirmity in the prosecution establishing the incident as set up in the First Information Report. For the said conclusion, we have taken note of the following:

(i) First Information Report was promptly lodged.

(ii) The prosecution story as set up in the FIR appears to be probable.

(iii) The medical evidence fully corroborates the prosecution story.

(iv) PW-1, PW-2 and PW-4, the three eye-witnesses have fully supported the prosecution story and have narrated the same incident as it occurred.

(v) Formal witnesses have discharged their burden by proving the police papers and other documentary

evidence placed on record by the prosecution.

(vi) The material objects recovered have also been duly proved.

(vii) According to the medical evidence, the material objects alleged to have been used in the commission of crime could have been actually used in causing the injuries.

24. The distinctive features and the considerations relevant for determining a culpable homicide amounting to murder and distinguishing it from the culpable homicide not amounting to murder has been a matter of debate in large number of cases. Instead of referring to several decisions on the point reference is being made to a recent decision in the case of Mohd. Rafiq v. State of M.P., (2021) 10 SCC 706, wherein Justice Ravindra Bhatt, speaking for the Bench, relied upon two previous judgments dealing with the issue as narrated in paragraph nos. 11, 12 and 13 of the report which are reproduced below:--

"11. The question of whether in a given case, a homicide is murder 3, punishable under section 302 IPC, or culpable homicide, of either description, punishable under section 304 IPC has engaged the attention of courts in this country for over one and a half century, since the enactment of the IPC; a welter of case law, on this aspect exists, including perhaps several hundred rulings by this court. The use of the term "likely" in several places in respect of culpable homicide, highlights the element of uncertainty that the act of the accused may or may not have killed the person. Section 300 IPC which defines murder, however refrains from the use of the term likely, which reveals absence of ambiguity left on behalf of the accused. The accused is for sure that his act will definitely cause death. It is often difficult to distinguish between culpable homicide and murder as both involve death. Yet, there is a subtle distinction of intention and knowledge involved in both the crimes. This difference lies in the degree of the act. There is a very wide variance of degree of intention and knowledge among both the crimes.

12. The decision in State of Andhra Pradesh v. Rayavarapu Punnayya, (1976) 4 SCC 382 notes the important distinction between the two provisions, and their differing, but subtle distinction. The court pertinently pointed out that:"12. In the scheme of the Penal Code, "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 this generic offence, the Code practically recognises 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.. 13. The academic distinction between "murder" and

"culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of sections 299 and 300."

13. The considerations that should weigh with courts, in discerning whether an act is punishable as murder, or culpable homicide, not amounting to murder, were outlined in Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh, (2006) 11 SCC 444. This court observed that:"29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances; (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body;(iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger;(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.""

30. Thus, for all the reasons stated above, we are of the view that the appellants would be entitled for acquittal under section 302 IPC but would be liable to be convicted under section 304 Part-II IPC. Rest of the conviction upheld by the High Court and the sentence for the charges under sections 341, 323, 324 and 427 read with section 34 IPC is maintained. It is ordered accordingly."

43. Likewise, in **Mavila Thamban Nambiar vs. State of Kerala7** in para 10, the Hon'ble Supreme Court has held as under:-

"10. Mr Lalit then, seriously challenged the conviction of the appellant under Section 302 of the Penal Code. He urged that the appellant had neither intention nor knowledge that such an injury would result into the death of Madhavan. He, therefore, urged that the appellant at the most could be convicted for any other minor offence. Mr George, appearing for the State of Kerala urged that the appellant was rightly convicted under Section 302 of the Penal Code and no interference was called for. ***After giving our careful thought to the nature of offence, we are of the considered view that the offence of the appellant would more appropriately fall under Section 304 Part II of the Penal Code. The appellant had given one blow with a pair of scissors on the vital part of the body of Madhavan and, therefore, it would be reasonable to infer that he (appellant) had knowledge that any injury with pair of scissors on the vital part would cause death though he may not have intended to commit the murder. We accordingly alter the conviction of the appellant from Section 302 IPC to one under Section 304 Part II IPC."***

(emphasized supplied by us)

44. The Hon'ble Supreme Court in **Takhaji Hiraji vs. Thakore Kubersing Chamansing and others8** in para 24 has held as under:-

"24. Dr Varvadia, PW 2, who examined Sabuji Viraji on 24-3-1980 at 12.15 a.m. found him to have sustained 3 injuries of which the incised wound on the left side of the upper part of the abdomen was 1" × 1/4" × 1/4". This injury is attributed to Magansing, Accused 2 by all the prosecution witnesses. They are consistent on this point and not shaken in cross-examination. The dying declaration, Ext. 28 made by the deceased Sabuji and recorded by the Magistrate also attributes authorship of this injury to Magansing, Accused 2. However, what has to be really determined is the nature of this injury. In his statement Dr Varvadia has not stated the nature of the injury caused. Sabuji Viraji died on 30-3-1980. Post-mortem on his dead body was conducted on 31-3-1980 by Dr Solanki, PW 4. Dr Solanki, PW 4, conducted post-mortem on the dead body of Sabuji on 31-3-1980 at 10.20 a.m. He found the wound stitched. On opening it he found internally -- "large intestine sutured, wound 2.5 cm on splenic flexure gaping containing faecal matter; surrounding area of wound was red in colour; opening was found absent". The cause of death in the opinion of Dr Solanki was shock due to acute peritonitis. None of the two doctors has deposed if the injury was grievous or sufficient in the ordinary course of nature to cause death or that the injury was so imminently dangerous that it must have in all probability resulted in death or was likely to cause death. The exact cause of peritonitis is not known. That negligence to treat the wound could be a contributing factor cannot be ruled out. In such state of medical evidence it will not be proper to draw an inference against Magansing, Accused 2 of his having committed murder of Sabuji Viraji punishable under Section 302 IPC. The injury dealt by him by a sharp weapon had cut into the intestine. Though an intention to cause death or such bodily injury as is likely to cause death cannot be attributed to him, knowledge is attributable to Accused 2 that an injury by a knife into the abdomen was likely to cause death. As it was a case of sudden fight, the act of this accused would amount to culpable homicide not amounting to murder punishable under Part II Section

304 IPC. The other injuries on the person of Sabuji are not attributed to Accused 2 Magansing."

45. The Hon'ble Supreme Court in **Ramkishan and others vs. State of Rajasthan9** in para-7 has held as under:-

"7. On the basis of the findings of the learned trial court, as noticed above, it is quite obvious that the intention of the appellants could only have been to cause injuries to the deceased by obstructing his bullock cart and they did not share any common intention or object to cause the death of the deceased. Indeed by causing injuries with an axe it could be said that the appellants should have realised that the injuries were likely to cause his death but that would only bring the case of the appellants under Section 304 Part II IPC and not one under Section 302 IPC."

(Emphasis supplied by us)

46. From a perusal of record, it is not borne out that the act of appellant, Kicchi @ Ram Surat was, in any manner, premeditated and in absence of any premeditation the incident of killing of Auhardeen appears to have occurred in a spur of moment wherein only one blow from ballam was given by the appellant, Kicchi @ Ram Surat to the deceased. It is proved fact that the appellant, Kicchi @ Ram Surat was armed with a ballam. He gave only one blow from it on the chest of the deceased, Auhardeen who ultimately succumbed to this injury. There was no premeditation, therefore, no intention to kill can be imputed to the appellant because he inflicted only one blow from ballam. However, the fact that he had knowledge that such blow from a sharp edged weapon could cause death of the deceased, cannot be ruled out in the facts of this case. Thus, in our considered view, the appellant, Kicchi @ Ram Surat is liable to be convicted under Section 304 Part-II I.P.C. The conviction and sentence awarded to the appellant, Kicchi @ Ram Surat under Section 302 I.P.C. is, thus, liable to be set aside.

47. So far as the case of the appellants, Gaya Chamar, Ram Sajeevan Yadav and Kundan Badhai are concerned, as we have held in preceding paragraphs that these appellants were not sharing common intention with the appellant, Kicchi @ Ram Surat to kill the deceased, Auhardeen and only one appellant, Kundan Badhai who was armed with lathi, caused injuries to injured, namely, Adalatdeen and Ramu which are abrasion and contusion only, therefore, their conviction under Section 302 I.P.C. with the aid of Section 34 in want of any evidence of sharing common intention with the appellant, Kichhi to kill the deceased, Auhardeen can also not be upheld. Resultanly, the conviction and sentence awarded to the appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai under Section 302 read with Section 34 I.P.C. deserves to be set aside. Their case, at most, falls under Sections 323/34 I.P.C. for which they deserve to be convicted and sentenced.

48. Insofar as the conviction of the appellants, namely, Ram Sajeevan Yadav, Kundan Badhai and Kicchi @ Ram Surat and sentences awarded to them for the offences under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act are concerned, it is apposite to refer to paragraphs-11, 12, 17 and 18 of a judgment rendered by the Hon'ble Supreme Court in **Hitesh Verma vs. Sate of**

Uttarakhand and another10 in paragraphs-11, 12, 17 and 18 has held as under:-

"11. It may be stated that the charge-sheet filed is for an offence under Section 3(1)(x) of the Act. The said section stands substituted by Act 1 of 2016 w.e.f. 26-1-2016. The substituted corresponding provision is Section 3(1)(r) which reads as under:

"3. (1)(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;"

12. The basic ingredients of the offence under Section 3(1)(r) of the Act can be classified as "(1) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe and (2) in any place within public view".

17. In another judgment reported as Khuman Singh v. State of M.P. [Khuman Singh v. State of M.P., (2020) 18 SCC 763 : 2019 SCC OnLine SC 1104] , this Court held that in a case for applicability of Section 3(2)(v) of the Act, the fact that the deceased belonged to Scheduled Caste would not be enough to inflict enhanced punishment. This Court held that there was nothing to suggest that the offence was committed by the appellant only because the deceased belonged to Scheduled Caste. The Court held as under:

"15. As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar" Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable."

18. Therefore, offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste. In the present case, the parties are litigating over possession of the land. The allegation of hurling of abuses is against a person who claims title over the property. If such person happens to be a Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out."

(emphasis supplied by us)

49. Our anxious search to find out ingredients which constitute offence under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act in the written report, Ex. Ka-1 and also in the testimonies of PW-1, Mansharam, PW-2, Adalatdeen, PW-9, Ramu and PW-10, Ambar Prasad ended in vain. We have been unable to notice any caste based insult and intimidation by the appellants given with intent to humiliate the first informant, PW-1, Mansharam, deceased-Auhardeen and injured persons, namely, Ramu and Adalatdeen in any place within public view. Therefore, mere fact that the first

informant, PW-1-Mansharam, deceased-Auhardeen and the injured persons, namely, Ramu and Adalatdeen belonged to the scheduled caste community, per se, does not constitute offence under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act in view of law laid down by the Hon'ble Supreme Court in **Hitesh Verma's case (supra).**

50. It is also relevant to mention that in terms of Rule 7 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (hereinafter referred to as "S.C./S.T. Rules), the offence committed under the S.C./S.T. Act shall be investigated by a police officer not below the rank of a Deputy Superintendent of Police. However, to our utter surprise, the instant case has been investigated by S.I. Sher Bahadur Singh who is not an officer of the rank of Deputy Superintendent of Police as required by Rule 7 of S.C./S.T. Rules. Due to this reason also, the investigation of this case, insofar as, the same relates to offences under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act is vitiated.

51. Accordingly, we find ourselves unable to uphold the conviction of appellants, namely, Ram Sajeevan Yadav, Kundan Badhai and Kicchi @ Ram Surat under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act which being palpably illegal, are also liable to be set aside.

52. On the basis of foregoing discussion, we hold the appellant, Kicchi @ Ram Surat guilty under Section 304 Part-II I.P.C. and sentence him to rigorous imprisonment for ten years with a fine of Rs.10,000/- and in default of payment of fine, the appellant, Kicchi @ Ram Surat would undergo six months' additional simple imprisonment.

53. The appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai are held guilty for the offence under Section 323 read with Section 34 I.P.C. Accordingly, they are sentenced to period already undergone by them in this case.

54. The conviction and sentences awarded to the appellant, Kicchi @ Ram Surat, under Section 302 I.P.C. and Sections 3(i)(x), 3(2)(v) S.C./S.T. Act, conviction and sentences awarded to the the appellants, namely, Ram Sajeevan Yadav and Kundan Badhai, under Sections 302/34 I.P.C., Sections 3(i)(x), 3(2)(v) S.C./S.T. Act and the conviction and sentences awarded to the appellant, Gaya Chamar, under Section 302/34 I.P.C. are hereby set aside and they are, accordingly, acquitted of charges as aforesaid.

55. These appeals, therefore, deserve to be partly allowed with aforesaid modification which are accordingly **partly allowed.**

56. In case, the appellant, Kicchi @ Ram Surat has already served out the sentence awarded to him by this Court for the offence under Section 304 Part-II I.P.C., he shall be released forthwith, if he is not wanted in any other case.

57. The appellants, Ram Sajeevan Yadav and Gaya Chamar shall also be released forthwith if they are not wanted in any other case.

58. The accused/appellant, Kundan Badhai is on bail. His bail bonds are hereby

cancelled and sureties are discharged from their liabilities.

59. All appellants are directed to file a personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance of Section 437-A Cr.P.C. within six weeks from today.

60. Before we part with the case, we express our appreciation for the distinguished assistance rendered by Shri Anurag Shukla, learned *amicus curiae* for the appellant (in Criminal Appeal No.1202 of 2008). He shall be paid fee for amicus curiae as per the Rules of the Court.

61. Let copies of this judgment be placed on the records of Criminal Appeal No.1078 of 2008 (Kundan Badhai vs. State of U.P.) and Criminal Appeal No.1202 of 2008 (Kicchi @ Ram Surat vs. State of U.P.)

62. Let a copy of this judgment be also sent to learned trial court concerned along with lower court record for its information and necessary compliance forthwith.

(2022) 8 ILRA 658
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:LUCKNOW 16.08.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No.1024 of 2018

Kali Prasad ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Rakesh Kumar Singh

Counsel for the Opposite Party:
G.A.

Criminal Law- Indian Penal Code, 1860- Sections 302 & 306- Deceased sustaining fatal ante-mortem injury and hanging found to be post-mortem- The post mortem examination report shows that severe injury was found in the intestine of the deceased. In the opinion of doctor conducting the autopsy of the deceased, when the deceased became unconscious then she would have been hanged. In the opinion of doctor the hanging was post-mortem. The person cannot hang himself or herself when he or she is unconscious, hence, the version of the defence that the deceased committed suicide herself by hanging cannot be believed.

Where the post mortem report shows that death of the deceased was due to ante mortem injuries and she was hanged posthumously, then the defence of the deceased committing suicide held to be false.

Indian Evidence Act, 1872- Section 106- The convict Kali Prasad had failed to give any plausible and satisfactory explanation about the death of his wife. The theory put forward by the defence is not supported by the post mortem report and the evidence given by P.W.3, P.W.7 and P.W.8. In the trial court the convict/appellant Kali Prasad has utterly failed to explain the injuries found on the body of the deceased.

Where the accused fails to discharge the burden of proof about the homicidal death of his wife and gives a false explanation, then an adverse inference is liable to be drawn against him.

Indian Evidence Act, 1872- Section 106- As far as the convicts/appellants Raj Patti and Parsu Ram are concerned, according to the evidence available on record, they used to reside in the same house at a distance of 15-20 feet from the place of occurrence. It is quite possible that what

happened inside the room they were not aware of that-Involvement of co-accused Parsu Ram and Raj Patti in killing the deceased is not proved beyond reasonable doubt because only one injury in the stomach was found in the small intestine of the deceased, which according to the doctor proved fatal. If these two convicts/appellants had also assaulted the deceased, some more injuries would have been found on the person of the deceased.

As the co-accused were residing at some distance away from the place of the occurrence and the deceased has sustained a solitary injury, hence the participation of the c-accused in the commission of the offence cannot be established beyond reasonable doubt. (Para 18,19)

Criminal Appeal No.1024 of 2018 rejected and Criminal Appeal No.525 of 2018 allowed. (E-3)

Judgements/ Case Law relied upon:-

1. Ranjit Kumar Haldar Vs St. of Sik. (2019) 7 SCC 684.

(Delivered by Hon'ble Mrs. Saroj Yadav, J)

1. The Criminal Appeal No.1024 of 2018 (Kali Prasad vs. State of U.P.) has been filed by the convict/appellant Kali Prasad and Criminal Appeal No.525 of 2018 (Parsu Ram And Another vs. State of U.P.) has been filed by the convicts/appellants Parsu Ram and Smt. Raj Patti against the judgment and order dated 08.03.2018 passed by Additional Sessions Judge, Fast Track Court, (1st), Ambedkar Nagar in Sessions Trial No.189 of 2010 (State vs. Kali Prasad and Others), arising out of Crime No.727 of 2010, under Sections 302/34 and 201/34 of Indian Penal Code, 1860 (in short I.P.C.), Police Station Ahirauli, District Ambedkar Nagar.

2. The facts necessary for disposal of these appeals in short are as under:-

A First Information Report (in short F.I.R.) was registered at Case Crime No.727/2010 at Police Station Ahirauli, District Ambedkar Nagar on the basis of written report presented by the complainant Jitendra Kumar. It was stated in the report that the marriage of his sister Neelam was solemnized ten years back with Kali Prasad. After so many years his sister had no child, for that reason Kali Prasad, Raj Patti @ Nankau (mother of Kali Prasad) and Parsu Ram (father of Kali Prasad) used to torture and harass his sister. Just three months ahead, his sister conceived and these people doubted that the conception was illegitimate so they started beating and harassing his sister and on 06.08.2010 they ousted his sister from home. His sister reached at the house of complainant on the same day. On 07.08.2010, Kali Prasad came to the house of the complainant and requested to send his sister with him (Kali Prasad), on that the complainant and family members sent his sister with Kali Prasad. Since the evening of 10.08.2010 Kali Prasad and his parents again started beating and abusing his sister which was seen and heard by the neighbours and they intervened also. On that Raj Patti told these neighbours that it was her private matter and it would not be good if they intervene. Thereafter they all took her sister inside a room in the house and killed her and in order to hide the crime hanged her corpse. Information of the same was given on the same day by him (complainant) in the police station and the inquest and the post mortem examination of the dead body was conducted on the same day.

3. After investigation, charge sheet was submitted against Kali Prasad, Parsu Ram and Raj Patti, under Sections 302/34 and 201/34 of I.P.C. The concerned Magistrate after taking cognizance

committed the case to the court of Sessions for trial. The court of Sessions framed the charges under Sections 302/34 and 201/34 of I.P.C. against convicts/appellants. They all denied the charges and claimed to be tried.

4. In order to prove its case, the prosecution examined following witnesses:-

(i) P.W.1- Ramcharitra;

(ii) P.W.2- Chhati Ram;

(iii) P.W.3- Jitendra Kumar, the complainant;

(iv) P.W.4- Ramprasad, the witness of inquest;

(v) P.W.5- Omprakash Verma;

(vi) P.W.6- Head Constable Bantesh Bahadur Singh;

(vii) P.W.7- Inspector Baijnath Dubey, the Investigating Officer;

(viii) P.W.8- Dr. Omkarnath Verma, who conducted the postmortem examination;

Apart from the oral evidence, relevant documents have also been proved by the prosecution and the exhibits are as under:-

(i) Exhibit Ka-1- Written report;

(ii) Exhibit Ka-2- Primary information given by the complainant;

(iii) Exhibit Ka-2A- Inquest report;

(iv) Exhibit Ka-3- Chick F.I.R.;

(v) Exhibit Ka-4- Carbon copy of the concerned General Diary;

(vi) Exhibit Ka-5- Letter to C.M.O.;

(vii) Exhibit Ka-6- Specimen seal;

(viii) Exhibit Ka-7- Letter to C.M.O. for handing over the clothes of the deceased;

(ix) Exhibit Ka-8- Police Form No.379;

(x) Exhibit Ka-9- Police Form No.13;

(xi) Exhibit Ka-10- Police Form No.33;

(xii) Exhibit Ka-11- Site plan of the place of occurrence;

(xiii) Exhibit Ka-12- Charge sheet;

(xiv) Exhibit Ka-13- Post mortem examination report.

5. After close of the prosecution evidence, the statements of convicts/appellants under Section 313 of the Code of Criminal Procedure, 1973 (in short Cr.P.C.) were recorded. All the three convicts/ appellants denied the incident and stated that there is no eye witness of the incident. Kali Prasad himself informed the complainant Jitendra Kumar about the incident by reaching at his place. The complainant came to the place of incident

and brought down the dead body of the deceased and informed the police station. Thereafter, police reached at the spot. They all have stated that the complainant on 11.08.2010 informed the real incident at the police station which is available on record as Exhibit Ka-2. Thereafter on 17.08.2010 he lodged a false F.I.R. with ulterior motive on the basis of false allegations. It has also been stated that the deceased used to think that she was not having child and some days ahead of the incident deceased was considering herself pregnant. On the date of incident i.e. on 10.08.2010 in the evening she accidentally fell down on the cot and got injured and started bleeding. For this reason she felt depressed and after taking meal and medicines she slept and committed suicide in the night at some time. Kali Prasad came to know about this fact in the morning.

6. The convicts/appellants also got examined two witnesses in defence, these are D.W.1- Ramsagun and D.W.2- Chanda.

7. After completion of evidence, learned trial court heard the arguments of both sides. After going through the evidences available on record, the trial court relied upon the evidence of P.W.3, the complainant corroborated by the medical evidence and also the fact that the deceased died in the house of the convicts/appellants and they failed to explain the reason of the death of the deceased, and came to the conclusion that the convicts/appellants killed the deceased and in order to show that the deceased committed suicide hanged her dead body in the room. The learned trial court came to the conclusion that the prosecution has successfully proved the charges framed against the convicts/appellants under Sections 302/34 and 201/34 of I.P.C. The learned trial court held the convicts/appellants guilty under Sections 302/34 and 201/34 of I.P.C. and punished them with imprisonment for life under Sections 302/34 I.P.C. coupled with a fine of Rs.25,000/- each and in default of payment of fine further imprisonment of six months for each. Under Sections 201/34 I.P.C., the convicts/appellants were punished with sentence of three years of Rigorous Imprisonment coupled with a fine of Rs.5,000/- each and in default of payment of fine further imprisonment of two months for each. All the sentences were directed to run concurrently and the period of incarceration during the trial be adjusted in the present imprisonment. Being aggrieved of this conviction and sentence, these appeals have been preferred.

8. Heard Shri Rakesh Kumar Singh, learned counsel for the appellants in both the appeals and Ms. Ruhi Siddiqui, learned A.G.A. for the State-respondent.

9. Learned counsel for the convicts/appellants has submitted that the impugned judgment and order is bad in the eye of law because the conviction of appellants is based on conjectures and surmises. The learned trial court has not applied its legal mind while convicting the appellants. The prosecution has failed to prove its case beyond reasonable doubt. The learned trial court has ignored the statements of defence witnesses and without any conclusive evidence has convicted the appellants. The learned trial court has not considered the fact that there was no motive to commit the murder of the deceased as the reason of committing murder mentioned by the informant in the F.I.R. is not proved by the prosecution. The learned trial court has overlooked the fact that Kali Prasad himself informed about the

incident to the informant. Kali Prasad went to the house of complainant and informed him that his sister has closed the room from inside and asked the complainant to come to the place of occurrence. The learned trial court has convicted the appellants on the basis of post mortem report only wherein the doctor has given opinion on injury in the intestine but at the same time stated that no external injury was found on the corpse. The learned trial court did not consider the fact that when the brother of the deceased i.e. the informant came to the place of incident, he found the door closed and the complainant himself was one of the witnesses of inquest. It was further argued by the counsel for convicts/appellants Parsu Ram and Raj Patti that they were not present at the spot on the day of incident as they had gone for treatment to Ahmedabad where their daughter was residing. Hence, the impugned judgment and order should be set aside and the convicts/appellants should be acquitted.

10. Contrary to the submissions of learned counsel for the convicts/appellants, learned A.G.A. argued that there is allegation of harassment and torture of the deceased in the first information report and that has been proved by the complainant, the brother of the deceased. The complainant has also proved that his sister came to his house as the convicts/ appellants ousted her from her in-laws' home but Kali Prasad came and took her back. As far as the information given by the complainant i.e. Exhibit Ka-2 is concerned, it is quite natural that, initially he was not thinking aware of the fact that his sister was killed so he just informed the police station about the death of his sister on which the inquest was conducted and the body was sent for post mortem. In the post mortem examination, it was revealed that there were ante-mortem injuries on the body of the deceased and hanging was 'Post-Mortem'. He doubted that his sister was killed by Kali Prasad and his parents as they used to beat and harass his sister for the reason that his sister had no child and when she conceived just 3-4 months ahead from the date of incident, then they doubted that the pregnancy was illegitimate. Learned A.G.A. further submitted that it is the admitted fact that the deceased was found dead in the room where Kali Prasad and the deceased used to reside. In the post mortem report, the hanging was found post-mortem and ante-mortem injuries were also found. In the post mortem report severe injuries were also found on the body of the deceased and these injuries were sufficient to cause the death of deceased. Learned A.G.A. further argued that the convicts/appellants have failed to explain the fact how deceased sustained these injuries and how the deceased could hang herself after her death. Learned A.G.A. further argued that the plea of alibi by the convicts/ appellants Raj Patti and Parsu Ram is also not reliable because in their statements recorded under Section 313 Cr.P.C. they have not stated that they were not present in the house on the day of incident as they were in Ahmedabad but subsequently just to create evidence they examined their daughter Chanda as D.W.2, to prove that they were in Ahmedabad for their treatment. Hence, there is no error in the judgment and order passed by the trial court and both the appeals should be dismissed.

11. Considered the rival submissions and perused the original record of the trial court as well as the record of these appeals.

12. Admittedly the deceased died at her matrimonial home i.e. in the house

of convicts/appellants. The place of occurrence where the dead body of the deceased was found, was the room of convict/ appellant Kali Prasad. It is also admitted that the convict/appellant Kali Prasad went to inform the complainant about the incident at his (complainant's) house. After getting the information, the complainant informed the police station submitting Exhibit Ka-2 wherein he stated that in the morning of 11.08.2010 Kali Prasad informed him that his sister had closed the room from inside. When he went there and got the door opened, he found that his sister was dead. On this information police reached at the spot and conducted the inquest i.e. Exhibit Ka-2A and sent the dead body for postmortem examination. In the inquest report it was mentioned that the door was closed from inside, and was opened with the help of the people gathered there. The dead body of the deceased was found hanging and brought down and sent for post mortem. The post mortem of the deceased was conducted on 11.08.2010 at 03:30 P.M. The post mortem report is Exhibit Ka-13. The following facts were found by the doctor who conducted the *post mortem* examination of the deceased:-

(i) No decomposition was found and Rigor Mortis was present. Ligature marking 1 cm wide just above thyroid extended up to right ear obliquely on right side and horizontally on left side up to middle on lateral side of neck;

(ii) Teeth clenched with tip of tongue bitten between teeth;

(iii) No Salivation;

(iv) Tongue not protruded;

(v) Eyes congested on the left side with face- PM;

(vi) P/V discharge blood tinged present;

(vii) Fingers and nails cyanosed of both hands;

(viii) Rope of jute 1 cm wide found around neck, loose circle. Pleural was found congested, Larynx pale and intact. No fracture of thyroid bone. S/C Blood clot present above thyroid on anterior surface. Lungs on both sides highly congested with blackening patches. Intestines full of gases with congestion in front loops with blackened intestines in size wound 6 cm x 3 cm area. Uterus was found Nulliparous.

The cause of death of deceased has been mentioned as "hard and blunt injury to abdomen leading to intestinal contusion and resulting shock and followed by Post-Mortem hanging by jute rope." Duration has been mentioned as one day.

13. The doctor who conducted the post mortem has been examined as P.W.8. This witness has proved the post mortem examination report as Exhibit Ka-13 and stated that death of the deceased occurred after becoming unconscious of injuries caused by blunt and hard object and thereafter tightening of rope around her neck. The noose of rope was present on her neck. In the cross-examination this witness has stated that there was no physical injury on the external parts of the body but in the internal examination, injury was found on the small intestine. The injury was blackish and bluish in colour. No blood was oozing out of that injury. It has also been stated in the cross-examination that due to the injury

found on the intestine, the deceased might have become unconscious. This witness has denied the suggestion that the injury found on the body of the deceased could come by falling on something.

14. P.W.3, the complainant has stated before the trial court that his sister Neelam was married to Kali Prasad but she could not have child even after passing of 10 years of marriage and for that reason, her husband, mother-in-law and father-in-law used to beat her. Three months before the incident, his sister conceived and her mother-in-law said to her that the conception was illegitimate and started beating her. On 06.08.2010, these persons ousted his sister after beating her. His sister came to his (P.W.3) house and told her mother about the incident and also told that they used to beat her and said that the child was illegitimate. Thereafter Kali Prasad came to his (P.W.3) house and requested to send his sister with him and he sent his sister with Kali Prasad. On 11.08.2010, his brother-in-law (Kali Prasad) came to his house in the morning at 5 O'Clock and told that his sister (wife of Kali Prasad) had closed the room from inside and requested him to come and get the door opened. Thereafter he (P.W.3) and 4-6 more persons started to the house of the convicts/ appellants, on the way he (complainant) thought that first he should go to the police station. This witness went to the police station and gave information. The police came at the spot and entered the room where the deceased was residing, the door of which was opened by kicks and he saw that the dead body of his sister was hanging, the police got the dead body down and conducted the Panchnama (inquest) and thereafter sent the dead body for postmortem examination. He has further stated that after post mortem examination, he received the dead body and did the cremation. He has further stated that the husband, mother-in-law and father-in-law of the deceased had absconded from the spot. This witness has proved the written report as Exhibit Ka-2.

15. P.W.4 is Ram Prasad who has proved the inquest report as Exhibit Ka-2A and has stated that in his presence, the inquest was conducted and the dead body was sent for post mortem examination and he also signed at the inquest report as a 'Panch'. In the cross-examination this witness has stated that the dead body was found in the room of Kali Prasad and also denied the suggestion that the deceased committed suicide. P.W.6 has proved the Chick F.I.R. as he registered the F.I.R. and made the entry in the concerned General Diary. He has proved Chick F.I.R. as Exhibit Ka-3 and the carbon copy of General Diary as Exhibit Ka-4. P.W.7 is the Investigating Officer and he has stated before the trial court that on 10.08.2011 he reached at the spot after getting the information of death of the deceased. He reached at the spot along with Sub-Inspector P.K. Katiyar, Constable Jagdamba Singh and Head Constable Rangnath Mishra. He got conducted the inquest by Sub-Inspector P.K. Katiyar and the relevant papers were prepared by Sub-Inspector P.K. Katiyar and sent the dead body for postmortem. This witness has proved the inquest report and relevant papers in the handwriting of Sub-Inspector P.K. Katiyar as he has seen the handwriting in the ordinary course and identified his writing and signature. This witness has further stated that he has inspected the place of occurrence on the pointing out of the complainant and prepared the site plan. This site plan has been proved as Exhibit Ka-11. He has further stated that after

recording the statements of witnesses he submitted the charge sheet against the convicts/ appellants and proved the same as Exhibit Ka-12. In the cross-examination, this witness has stated that he received the information of the incident from Jitendra Kumar. In the written information about the death of his sister, Jitendra Kumar did not tell him about the murder. He reached on the spot and opened the door with the help of the persons present there and found the body of the deceased hanging. He has also stated that the room of Raj Patti @ Nankav and Parsu Ram was at a distance of 15-20 feet from the place of incident. The rope was present around the neck of the deceased. In the cross-examination, this witness has further stated that since findings in post mortem report and the injury sustained were contradictory so the same was placed for legal opinion. In between, on 17.08.2010, the complainant gave written report on the basis of which the case was registered. He has also stated that there was no physical injury on the stomach of the deceased. He has further stated that before getting the post mortem examination report, he was not aware of the fact that the case was of a murder. This witness has denied the suggestion that the deceased had committed suicide and he with the connivance of the complainant made it a case of murder.

16. Learned counsel for the convicts/appellants argued that the room where the incident occurred was found closed from inside. The deceased herself closed the door and committed suicide as she was depressed about not having a child. The learned counsel for the convicts/appellants drew the attention of the court towards the facts mentioned in the inquest report as well as the statement of P.W.7 wherein he has stated that room was found closed and he got it opened and submitted that this evidence shows that the room was closed from inside so the convicts/appellants did not hang the deceased and she hanged herself inside the room.

17. We considered the above argument, In our opinion this argument of defence counsel does not have force because in the cross-examination P.W.7, the Investigating Officer has stated that the room was closed and he got it opened with the help of people present there. He was further asked by the defence counsel whether the door was broken, then he stated that the door was not broken but got opened. This witness has not stated that the door was closed from inside, he has stated only that the door was closed. P.W.3, the complainant has also stated before the trial court that the Investigating Officer came on the spot and made two kicks on the door and the door was opened. He has clearly stated that the door was not closed from the inside and further cleared that if the door might have been closed from the inside then that would not have been opened by merely two kicks of the Investigating Officer. It shows that the door was closed, but it was not closed from the inside. The post mortem examination report shows that severe injury was found in the intestine of the deceased. In the opinion of doctor conducting the autopsy of the deceased, when the deceased became unconscious then she would have been hanged. In the opinion of doctor the hanging was post-mortem. The person cannot hang himself or herself when he or she is unconscious, hence, the version of the defence that the deceased committed suicide herself by hanging cannot be believed. D.W.1 Ram Sagun has stated that the door was closed from inside and that was opened after

breaking but the Investigating Officer and P.W.3 both have stated that the door was not broken but it was opened with the help of people. D.W.1 has further stated that when room was opened after breaking the door it was found that dead body was hanging and it was brought down and some water was sprinkled on the dead body and it was found that Neelam was dead then again she was hanged with a noose of rope and door was closed and the police came thereafter. This defence witness has stated that the door was closed again, and in such circumstances the argument that the door was closed from inside is not trustworthy. All this shows that the door was not closed from inside but it was closed. As the dead body was found hanging inside the room where Kali Prasad and the deceased used to reside, a heavy burden lies on convict/appellant Kali Prasad to explain the injuries found on the body of the deceased. Section 106 of the Indian Evidence Act provides as under:-

"106. Burden of providing fact especially within knowledge.- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

The **Hon'ble Apex Court** in the case of **Ranjit Kumar Haldar vs. State of Sikkim (2019) 7 SCC 684** observed as under:-

"15. In another judgment Trimukh Maroti Kirkan v. State of Maharashtra [Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80] , the Court considered a situation wherein the accused is alleged to have committed the murder of his wife. The prosecution succeeded in leading evidence to show that shortly before the commission of the crime, they were seen together or the offence takes place in the dwelling house where the appellant normally resided. The Court held as under : (SCC pp. 694-95, para 22)

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of H.P. [Nika Ram v. State of H.P., (1972) 2 SCC 80 : 1972 SCC (Cri) 635] it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra [Ganeshlal v. State of Maharashtra, (1992) 3 SCC 106 : 1993 SCC (Cri) 435] the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State

of U.P. v. Ravindra Prakash Mittal [State of U.P. v. Ravindra Prakash Mittal, (1992) 3 SCC 300 : 1992 SCC (Cri) 642] the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In State of T.N. v. Rajendran [State of T.N. v. Rajendran, (1999) 8 SCC 679 : 2000 SCC (Cri) 40] the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.""

18. In the present matter the convict Kali Prasad had failed to give any plausible and satisfactory explanation about the death of his wife. The theory put forward by the defence is not supported by the post mortem report and the evidence given by P.W.3, P.W.7 and P.W.8. In the trial court the convict/appellant Kali Prasad has utterly failed to explain the injuries found on the body of the deceased. Though he tried to say that the deceased fell down on the cot and received injuries in her stomach and started bleeding and she went into depression and committed suicide but that is not being supported by the evidence available on record. The medical witness P.W.8 has clearly denied the suggestion made by the defence counsel that such an injury would have occurred due to falling on something, hence it is proved that the deceased was killed by Kali Prasad (the husband of the deceased).

19. As far as the convicts/appellants Raj Patti and Parsu Ram are concerned, according to the evidence available on record, they used to reside in the same house at a distance of 15-20 feet from the place of occurrence. It is quite possible that what happened inside the room they were not aware of that. D.W.2, Chanda daughter of Parsu Ram and Raj Patti has stated that they both were present at her house in Ahmedabad on the date of incident for their treatment. Though no prescription of treatment was produced by D.W.1 and even in their statements recorded under Section 313 Cr.P.C., Parsu Ram and Raj Patti have not stated that they were not present in the house at the time of incident, hence, this plea of 'alibi' is not acceptable, but their involvement in killing the deceased is not proved beyond reasonable doubt because only one injury in the stomach was found in the small intestine of the deceased, which according to the doctor proved fatal. If these two convicts/appellants had also assaulted the deceased, some more injuries would have been found on the person of the

deceased. Hence from the above analysis, it is clear that the prosecution has proved that the deceased was killed by Kali Prasad by assaulting her in her stomach which was supported by the post mortem examination wherein severe injury in her small intestine was found and when she became unconscious she was hanged, (as the doctor has clearly written in the post mortem examination report that, it was a 'Post-Mortem' hanging). As far as the involvement of Raj Patti and Parsu Ram are concerned their involvement in the killing of the deceased could not be proved beyond reasonable doubt for the reason that only one severe injury in the intestine of the deceased was found. Hence they deserve to be given the benefit of doubt.

20. Hence to sum up the conviction and sentence awarded to Parsu Ram and Raj Patti is hereby **set aside**. In the result, the **Criminal Appeal No.1024 of 2018** is **dismissed** and **Criminal Appeal No.525 of 2018** is hereby **allowed.**

21. The appellant Kali Prasad is already in jail. He shall serve out the sentence awarded by the trial court. The convicts/appellants Parsu Ram and Raj Patti are already on bail by the order of this Court. Their bail bonds are cancelled and sureties are discharged.

22. The convicts/appellants Parsu Ram and Raj Patti are directed to file personal bonds and two sureties each in the like amount to the satisfaction of the court concerned in compliance with Section 437-A of Cr.P.C.

23. Office is directed to send a copy of this order along with lower court record to the trial court concerned for necessary information and compliance forthwith.

(2022) 8 ILRA 668
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.08.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No.1100 of 2010

Zaheer ....Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Mohammad Naseerullah, Sri Ajai Sharma, Sri Vimal Kumar Pandey

Counsel for the Opposite Party:
G.A.

Criminal Law- Indian Penal Code,1860- Sections 376 & 354 - The medical examination of the victim "x' (Ext. Ka. 2) shows redness and mild swelling present at 6 O'clock position of the hymen; small tear at 6 O'clock position; and vagina admits tip of finger with extreme pain. At the same time, it also transpires from the medical report that victim "x' was having difficulty in walking, which also finds corroboration with the evidence of victim "x' (P.W.2) as well as P.W.1 as they had stated in clear terms that after committing rape against the victim "x', she went to home limping. Further, P.W.3-Reeta Raman had stated in her cross-examination that hymen of the victim "x' was torn and hymen would also be torn in the case of rape. It is apparent from the testimonies of P.W.2-victim "x' that the victim "x' has fully supported the case of the prosecution. She has been consistent right from the very beginning. Nothing has been specifically pointed out why her testimony 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 - No reason to doubt the credibility and/or trustworthiness of the victim "x'-Both of them i.e. P.W.1 and P.W.2 had no rancour or ill-will against the convict/appellant Zaheer and in this view of the matter would not have falsely deposed against him.

Where the testimony of the victim is consistent and cogent and the same is corroborated by other evidence as well as medical evidence and where there is no reason for the victim to falsely implicate the accused, then the said evidence can be safely relied upon for convicting the accused.

Indian Evidence Act, 1872- Section 134- No other independent witnesses have been examined and/or supported the case of the prosecution and the conviction on the basis of the testimonies of P.W.1-Surja Devi, who happened to be maternal grand-mother of the victim "x' and interested and partisan witness as well as testimony of P.W.2-victim "x' cannot be sustained, is concerned, the same has no substance. 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 Apex 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.

Settled law that it is the quality of evidence and not the quantity that is relevant. Where the testimony of the victim is consistent and inspires the confidence of the court, then the same is in itself sufficient to secure the conviction of the accused without seeking further corroboration. (Para 32, 35)

Criminal Appeal Rejected. (E-3)

Judgements/ Case law relied upon:-

1. Santosh Kumar Vs St. of M.P. : 2006 (8) JT SC 171

2. St. of Punj. Vs Gurmit Singh : (1996) 2 SCC 384

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

(A) INTRODUCTION

(1) Accused, Zaheer, was tried by the Additional District & Sessions Judge/Fast Track, Court No.3, Raebareli, in Sessions Trial No. 277 of 2001 : State Vs. Zaheer, arising out of Case Crime No. 16 of 2001, under Sections 376, 354 I.P.C. and Sections 3(1)(xii), 3(2)(v), 3(1)(xi) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Khero, District Raebareli.

(2) Vide judgment and order dated 05.03.2010, the Additional District & Sessions Judge/Fast Track, Court No.3, Raebareli, acquitted the accused, Zaheer, for the offence punishable under Section 3 (1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "***S.C./S.T. Act***") and convicted and sentenced him in the manner as stated hereinbelow :-

i. Under section 376 I.P.C. read with Section 3 (2) (v) of the S.C./S.T. Act to undergo life imprisonment and fine of Rs.10,000/-. In default of fine to undergo additional one year simple imprisonment;

ii. Under section 354 I.P.C. to undergo two years' R.I. and fine of Rs.2000/-. In default of fine to undergo additional two months simple imprisonment.

iii. Under section 3(1) (XI) of the S.C./S.T. Act to undergo six months' R.I. and fine of Rs.2000/-. In default of fine to undergo additional one month's simple imprisonment.

All the sentences were directed to run concurrently.

(3) Feeling aggrieved by his conviction and sentence by means of the aforesaid impugned order dated 05.03.2010, the convict/ appellant, Zaheer, has preferred the instant criminal appeal.

(4) In view of the judgments of the Apex Court in Bhupinder Sharma vs. State of Himachal Pradesh : (2003) 8 SCC 551 and Nipun Saxena and anothers vs. Union of India and others : 2018 SCC Online 2772, the name of the victim is not being mentioned. She is transcribed as victim 'x' in the judgment hereinafter.

(B) FACTUAL MATRIX

(5) Shortly stated, the prosecution case runs as under :-

The informant P.W.1-Smt. Surja Devi was the resident of village Vasinpurwa, Jahripur Mirdaha, police station Khero, district Raebareli. Her grand-daughter, victim "x', aged about 8 years was living with her. On 10.01.2001, her grand-daughter, victim "x', went to graze the cow towards Khajuha pond situated in eastern side of the village and at about 05:00 p.m., Zaheer (convict/appellant), on finding her grand-daughter (victim "x') alone, caught her; denuded her; and put his finger on her private part, however, she managed to return to home. She stated cryingly, about the incident to her (informant) and her family members about the aforesaid incident.

(6) Thereafter, informant P.W.1-Surja Devi got the FIR scribed from some person, who after scribing it read it over to her. She thereafter affixed her thumb impression on it. She then proceeded to Police Station Khero, District Raebareli and lodged it. On the basis of the aforesaid written report (Ext. Ka.1), an F.I.R. (Ext. Ka.8), bearing Case Crime No. 16 of 2001, under Sections 354 I.P.C. and Section 3 (1) (x) of the S.C./S.T. Act was registered on 10.01.2001, at 08:20 p.m. against the convict/appellant Zaheer at police station Khero, district Raebareli, which was situated at a distance of two kilometers from the place of the incident. A perusal of the F.I.R. shows that the facts mentioned in the preceding paragraph were stated therein.

(7) The investigation of the case was conducted by P.W.4-Awadhesh Saran, who, in his examination-in-chief, had deposed before the trial Court that on 10.01.2001, he was posted as Circle Officer, Lalganj. He conducted the investigation of the case. On 11.01.2001, he recorded the statement of Constable Abdul Kalam, informant P.W.1-Smt. Surja Devi, P.W.2-victim "x', Smt. Hira Devi, Kalawati, Takhurdeen and had also inspected the place of occurrence. On 12.01.2001, he recorded the statement of accused Zaheer. On 13.01.2001, he copied the medical examination of victim "x' in paper no. 3; recorded the statement of

witnesses Raj Kumar, Kalludin Mohammad; and sent the sealed clothes of victim "x' received from Dr. Rita Raman (P.W.3) for chemical examination. On 24.01.2001, he copied the pathological report in paper no.4. On 12.02.2001, as incriminating evidence was found against the accused Zaheer, he filed charge-sheet against him under Sections 354, 376 I.P.C. and Sections 3 (1) (xii) of the S.C./S.T. Act before the Court. He proved the site plan (Ext. Ka. 6) and charge-sheet (Ext. Ka.7). He also proved the chik F.I.R. written by Constable Moharrir Abdul Kalam as Ext. Ka.8.

In cross-examination, P.W.4-Awadhesh Saran had deposed before the trial Court that he recorded the statement of Surja Devi (P.W.1), Hira Devi and victim "x' on 11.01.2001 at about 05:00 p.m. in their village. On that date, the victim "x' was not admitted to any hospital. In the statement of victim "x', "penetrating his penis by the accused' was mentioned but it was not mentioned that the accused had penetrated. In the whole statement of victim "x', the fact of penetration of penis even a little bit has not been mentioned. He further deposed that when the victim "x', in her statement, stated that the accused started penetrating his penis inside her vagina, then, she shouted and after that victim "x' had trouble in walking and blood was oozing out. In these circumstances, he added Section 376 I.P.C. He further deposed that in the statements of witnesses recorded under Section 161 Cr.P.C., no instance of rape has been made out. The victim "x' had not stated in her statement that she was unconscious for half an hour. He denied that victim "x' was unconscious for two days. He was not told by the victim "x' that the accused had held her mouth by hand. He deposed that the victim "x' did not come to the police station in the state of unconsciousness. On the said date, Hira, Surja Devi (informant) and victim "x' came at the police station and on seeing the victim "x', it transpired that there was no mark of scratch or grievous injuries on her person. He did not record the statement of other children who were grazing their animals on that day. He went to the place of occurrence on the next date i.e. on 11.01.2011 and he met with victim "x'. He inspected the place of occurrence on the pointing out of victim "x' and Hira Devi. He recorded the statement Surja Devi (P.W.1) twice. In the second statement, Surja Devi (P.W.1) declined the occurrence of rape with the victim "x'. Hira Devi had also stated in her statement that victim "x' did not tell her about occurrence of rape with her. He recorded the statement of victim "x' at her house on 11.01.2011. He denied that he recorded the statement of the victim "x' during her admission in hospital. He also denied that he developed a case of rape on the pressure of Village Pradhan even after no incident of rape occurred. He further deposed that he saw the medical report but he did not record the statement of doctor who conducted the medical examination of victim "x'. In the report, no opinion of rape was mentioned.

(8) The medical examination of victim "x' was conducted on 11.01.2001 at 05:15 p.m. in Women's Hospital, Raebareli by Dr. Reeta Raman (P.W.3), who found the following injuries on her (victim "x') person :-

"Examination :- Height 47 inches, weight 20 kg. Teeth 12/12 space for molass present in upper and lower jaws. Child was having difficulty in walking. Auxiliary and pubic hair absent. Breast not yet started developing. No mark of injury

present over the external surface of the body.

Internal Examination :- Redness and mild swelling present at 6 O'clock position of the hymen. Small tear at 6 O'clock position. No fresh bleeding, vagina admits tip of finger with extreme pain. Smear slid was made and sent to Pathologist District Hospital Raebareli for determination of any spermatozoa. There was no bleeding or discharge over her private parts. Her undergarments and a cloth was sealed and sent for forensic examination. For determination of her age, she is being sent to Radiologist District Hospital for X-ray of both elbow and wrist joint."

(9) It is significant to mention here that P.W.3-Dr. Reeta Raman had reiterated the aforesaid medical examination in her statement before the trial Court and had also stated that on receipt of report of x-ray and vaginal smear, she prepared a supplementary report on 18.01.2001. In the report No. 1/12.01.2001 of the vaginal smear, it has been mentioned that no sperm was present. After perusing the x-ray report, she opined that the victim "x' was aged about 8 years and her injuries were 24 hours old and it was caused with blunt objects. She further deposed that injuries could be caused by penis. She further stated that if a person penetrates his penis in the vagina of the victim, then, the injuries could be attributable. She proved the medical report (Ext. Ka.2), supplementary report (Ext. Ka.3) and pathology report (Ext. Ka.5). She deposed that injuries could be attributable on 10.01.2001 at 05:00 p.m.

In cross-examination, P.W.3 had deposed that there was no report with regard to rape in her report. She deposed that if any girl sat in the field for urinating and if the thooth (one of the hard grass) of the field was blunt, then, these injuries could be attributable. The injuries could be attributable on 10.01.2001 in the afternoon and it could not occur in the morning. She further deposed that in this case, the Hymen was found torn and in the case of rape also, hymen is found torn.

(10) The evidence of P.W.5-Dr. D.K. Mishra shows that on 12.01.2001, he was posted as Radiologist in District Hospital, Raebareli. On the said date, he conducted the x-ray of victim "x', who was brought by C.P.55 Shyma Devi of Police Line, Raebareli. He proved the x-ray report (Ext. Ka.10).

In cross-examination, P.W.5-Dr. D.K. Mishra had deposed that victim "x' was referred by Dr. Reeta Raman (P.W.3) on 11.01.2001 for x-ray. On 12.01.2001, victim "x' was brought before him for x-ray and he conducted the x-ray of the victim on 12.01.2001. The victim "x' came before him in a good condition and she had no problem.

(11) The case was committed to the Court of Sessions in the usual manner where the convict/appellant was charged for the offences mentioned in paragraph-1 hereinabove., to which he pleaded not guilty and claimed to be tried.

(12) During trial, the prosecution in order to substantiate its case, examined five witnesses viz. informant P.W.1-Smt. Surja Devi, who is the maternal grand-mother of the victim "x', P.W.2-victim "x' herself, P.W.3-Dr. Reeta Raman, who conducted the medical examination of victim "x', P.W.4-Awadhesh Saran, who conducted the investigation of the case and P.W.5-Dr.

D.K. Mishra, who conducted the x-ray of the victim "x'.

(13) P.W.1-Smt. Surja Devi, who is the informant of the case and maternal grand-mother of the victim "x', had deposed in her examination-in-chief before the trial Court that she was an illiterate lady and she belongs to pasi community. At the time of the incident, her grand-daughter, victim "x', aged about 8 years was living with her. On the date of the incident, at about 05:00 p.m., her grand-daughter, victim "x', went to graze her cow towards Khajuha village situated in eastern side of her village, wherein accused Zaheer on finding her grand-daughter alone caught her; untied the string of her paijama; and started fingering her urethra which caused bleeding to her. When her grand-daughter started shouting, the convict/appellant fled away from there. When the cow reached home, she started looking for her grand-daughter from the house and she noticed that her grand-daughter (victim "x') was limping. Thereafter, she picked up her grand daughter in lap and carried home from a distance of one furlong. Blood was oozing out from her private part. Her grand-daughter (victim "x') told her about this incident in the house. She proved the written report (Ext. Ka. 1). She further deposed that after the incident, the police had interrogated her and also inspected the place of occurrence. The medical examination of her grand-daughter was conducted at Raebareli Hospital.

In cross-examination, P.W.1 had stated that she went to lodge the report at 07:00 p.m. as none of her family members were there on the date of the incident. She deposed that she knew Anwar Pradhan. Before fifteen days of the incident, the election of Pradhan was held, in which Anwar won the election and Israr lost the election. Accused Zahir was with Israr in the said election, whereas she supported Anwar. She further deposed that after the incident, she went to the house of Anwar Pradhan along with her grand-daughter victim "x' but he did not extend any help.

P.W.1 had further deposed that the Inspector came for investigation. She did not show the place of occurrence to the Inspector. She was at home with her granddaughter (victim "x'). The Inspector interrogated the people of her village in her presence but none of them had supported the incident. She did not ask from the children who also were grazing their animals along with her grand-daughter because the children fled away from there. Apart from these children, she did not inquire about the incident from any person of the village. She went to the place of the incident after 4-6 days of the incident. She further deposed that after lodging the report, she received the compensation from the Government.

(14) P.W.2-victim "x', in her examination-in-chief, had deposed before the trial Court that her father had died earlier. She, while living in the house of her maternal grand-mother Surja Devi (P.W.1), was studying in Class-II at Khajuria Bodh Private School. The incident occurred eight years ago at 05:00 p.m. On that date, there was holiday in her school. She went for grazing cow towards pond situated in the eastern direction of her village, wherein Zaheer (convict/appellant) was also grazing his cow. She knew Zaheer prior to the incident as he used to visit her village usually. It was the time for the sun to set. Zaheer (convict/appellant), who sat on the med (boundary of the field), called her, upon which she went to him. Thereafter,

first of all, Zaheer (convict/appellant) rubbed her cheeks; after that, untied her paijama's string; touched her urethra; and started fingering her urethra. Thereafter, Zaheer (convict/accused) removed her salwar and laid her inside the ditch adjacent to med (boundary of the field) and started penetrating his penis inside her urethera. She further deposed that when Zaheer started to penetrate his penis into her urethra, she felt lot of pain and blood was also oozing out, on which she started screaming. Her cow had also gone along with the cow of Zaheer (convict/appellant). She identified the convict/appellant Zaheer in Court and had stated that he was the person who committed rape on her. She went towards her house limping and when she reached near the village, she met her maternal grand-mother (P.W.1) and narrated the whole incident to her (grand-mother P.W.1) while crying, whereafter, her maternal grand-mother (P.W.1) carried her in lap. She identified the salwar (Ext. .2) which she wore on the date of the occurrence, in the trial Court. Zaheer (convict/appellant) had penetrated his penis to her urethra a little bit but when bleeding started, he fled away from there. Zaheer (convict/appellant) had committed bad things on finding her alone.

In cross-examination, P.W.2-victim "x' had deposed before the trial Court that when she was aged about three years, her father died. Her grandmother had four daughters, namely, Ram Dulari, Ram Piyari, Hira and Kalawati. Her mother's name is Ram Piyari. After death of her father, her mother got married again but she did not know the person to whom she was married. She got unconscious after the incident for about one hour or half an hour. After an hour, when she gained consciousness, she went towards her house. When she walked a little bit, her mausi (aunt) came and carried her in lap. The place of the incident was at a distance of 3-4 bighas from her house. The place of the incident was in the eastern direction from her house. Her house was situated after 10-20 houses from the place of the incident. When she walked 2-3 steps, her mausi (aunt) came and when her mausi (aunt) met her, she was conscious. After the incident, she was brought to Raebareli Hospital for medical examination, wherein she was admitted for 2-3 days and her maternal grand-mother was along with her. Her treatment was going on.

(15) The statement of convict/appellant Zaheer was recorded under Section 313 Cr.P.C. In his statement, convict/appellant Zaheer had denied the allegations levelled against him and had stated that when victim "x' went to collect cow dung, the cow kicked her, as a consequence of which, she fell down. He did not know where she sustained injuries. He further stated that Pradhan Anwar demanded Rs.5000/- from him but when he refused to do so, Anwar had falsely implicated him in the instant case. From the side of the convict/appellant, Furkan Khan and Kallu were examined as D.W.1 and D.W.2, respectively, by the trial Court.

(16) D.W.1 Furkan Khan, in his examination-in-chief, had stated that the alleged incident was about nine years old i.e. in the year 2001. Before fifteen days of the incident, the election of Gram Pradhan was held. Israr and Anwar were the candidates in the said election. In the said election, convict/appellant Zaheer was with Israr and was on the polling booth, Anwar had assaulted Zaheer and threatened him that after winning of election, he would be falsely implicated in a case. Surja Devi

(P.W.1) was in support of Anwar. The said election of Pradhan was won by Anwar. Thereafter, Anwar, on account of enmity and with the connivance of police, had falsely implicated Zahir (convict/appellant) in the instant case. He and all the villagers knew that the injury caused to the victim "x' was on account of either falling down getting hit by cow or because of sitting up straight in the field for easing herself. Zaheer (convict/appellant) was not on spot and the victim "x' had also not stated in her statement at her house, village and police station that accused had tried to rape her.

In cross-examination, D.W.1 had stated that he knew that Surja Devi (P.W.1) had lodged report against Zaheer. The said report was scribed by Anwar, who was present there. He (D.W.1) was also present there and was standing outside. He denied that he had falsely deposed at the instance of convict/appellant Zaheer.

(17) D.W.2 Kallu, in his examination-in-chief, had deposed that the alleged incident was 9 years old. Before fifteen days of the incident, the election of Pradhan was held. Israr and Anwar were the candidates in the said election. Zaheer (convict/appellant) was in the support of Israr. On the date of the election, Anwar had assaulted Zaheer in his presence at polling station and threatened him that after winning of election, he would falsely implicate him in a case. Anwar won the election of Pradhan. Thereafter, on account of enmity and with the connivance of police, a false case had been lodged against the convict/appellant Zaheer at the instance of Anwar. The injury caused to victim "x' was on account of falling down after being kicked by cow or sitting in the field for urinating. On the date of the incident, Zaheer was not present there.

(18) The learned trial Court believed the evidence of prosecution i.e. P.W.1-Smt. Surja Devi, P.W.2-victim "x' as well as medical evidence and came to the conclusion that there was sufficient evidence warranting the conviction of the appellant for the offence punishable under sections 376 I.P.C. read with Section 3 (2) (v) of S.C/S.T. Act, Section 354 I.P.C. and Section 3 (1) (xi) of the S.C./S.T. Act and accordingly convicted and sentenced him thereunder by means of the impugned judgment and order dated 05.03.2010.

(19) Hence the instant appeal.

(C) ARGUMENTS

(20) Heard Shri Vimal Kumar Pandey, learned Counsel for the convict/appellant, Shri Prabhat Adhaulia, learned Additional Government Advocate for the respondent/State and perused the lower Court record as well as impugned judgment and order dated 05.03.2010.

C.1. ARGUMENTS ON BEHALF OF THE CONVICT/ APPELLANT

(21) While challenging the impugned judgment and order dated 05.03.2010, learned Counsel for the convict/appellant has argued :-

I. that Dr. Reeta Raman, who medically examined victim "x' on the next day of the incident, did not give any opinion of rape committed against victim "x' and further no semen was reported to be present in the seriologist report. He argued that in the F.I.R., which was lodged by the maternal grand-mother of the victim "x' (P.W.1), it has been alleged that convict/appellant Zaheer had entered his

finger into the private part of the victim "x'. At that time, there was no allegation of rape upon the convict/appellant and as such, the F.I.R. against the appellant was lodged under Section 354 I.P.C. and Section 3 (1) (x) of S.C./S.T. Act. The victim "x', for the first time, had stated before the trial Court that rape against her was committed by the appellant. He argued that in the F.I.R., P.W.1-Surja Devi had stated that victim "x' had stated the whole factum of the incident to her while reaching home. Therefore, his submission is that if that being so, as to why P.W.1-Surja Devi had only mentioned in the F.I.R. that convict/appellant Zaheer had entered his finger in the private parts of the victim "x', which itself shows that the prosecution had intentionally cooked up the story of rape committed against victim "x'. Thus, the entire story of the prosecution is doubtful.

II. that no independent witnesses have been examined by the prosecution.

III. that the informant of the F.I.R. was maternal grand-mother of the victim "x', namely, Surja Devi (P.W.1). She is not the eye-witness of the alleged incident. The F.I.R. of the incident lodged by P.W.1 is hearsay, therefore, allegations made against the convict/appellant by P.W.1 in the F.I.R. are frivolous one.

IV. that the trial Court materially erred in not believing the testimonies of D.W.1 and D.W.2, who categorically stated that on the date of the alleged incident, the convict/appellant was not present at the place of occurrence and further the injuries caused to the victim "x' was on account of kicks of cow or may be due to squatting on the field for urinating. According to him, the convict/appellant has been falsely implicated in the instant case.

V. that P.W.3-Reeta Raman, who conducted medical examination, did not support the case of the prosecution that any rape was committed with victim "x'. There was no allegation of rape against the appellant in the F.I.R.

VI. Thus, it is prayed to allow the present appeal.

C.2. ARGUMENTS ON BEHALF OF THE RESPONDENT/ STATE

(22) Mr. Prabhat Adhaulia, learned Counsel for the respondent/State has vehemently opposed the aforesaid submissions of the learned Counsel for the convict/appellant and argued :-

I. that in the present case, the trial Court has rightly convicted the convict/appellant for the offence under Section 376 IPC read with Section 3 (2) (v) of the S.C./S.T. Act, Section 354 I.P.C. and Section 3 (1) (xi) of the S.C./S.T. Act by means of the impugned order on relying upon the testimony of prosecution witnesses.

II. that there is no reason to doubt the credibility and trustworthiness of the victim "x'. He argued that victim "x' was medically examined on next day of the incident. The victim "x' is consistent in her evidence right from the very beginning and even in the cross-examination also she has stood by what she has stated and she has fully supported the case of the prosecution. Therefore, in the light of facts and circumstances of the case, the conviction of the appellant deserves to be confirmed.

III. that cogent reasons have been given by the learned trial Court for not

believing the testimonies of D.W.1, D.W.2 as well as statement of the accused recorded under Section 313 Cr.P.C. It is specifically observed by the learned trial Court that depositions of D.W.1, D.W.2 and statement of the appellant recorded under Section 313 Cr.P.C. does not inspire any confidence.

IV. Thus, the present appeal is liable to be dismissed.

D. ANALYSIS

(23) We have examined the submissions of the learned counsel for the respective parties at length and gone through the impugned judgment and order of conviction passed by the learned trial Court as well as lower Court record.

(24) The F.I.R. of the incident was promptly lodged. The incident occurred on 10.01.2001 at 05:00 p.m. and the F.I.R. was lodged by P.W.1-Smt. Surja Devi, maternal grand-mother of the victim "x', on 10.01.2001 at 08.20 p.m. The distance between the police station Khero, district Raebareli and place of occurrence was two kilometers.

(25) The evidence of the informant Smt. Surja Devi (P.W.1) shows that on 10.01.2001, her grand-daughter, victim "x', aged about 8 years, went to graze cow at Khajuha village situated in eastern side of her village, wherein her grand-daughter (victim "x') met with Zaheer (convict/appellant). Thereafter, Zaheer caught her; untied string of her pajama; and started fingering on her private part, upon which blood was oozing out from her private part. After that on her shouting, convict/appellant ran away. She further stated that when her grand-daughter was coming home, she saw her grand-daughter limping, thereupon she carried her in lap and went to the house and at that time, blood was oozing out from her private part. After that, her grand-daughter narrated the whole incident to her.

(26) The aforesaid testimonies of P.W.1-Smt. Surja Devi were supported by P.W.2-victim "x' and in her statement before the trial Court, P.W.2-victim "x' had deposed that she knew Zaheer (convict/appellant) before the incident as he came to his village usually. On the date of the incident, she went to graze the cow near the pond situated in the eastern side of the village, where Zaheer (convict/appellant) was also grazing his cow. It was the time for the sun to set. Zahir (convict/appellant), who sat on med (boundary of the field), called her, upon which she went there. After that, Zaheer (convict/appellant) rubbed her cheeks; untied string of her *paijama*; touched her urethra; and started fingering in her urethra. Thereafter, Zaheer (convict/appellant) removed her salwar and laid her inside the ditch adjacent to med (boundary of the field) and started penetrating his penis inside her urethera, upon which she felt lot of pain and blood was also oozing out. She, thereafter, shouted, whereupon Zahir fled away. After that she went to the house limping and when she about to reach near the house, her maternal grand-mother (P.W.1) met her, then, she narrated the whole incident to her maternal grand-mother while crying, then, her maternal grand-mother carried her in lap and went to her house.

(27) In our opinion, the evidence of PW-1 Smt. Surja Devi and P.W.2-victim "x' inspire confidence and reliance can be placed on it. There are no major discrepancies in their evidence. They have

stood the test of cross-examination very well.

(28) The report of medical examination (Ext. Ka.2) shows that the medical examination of the victim "x' was conducted on the next date of the incident i.e. on 11.01.2001 at 05:15 p.m. at Women's Hospital, Raebareli by Dr. Reeta Raman (P.W.3), who, after examination of victim "x', has opined that victim "x' was having difficulty in walking; redness and mild swelling present at 6 O'clock position of hymen; small tear at 6 O'clock position; no fresh bleeding; and vagina admits tip of finger with extreme pain. The evidence of P.W.3-Dr. Reeta Raman shows that the injuries sustained by the victim "x' was 24 hours old and it could be caused by blunt object. She had further deposed that injuries could be caused by penis and if anyone penetrating his penis to the vagina of the victim, these injuries could be attributable. However, P.W.3 had deposed in cross-examination that there is no report of rape in her report. She further deposed that if any girl sits for urinating in the field and grass of the field is blunt, then, these injuries could be caused. She further stated in cross-examination that injuries could be attributable on 10.01.2001 in the afternoon and it was not in the morning. The hymen was torn and hymen may be torned in the case of rape. However, the report of the Forensic Laboratory (Paper No.25 Ka) shows that no semen was found in the vaginal swab. However, human blood was found on the salwar of the victim "x'.

(29) Learned Counsel for the convict/appellant, therefore, has contended that Dr. Reeta Raman, who medically examined victim "x' on the next date of the incident, did not find any rape committed against victim "x' and further as per forensic report, no semen was present, hence the prosecution case of rape committed against the victim "x' is doubtful.

(30) At this juncture, it would be apt to mention that in **Santosh Kumar vs. State of M.P. : 2006 (8) JT SC 171,** the Apex Court has held that :

"10. The question, which arises for consideration, is whether the proved facts establish the offence of rape. It is not necessary for us to refer to various authorities as the said question has been examined in considerable detail in Madan Gopal Kakkad v. Naval Dubey (1992) 3 SCC 204 and paras 37 to 39 of the said judgment are being reproduced below:

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus:

"Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only

statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

38. In Parikhs Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

"Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:

".....even slight penetration is sufficient and emission is unnecessary. "

11. The medical examination report of the victim shows that she received injuries on front portion of the body and also on her hands.

1**2. The mere fact that no injuries were found on private parts of her body cannot be a ground to hold that no rape was committed upon her or that the entire prosecution story is false. It may be noted that Halki Bai is a married grown up lady and in such circumstances the absence of injuries on her private parts is not of much significance."**

(Emphasis supplied)

(31) In the instant case, the medical examination of the victim "x' (Ext. Ka. 2) shows redness and mild swelling present at 6 O'clock position of the hymen; small tear at 6 O'clock position; and vagina admits tip of finger with extreme pain. At the same time, it also transpires from the medical report that victim "x' was having difficulty in walking, which also finds corroboration with the evidence of victim "x' (P.W.2) as well as P.W.1 as they had stated in clear terms that after committing rape against the victim "x', she went to home limping. Further, P.W.3-Reeta Raman had stated in her cross-examination that hymen of the victim "x' was torn and hymen would also be torn in the case of rape.

(32) Keeping in mind the aforesaid medical evidence on record, this Court now proceed to consider the evidence of the victim "x'. The victim "x' is very clear in her statement recorded before the trial Court regarding her rape committed by the convict/appellant. It is apparent from the testimonies of P.W.2-victim "x' that the victim "x' has fully supported the case of the prosecution. She has been consistent right from the very beginning. Nothing has been specifically pointed out why her testimony 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. This Court finds no reason to doubt the credibility and/or trustworthiness of the victim "x'. We may also mention that both of them i.e. P.W.1 and P.W.2 had no rancour or ill-will against the convict/appellant Zaheer and in this view of the matter would not have falsely deposed against him. This circumstance unmistakenly shows that whatever happened to victim "x' on 10.01.2001 at 05:00 p.m., the convict/appellant was solely responsible.

(33) Learned counsel for the appellant strenuously urged that since Dr. Reeta

Raman (P.W.3) stated in her deposition that the injuries suffered by victim "x' were a result of a blunt object, which may be caused if a girl sat for urinating in the field where hard remains of the crops were there, hence the convict/ appellant deserves the benefit of doubt.

(34) We have examined the aforesaid submissions of the learned Counsel for the appellant and are of the view that this submission of the learned counsel for the appellant is not worthy of acceptance. It is pertinent to mention that Dr. Reeta Raman (P.W.3) admits of the possibility of the injuries caused from sitting for urinating on a blunt grass in the field. At the same time, she also admits of the possibility that it could be a result of a hard and blunt object including insertion of penis. Since both the possibilities are there, in our view, the crucial evidence would be that of P.W.2-victim "x'. Her evidence, which has been discussed by this Court hereinabove, clearly shows that rape was committed by the convict/appellant on 10.01.2001 at 05:00 p.m. Moreso, it transpires from the injuries of victim "x' that it was caused while the convict/appellant was raping her.

(35) So far as the submission on behalf of the convict/appellant that no other independent witnesses have been examined and/or supported the case of the prosecution and the conviction on the basis of the testimonies of P.W.1-Surja Devi, who happened to be maternal grand-mother of the victim "x' and interested and partisan witness as well as testimony of P.W.2-victim "x' cannot be sustained, is concerned, the same has no substance. In **State of Punjab v. Gurmit Singh :** (1996) 2 SCC 384, the Apex 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 Apex 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.

(36) Now so far as the submission on behalf of the convict/appellant that the learned trial Court erred in not believing DW1, DW2 and erred in not accepting the defence is concerned, at the outset, it is required to be noted that cogent reasons have been given by the learned trial Court not to believe DW1, DW2 and not to believe the statement of the appellant. On due consideration, this Court is of the view that the learned trial Court has rightly disbelieved the statement made by the convict/appellant under Section 313 Cr.P.C. and has rightly disbelieved DW1 and DW2.

(E) CONCLUSION

(37) In view of the above and for the reasons stated hereinabove, the present criminal appeal fails and the same deserves to be dismissed and is accordingly dismissed. The conviction and sentence awarded to the convict/appellant Zaheer by means of the impugned order dated 05.03.2010 is hereby confirmed.

(38) The convict/appellant Zaheer, who is in jail, shall serve the sentence as awarded by the trial Court by means of the impugned judgment and order dated 05.03.2010.

(39) Let a certified copy of this order as well as Lower Court Record be transmitted to the Court concerned for necessary information and compliance forthwith.

(2022) 8 ILRA 681
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 1443 of 2008

Raj Kishore @ Pappu ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Onkar Nath, Sri Birendra Prasad Maurya, Sri Amit Tripathi

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Section 302 – murder - case based on circumstantial evidence - conviction when sustained - circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established - all the facts so established should be consistent only with the hypothesis of the guilt of the accused - circumstances should be of a conclusive nature and tendency - they should be such as to exclude every hypothesis but the one proposed to be proved - case based on ocular account, motive may not have a crucial role to play - case based on circumstantial evidence, motive assumes importance and may form part of the chain of circumstances.(Para - 18,21)

Incriminating circumstance (relied by prosecution) - accused was a liquor addict - used to pester/harass his sister-in-law (wife of his brother) for money – appellant's brother used to reside outside in connection with work - Two days before incident - deceased's husband had sent money to his wife - entered the hut on the upper floor of the house - found deceased lying dead on a cot with injuries on her neck - no cogent evidence about the presence of the appellant in the house at the relevant time - case of day-time occurrence - incriminating circumstances not proved beyond reasonable doubt.**(Para - 19,27,28)**

(B) Evidence Law - Indian Evidence Act, 1872 - Section 106 - Section 106 of evidence Act does not directly operate against either a husband or wife staying under the same roof -being the last person seen with the deceased - does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt – held - in absence of cogent evidence that appellant was in house/hut at the relevant time - provisions of Section 106 of the Evidence Act cannot be pressed into service to put onus on the accused to explain as to under what circumstances, the deceased suffered ante-mortem injuries.**(Para - 27)**

HELD:-Prosecution failed to prove charge against the appellant beyond the pale of doubt. Accused-appellant entitled to benefit of doubt. Judgment and order convicting and sentencing appellant set aside. **(Para - 29)**

Criminal Appeal allowed. (E-7)

List of Cases cited:-

Shivaji Chintappa Patil Vs St. of Mah., (2021) 5 SCC 626

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. We have heard Sri Amit Tripathi for the appellant; Sri Amit Sinha, learned AGA, for the State and have perused the record.

2. This appeal is against the judgment and order dated 21.02.2008, passed by Sessions Judge, Etah in Sessions Trial No.655 of 2003, arising out of Case Crime No.62 of 2003, police station Bagwala, district Etah, whereby the accused-appellant has been convicted under Section 302 IPC and punished with imprisonment for life and fine of Rs.5,000/- coupled with a default sentence of two years R.I.

INTRODUCTORY FACTS

3. The FIR of the case was lodged by Virendra Singh (PW-1) vide written report (Exb.Ka-1) dated 23.07.2003 scribed by Rahees Ahmad (not examined), which was registered as Case Crime No.62 of 2003 at police station Bagwala, district Etah on 23.07.2003 at 18.20 hrs. The GD entry (Exb.Ka-3) of the written report and the chik FIR (Exb.Ka-2) was prepared by PW-3 at the time and date specified. The allegation in the FIR is to the effect that informant's sister-in-law Anima (the deceased) was married to Narendra. Narendra used to work as a labour in Delhi whereas his elder brother Raj Kishore @ Pappu (the accused-appellant) used to stay in the village and was addicted to liquor. It is alleged that the appellant used to harass the deceased Anima for money and used to pester her for money sent by her husband. According to the allegations, few days before the incident, Narendra (husband of the deceased) had sent money to Anima. The accused-appellant asked Anima for the money. When Anima refused, she was assaulted. On 23.07.2003 i.e. the date of the incident, the informant (PW-1) and his wife Anita (PW-2) came to know that the accused-appellant was assaulting Anima. On getting information, the informant and his wife Anita, at about 2.00 pm, rushed to Anima's house. There they noticed that the accused-appellant was coming out of the hut on the first floor of the house and running away. When they went up-stairs, they noticed that Anima's body was lying with injury marks on her neck. The FIR was lodged by alleging that the accused-appellant has killed Anima.

4. After registration of the report, inquest was conducted at the spot. After completing the inquest by about 22.00 hrs on 23.07.2003, inquest report (Exb.Ka-5) was prepared by PW-5. The body of the deceased was sealed and dispatched for autopsy. The autopsy was conducted by PW-4 at about 2.30 pm on 24.07.2003. The autopsy report (Exb.Ka-4) notices :

External Examination :

Well built body. Rigor Mortis passed off from upper extremities and present in lower extremities. Face, neck and upper part of chest congested. Abdomen distended (sic) bloated.

(i) Abraded contusion 2 cm x 1.25 cm, right side of neck anteriorly on upper part. Underlying tissues congested.

(ii) Two abraded contusions in a row on left side of neck upper part anteriorly. Each 1.75 cm x 1.25 cm. Underlying tissues congested.

Internal Examination :

Larynx/Bronchi - Congested. Both cornua of hyoid bone fractured.

Lungs - Congested.

Abdomen - Stomach full of un-identified food material.

Small Intestine - chyme and gases.

Large Intestine - gases and faecal matter.

Cause of Death - death is due to asphyxia as a result of throttling on account of AMI.

Estimated time of death - about one day before.

5. Investigation was conducted by PW-5 who visited the spot, conducted inquest, prepared papers for autopsy, prepared site plan (Exb.Ka-9) at the behest of PW-2, recorded statement of witnesses and, after carrying out various stages of investigation, submitted charge-sheet (Exb.Ka-10) against the accused-appellant. After taking cognizance on the charge-sheet, the case was committed to the court of session.

6. The court of session vide order dated 11.02.2004 framed charge of the offence of murder punishable under Section 302 IPC against the appellant. The accused-appellant pleaded not guilty and claimed trial.

PROSECUTION EVIDENCE

7. During the course of trial, the prosecution examined as many as six witnesses, their testimony, in brief, is noticed below :

8. **PW-1** - Raj Kishore @ Pappu (Informant). He stated that the deceased Anima was his sister-in-law, younger sister of his wife and used to reside in the same village in which he resided; whereas, Narendra, her husband, used to work as a labour in Delhi. The accused-appellant, elder brother of Narendra, was a liquor addict and he used to harass Anima for money to cater to his liquor addiction. In respect of the incident, PW-1 stated that about a day or two before the incident, Rs.1,000/- was sent by Narendra to Anima. On the date and time of the incident, PW-1 was in his own house when he was informed by fellow villager, namely, Damodar, that Anima is being assaulted by the accused. On getting the information, PW-1 and his wife Anita (PW-2), at about 2.00 pm, went to her house. They heard Anima crying for help. Those cries were coming from the hut on upper floor of the house. Soon thereafter, they noticed the accused rushing out of the hut located on the upper floor and escaping. When PW-1 went inside the hut, he noticed the body of Anima lying in the hut with injury marks on her neck. PW-1 stated that he got a written report scribed by Rahees Ahmad, which was submitted at the police station. The written report was exhibited as Exb.Ka-1.

During cross-examination, the witness stated that usually money was delivered to the deceased by her husband, when he used to visit. But this time money was sent through a boy Talewar one or two days before the incident. PW-1 stated that his house is about 15-20 paces away from the house of the deceased. In between his house and the house of the deceased, there were two or three houses. He denied the suggestion that the house of PW-1 is about 250 paces away from the house of the deceased. PW-1, however, maintained that information about the incident was received by him from Damodar whose house is next

to the house of the deceased. At this stage, the witness was confronted with an omission in the written report with regard to receiving information from Damodar about the deceased being assaulted by the appellant. He was also confronted with an omission in the written report that he heard cries of Anima. He admitted that he had not mentioned in the report that he heard screams of Anima and stated that by the time he reached there, she was dead. But immediately thereafter, he stated that Anima was asking for help in a low tone. In paragraph 16 of his statement, during cross-examination, the witness stated as follows :

"दामोदर ने खबर दिया तो केवल 5 मिनट में ही मै पहुंच गया था। मारने वाला पिछवाड़े, को कूद गया था। मेरे शोर मचाते ही वह कूद गया था।"

In paragraph 17 of his statement, the witness stated that there was no blood on the cot where he found the body of the deceased. PW-1 stated that when the I.O. had arrived at the spot, he was there. He stated that he had shown the staircase to the I.O. but had not shown to the I.O. either his or Damodar's house. PW-1 stated that he had also not shown to the I.O. the direction and the place from where he arrived at the spot. The witness, however, denied the suggestion that he has not seen the accused-appellant escaping from the house/room and that he has lodged a false case to get the benefit of the money left by her sister-in-law.

9. **PW-2** - Anita - elder sister of the deceased and wife of PW-1. After disclosing her relationship with the deceased, PW-2 stated that the husband of the deceased, namely, Narendra, used to work in Delhi and used to send money to the deceased; the accused-appellant and her sister's husband, Narendra, used to reside in the same house; that the accused-appellant was addicted to liquor and used to pester the deceased for money to satisfy his liquor addiction; that just two days before the incident, Rs.1,000/- was sent by her husband to the deceased, the accused-appellant came to know about receipt of money by her and, therefore, asked her for money; and that when money was not given to the accused, he assaulted the deceased. In respect of the incident, PW-2 stated that Damodar had given information that the accused-appellant is beating Anima. On receipt of this information, PW-2 and her husband (PW-1) went to the spot. Anima was crying. She noticed accused-appellant rushing out from the hut located on the upper floor of the house. When PW-2 went there, she noticed Anima lying dead with injury marks on her neck. She stated that the time must have been 2.00 pm. PW-2 stated that her husband and other villagers had also spotted the accused coming out of that hut. PW-2 stated that after the I.O. arrived at the spot he took her statement and prepared site plan as per her instructions.

During cross-examination, PW-2 stated that her house is just 15-20 paces away from the house of the deceased. She, however, admitted of not showing her house to the I.O. She stated that her brother-in-law (husband of the deceased) used to send money to the deceased monthly or bi-monthly. In paragraph 6 of her deposition, during cross-examination, she stated as follows :

"Damodar ने खबर दिया तो मै घर मे काम कर रही थी। बच्चो को ऐसे ही छोड़कर मै चली, 5 मिनट लगा पहुँचने में। मै पहुँची तो बहुत धीमी आवाज में वह कह रही थी कि बचा ले बचा ले। जब तक मै ऊपर पहुँची तो गले पर मेरी बहन के निशान थे और वह मर गई थी तथा अभियुक्त पीछे को कूद गया।"

She denied the suggestion that her house is 500 paces away from the house of the deceased. She also denied the suggestion that she arrived at the spot after learning about the death of her sister. She denied the suggestion that there use to be quarrel between the accused and PW-2's husband in respect of the money sent. She also denied the suggestion that she has not seen anyone escaping from the spot.

10. **PW-3** - Suraj Pal Singh. He is the constable of the police station concerned who made the GD entry of the written report and the chik FIR in connection therewith. The chik FIR and GD entry were exhibited as Exb.Ka-2 and Ka-3, respectively. He denied the suggestion that the FIR was ante-timed but admitted that on the date when the FIR was registered, there was no other cognizable report made at the police station concerned.

11. PW-4 - Dr. V.V. Verma - autopsy surgeon. He proved the autopsy report and the contents thereof already noticed above. He stated that during internal examination, he had noticed that both cornua of hyoid bone were fractured and in the uterus a 4 cm long foetus was present. The autopsy report was exhibited as Exb.Ka-4. He accepted the possibility of death having occurred at about 2.00 pm on 23.07.2003 as a result of the injuries noticed in the autopsy report.

During cross-examination, he accepted that there could be variation of about six hours either way in his estimate regarding the time of death.

12. **PW-5** - S.I. Narendra Pal Singh - Investigating Officer. He proved various stages of investigation. He stated that he visited the spot, noticed the body of Anima lying on a cot in a hut on the upper floor of the house. He proved the preparation of the inquest report and documents prepared for autopsy. He stated that he inspected the spot in torch and gas light in the presence of the informant as well as his wife Anita and prepared the site plan accordingly, which was marked as Exb.Ka-9. He stated that he recorded the statement of the witnesses and after completing the investigation submitted charge-sheet, which was marked as Exb.Ka-10. He produced the articles worn by the deceased at the time of her death, which were made material exhibits I.e. Exb.Ka-1 to Ka-5.

During cross-examination, PW-5 stated that neither the house of Damodar nor the house of informant was shown by him in the site plan because at the time of inspection he had not noticed them. He also admitted that he had not shown the place from where the witnesses heard the cries of the deceased. PW-5 stated that although he cannot say whether the house of the witnesses was 200 mtrs away from the spot but admitted that the house of the witnesses examined was in the middle of village Abadi and quite far from the spot. After stating as above, PW-5, to disclose the surroundings, stated as follows :

"To Counsel & मृतक का मकान गांव की आबादी के पूरब में है। मृतक के मकान के पूरब में भूदेव और कुंवरपाल के मकान है। कुंवर पाल का मकान मृतक के मकान के सामने स्थित खरंजा के पूरब में है। कुंवरपाल व भूदेव के मकानो के पूरब में आबादी नहीं है। यह बात भी मै अपनी याददास्त से ही बात रहा हूँ। मृतक के मकान के पश्चिम–दक्षिण– उत्तर–पूर्व में चारो दिशा में मकानआत है। मृतक के मकान के पश्चिम में लगी हुई खाली जगह नाथू राम की है। वादी ने मुझे यह नहीं बताया था कि मृतक के पति ने उसकी मृत्यु से पूर्व जो एक हजार रूपये भेजे थे वह तालेवर लाया था।"

After stating as above, PW-5 admitted that he did not notice any blood on the cot. He denied the suggestion that he

prepared police Parchas while sitting at the police station. He also denied the suggestion that he has submitted a false charge-sheet.

13. **PW-6** - Constable Satyendra Singh. He is the constable of the police station concerned who was handed over the body for autopsy. He proved that sealed body was handed over to the Doctor for autopsy. He also stated that the body was brought by Jugaad (a vehicle) and as the said vehicle had a breakdown therefore there was delay in the post-mortem. He stated that till the body was in his custody, no person was allowed to touch it and it was kept sealed.

STATEMENT OF THE ACCUSED UNDER SECTION 313 CrPC

14. The incriminating circumstances appearing in the prosecution evidence were put to the appellant for recording his statement under Section 313 CrPC. The appellant denied the incriminating circumstances appearing in the prosecution evidence and claimed that the deceased used to reside separate and not in his house; that he was not present in the house at the time of the occurrence; he was irrigating his field; and that he has been falsely implicated.

TRIAL COURT FINDINGS

15. The trial court found that the prosecution was successful in establishing motive; that the accused was seen rushing out of the hut wherein, immediately thereafter, the body of the deceased was noticed lying on a cot with injury marks on the neck; that the autopsy report confirmed that the deceased was strangulated on or about the time the deceased was noticed exiting the hut, the chain of circumstance stood complete indicating beyond reasonable doubt that it was the accused-appellant and none other who committed the murder and as the explanation tendered by the appellant was found inadequate and false, he is liable to be convicted.

SUBMISSIONS ON BEHALF OF THE APPELLANT

16. Learned counsel for the appellant submitted that the prosecution evidence fails to establish that information about the deceased being assaulted by the accused was provided to PW-1 and PW-2 by Damodar, inasmuch as, Damodar has not been examined as a witness. Further, the I.O. was not shown the house of Damodar as being next to the house of deceased therefore, on what basis PW-1 and PW-2 arrived at the spot has not been proved beyond doubt. Hence, the very foundation of the prosecution case is rendered doubtful. PW-1 and PW-2 in their deposition though stated that their house is about 15-20 paces away from the spot but, in the site plan, there are other persons house adjoining the house of the deceased. In addition to above, the statement of the I.O. indicates that the house of PW-1 and PW-2 was quite far from the house of the deceased, inasmuch as, according to him, the house of the deceased was in one corner of the village, whereas the house of PW-1 and PW-2 was in the middle of village Abadi. Therefore, possibility of PW-1 and PW-2 arriving at the spot immediately after getting information about the deceased being assaulted by the accused appears remote. It was also argued that though PW-1 and PW-2 initially stated that they saw the accused-appellant exiting the hut and escaping from the house by using the staircase, as was disclosed in the site plan,

but during cross-examination they stated that the accused escaped by jumping over the back wall. This is at complete variance from the initial statement of PW-1 and PW-2 made during the course of investigation. In these circumstances no reliance can be placed on their deposition. It has been submitted that it appears to be a case where the deceased was killed in her own house; no one witnessed the incident; that as the incident was of day-time, no one was present in the house; that the FIR was lodged, after deliberation or guess work, with delay of over four hours even though the police station was only five kilometres away. As there is no cogent and reliable evidence in respect of the presence of the appellant within the house at the relevant time, the conviction of the accused-appellant is not sustainable and is liable to be set aside.

SUBMISSIONS ON BEHALF OF THE STATE

17. Per contra, learned AGA, appearing for the State, submitted that both PW-1 and PW-2 have succeeded in proving the motive for the crime; that although the accused-appellant stated that he had a separate residence but he has not disclosed specifically as to where else he resided; that the appellant was noticed exiting the hut where, immediately after appellant's exit, the deceased was found dead by PW-1 and PW-2, with injury marks on her neck and the autopsy confirmed that she could have died due to those injuries at the time when the appellant was seen exiting the hut therefore, the chain of circumstances is complete and in absence of cogent explanation from the appellant, the trial court was justified in convicting the accused-appellant and sentencing him as above.

ANALYSIS

18. Having noticed the rival submissions as also the entire evidence on the record, before proceeding to evaluate the evidence we may observe that this is a case based on circumstantial evidence. In a case based on circumstantial evidence, when conviction can be sustained, the law is settled. The circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so 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.

19. In the instant case, the incriminating circumstances on which the prosecution placed reliance were as follows : the appellant was a liquor addict; he used to pester/harass his sister-in-law (wife of his brother) for money; the appellant''s brother used to reside in Delhi in connection with his work and used to send money to his wife; two days before the incident, the deceased's husband had sent money to his wife; the appellant had been pestering the deceased for the money and in connection therewith he assaulted the deceased; that on 23.07.2003, at about 2.00 pm, PW-1 and PW-2 were informed by Damodar that the deceased was being assaulted by the appellant; on receipt of this information, PW-1 and PW-2 arrived at the

spot to notice the appellant escaping from the hut; when they entered the hut on the upper floor of the house, PW-1 and PW-2 found the deceased lying dead on a cot with injuries on her neck.

20. In so far as the motive is concerned, the best person who could have given evidence of having sent money to the deceased was her husband Narendra. The husband of the deceased has neither been interrogated nor examined by the prosecution to ascertain whether any money was sent by him to the deceased in connection with which she was allegedly harassed/assaulted by the appellant. No doubt, it is not necessary for the prosecution to examine all the witnesses interrogated but the Investigating Agency did not even interrogate Narendra to confirm whether any money was dispatched by him to his wife. We did not find any statement of the I.O. (PW-5) with regard to recording the statement of deceased's husband in connection with sending money to the deceased. Interestingly, in the evidence of PW-1 it has come that Talewar had delivered money to the deceased. But, even the statement of Talewar was not recorded. In these circumstances, we are of the view that it is not proved beyond reasonable doubt whether money was sent to the deceased by her husband two or three days before the incident. Further, except PW-1 and PW-2, no other person has been examined to disclose whether the appellant was a liquor addict. In these circumstances, the motive for the crime has not been established beyond reasonable doubt.

21 . We are conscious of the law that in a case based on ocular account, motive may not have a crucial role to play but in a case based on circumstantial evidence, motive assumes importance and may form part of the chain of circumstances. However, even if the prosecution was not successful in establishing the motive for the crime beyond reasonable doubt, we would have to examine whether the prosecution was successful in proving beyond doubt that the accused-appellant was noticed rushing out of the hut wherein, immediately after his exit, the deceased was found dead by PW-1 and PW-2. If the prosecution succeeds in establishing this circumstance beyond reasonable doubt, the onus would shift on the accused appellant to explain his presence there at that time, in absence whereof, an adverse inference in respect of his guilt might be drawn.

22. To prove the above-mentioned circumstance, the prosecution has relied on the testimony of PW-1 and PW-2. Consequently, we would have to evaluate the testimony of PW-1 and PW-2.

23. In assessing the value of the evidence of an eye witness there are two principal considerations : (a) whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence; and (b) whether there is anything inherently improbable or unreliable in their evidence.

24. In the instant case, PW-1 and PW-2 were not residents of the house/hut where the incident occurred. They claim to have arrived at the spot on receipt of information from Damodar. Thus, their presence is not natural. To prove that Damodar provided them information neither Damodar has been produced as witness nor location of Damodar's house enabling him to get information and pass it on to PW-1 and PW-2 is disclosed in the site plan. Rather, the prosecution has suppressed vital

information with regard to the distance of the house of the two witnesses from the house of the deceased. Interestingly, the site plan does not indicate the presence of house of PW-1 and PW-2 in the vicinity. There are, however, several houses shown in the site plan neighbouring the house of the deceased but the house of the two witnesses as also of Damodar is conspicuous by its absence. The two witnesses were cross examined on this aspect and suggestion was given to them that their house is located at a distance of about 250 paces from the house of the deceased. The two witnesses might have denied this suggestion and claimed that their house is 15-20 paces away from the house of the deceased but, interestingly, the I.O. who made spot inspection and prepared site plan (Exb.Ka-9) at the behest of PW-1 and PW-2 did not disclose the house of either the informant or of the witness Damodar in the site plan. Further, the I.O. (PW-5) stated that though he cannot disclose the exact distance between the house of the informant and the house of the deceased but it is correct that the house of the two witnesses is located in the middle of village Abadi and is at a distance from the spot. He clarified the above statement by stating that the house of the informant is in the middle of village Abadi whereas the house of the deceased is in the eastern corner of the village. Once this is the position, the possibility of the witnesses having arrived at the spot immediately on getting the information that the deceased was being assaulted appears remote. More so, because the autopsy report does not disclose presence of injuries over the body except around the neck. Had there been injury marks all over the body the possibility of the victim raising an alarm and inviting attention of neighbours would have been there. Since only two abraded contusions have been found around her neck, the probability of her murder going unnoticed is quite high. Consequently, the possibility of her neighbours noticing her cries and informing others appears remote. Further, both PW-1 and PW-2 have admitted during their cross-examination that the culprit had escaped by jumping over the back wall of the house. If that was so, the site plan prepared at the behest of PW-1 and PW-2 was at complete variance with their statement inasmuch as it discloses the accused escaping from the front of the house by using the same staircase which the witnesses used to go to the upper floor of the house to notice the deceased lying dead on a cot in the hut. These circumstances seriously dent the credibility of the statement of PW-1 and PW-2 that they noticed the accused exiting the hut wherein, immediately after his exit, the deceased was found dead there.

25. Now, we shall examine whether, on account of joint living, a presumption could be drawn against the appellant. In this regard we notice that appellant was the Jeth of the deceased. According to PW-2 the appellant resided in the same house. The appellant in his statement under Section 313 CrPC has denied joint living. But, during cross-examination of PW-2, no specific suggestion was put to PW-2 that the appellant resided elsewhere at some other place. Therefore, assuming that the appellant and the deceased resided in different rooms of the same house, we would have to examine whether there could be a presumption drawn against him with the aid of section 106 of the Evidence Act even though the appellant denied his presence in the house at that time.

26. In **Shivaji Chintappa Patil Vs. state of Maharashtra, (2021) 5 SCC 626**, it was

observed that *"Section 106 of the evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. It was observed that 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 was further observed that 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".*

27. In the instant case, the appellant has denied his presence in the house at the relevant time. The deposition of PW-1 and PW-2, who allegedly saw him exiting the hut, have not been found trustworthy by us. Other than that, there is no cogent evidence about the presence of the appellant in the house at the relevant time. Moreover, it is a case of day-time occurrence. Ordinarily, during day-time men-folk are out in connection with their daily chores. The appellant has claimed that he was not present in the house but was watering his fields. Thus, in absence of cogent evidence that the appellant was in the house/hut at the relevant time, provisions of Section 106 of the Evidence Act can not be pressed into service to put onus on the accused to explain as to under what circumstances, the deceased suffered ante-mortem injuries.

28. In addition to above, we notice that the police station where the report was lodged is at a short distance of five kilometres from the spot. The FIR though is within 4 and ½ hours of the alleged occurrence but that time is sufficient to deliberate and implicate a person on the basis of suspicion. In ordinary circumstances, this delay was not much but here we are dealing with a case based on circumstantial evidence where, firstly, the incriminating circumstances have not been proved beyond reasonable doubt and, secondly, the person who provided information to PW-1 and PW-2, namely, Damodar, about deceased being assaulted by the accused appellant has not been examined. The sum total of our analysis is that the prosecution evidence does not inspire our confidence and the possibility of involvement of some one else in the crime is not ruled out.

29. In view of the analysis and discussion above, we are of the view that the prosecution has failed to prove the charge against the appellant beyond the pale of doubt therefore, this is a fit case where the accused-appellant is entitled to the benefit of doubt. Consequently, the appeal is **allowed**. The judgment and order of the trial court convicting and sentencing the appellant is set aside. The accused-appellant is acquitted of the charge for which he has been tried and convicted. It is reported that the appellant is in jail. He shall be set at liberty forthwith, unless warranted in any other case subject to compliance of provisions of Section 437-A CrPC to the satisfaction of the trial court.

30. Let a copy of this order be forwarded to the court below along with the record for information and compliance.

(2022) 8 ILRA 690
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 1459 of 2009

Kalloo @ Kalyan Singh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Sri Neeraj Mishra, Sri A.N. Mishra, Sri Amit Kumar Gaur, Sri Ved Prakash Ojha, Sri Ashwani Kumar Ojha

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Sections 201 & 302 - The Code of Criminal Procedure, 1973 - Sections 161 & 313 - appeal against conviction -when conviction can be recorded on the basis of evidence circumstantial in nature - circumstances from which conclusion of guilt is to be drawn should be fully established - facts so established should be consistent only with the hypothesis of the guilt of the accused - circumstances should be of a conclusive nature and tendency - exclude every possible hypothesis except the one to be proved - 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 - must show that in all human probability the act must have been done by the accused.(Para -32)

Deceased found dead in her own house - killed during night hours - appellant husband of deceased - presence of the appellant in the house would be presumed unless proved otherwise -Trial court convicted and sentenced appellant – hence appeal.**(Para - 26,31)**

(B) Evidence Law - Indian Evidence Act, 1872 - Section 106 - in absence of statutory exception to the contrary, the ordinary rule in a criminal trial is that the burden lies on the prosecution to prove the guilt of the accused - burden is not diluted by the rule of evidence contained in section 106 of the Evidence Act.(Para - 40)

HELD:-Prosecution failed to lead evidence that appellant was present in the house at the time when the deceased was killed. No general presumption regarding appellant's presence in the house can be drawn as according to the prosecution own witness (PW-13), who is the son of the deceased, he and the appellant had left to watch Ramleela. Incriminating circumstances on which trial court has based the order of conviction not proved beyond reasonable doubt. Benefit of doubt goes to the accused-appellant. Judgment and order convicting and sentencing appellant set aside. Accused-appellant acquitted of charge. **(Para - 49)**

Criminal Appeal allowed. (E-7)

List of Cases cited:-

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

2. Shatrughna Baban Meshram Vs St. of Maha., (2021) 1 SCC 596

3. Shivaji Sahabrao Bobade & anr. Vs St. of Maha., (1973) 2 SCC 793

4. Devi Lal Vs St. of Raj., (2019) 19 SCC 447

5. Shivaji Chintappa Patil Vs St. of Maha., (2021) 5 SCC 626

6. Satye Singh & ors. Vs St. of Uttarakhand, (2022) 5 SCC 438

7. Nagendra Sah Vs St. of Bihar, (2021) 10 SCC 725

8. Rajasthan Vs Kashi Ram, (2006) 12 SCC 254

9. Muniappan Vs St. of T.N., (2010) 9 SCC 567

10. Rajesh Yadav & anr. Vs St. of U.P., 2022 SCC OnLine SC 150

11. Harkirat Singh Vs St. of Punj., (1997) 11 SCC 215

12. St. of Bom. Vs Rusy Mistry, AIR 1960 SC 391

13. Sheikh Hasib @ Tabard Vs St. of Bihar, (1972) 4 SCC 773

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. This appeal is against the judgment and order dated 04.03.2009/06.03.2009 passed by the Additional Sessions Judge, Lalitpur in S.T. No.15 of 2005, arising out of case crime no.382 of 2004, P.S. Bar, district Lalitpur, whereby the appellant Kalloo @ Kalyan Singh has been convicted and sentenced as follows: imprisonment for life as well as fine of Rs.10,000/-, coupled with a default sentence of 2 year, under Section 302 IPC; 3 years R.I. as well as fine of Rs.5,000/-, coupled with default sentence of 1 year, under Section 201 IPC. Both sentences to run concurrently.

INTRODUCTORY FACTS

2. On 11.11.2004, at 5.10 a.m., the appellant gave a written report (Ex. Ka-4) at P.S. Bar, District Lalitpur, which gave rise to Case Crime No.382 of 2004 vide GD report no.6 (Ex. Ka-3) of which Chik FIR (Ex. Ka-2) was prepared by PW-11 at the specified date and time above. In the written report (Ex. Ka-4) the appellant alleged that last night (i.e. night of 10/11.11.2004), at about 10 pm, he and his two sons, namely, Harpal Singh (elder son - PW-13) and Tilak Singh (younger son- not examined), had gone to watch Ramleela. When they returned back, they found informant's (i.e. appellant's) wife (Smt. Babboo Raja, aged 32 years), dead with injuries on her face and Rs.27,000/- cash, one gold mangalsutra, a silver anklet and half Kardhani (waist band) missing. Alleging that due to fear the informant did not come to report in the night, the written report, which was scribed by Hariram Upadhyay (PW-5), was submitted.

3. After registration of the first information report, inquest was conducted at the spot and was completed by 9 am on 11.11.2004. Out of the five inquest witnesses, two have been examined, namely, Hariram Upadhyay (PW-5) and Lakhan Lal (PW-4). On 11.11.2004 itself, the investigating officer lifted from the spot blood stained /plain earth, three broken teeth and one wood plank (weapon of assault), measuring one feet in length, 3 inch in width and 1 inch in depth, as also two earrings of yellow metal, in respect of which a seizure memo (Ex. Ka-13) was prepared.

4. Autopsy was conducted on 11.11.2004 at 3 pm by Dr. M.P. Singh (PW-10). The autopsy report notices as follows:-

Age: 32 years

External examination:

Average built body. Rigor mortis pass off from neck present in upper and lower extremities. Eyes and mouth half open. Bleeding from left ear present.

Ante-mortem injuries:

(i) Swelling over left side of scalp 10 cm x 8 cm in size, underneath partial, temporal and occipital bone found fractured.

(ii) Swelling over left side of face 1 cm x 8 cm underlying mandible bone found fractured.

(iii) Multiple linear abrasions in an area of 8 cm x 5 cm over front of neck, right side upper part of neck (sic).

(iv) Swelling 14 cm x 12 cm at lower part right side of chest.

(v) Abrasion 3 cm x 1.5 cm at right (sic) orbital margin.

Internal examination:

(1) Neck:-

(2) Skull:- Left parital, temporal and occipital bone found fractured. Membranes:- found ruptured on left side; Brain:- blood present over the surface of brain at left side.

(2) Thorax:- fifth to ninth ribs of right side and sixth to ninth ribs of left side found fractured. Larynx:- NAD; Trachea:- NAD; Lungs:-NAD; Pericardium:- NAD; Heart:- both chambers empty.

(3) Abdomen:-

Membranes- NAD; Peritoneum- NAD; Cavity filled with 1.5 liters of blood; Stomach- contains 250 gms of pasty food material; Small intestine contains chyme plus gasses; Large intestine contains faecal matter and gasses; Gall bladder found ruptured; Uterus- non gravid.

Estimated time since death: About within one day.

Cause of death: Due to shock and haemorrhage as a result of ante mortem injuries.

5. During the course of investigation, on 15.11.2004, the investigating officer (Ram Naresh Tiwari-PW-12), on the basis of information received, left the police station at 23.40 hours, vide GD Report No.32, to visit the house of the appellant. The appellant was interrogated. Upon interrogation, allegedly, the appellant confessed his guilt in the presence of witnesses Ram Singh Thakur (PW-9) and Darau Kushwaha (PW-7). On the said confessional statement and at the pointing out of the appellant, from the bushes near the house of the appellant, a blood stained stone, alleged to have been used to assault the deceased, was recovered at 07.50 am on 16.11.2004 of which a seizure memo (Ex. Ka-1) was prepared, which was witnessed by PW-9 and PW-7.

6. After completing the investigation, charge sheet (Ex. Ka-15) was submitted against the appellant under Section 302 IPC on 03.12.2004. Whereafter, a supplementary charge sheet (Ex. Ka-16) was also submitted under Section 201 IPC on 09.01.2005. Cognizance was taken on the charge sheet and the case was committed to the court of session.

7. On 21.01.2006, the trial court charged the appellant for committing murder of his wife on 10/11.11.2004, between 10 pm and 1 am, punishable under section 302 IPC, and for removing evidence of murder as well as lodging a false report, punishable under section 201 IPC. The appellant pleaded not guilty and claimed trial.

PROSECUTION EVIDENCE

8. During the course of trial, the prosecution examined 13 witnesses. Their testimony, in brief, is as follows:-

9. PW-1 - Vishwanath. He stated that he knows the accused; accused's wife was killed about a year ago; that he does not know the time of her death; that on the day when accused's wife was killed, the accused came to PW-1's house and informed PW-1 that his wife has been murdered by unknown persons and money and jewellery have been looted; and that after getting information from the accused, PW-1, Hariram Updhyay (PW-5), Bal

Chand, Kartar and Chaturbhuj etc. went to the house of the accused and noticed that his wife is dead with blood splattered all over her. The accused did not open any box to show it to him.

The witness was declared hostile by the prosecution and permission sought to cross him by the prosecution was allowed.

During cross examination by the prosecution, PW-1 admitted that the accused did not show an open box to him. He also stated that the inquest report was not prepared in his presence. The body was also not sealed in his presence. He denied the suggestion that he had informed the I.O. regarding his suspicion that the appellant had killed his own wife. He also denied the suggestion that from the box no tell tale signs of theft could be gathered. PW-1, however, accepted that he had informed the I.O. about receipt of information from the accused about the occurrence as also that they had visited the house of the accused on receipt of the information to notice the dead body of appellant's wife. PW-1 denied the suggestion that he gave a statement to the I.O. that the accused had given a false report to avoid payment of money. On being confronted with his statement under Section 161 CrPC, PW-1 denied having made any such statement.

10. PW-2 - Ramakant Dubey. He stated that the accused had not come to fetch him to go to his house after the death of his wife. Rather, when the police had arrived at the house of the accused, PW-2 and other villagers visited the house of the accused. He stated that in his presence, the accused never confessed his guilt to the police and had never stated that he has killed his wife.

At this stage, witness was declared hostile by the prosecution and permission sought to cross him by the prosecution was allowed.

During cross examination by the prosecution, PW-2 sated that Kalyan Singh had not given him money (Rs. 4,700/-) to be kept by him. He denied the suggestion that the money was given by Kalyan Singh (the accused) to him as he apprehended that the police would interrogate him and if the money is found with him, his report would be found false. At this stage, the witness was confronted with his statement recorded under Section 161 CrPC. The witness denied having given any such statement.

11. **PW-3 - Rajendra Singh.** *(Note: This witness was set up by the prosecution to show conduct of the appellant and prove motive for the crime).* He stated that he knows Kalyan Singh (the accused). He also knows Omwati, daughter of Munna Dhimar. Kalyan Singh had told him that he likes the daughter of Munna Dhimar but his wife (i.e the deceased) objects to his liking for her therefore, he has to remove the obstacle. He stated that soon after the said disclosure, the wife of the accused was killed. He stated that he heard in the village that Kalyan Singh had killed his wife.

During cross examination, he stated that in respect of the incident his statement was recorded by the I.O. wherein he had stated that the appellant used to have drinks with him and when he used to get drunk, he used to tell about quarrels with his wife (the deceased). This kind of information was given two or three times and was given two or three days before. At this stage, the witness was confronted with following omissions in his statement under

Section 161 CrPC: (a) that he knew Omwati, daughter of Munna Dhimar; (b) that 2-3 days before the incident, he was informed by the accused that his wife is an obstacle and had to be removed; and (c) that he heard in the village that Kalyan Singh had killed his wife. PW-3 also admitted in his cross examination that the police had booked him for possessing a bomb in which he had been put in jail for a month and that case is pending. He also admitted that he was implicated in a case of theft of a hen in which he has been acquitted. He denied the suggestion that police had arrested him in connection with murder of appellant's wife. He admitted that he is a first cousin of the accused and stays separate. He denied knowledge about his father being implicated in a dacoity case. He denied the suggestion that the relationship between him and the accused is not cordial and they are not on visiting terms. He, however, admitted that after the murder of Kalyan Singh's wife, he is not on visiting terms with the accused. He stated that Kalyan used to have liquor with him. He denied the suggestion that Kalyan Singh never told him that he has to remove the obstacle, namely, his wife. He also denied the suggestion that the relationship between the family of Kalyan and his family had been sour and that they were not in talking terms. He denied the suggestion that he was arrested in connection with murder of appellant's wife and the police took Rs.3,000/- to release him. He also denied the suggestion that he asked Kalyan for Rs.3,000/- and as Kalyan refused to pay him money, he has falsely implicated him.

12. **PW-4- Lakhan Lal.** He is a witness of the inquest. He stated that at the time of inquest he saw the body of the deceased. At the spot two broken teeth of the deceased and a blood stained stone were lying there. He stated that the body was sealed in his presence and that he had signed the inquest report. The relevant portion of his statement is extracted below:-

''मैंने मुतिका की लाश को देखा था तथा मृतिका के दो दांत टूटे पड़े थे एक खून आलूदा पत्थर भी वहां पर पड़ा था दरोगा जी ने पंचनामा मेरे सामने भरा था तथा लाश को मेरे सामने शील किया गया था। पंचायतनामा पर मैने हस्ताक्षर किये थे। पंचनामा के समय हरीराम परस राम यादव अनुराग व सीताराम आदि लोग उपस्थित थे। पुलिस ने पत्थर मेरे सामने कब्जे में लिया था।''

Note: Neither the prosecution nor the defence cross examined this witness even though he stated that blood-stained stone was noticed at the spot. He was also not declared hostile by the prosecution.

13. **PW-5- Hariram Upadhyay**. He is the scribe of the written report and is an inquest witness. PW-5 stated that the night in which Kalyan's wife was killed, Kalyan had come to his house at about 1 am in the night and had told him that his wife is lying dead. PW-5 stated that Kalyan informed him that some unknown person has killed his wife. PW-5 stated that upon receiving the information, he and Vishwanath along with the appellant went to appellant's house to notice that his wife was lying dead, her broken teeth and earrings were lying there along with a blood-stained stone. PW-5 stated that in the night itself, he went with the appellant to the police station to lodge the report, which was dictated to him by Kalyan. After the report was lodged, the police had arrived at the spot, the inquest was conducted and the body was sealed. He signed the inquest report as a witness.

Note*: Neither the prosecution nor the defence cross examined this witness even though he stated that blood-stained*

stone was noticed at the spot. He was also not declared hostile by the prosecution.

14. **PW-6- Raoraja**. (Prosecution examined him as a witness of an extra judicial confession). PW-6 stated that 5-6 days after the death of appellant's wife, appellant had met him and informed him that the police is suspecting him. Appellant requested him to tell the Pradhan to correctly inform the I.O. PW-6 stated that the accused Kalyan never confessed his guilt.

At this stage, witness was declared hostile by the prosecution and permission sought to cross him by the prosecution was allowed.

During cross examination at the instance of the prosecution, the witness was confronted with his statement recorded under Section 161 CrPC. He denied that he gave any such statement. He stated that he had informed the I.O. only this much that Kalyan Singh (the appellant) had told him that the police was suspecting him. He denied the suggestion that Kalyan Singh (i.e. the appellant) had made a confession before him. He also denied the suggestion that he is telling lies only to save Kalyan Singh as he has colluded with him.

During cross examination at the instance of defence, PW-6 stated that Kalyan Singh had a talk with him only after he was arrested and not before.

15. **PW-7- Darau.** (Prosecution examined him as a witness of confessional disclosure/ recovery of stone). He stated that no confessional disclosure was made by Kalyan Singh in his presence. He stated that the investigating officer was carrying the stone with him and that the stone was not recovered at the instance of Kalyan (i.e. the appellant).

At this stage, witness was declared hostile by the prosecution and permission sought to cross him by the prosecution was allowed.

During cross examination at the instance of the prosecution, PW-7 denied the suggestion that he is telling lies because of fear of Thakurs of the village. On being confronted with the statement recorded under Section 161 CrPC, he denied having given any such statement. He also denied the suggestion that he was threatened by the accused therefore he is telling lies.

16. **PW-8- Nihal Singh.** *(Prosecution examined him as a witness of extra judicial confession).* PW-8, however, denied that any confession was made by the accused to him. Rather, the accused never met him after the incident. He specifically stated that the accused made no confession before him.

At this stage, witness was declared hostile by the prosecution and permission sought to cross him by the prosecution was allowed.

During cross examination at the instance of the prosecution, the witness was confronted with his statement recorded under Section 161 CrPC. He denied having made any such statement. He also denied the suggestion that he is telling lies because he is of the same caste as is the accused.

17. **PW-9- Ram Singh.** (*Prosecution examined him as a witness of disclosure/ recovery of blood-stained stone).* He stated that when Kalyan Singh (i.e. the appellant) was arrested he was not there. In his

presence Kalyan Singh did not take out the stone to hand it over to the police. He, however, admitted his signature on the seizure memo /Fard Baramdagi (Ex. Ka-1).

At this stage, witness was declared hostile by the prosecution and permission sought to cross him by the prosecution was allowed.

During cross examination at the instance of the prosecution, the witness though admitted his signature on the fard/seizure memo but stated that such recovery was not made in his presence.

To the Court - The witness informed the Court -- that the police had got his and Darau's signature simultaneously on the memo; that he knew that Kalyan Singh is an accused for the murder of his wife and that he has been arrested 4-5 days after the death of his wife; and that he never made a complaint that Kalyan Singh has been falsely implicated or that his and Darau's signatures on the memo were obtained by force.

During cross examination by the defence, PW-9 stated -- that his signature on the seizure memo was obtained at the police station; that the seizure memo was already written when he had put his signature; that the seizure memo was not prepared in his presence; and that Kalyan Singh's signature was not obtained on the seizure memo in his presence.

18. **PW-10 - Dr. M.P. Singh** - Autopsy Surgeon. He proved the autopsy report and its contents noticed above. The autopsy report was marked Ex. Ka-2. He accepted the possibility of death of the deceased on 11.11.2004 at about 10 pm. He also accepted the possibility of the injuries noticed on the body being inflicted by use of a stone.

During cross examination by the defence, PW-10 stated that injuries 3 and 5 could be a result of friction from a rough surface. Injuries 1 and 2 could be a result of the head hitting a hard surface and might be on account of a fall. He also accepted the possibility that in such a situation laceration may be noticed. He stated that his estimate with regard to the time of death is merely an estimate as he cannot give a precise time as to when it occurred. He denied the suggestion that he did not properly conduct the autopsy.

19. **PW-11- Constable B.L. Pal.** He proved the receipt of written report (Ex. Ka-4), preparation of the chik FIR (Ex. Ka-2) and GD entry (Ex. Ka-3) in respect thereof.

During cross examination by the defence, PW-11 stated that the written report was not written in his presence; that besides the accused-appellant (i.e. the informant), 3-4 persons had come to lodge the report.

20. **PW-12 - Ram Naresh Tiwari (Investigating Officer)**. He proved various stages of investigation i.e. inquest, preparation of inquest report, sealing of the body, preparation of documents relating to autopsy, lifting of blood stained earth/plain earth, broken teeth and wooden plank from the spot, preparation of site plan and the documents prepared in respect thereof were exhibited. PW-12 stated that during the course of investigation he recorded the statement of persons conversant with facts of the case. On 12.11.2004, during

investigation, he sensed the involvement of the informant in the crime. On 13.11.2004, he recorded the statement of Munna Dhimar (not examined), who stated that his daughter Omwati (not examined) had relations with the accused-appellant. The statement of Omwati was recorded. She admitted having love relations with the accused-appellant. PW-12 stated that on 14.11.2004 he got information that Kalyan's wife has been killed by someone of her family. He stated that on 15.11.2004, during investigation, he recorded statement of Nihal Singh (PW-8) and Rao Raja (PW-6), who stated that Kalyan alias Kalloo (i.e. the appellant) had come and had confessed his guilt and requested them to save him. He stated that after the above information, on 16.11.2004, he again interrogated the informant who confessed his guilt and made a disclosure leading to recovery of the stone. He stated that on that disclosure and at the pointing of the appellant, the recovery was made of which recovery memo (Ex. Ka-1) was prepared. Site plan of the place from where the recovery was made was also prepared, which was marked Ex. Ka-14. He stated that after completing the investigation, he submitted charge sheet (Ex. Ka-15) and a supplementary charge sheet (Ex. Ka-16). He produced the recovered articles, namely, the stone (Ex-1), plain earth (Ex-2), blood stained earth (Ex-3), wooden plank (Ex-4), two broken teeth (Ex-5) and metal ear tops (Ex-6).

During cross examination, PW-12 admitted that Rajendra Singh (PW-3) had not informed him (PW-12)-- that he knew Munna Dhimar's daughter Omwati from before or that the accused-appellant's wife was killed just 2-3 days after the accused-appellant had informed him (Rajendra Singh) that he has to remove the obstacle in his relationship with Munna Dhimar's daughter. PW-12 also admitted that Rajendra Singh (PW-3) never informed him that he had heard in the village that the accused-appellant had killed his wife. In respect of criminal antecedents of PW-3, PW-12 stated that Rajendra Singh (PW-3) did not commit any offence in his presence. If Rajendra Singh had criminal antecedents, he was not aware. PW-12 also stated that he had not recorded the statement of neighbours while preparing the site plan. He stated that in the site plan the indication of the direction from where unknown accused entered the house of the deceased has been disclosed at the instructions of the appellant. He stated that the stone recovered during investigation had blood stains but he had not scraped the stone. PW-12 stated that the stone was not found kept in a concealed/closed place. PW-12 denied the suggestion that he did not properly conduct the investigation and that under pressure from higher authorities submitted charge sheet to save his own skin.

21. **PW-13 - Harpal Singh**. He is son of the accused -appellant and the deceased. He stated that on the day when his mother was killed, Ramleela was being performed in the village at a distance of about 200 paces from his house. He, his younger brother Tilak and his father (the appellant) went together to witness Ramleela at about 7.30 pm. They witnessed Ramleela till 12 midnight. While they were witnessing Ramleela, neither he, nor his father, left Ramleela to go to the house, either to have water or food, because they had gone to witness Ramleela after having their dinner. He stated that in the house, his mother and his youngest brother, who was a year old, were there. PW-13 stated that after witnessing Ramleela, he came back with his father to their house. At that time, he

noticed the door of the house shut. When they had left the house the door was not shut. When they made a call for the deceased (i.e. PW-13's mother) no response came. When they opened the door to enter the house, they found blood oozing from his mother's head.

At this stage, witness was declared hostile by the prosecution and permission sought to cross him by the prosecution was allowed.

During cross examination by the prosecution, PW-13 denied the suggestion that he and his brother went to witness Ramleela at 8 pm, whereas his father came to witness Ramleela between 10 and 11 pm. He stated that he, his father (the accused) and his brother Tilak all went together and when they went to visit Ramleela, his mother and youngest brother were there in the house. He stated that the I.O. had not recorded his statement. How the I.O. recorded his statement under Section 161 CrPC is not known to him. He denied the suggestion that he stated before the I.O. that he and his brother went to witness Ramleela at 8 pm, whereas his father came to witness Ramleela between 10 and 11 pm. He denied the suggestion that his father was a liquor addict and that his father and mother used to have fights. He stated that when they reached home, younger brother was sleeping and mother (the deceased) was lying in the courtyard. He stated that whatever jewellery her mother was wearing were there on her body. He also stated that none of the locks of the house were broken and the box was also not broken. He stated that upon seeing his mother's body, his father (the accused) went to call the villagers. He stated that as his mother was already dead, no effort was made to take her to the hospital. At this stage, the witness was confronted with his statement recorded under Section 161 CrPC. He denied having made any such statement.

During cross examination by the defence, PW-13 stated that at the time when his mother died he was aged 11 years. He stated that villagers were called and they had seen his mother. He also stated that his father had not disclosed to him as to in which room money was kept. He stated that his house was a single floor house having three rooms. He reiterated that when they left the house to watch Ramleela, his mother was alive; and that while watching Ramleela he was all throughout with his father.

22. In addition to the evidence noticed above, a Serologist report, dated 26.10.2005, obtained from U.P. Forensic Laboratory Agra was produced which indicated that the blood found present on the stone was of the same group as found on the clothes worn by the deceased at the time of her death.

Statement of the appellant under Section 313 CrPC

23. The incriminating circumstances appearing in the prosecution evidence were put to the appellant for recording his statement under Section 313 CrPC. The appellant denied the incriminating circumstances and claimed that there was no recovery at his instance. He however admitted that inquest report was prepared. But, claimed that thereafter, the entire investigation was bogus and a false charge sheet has been submitted. The accused stated that he would like to produce defence evidence. But no defence witness was produced. Thereafter, another

statement, after PW-13's statement, was recorded. With reference to the statement of PW-13, the appellant stated that he does not wish to lead any evidence.

24. Interestingly, there is yet another additional statement of the accused recorded under Section 313 CrPC in which the accused-appellant stated that on 11.11.2004 he gave a report at the police station Bar in respect of murder of his wife and robbery against unknown person. In this statement, he accepted that the written report (Ex. Ka-4) bears his thumb impression.

TRIAL COURT FINDING

25. The trial court held the following circumstances proved: (i) that in the night of the incident the accused-appellant was there in his house at 10 pm i.e. the probable time when his wife got killed; (ii) that the accused-appellant gave a false report that Rs.27,000/- (cash) and jewellery articles were looted, inasmuch as, he could not prove that there was a theft or that he showed to the witnesses, including PW-1 or PW-2, a broken box, etc reflecting signs of theft; (iii) giving a false explanation is an indication of appellant's complicity in the crime; (iv) that on the pointing out of the appellant, the weapon of assault (stone) was recovered which, according to serologist report, carried blood of the same group as that of the deceased; and (v) that the appellant had illicit relations with the daughter of Munna Dhimar, namely, Omwati, and three days before the incident he told PW-3 that he had to remove the obstacle i.e. the deceased in his relationship with Omwati.

26. The trial court found the above circumstances forming a chain so complete that indicated conclusively that in all human probability it was the appellant and no body else who committed the murder of his wife. The trial court thus convicted and sentenced the appellant, as above.

27. We have heard Sri Ashwani Kumar Ojha, holding brief of Sri Ved Prakash Ojha, for the appellant; Sri J.K. Upadhyay, learned AGA, for the State; and have perused the record.

Submissions of the learned counsel for the appellant

28. The learned counsel for the appellant submitted that the trial court failed to notice that there was no evidence that at the time of occurrence the appellant was in the house with his wife. Rather, PW-13, the son of the appellant and the deceased, had deposed that the appellant, PW-13 and PW-13's younger brother all had gone to watch Ramleela at about 8 pm and when they had left the house, PW-13's mother i.e. the deceased was alive. Further, PW-13 proved that the accused-appellant was throughout with PW-13 watching Ramleela and returned home together to notice that PW-13's mother has been killed. It was urged that PW-13 is a prosecution witness and even though he was declared hostile, his testimony is not wiped out. It was urged that there was no cogent evidence in respect of motive for the crime because no reliable evidence is there on record to prove that the appellant and Omwati i.e. daughter of Munna Dhimar had illicit relations /love affairs. The only witness examined in that regard is PW-3 who, though, stated in his examination-in-chief that the deceased was killed soon after the appellant disclosed to him that he likes Munna Dhimar's daughter and his wife (i.e. the deceased) objects to it, which

obstacle the appellant had to remove, but, this statement of PW-3 was an improvement over his statement recorded under Section 161 CrPC wherein he made no disclosure that the appellant had told him that he has to remove the obstacle and that 2-3 days thereafter appellant's wife died. It was submitted that there is no reliable evidence in respect of the motive. Further, PW-3 is not a trustworthy witness because he was facing prosecution in other matters and suggestion was given to him that the police had pressurised him to depose. Furthermore, suggestion was there that the police had arrested PW-3 as a suspect in the murder of appellant's wife and, therefore, to save himself he became a witness against the appellant. In addition to above, suggestions were given to this witness that his relations with the appellant were not cordial.

29. Learned counsel for the appellant next submitted that the circumstance of recovery of stone has not been proved beyond reasonable doubt, inasmuch as, the witnesses to the recovery have been declared hostile and, otherwise also, the inquest witnesses PW-4 and PW-5 have stated that they had noticed the stone at the spot at the time of inquest. Moreover, recovery of that stone was from an open place. Further, it does not appeal to logic as to why the appellant would hide the stone, particularly, when the wooden plank which was also used for assault was left at the spot. Hence, the circumstance of recovery is not proved beyond reasonable doubt.

30. Lastly, learned counsel for the appellant submits that this is a case where the police to solve out the case has falsely implicated the appellant even though the appellant had promptly informed the villagers about the death of his wife and had reported the matter to the police. It has also been submitted that once PW-13 deposed before the court that the appellant had left home with him to watch Ramleela and when they left, his mother was alive; and, thereafter, his father was throughout with him watching Ramleela; and when they returned back, after watching Ramleela, his mother was found dead, there was no occasion to convict the appellant more so when the prosecution itself gave suggestion that the accused had gone to watch Ramleela later, though not with PW-13. It has been submitted that the trial court has not properly evaluated the evidence hence the judgment and order of the trial court be set aside and the appellant be acquitted of the charge for which he has been tired.

Submissions on behalf of the State

31. Sri J.K. Upadhyay, learned AGA, submitted that this is a case where the deceased was found dead in her own house. The autopsy report and the evidence clearly suggested that she was killed during night hours. As the appellant is the husband of the deceased, the presence of the appellant in the house would be presumed unless proved otherwise. The only witness, namely, PW-13, who states that the appellant was with him watching Ramleela while his mother (the deceased) was in her house, is the son of the appellant and, therefore, there is every possibility that to save his father, he may have given such a statement. Moreover, he was a prosecution witness and has been declared hostile therefore, not much reliance can be placed on his testimony. He submitted that even if it is assumed that there was no direct evidence in respect of the relationship of the appellant with Omwati but, PW-3 did disclose that the appellant has a liking for

Omwati and that the deceased is an obstacle in their relationship. This, therefore, is an adequate motive for the crime and forms part of the chain of circumstances. Further, the appellant set up a false case of robbery. There were no tell-tale signs of theft/robbery. The false report lodged by the appellant therefore forms an additional link to the chain of circumstances, indicating appellant's guilty mind. In addition to above, recovery of the stone at the instance of the appellant bearing blood of the same group as that of the deceased is a clinching circumstance which completes the chain as to leave no reasonable doubt that it is the appellant and none else who committed the crime. Even if recovery witness became hostile, the recovery has been proved by the I.O. Therefore, the trial court was justified in convicting and sentencing the appellant, as above. He, accordingly, prayed that the appeal be dismissed and the judgment and order of the trial court be affirmed.

ANALYSIS

32. Having noticed the rival submissions and the entire prosecution evidence, before we proceed to evaluate the evidence to ascertain whether on the basis of proven circumstances the prosecution has been successful in bringing home the charge, it would be useful to notice the law as to when conviction can be recorded on the basis of evidence circumstantial in nature. The apex court in the case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116,*** in paragraph 153, observed as follows:-

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793 where the following observations were made:

"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."

33. In a recent three-judge Bench decision of the Apex Court in the case of **Shatrughna Baban Meshram Vs. State of Maharashtra, (2021) 1 SCC 596**, reiterating the legal principles set out in **Sharad Birdhichand Sarda's case (supra)**, in para 42, it was observed:-

".....42. Before we deal with the second submission on sentence, it must be observed that as laid down by this Court in Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116], a case based on circumstantial evidence has to face strict scrutiny. Every circumstance from which conclusion of guilt is to be drawn must be fully established; the circumstances should be conclusive in nature and tendency; they must form a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused; and such chain of circumstances must be consistent only with the hypothesis of the guilt of the accused and must exclude every possible hypothesis except the one sought to be proved by the prosecution. The decision in Sharad Birdhichand Sarda V. State of Maharashtra [(1984) 4 SCC 116] had noted the consistent view on the point including the decision of this Court in Hanumant v. State of M.P. [1952 SCR 1091] in which a bench of three judges of this Court had ruled (AIR pp 345-46, para 10):-

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

34. 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 were also reiterated by a three-judge Bench 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."

35. Having noticed the legal principle as to when in a case based on circumstantial evidence conviction can be sustained, at this stage, it would be useful to examine as to when a lawful presumption of guilt can be drawn against the accused, in a case based on circumstantial evidence, by taking the aid of section 106 of the Evidence Act, in respect of death of his or her spouse due to injuries received in the house, where he or she resided with the other spouse. In this context, the Supreme Court, after noticing earlier decisions, in the case of Shivaji Chintappa Patil Vs. State of Maharashtra, (2021) 5 SCC 626, in paragraph 23, observed:-

"23. It could thus be seen, that ***it is well-settled that Section 106 of the Evidence Act does not directly operate against either a 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."*

36. In the case of **Satye Singh and others Vs. State of Uttarakhand, (2022) 5 SCC** 438, after analysing earlier decisions in respect of applicability of Section 106 of Evidence Act, the Supreme Court, in paragraphs 19 and 20, observed:-

"19. Applying the said principles to the facts of the present case, the Court is of the opinion that the prosecution had miserably failed to prove the entire chain of circumstances which would unerringly conclude that alleged act was committed by the accused only and none else. Reliance placed by learned advocate Mr. Mishra for the State on Section 106 of the Evidence Act is also misplaced, inasmuch as ***Section 106 is not intended to relieve the prosecution from discharging its duty to prove the guilt of the accused.***

20. In Shambu Nath Mehra vs. State of Ajmer, AIR (1956) SC 404, this court had aptly explained the scope of Section 106 of the Evidence Act in criminal trial. It was held in para 9:

"9. This lays down the general rule that in a criminal case ***the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are***

"especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. *The word "especially" stresses that. It means facts that are preeminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor [AIR 1936 PC 169] and Seneviratne v. R. [(1936) 3 All ER 36, 49]."*

37. Extending the principle further by reiterating that section 106 of the Evidence Act does not absolve the prosecution to prove the guilt of the accused, it was observed that in a case based on circumstantial evidence mere falsity of defence is not sufficient to record conviction unless the chain of circumstances has been established by the prosecution. The relevant observations in that regard can be found in paragraph 25 of the judgment of the Apex Court in the case of **Shivaji Chintappa Patil (supra),** which is extracted below:-

"25. Another circumstance relied upon by the prosecution is, that the appellant failed to give any explanation in his statement under Section 313 Cr.P.C. ***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 as a link to complete the chain****. Reference in this respect could be made to the judgment of this Court in Sharad Birdhichand Sarda (supra)."*

38. Reiterating the above principle, in **Nagendra Sah Vs. State of Bihar (2021) 10 SCC 725,** in paragraphs 22 and 23 of the judgment, Apex Court held:-

"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, ***if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."***

39. In an earlier decision in the case of ***Rajasthan Vs. Kashi Ram, (2006) 12***

SCC 254, the Supreme Court, in paragraph 26 of the judgment, had clarified the law with regard to the provisions of Section 106 of the Evidence Act in the following words:-

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

40. The legal principle deducible from the decisions noticed above is that in absence of statutory exception to the contrary, the ordinary rule in a criminal trial is that the burden lies on the prosecution to prove the guilt of the accused. This burden is not diluted by the rule of evidence contained in section 106 of the Evidence Act. It is only when the facts proved by the evidence give rise to a reasonable inference of guilt of the accused unless the same is rebutted, and such rebuttal can be by proof of some fact(s) which can only be within the special knowledge of the accused, the court can take the aid of section 106 of the Evidence Act and take accused's failure in adducing a cogent explanation as an additional link to the chain of circumstances to record conviction. But if the proven circumstances by themselves do not indicate that in all human probability it is the accused who has committed the crime and exclude all reasonable hypotheses consistent with his innocence, it would not be lawful for the court to absolve the prosecution of its burden to prove the guilt and, by taking recourse to the provisions of section 106 of the Evidence Act, shift the onus on the accused to prove his innocence. Needless to add that it is a matter of appreciation of evidence as to when recourse to the provisions of section 106 of the Evidence Act can be had. Much would depend on facts of the case.

41. Bearing in mind the legal principles noticed above, we would first examine whether the incriminating circumstances relied by the prosecution have been proved beyond reasonable doubt. If yes, whether they form a chain so complete as to indicate that in all human probability it is the appellant who has committed the crime and exclude all other reasonable hypotheses consistent with his innocence.

42. In this case, the incriminating circumstances on which the trial court based the order of conviction are as follows:-

Circumstance A - that the appellant is the husband of the deceased and in the night of the incident, at about 10 pm i.e. the probable time of the incident, the appellant was present in his house where the deceased was found dead with ante mortem injuries, whereas, appellant's children including PW-13 had gone to visit Ramleela;

Circumstance B - that the appellant made a false report that his wife was killed by robbers who looted Rs.27,000/- cash, and jewellery articles;

Circumstance C - that the appellant had illicit relations with Munna Dhimar's daughter Omwati regarding which, three days before the incident, he informed PW-3 that the deceased was an obstacle in his relationship with Omwati and would have to be removed;

Circumstance D - that a blood stained stone was recovered on the disclosure/ pointing out of the appellant and the serologist report confirmed that it bore blood of the same group as found on the clothes of the deceased worn by her at the time of her death.

CIRCUMSTANCE - A

43. In so far as the appellant being husband of the deceased and the deceased residing with the appellant in the same house where she was found dead, with injuries, are concerned, the prosecution has been successful in proving those facts by leading evidence already noticed above. In fact, the appellant does not dispute those facts. The dispute is on two counts: (a) with regard to the presence of the appellant in the house when the incident occurred; and (b) with regard to the time when the incident occurred. With regard to the presence of the appellant in the house at 10 pm, we do not find any substantive evidence. PW-1 and PW-5 only state that in the night they were informed by the appellant that somebody has killed his wife. They do not state as to when she was killed. PW-1 does not even state as to at what time, the appellant informed him about appellant's wife's death. PW-5, who is the scribe of the written report, however, stated that the appellant informed him about the incident at 1.00 am in the night. PW-5 does not state that the appellant told him that he had left his house at 10 pm. and on return found his wife dead. PW-5, however, accepted that the appellant had got the report written from him. The prosecution witnesses who have been examined during the course of trial have not stated that they have seen the appellant in the house at 10 pm. There is virtually no evidence that the appellant was seen at 10 pm in the house with his wife. Rather, the evidence of PW-13, who is the son of the appellant and the deceased, is that the appellant, PW-13 and PW-13's younger brother had gone to watch Ramleela at 7.30 pm and that he, his father and his younger brother were there at Ramleela continuously till 12 midnight. Though, the prosecution declared him hostile and suggested to him that he and his younger brother had arrived at the Ramleela by 8 pm whereas the accused-appellant arrived later, between 10 and 11 pm, but this witness stood firm and refuted any such suggestion and claimed that his father (the appellant) had gone with him to watch Ramleela and was there with him till they

returned to their house to notice the deceased dead. No doubt, this witness has been declared hostile but it is well settled that a hostile witness testimony is not washed off the record. It can be relied upon by the prosecution as well as defence to support their respective plea to the extent found dependable.

44. In **C. Muniappan v. State of T.N., (2010) 9 SCC 567**, it was observed by the Supreme Court, in paragraphs 81, 82 and 83 of the judgment:

81. It is settled legal proposition that:

.....the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found dependable on a careful scrutiny thereof."

82. In State of U.P. v. Ramesh Prasad Misra, (1996)10 SCC 360, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon.....

83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

The law noticed in C. Muniappan's case (supra) has been noticed and applied by the Supreme Court in a recent decision in the case of **Rajesh Yadav and Another v. State of U.P., 2022 SCC OnLine SC 150.**

45. In light of the law noticed above, the testimony of PW-13, who is the son of the appellant and the deceased and was aged 11 years at the time of incident, appears straight forward and there appears no logical reason to disbelieve him. More so, when the prosecution itself suggested to him that PW-13 was watching Ramleela since 8.00 pm and his father (the appellant) joined him later at 10.00 p.m. In such circumstances, the prosecution itself admits that at some stage, both, father and son, were watching Ramleela in the night concerned. Thus, the only material that remains in respect of the presence of the appellant in his house at 10 pm is the statement of the appellant in the written report submitted at the police station. It is well settled that a first information report is not a substantive piece of evidence. The same can be read in evidence only to contradict or corroborate its maker when the maker is examined as a witness (**See Harkirat Singh v. State of Punjab, (1997) 11 SCC 215; State of Bombay v. Rusy Mistry, AIR 1960 SC 391; Sheikh Hasib @ Tabard v. State of Bihar, (1972) 4 SCC 773).** Notably, the appellant has not been examined as a witness and therefore the contents of the first information report cannot be read as a piece of evidence against the appellant though, the act of making the report would be admissible as a piece of conduct of the appellant. The prosecution witnesses who have been examined during the course of trial have not stated that they have seen the appellant in the house at 10 pm. There is virtually no

evidence that the appellant was seen at 10 pm in the house with his wife. Further, there is no evidence that the deceased was killed between 8.00 p.m. or 10.00 p.m. on 10.11.2004. It could be that she was killed between 10.00 p.m. and 12 minight. The autopsy surgeon can only give an estimate. He can never with precision state as to when death could have occurred. We are therefore of the view that the finding returned by the trial court that the appellant was present in his house, when his wife was killed, at about 10 pm, is based on no admissible evidence. Rather, the evidence of PW-13 is to the effect that the appellant was watching Ramleela with him from about 8 pm till about midnight when they returned to the house to find the deceased murdered.

CIRCUMSTANCE - B

46. Even if the issue as to whether the appellant made an incorrect report is decided against the appellant, the same is not a clinching circumstance as to hold the appellant guilty for murder of his wife, firstly, because if the appellant was at the Ramleela with his sons when his wife is killed, what transpires in between is not within his knowledge, in such circumstances, the first thing that comes to mind is that there may be a theft. Suggestion to report a theft may also be from the villagers who visited the house. Further, who knows, there might have been a theft though, the appellant might have failed to prove. Although, the investigating officer may have come up with a case that he could not notice tell-tale signs of robbery but that itself cannot be a ground to hold that the first information report lodged by the appellant was false to his own knowledge. Secondly, mere submission of a false report or false explanation, as we have already noticed above, by itself is not a clinching circumstance as to hold the accused guilty though it may form an additional link to the chain of circumstances already complete. We, therefore, discard this circumstance by holding that it is not of a conclusive tendency pointing towards the guilt of the appellant.

CIRCUMSTANCE - C

47. In so far as the circumstance that the appellant had illicit relations with Munna Dhimar's daughter Omwati and therefore had motive to commit the crime is concerned, there is no worthwhile evidence in proof of that circumstance. No doubt, the investigating officer has made a statement that he recorded the statement of Munna Dhimar and Omwati during the course of investigation to infer that Omwati had love relations with the accused but this information being hearsay cannot be read in evidence. Neither Munna Dhimar nor his daughter Omwati has been examined as a prosecution witness. The other evidence in this regard comes from PW-3. The credibility of PW-3 has been shattered by the defence by pointing out that he was an accused in a case relating to possession of explosive and was recently released on bail and that that case was pending; and that he was a suspect in this case and was held by the police therefore, to save himself he had become a police witness. That apart, the testimony of PW-3 is not in respect of his own knowledge about the relationship between the appellant and Munna Dhimar's daughter. Rather, it is in respect of the appellant telling him about appellant's liking for Munna Dhimar's daughter Omwati and his wife's objection to it. Importantly, PW-3's statement that soon after appellant's disclosure of his relationship and expression of desire to remove the obstacle in his relationship, the deceased was

killed, is not there in his statement recorded during investigation. Moreover, in what manner the appellant contemplated removal of the obstacle is not disclosed in PW-3's deposition. In our view, firstly, the testimony of PW-3 does not inspire our confidence and, secondly, the statement of PW-3 is not a conclusive reflection of appellant's resolve to kill his wife. Hence, this circumstance too, is discarded.

CIRCUMSTANCE - D

48. In respect of recovery of the blood stained stone, bearing blood of the same group as of the deceased, on the disclosure made by the appellant and at his pointing out is concerned, firstly, no separate disclosure statement has been made an exhibit. Secondly, the alleged recovery is from an open space i.e. the bushes near the house of the appellant. Thirdly, there is a serious doubt with regard to the disclosure as well as the recovery of the stone of which a composite seizure memo (Ex. Ka-1) was prepared. According to the seizure memo (Ex. Ka-1) disclosure was made in the presence of Ram Singh (PW-9) and Darau (PW-7). Both these witnesses have denied that such recovery was made on the pointing out of the appellant. PW-7 specifically stated that there was no disclosure made by the appellant in respect of his guilt. PW-7, rather, stated that the I.O. was carrying stone and that the stone was not recovered by Kalyan (the appellant). PW-9 states that Kalyan (appellant) was not arrested in his presence and that Kalyan did not get any stone recovered. Both these witnesses, however, admit their signature on the seizure memo. No doubt, it is not the requirement of law that a recovery can be deemed proved only when supported by a public witness, if there is any. It is well settled that a police witness may also prove the recovery. But, what restrains us from accepting this recovery is that not only the public witnesses of recovery have resiled from the prosecution case in respect of the recovery at the instance of the appellant but there are two other prosecution witnesses, who were witnesses of the inquest proceeding, namely, PW-4 (Lakhan Lal) and PW-5 (Hariram Upadhyay), who have stated that at the time of inquest they had seen the body of the deceased and had noticed a blood stained stone lying at the spot. Interestingly, the prosecution did not declare those witnesses hostile and did not cross examine them. In such circumstances, the recovery of the stone at the pointing out and on the disclosure made by the appellant becomes highly doubtful. That apart, there is another reason for us to doubt the recovery which is, that if the accused had left the other weapon of assault, namely, wooden plank, at the spot, of which seizure memo (Ex. Ka-13) was prepared on 11.11.2004, what was the logic for the accused to hide the stone used to inflict injury on the deceased, particularly, when the accused himself had reported about the murder of his wife. In such circumstances, the recovery of the stone on the disclosure made by the appellant or at his pointing out becomes highly doubtful and, therefore, in our view, the said circumstance too, is liable to be discarded. Once we doubt the recovery of the stone at the instance of the appellant, the serologist report connecting the blood group of the deceased with the blood present on the stone is of no consequence. For all the reasons recorded above, we hold that the recovery of the blood stained stone on the disclosure made by the appellant, or at his pointing out, is not proved beyond reasonable doubt.

49. The summary of our analysis is that the prosecution has failed to lead evidence that the appellant was present in the house at the time when the deceased

was killed. No general presumption regarding appellant's presence in the house can be drawn as according to the prosecution own witness (PW-13), who is the son of the deceased, he and the appellant had left to watch Ramleela. When they left the house, the deceased was alive. On their return after watching Ramleela they found deceased dead. This witness also states that the appellant was throughout with him watching Ramleela. PW-13, therefore, shatters the very foundation of the prosecution case. Moreover, this is not a case where the appellant has absconded. He reported the incident to the villagers in the night itself and, thereafter, reported the incident to the police in the wee hours of the morning. Once this is the position and as we have found the incriminating circumstances on which the trial court has based the order of conviction not proved beyond reasonable doubt, the benefit of doubt would have to go to the accused-appellant. Consequently, the appeal is allowed. The judgment and order of the trial court convicting and sentencing the appellant is set aside. The accused-appellant is acquitted of the charge for which he has been tried and convicted. The appellant is reported to be in jail. He shall be released forthwith unless wanted in any other case, subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court.

50. Let a copy of this order be forwarded to the court below along with the record for information and compliance.

(2022) 8 ILRA 711
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No.1559 of 2015
(U/S 372 Cr.P. C.)

Anang Pal Singh ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Atul Pandey

Counsel for the Opposite Parties:
Govt. Advocate, Sri Jitendra Kumar Yadav

Criminal Law - Indian Penal Code,1860 - Sections 376/511 & 506 – Minor daughter taken away by accused's wife -and she went to answer nature's call-in between accused raped her-Delayed FIR (Four Days)-no convincing explanation- no injury to victim- evidence of enmity between the parties due to the land dispute.

Appeal dismissed. (E-9)

List of Cases cited:

1. Bannareddy & ors. Vs St. of Kar. & ors.

2. Jayamma Vs St. of Kar., 2021 (6) SCC 213

3.Virendra Singh Vs St. of U.P. & ors., 2022 (3) ADJ 354 DB

4. Tulsiram Kanu Vs The State AIR 1954 SC 1

5. Balbir Singh Vs St. of Pun. AIR 1957 SC 216

6. M.G. Agarwal Vs St. of Mah. AIR 1963 SC 200

7. Khedu Mohton & Ors. Vs St. of Bih. AIR 1970 SC 66

8. Sambasivan & ors. Vs St. of Ker. (1998) 5 SCC 412

9. Bhagwan Singh & ors. Vs St. of M.P. (2002) 4 SCC 85

10. St. of Goa Vs Sanjay Thakran & anr. (2007) 3 SCC 755)

11. Chandrappa & ors. Vs St. of Kar. (2007) 4 SCC 415

12. Ghurey Lal Vs St. of U.P. (2008) 10 SCC 450

13. St. of U.P. Vs Banne alias Baijnath & ors. (2009) 4 SCC 271

14. St. of Raj. Vs Naresh @ Ram Naresh (2009) 9 SCC 368

15. Dhanapal Vs State by Public Prosecutor, Madras (2009) 10 SCC 401

16. Ramesh Babulal Doshi Vs St. of Guj. (1996) 9 SCC 225 : 1996 SCC (Cri) 972

17. Rajesh Prasad Vs St. of Bih. & anr.,(2022) 3 SCC 471

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

1. No one is present on behalf of the appellant even in the revised call of additional cause list.

2. On perusal of the order sheet, almost on all occasions appeal is listed for admission and since 2013 itself either illness slip is sent or no one is present for the appellant. Accordingly, as observed in the order dated 9.5.2022, we proceed to consider the appeal on merits with the assistance of learned AGA.

3. Present Criminal Appeal under Section 372 Cr.P.C. has been filed against the judgement and order dated 11.9.2013 passed by the Additional District & Sessions Judge, Court No. 3, District Pilibhit in Sessions Trial No. 492 of 2013 (State vs. Mukesh Singh), arising out of Case Crime No. 201 of 2012, under Sections 376/511, 506 IPC, PS Sehra Mau, North District Pilibhit.

4. Prosecution story, in brief, on 20.6.2012 minor daughter Sandhya Devi aged about 11 years of the informant Anand Pal Singh was taken away by Seema (wife of the accused Mukesh) at her residence and thereafter she went to answers nature's call. In between accused Mukesh had taken her under the chappar (shed) by threatening her to kill her and raped her. Thereafter, the victim told her mother about strangulation and she was treated in the government hospital and when she did not get well, she told her mother about the commission of rape by accused Mukesh. Thereafter, her mother went to police station on 24.6.2012 and gave a written report for taking proper action against the accused. On that basis, a first information report being Case Crime No. 201 of 2012 was lodged on 24.6.2012 under Section 376, 506 IPC

5. In support of prosecution case, PW-1 Anagpal Singh (informant), PW-2 Uma Baksh, PW-3 Surendra Singh, PW-4 Km. Sandhya Devi, PW-5 Smt. Bitto Devi, PW-6 SI Rajendra Singh, PW-7 Dr. Anjali singh were produced and examined before the Court below. Medical report of the victim is Exhibit Ka-8. The Pathologist Report dated 25.3.2012 is also on record.

6. The judgement of acquittal was passed on the ground that the prosecution version has not been supported either by the oral evidence or by the medical report. As per prosecution case, the victim aged about 11 years old was taken by the wife of Mukesh Singh (accused respondent herein) to her residence and when she had gone out to answer the nature's call, the accused respondent Mukesh Singh committed rape on

her. It was found that this story does not inspire confidence, as according to the medical report external and internal examination of the victim does not prove that any rape was committed on her. She was admittedly found minor aged about 12 years and was not having monthly cycle and her physique was not developed and there was no injury either external or internal on private parts and even the hymen was not torn and the finger test (as permissible at that time) also did not prove that rape has been committed or not. It was found that the allegation is that she was taken away by wife of the accused Mukesh on 20.6.2012, however, first information report was lodged after unexplained long delay of four days on 24.6.2012. It was also found that in her statement the victim herself had not supported the prosecution version and had submitted that she was being strangulated by accused Mukesh, therefore, she had levelled the allegation of rape against him. It was further found that she had admitted that she gave the statement as told by her mother. It was also found that there was a land dispute between the informant Anand Pal Singh and the accused Mukesh and they were not on even talking terms. Under such circumstances, it was found that the prosecution has failed to prove its case and judgement of acquittal was passed.

7. We have perused the record with the help of learned AGA.

8. In the memo of appeal, grounds to challenge the impugned judgement are that a too narrow and technical interpretation of the evidence has been taken and the same suffers from non-application of mind.

9. Before proceeding further, it would be appropriate to take note of law on the appeal against acquittal.

10. In the case of ***Bannareddy and others vs. State of Karnataka and others, (2018) 5 SCC 790,*** in paragraph 10, the Hon'ble Apex Court has considered the power and jurisdiction of the High Court while interfering in an appeal against acquittal and in paragraph 26 it has been held that "the High Court should not have reappreciated the evidence in its entirety, especially when there existed no grave infirmity in the findings of the trial Court. There exists no justification behind setting aside the order of acquittal passed by the trial Court, especially when the prosecution case suffers from several contradictions and infirmities"

11. In ***Jayamma vs. State of Karnataka,*** 2021 (6) SCC 213, the Hon'ble Supreme Court has been pleased to explain the limitations of exercise of power of scrutiny by the High Court in an appeal against against an order of acquittal passed by a Trial Court in the following words:

"The power of scrutiny exercisable by the High Court under Section 378, CrPC should not be routinely invoked where the view formed by the trial court was a "possible view'. The judgment of the trial court cannot be set aside merely because the High Court finds its own view more probable, save where the judgment of the trial court suffers from perversity or the conclusions drawn by it were impossible if there was a correct reading and analysis of the evidence on record. To say it differently, unless the High Court finds that there is complete misreading of the material evidence which has led to miscarriage of justice, the view taken by the trial court which can also possibly be a correct view, need not be interfered with. This self-restraint doctrine, of course, does not denude the High Court of its powers to

re-appreciate the evidence, including in an appeal against acquittal and arrive at a different firm finding of fact."

12. In a recent judgement of this Court in **Virendra Singh vs. State of UP and others,** 2022 (3) ADJ 354 DB, the law on the issue involved has been considered. For ready reference, paragraphs 10, 11 and 12 are quoted as under:

"10. In the case of Babu vs. State of Kerala (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179, the Hon'ble Apex Court has observed that while dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Paragraphs 12 to 19 of the aforesaid judgment are quoted as under:-

"12. This court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the Trial Court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more, the probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P. AIR 1974 SC 2165; Shambhoo Missir & Anr. v. State of Bihar AIR 1991 SC 315; Shailendra Pratap & Anr. v. State of U.P. AIR 2003 SC 1104; Narendra Singh v. State of M.P. (2004) 10 SCC 699; Budh Singh & Ors. v. State of U.P. AIR 2006 SC 2500; State of U.P. v. Ramveer Singh AIR 2007 SC 3075; S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors. AIR 2008 SC 2066; Arulvelu & Anr. Vs. State (2009) 10 SCC 206; Perla Somasekhara Reddy & Ors. v. State of A.P. (2009) 16 SCC 98; and Ram Singh alias Chhaju v. State of Himachal Pradesh (2010) 2 SCC 445).

13. In Sheo Swarup and Ors. King Emperor AIR 1934 PC 227, the Privy Council observed as under:

"...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...."

14. The aforesaid principle of law has consistently been followed by this Court. (See: Tulsiram Kanu v. The State AIR 1954 SC 1; Balbir Singh v. State of

Punjab AIR 1957 SC 216; M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200; Khedu Mohton & Ors. v. State of Bihar AIR 1970 SC 66; Sambasivan and Ors. State of Kerala (1998) 5 SCC 412; Bhagwan Singh and Ors. v. State of M.P. (2002) 4 SCC 85; and State of Goa v. Sanjay Thakran and Anr. (2007) 3 SCC 755).

15. In Chandrappa and Ors. v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under:

"(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

16. In Ghurey Lal v. State of Uttar Pradesh (2008) 10 SCC 450, this Court re-iterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh @ Ram Naresh (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that an "order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused."

18. In State of Uttar Pradesh v. Banne alias Baijnath & Ors. (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of

acquittal by the High Court. The circumstances includes:

i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

ii) The High Court's conclusions are contrary to evidence and documents on record;

iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

v) This Court must always give proper weight and consideration to the findings of the High Court;

vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.

A similar view has been reiterated by this Court in Dhanapal v. State by Public Prosecutor, Madras (2009) 10 SCC 401.

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

11. Hon'ble Apex Court in the case of Ramesh Babulal Doshi vs. State of Gujarat (1996) 9 SCC 225 : 1996 SCC (Cri) 972 has observed that while deciding appeal against acquittal, the High Court has to first record its conclusion on the question whether the approach of the trial court dealing with the evidence was patently illegal or conclusion arrived by it is wholly untenable which alone will justify interference in an order of acquittal.

12. The aforesaid judgments were taken note of with approval by Supreme Court in the case of Anwar Ali and another vs. State of Himachal Pradesh (2020) 10 SCC 166, Nagabhushan vs. State of Karnataka (2021) 5 SCC 222, and Babu (supra) in Achhar Singh vs. State of Himachal Pradesh (2021) 5 SCC 543."

13. Similar view has been reiterated by Hon'ble Apex Court in **Rajesh Prasad vs. State of Bihar and another**, (2022) 3 SCC 471.

14. On perusal of record, we find that the victim herself has not supported the prosecution version and has stated that she was taken to the police station on the same day and was also examined in the hospital on the same day. She further admitted that the land dispute is going on between her father and the accused Mukesh and they were not in talking terms and did not visit each other whereas prosecution version is that the wife of accused Mukesh had taken the victim to her residence, which is not at all convincing. Moreover, in the first information report the time when she was

taken away by her has not been mentioned, however, in the statement recorded under Section 161 Cr.P.C. the informant Anand Pal Singh had stated that the victim was taken by Seema, wife of the accused Mukesh at 4:00 o'clock, however, whether it is AM or PM has not been mentioned. On the other hand, in the cross-examination the victim had stated that she came back to her house from the house of accused Mukeh at about 7-8 AM and thereafter during day time she was taken to the police station by her parents and was got medically examined. It is not at all indisputable as to why so early in the morning at 4:00 o'clock even before day broke, how wife of accused had taken the victim to her residence and why and how the informant and mother of the victim had permitted the same, that too, when they were not on even talking terms. In her cross-examination, she had stated that she was wearing underwear and frock at the time of incident and she was wearing the same clothes when she was taken to the police station as well as to the hospital, however, the informant stated that she was wearing Salwar Suit on which he had seen blood but such clothes were not produced or recovered. The victim had further stated that her mother had told the meaning of rape and whatever she had sated her mother, had told her to state. In other words, whatever statement was made by her before the Court below was tutored by her mother. PW-5 Bitto Devi (wife of the informant) in her statement had stated that after return for 2-3 days the victim never disclosed about the commission of offence of rape on her. Formal witness PW-6 Sub-Inspector Rajendra Singh had stated that the informant told him that the clothes worn by the victim at the time of alleged rape had been washed as his daughter never disclosed about the commission of rape on her. He further stated that although he had asked for recording of statement of the victim under Section 164 Cr.P.C., however, the family members of the victim had refused to get the same done.

15. Relevant extract of Medical Examination Report (Exhibit Ka-8) of the victim conducted by Dr. Anjali Singh on 25.6.2012 at 9:35 am at District Hospital, Pilibhit is mentioned below:

*"**External Examination**:- No marks of injury present on any part of body. Ht= 134 cm, Wt= 25 kg, Teeth= 14/14. Breast are not fully developed (are small in size), Axillary and pubic hairs absent. Menasure has not yet started.*

***Internal Examination:-** No marks of injury present on the private parts. Hymen intact. Vagina does not admits even the little finger. No conjestion, no edema, no tenderness. No BPV at the time of examination. Two vaginal smear prepared, sealed and send to the pathologist of Distt Hospital Pilibhit for examination of dead and alive spermatozoa."*

16. PW-7 Dr. Anjali Singh, Medical Officer, Zila Mahila Chikitshalya had supported the medical report and in her cross-examination she clearly stated that there was no injury whatsoever on the body of the victim and on the internal examination also she did not find any swelling, pain and redish or injury and her hymen was intact and even the little finger was not entering into. She had also certified that the victim was aged about 12 years. The Pathologist Report dated 25.3.2012 is also to the effect that no living or dead spermatozoa were found in the test slide of the victim.

17. In this background, we find that admittedly there was a delayed FIR (four

days) and no convincing explanation was given for the same and and correct picture about information of commission of rape on the victim given to the parents has also not come forward as the mother in her statement stated that the victim had informed about commission of rape after 2-3 days whereas as per victim she was taken to the police station and hospital on the same day (i.e. 20.6.2012) for medical examination whereas admittedly the first information report was lodged after four days and this delay has not been explained properly so as to generate confidence regarding cause of delay in lodging the FIR. From the evidence available on record, it is clear that the victim was minor and in case had there being any rape committed on her she must have suffered some kind of injury on her body particularly oh her private parts whereas there was no such injury, which was categorically proved by the doctor who has conducted the medical examination, coupled with the fact that there is evidence of enmity between the parties due to the land dispute (situated in front of the home of the information). In such view of the matter, we find that a correct view has been taken by the court below, which does not require any interference by this Court by taking a different view.

18. Accordingly, present criminal appeal stands dismissed at the admission stage itself.

Re: Criminal Misc. Application (Leave to Appeal)

1. As already held by this Court in number of cases that leave application filed under Section 378(3) Cr.P.C. is not required in the appeal filed by the victim under Section 372 Cr.P.C. like the present appeal. A reference may be made to the order dated 4.8.2021 passed in Criminal Appeal U/S 372 Cr.P.C. No. 123 of 2021 (Rita Devi vs. State of U.P. and another). As such, the application for leave to appeal stands rejected as not maintainable and / or not required.

2. Since the office has already allotted regular number, there is no need to allot fresh regular number.

(2022) 8 ILRA 718
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.08.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No.1597 of 2022

Alam @ Mohammad Alam ...Appellant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Sri Amarjeet Singh Rakhra

Counsel for the Opposite Parties:
Sri Umesh Channdra Verma, A.G.A.

Criminal Law- National Investigation Agency Act, 2008- Section 21- Bail - No incriminating article has been found and no such material could be detected from the mobile phone of the appellant as to show his association with the terrorist or terrorist activities- T**he grave offence under Section 124-A of I.P.C. is there in chargesheet but the Hon'ble Supreme Court has put the effect of Section 124-A I.P.C. in abeyance in the case of *S.G.Vombatkere Vs Union of India, Writ Petition (C) No.682/2021.* The only evidence against the appellant which has been shown at this stage i.e. after filing of**

the chargesheet is that he paid Rs.2,25,000/- as a purchase money of car to one Mohd. Aneesh just few days ahead of the incident and he is a relative of Danish who has criminal antecedents and was involved in roits of Delhi over the CAA Protest-In regard to the above two alleged evidences, the appellant has given a *prima facie* plausible explanation- Admittedly, the chargesheet has been filed. There are 55 witnesses mentioned in the chargesheet and the trial has not commenced yet. It will take a long time in completion of the trial. The appellant is already in jail since 5.10.2020- Prima facie, there appears no complicity and involvement of the appellant with the terrorist activities or any other activity against the nation- No such allegation has been placed before us to show that the appellant shall if released on bail, terrorise the witnesses to depose in the case or there is possibility of his absconding.

As no evidence , prima facie, establishing the involvement of the appellant in any terrorist activities is present, the offence u/s 124A of the IPC has been kept in abeyance by the Hon'ble Supreme Court and the adverse circumstances against the appellant have been satisfactorily explained by him, then considering the further fact that a large number of witnesses remain to be examined and there is no likelihood of the appellant absconding or tampering the prosecution witnesses, the appellant is admitted to bail. (Para 21, 24, 25, 27, 29)

Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Asif Iqbal Tanha Vs St. of NCT of Del. : MANU/DE/1095/2021 : (2021) 3 SCC (Del) 106

2. The N.I,A, Ministry of Home Affair, G.O.I. Vs Akhil Gogoi : MANU/GH/0179/2021

3. U.O.I Vs K.A.Najeeb. : (2021) 3 SCC 713

4. Thwaha Fasal Vs U.O.I, AIR Online 2021 SC 963

5. The N.I.A Vs Zahoor Ahmad Shah Watali : (2019) 5 SCC 1.

6. Ramjhan Gani Paloni Vs N.I.A : 2022 SC 2070.

7. S.G.Vombatkere Vs U.O.I, Writ Petition (C) No.682/2021.

8. Sudesh Kedia Vs U.O.I : (2021) 4 SCC 704

9. Ashim @ Asim Kumar Haranath Bhattacharya @ Asim Harinath Bhattacharya @ Aseem Vs N.I.A, (2022) 1 SCC 695

(Delivered by Hon'ble Ramesh Sinha, J.
&
Hon'ble Mrs. Saroj Yadav, J.)

1. By filing this appeal under Section 21 of the National Investigation Agency Act, 2008 (hereinafter referred to as NIA Act), the appellant Alam @ Mohd. Alam has challenged the order dated 30.5.2022 passed by the learned Additional District and Sessions Judge, Court No.3/Special Judge, NIA Special Court, A.T.S., Lucknow (in short Special Court) whereby bail application of the appellant was rejected.

2. The bail application of Sidhique Kappan was heard and rejected by learned Single Judge of this Court on 2.8.2022. That was so heard because at that time the bail application of Sidhique Kappan was decided by learned Additional District and Sessions Judge, Court No.1, Mathura as the case was pending in the court of Mathura District. Thereafter, on the application moved by the prosecution, the case was transferred to Special Court, Lucknow, the court established for trying the cases of such nature. The application was allowed per order dated 13.12.2021 and the case was transferred to the Special Court,

Lucknow. This case was investigated by the Special Task Force.

3. Under Section 21 sub clause (2) of the NIA Act, the appeal shall be heard by a Bench of two Judges of the High Court. For this reason, this appeal has been listed and heard by this Division Bench.

4. The appellant is presently in jail having been arrested on 5.10.2020 in Case Crime No.0199 /2020, Police Station Manth, District Mathura, wherein a chargesheet has been filed in court on 2.4.2021 under Sections 153-A, 295-A, 124-A, 120-B of the Indian Penal Code,1860 (in short I.P.C.), Sections 65 and 72 of the Information Technology (Amendment) Act, 2008 and Sections 17 and 18 of The Unlawful Activities (Prevention) Act, 1967 (in short UAPA).

5.The bail application filed by the appellant was rejected by the learned Special Court observing that the accused/ appellant is named in the First Information Report (in short F.I.R.) and the chargesheet had been filed against him after investigation, so at this stage, it cannot be said that he is completely innocent. The learned Special Court further observed that the application of the co accused has already been rejected, hence in view of the learned Special Court, the accused appellant was not entitled for bail and the Special Court rejected the bail application. Being aggrieved of this rejection order, this appeal has been preferred.

6. Heard Shri Amarjeet Singh Rakhra, learned counsel for the appellant and Shri Umesh Chandra Verma, learned A.G.A. for the respondent.

7. Learned counsel for the appellant Shri Rakhra argued that :-

i). Even from the perusal of the F.I.R. No.0199/2020, it is clear that the appellant has no role in the commission of the alleged offence. He was just ferrying the passengers in his taxi to the place of their destination.

ii). There is no allegation against the appellant that he was associated with any terrorist organization or was soliciting any donation or funding or had any linkage with either P.F.I. or C.F.I.

iii). No incriminating material was recovered from the possession of appellant or on his pointing out and a thorough investigation of his technical footprints (Mobile Data records and Social Website etc.) revealed that the appellant is not associated with any suspicious or anti national activities.

iv). It is an admitted position that the investigating agency has found no link of receiving any financial aid from any suspected organization or individual nor any heavy /suspicious transactions in the Bank account of the appellant were traced.

v). The appellant is neither engaged in any unlawful activity as defined under Section 2(o) of the UAPA nor is a part of any unlawful association as defined under Section 2 (p) of UAPA.

vi). The offences under Sections mentioned in the chargesheet are not made out against the appellant even if the story of the prosecution is believed on its face value. Sections 17 and 18 of the UAPA which relates to raising funds for terrorist activities and punishment thereof and conspiracy for committing any terrorist act and punishment thereof are not even remotely attracted to the facts of the case.

vii). From a bare perusal of the F.I.R., the chargesheet prepared and the material/evidence collated by the investigating agency, it is abundantly clear that no 'terrorist act' as defined under Section 15 of UAPA is made out as, neither of the alleged provisions of Section 17 and 18 of the UAPA are attracted. The Special Court has completely failed to appreciate that the perusal of the allegations made in the F.I.R. and the contents of the case diary including the chargesheet and material collated by the investigating agency clearly evince that accusation made against the appellant is prima facie false.

viii). In view of the provisions of Section 43-D (5) of the UAPA, it is the duty of the court dealing with the bail application of the accused to satisfy itself with regard to there being reasonable grounds for believing that the accusation against the accused is prima facie true. This provision has been inserted with a view to ensure that the stringent provisions of the U.A.P.A. are not misused against innocent persons. In the present matter, the learned Special Court has completely failed to satisfy itself about the applicability of Section 43-D (5) of the UAPA and has merely rejected bail application of the appellant merely because a chargesheet has been filed against him and the bail application of the co accused was rejected.

ix). There was neither any occasion nor any motive for the appellant to commit the offence in question. The appellant is languishing in jail for approximately two years even though there is no prima facie case against him and no active role has been attributed to him by the investigating agency.

x). The investigating agency has already filed a chargesheet against the appellant and the trial is yet to commence.

xi). It is a settled position of law that presence of statutory restrictions like Section 43-D (5) of UAPA, per se does not oust the ability of the Constitutional Courts to grant bail on grounds of violation of Part-III of the Constitution of India. Indeed, both the restrictions under the statutes as well as the powers exercisable under constitutional jurisdiction may be well harmonised.

xii). There are around 55 witnesses of the prosecution as per the chargesheet and while the appellant is languishing in jail for almost two years, the trial is yet to commence.

xiii). There is not even a prima facie case, establishing the complicity of the appellant and the nature and gravity of charges and the absence of criminal history on his part require his release on bail.

xiv). By the Hon'ble Supreme Court in the case of ***S.G.Vombatkere Vs. Union of India, Writ Petition (C) No.682/2021*** rigour of Section 124-A I.P.C. has been taken away and its application in the pending cases has been kept in abeyance. The sections mentioned in the chargesheet except Section 124-A I.P.C. denote no serious offence.

xv). No criminal antecedents could be found by the investigating agency after a thorough investigation. Hence, considering above submissions, the appeal may be allowed and the appellant be released on bail.

8. Learned counsel for the appellant has relied upon the following case laws :-

a). Asif Iqbal Tanha Vs. State of NCT of Delhi. : MANU/DE/1095/2021 : (2021) 3 SCC (Del) 106.

b). The National Investigation Agency, Ministry of Home Affair, Govt. of India. Vs. Akhil Gogoi : MANU/GH/0179/2021

c). Union of India Vs. K.A.Najeeb. : (2021) 3 SCC 713.

d). Thwaha Fasal Vs. Union of India reported in AIR Online 2021 SC 963

9. To the contrary, Shri Umesh Chandra Verma, learned A.G.A. countered the arguments of the learned counsel for the appellant and argued that :-

i). The Special Court has rejected the bail application of the appellant giving valid reasons.

ii). A chargesheet has been filed against the appellant after collecting sufficient evidence against him. At the time of arrest, one mobile phone was recovered from the appellant. However, pamphlets etc. were recovered from the co-accused persons. Sufficient evidence of the use of money received from terror funding to purchase the car being used by the appellant has been found in investigation.

iii). On 5.10.2020, the applicant and co accused persons were arrested under the provisions of Section 151 of the Code of Criminal Procedure, 1973 (in short Cr.P.C.) for the proceedings of Sections 107/116 of Cr.P.C. in an apprehension of disturbing the peace by going to Hathras which was mentioned in the G.D. No.41 of the Manth Police Station, Mathura but after that on examining the six phones, one laptop and 17 printed papers recovered from the possession of the accused and co-accused persons, the conclusion drawn by the investigating officer Sub-Inspector Mr. Prabal Pratap Singh, the F.I.R. in question was registered against the appellant and co-accused persons on 7.10.2020 at 6.13 a.m. at Police Station Manth at Crime No.199/2020.

iv). During the investigation of the case Crime No.136/ 2020 registered at Police Station Chandapa on 14.9.2020 about the unfortunate incident occurred at Harthras wherein a girl was killed,i t was revealed that the appellant and his associates were the members of one such organization which intended to disturb the law and order in Hathras, to implement their nefarious designs.

v). The so-called taxi of the appellant was registered with OLA Company but the taxi was not booked through OLA Company by the appellant to take co-accused persons to village Boolgarhi, Hathras. As per the inputs received, the taxi i.e. Swift Desire Car No. DL-1ZC 1203 was registered with OLA Company only to escape it from scrutiny. The real fact is that the taxi in question was being used for some criminal activities. From the investigation, it has come to light that during the period of lock-down when taxi business was completely closed, the taxi in question was purchased by the appellant from one Mohd. Anees on 25.9.2020 by paying Rs.2,25,000/- in cash, just 10 days prior to the incident. It shows that the amount of Rs.2,25,000/- was received by the appellant from PFI/ CFI. The appellant could not offer any plausible

explanation as to how he arranged that money.

vi). The appellant drove his car as OLA Cab and there is no shortage of passengers for OLA Cab in NCR but still the booking of OLA car was not taken by the appellant on the date of incident just to help the members of the PFI on the direction of his relative Danish.

vii). The past criminal history of the appellant is not known, however, the criminal history of Ateek-ur- Rahman and Danish, brother-in-law (Sala) of the appellant has come to light.

viii). The appellant is associated with the PFI organization which is involved in terrorist activities in the country and is trying to create unrest in the country by spreading caste and religious animosity.

ix). The bail application of the accused appellant was rejected by the learned Special Court on the basis of sufficient grounds as ample evidence is there against the appellant,hence the appeal should be dismissed.

10. Learned A.G.A. relied upon following case laws :-

a). The National Investigation Agency Vs. Zahoor Ahmad Shah Watali : (2019) 5 SCC 1.

b). Ramjhan Gani Paloni Vs. National Investigation Agency : 2022 SC 2070.

11. Considered the rival submissions and gone through the case laws cited and the material available on record.

12. It is an admitted fact that the appellant was arrested while driving the other co-accused persons to Hathras in his taxi/car Swift Desire Car No. DL-1ZC 1203.

13. The allegation of the respondents is that he was so driving the co-accused persons for committing the alleged crime. It is also admitted that chargesheet has already been filed against the appellant under Sections 153-A, 295-A, 124-A, 120-B of I.P.C., Sections 65 and 72 of the Information Technology (Amendment) Act, 2008 and Sections 17 and 18 of UAPA.

14. In the chargesheet which has been annexed as Annexure No.CA-5 to the counter affidavit, the following observations has been made against the appellant :-

"अभियुक्त आलम सह अभियुक्त दानिश का रिस्तेदार है। दानिश पीएफआई का त्रिलोकपुरी वार्ड का अध्यक्ष है जो पूर्वी दिल्ली में दंगो के दैरान हिंसा करने, जिसमे लगभग 51 लोग मारे गये थे, के अभियोग में अभियुक्त है। अभियुक्त आलम पेशे से टैक्सी चालक है जिसने योजना के अनुसार घटना से पूर्व दिनांक 24.09.2020 को 2.25 लाख रूपया नकद देकर टैक्सी खरीदी है। आलम के बैक खाते के अवलोकन से उसके खाते में नाममात्र का रूपया जमा है। पीएफआई के लोगो एंव सह अभियुक्तो द्वारा आतंकी गिरोह को प्राप्त फंडिग से नकद रूपया देकर उसके उद्देश्य की पूर्ति के लिए गाडी खरीदवाई गयी है। अभियुक्त आलम दिनांक घटना को हाथरस सह अभियुक्तो के साथ जा रहा था जबकि वह ओला कम्पनी में टैक्सी लगाकर बुकिग का कार्य लेता है। परन्तु दिनांक घटना को ओला कम्पनी से गाड़ी बुक नही की गयी थी जिससे यह स्पष्ट होता है कि आलम सह अभियुक्तो

के साथ घटना को अंजाम देने के षड़यंत्र में शामिल था।"

15. It is also admitted that initially the appellant was challaned under Section 107/116 Cr.P.C. and ordered to file the bonds but he failed to file bonds. Thereafter the F.I.R. in question was registered. The allegations of prosecution is that in investigation, the material evidence was found against him.

16. In ***National Investigation Agency Vs. Zahoor Ahmad Shah Watali (supra),*** the Hon'ble Supreme Court has held as under :-

"21. Before we proceed to analyse the rival submissions, it is apposite to restate the settled legal position about matters to be considered for deciding an application for bail, to wit :

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

ii). nature and gravity of charge;

iii). severity of the punishment in the event of conviction;

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

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

vi). likelihood of the offence being repeated;

vii). reasonable apprehension of the witnesses being tampered with;

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

17. After careful examination of the material available on record, the only evidence against the appellant on which the prosecution hammered much, is the payment of Rs.2,25,000/- made to one Anees for purchase of the vehicle which he was driving at the time of the incident. The learned A.G.A. argued that the money which he paid was earned by him out of terrorist funding as the economic condition of the appellant was not sound enough to pay for the same.

18. Learned counsel for the appellant countered the argument and offered an explanation in this regard that the appellant borrowed the money from his cousin namely Mehboob Ali who has filed affidavit stating the same and also explained the source of money from which Mehboob arranged that money. No question has been raised on the affidavit filed by Mehboob Ali and on the fact explained by Mehboob Ali as to how he resourced Rs.2,25,000/- to the appellant. One more important argument of learned A.G.A. on which he pressed hard is that the appellant used to ply his vehicle for OLA Company but on the day it was not booked through Company rather booked directly. The appellant has admitted that it was booked directly and explained, as that was COVID period and he could get some more money through direct booking in comparison to the booking through OLA, so he preferred the direct booking and ferried the passengers to their destination. He further submitted that there was no restrictions from OLA company to take direct booking.

19. Learned A.G.A. has not disputed the fact that a Cab associated with OLA Company could take direct bookings. It was also argued vehemently by learned A.G.A. that the appellant is a relative of Danish who has criminal antecedents and was found associated with many riots committed in Delhi regarding CAA protest.

20. Learned counsel for the appellant admitted that Danish is cousin of the appellant but submitted that he has no association or link with the crimes alleged against him. The only connection found in this regard is that he made a telephone call to the appellant to get the taxi booked.

21. No incriminating article has been found and no such material could be detected from the mobile phone of the appellant as to show his association with the terrorist or terrorist activities. Mainly, the grave offence under Section 124-A of I.P.C. is there in chargesheet but the Hon'ble Supreme Court has put the effect of Section 124-A I.P.C. in abeyance in the case of ***S.G.Vombatkere Vs. Union of India, Writ Petition (C) No.682/2021.***

22. In ***Asif Iqbal Tanha Vs. State of NCT of Delhi(supra)***, the Hon'ble High Court of Delhi has held as under :-

"61. Once we are of the opinion, as we are in the present case, that there are no reasonable grounds for believing that the accusations against the appellant are prima facie true, the Proviso to Section 43D(5) would not apply; and we must therefore fall back upon the general principles of grant or denial of bail to an accused person charged with certain offences.

64. The observations of the Hon'ble Supreme Court in Mazdoor Kisan Shakti Sangathan (supra) appear to us to be the most lucid and pithy answer as to the contours of legitimate protest and these bear repetition. In the said decision the Hon'ble Supreme Court says that legitimate dissent is a distinguishable feature of any democracy and the question is not whether the issue raised by the protestors is right or wrong or whether it is justified or unjustified, people have the right to express their views ; and a particular cause, which in the first instance, may appear to be insignificant or irrelevant may gain momentum and acceptability when it is duly voiced and debated. The Hon'ble Supreme Court further says that a demonstration may take various forms : it may be noisy, disorderly and even violent, in which case it would not fall within the permissible limits of Articles 19(1) (a) or 19(1) (b) and in such case the Government has the power to regulate, including prohibit, such protest or demonstration. The Government may even prohibit public meetings, demonstrations or protests on streets or highways to avoid nuisance of disturbance of traffic but the Government cannot close all streets or open areas for public meetings thereby defeating the fundamental right that flows from Article 19(1) (a) and 19(1) (b) of the Constitution.

66. In our view, on an objective reading of the allegations contained in the subject charge-sheet, there is complete lack of any specific, particularised, factual allegations, that is to say allegations other than those sought to be spun by mere grandiloquence, contained in the subject charge-sheet that would make out the ingredients of the offences under Sections 15, 17 or 18 UAPA. Foisting extremely grave and serious penal provisions engrafted in Sections 15, 17 and 18 UAPA frivolously upon people, would undermine

the intent and purpose of the Parliament in enacting a law that is meant to address threats to the very existence of our Nation. Wanton use of serious penal provisions would only trivalise them. Whatever other offence(s) the appellant may or may not have committed, at least on a prima facie view, the State has been unable to persuade us that the accusations against the appellant show commission of offences under Sections 15, 17 or 18 UAPA.

71. A quick conspectus of the general principles for considering a bail plea would not be out of place at this point. Outlining the considerations for bail, in Ash Mohammad Vs. Shiv Raj Singh and another, the Supreme Court expressed itself as follows :-

"8. In Ram Govind Upadhya v. Sudarshan Singh : (2002) 3 SCC 598, it has been opined that the grant of bail though involve exercise of discretionary power of the court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. The heinous nature of the crime warrants more caution and there is greater chance of rejection of bail, though, however dependent on the factual matrix of the matter. In the said case the learned Judges referred to the decision in Prahlad Singh Bhati v. NCT, Delhi and stated as follows :

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

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

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

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

23. In ***Union of India Vs. K.A. Nazeeb (supra),*** the Hon'ble Supreme Court has held as under :-

"16. This Court has clarified in numerous judgements 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 speedy trial. In Supreme Court Legal Aid Committee Representation Under trial Prisoners v. Union of India MANU/SC/0877/1994 : (1994)6 SCC 731, 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.

*19. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the Respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the Appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the Resp*ondent's rights guaranteed under Part III of our Constitution have been well protected.

20. Yet another reason which persuades us to enlarge the Respondent on bail is that Section 43-D (5) of the UAPA is comparatively less stringent than Section 37 of the NDPS. Unlike the NDPS where the competent court needs to be satisfied that prima facie the Accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such pre-condition under the UAPA. Instead, Section 43-D(5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the well- settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or change of the accused evading the trial by absconsion etc."

24. In the present matter, the only evidence against the appellant which has been shown at this stage i.e. after filing of the chargesheet is that he paid Rs.2,25,000/- as a purchase money of car to one Mohd. Aneesh just few days ahead of the incident and he is a relative of Danish who has criminal antecedents and was involved in roits of Delhi over the CAA Protest.

25. In regard to the above two alleged evidences, the appellant has given a *prima facie* plausible explanation. The money paid by him as per his statement was borrowed from his cousin Mehboob Ali who has filed his affidavit explaining the source of money. As far as the relation with Danish is concerned, he has admitted that Danish is cousin but specifically denied that he has any connection with the crime. Even the learned A.G.A. cannot specify the connection of the appellant with Danish of the nature that appellant is associated in any way with him regarding terrorist activities and terrorist funding etc.

26. The Hon'ble Supreme Corut in ***Sudesh Kedia Vs. Union of India : (2021) 4 SCC 704*** has held as under :

"13. While considering the grant of bail under Section 43- D(5), it is the bounden duty of the Court to apply its mind to examine the entire material on record for the purpose of satisfying itself, whether a prima facie case is made out against the accused or not."

27. Admittedly, the chargesheet has been filed. There are 55 witnesses mentioned in the chargesheet and the trial has not commenced yet. It will take a long time in completion of the trial. The appellant is already in jail since 5.10.2020.

28. The Hon'ble Apex Court in the case of ***Ashim Alias Asim Kumar***

Haranath Bhattacharya @ Asim Harinath Bhattacharya Alias Aseem Vs. National Investigation Agency : (2022) 1 SCC 695, has held as under :-

"10. This Court has consistently observed in its numerous judgements that the liberty guaranteed in 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 trials imperative and the undertrials cannot indefinitely be detained pending trial. Once it is obvious that a timely trial would not to possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obliged to enlarge him on bail.

11. Deprivation of personal liberty without ensuring speedy trial is not consistent with Article 21 of the Constitution of India. While deprivation of personal liberty for some period may not be avoidable, period of deprivation pending trial/appeal cannot be unduly long. At the same time, timely delivery of justice is part of human rights and denial of speedy justice is a threat to public confidence in the administration of justice."

29. On the basis of material available on record upto this stage, there appears no reasonable ground for believing that the accusation against the appellant are prima facie, true. Prima facie, there appears no complicity and involvement of the appellant with the terrorist activities or any other activity against the nation.

30. The case of this accused appellant is distinguished to the case of co accused Sidhique Kappan as incriminating material was allegedly recovered from his possession. He is a Press Reporter and Laptop and Mobile Phone recovered from his possession, incriminating articles and video clips etc. were found inter-alia. Admittedly, no such incriminating material was recovered from the possession of the present accused appellant.

31. No such allegation has been placed before us to show that the appellant shall if released on bail, terrorise the witnesses to depose in the case or there is possibility of his absconding. Hence, it is clear that learned trial court is not right in rejecting the bail application only for the reason that the appellant was named in the F.I.R. and chargesheet has been filed against him. Hence, considering all the facts and circumstances, aforesaid, it appears just to enlarge the appellant on bail.

32. The case law cited by the learned A.G.A. i.e. ***NIA Vs. Zahoor Ahmad Shah Watali (supra)*** is not applicable in this matter because in the cited case, there were recovery of many incriminating articles from the accused. The account book with details of receiving and disbursing the funds for terrorist, contact diaries containing phone numbers of Pakistan Nationals and Terrorist documents showing previous involvement of the accused in terrorist activities and CDR reveal connection with other terrorists and also photographs holding AK-47 Rifles with other terrorists etc. were recovered from the possession and house of the accused. Here in this case, admittedly no incriminating article was recovered from the possession of the accused. Only one mobile phone of the appellant was recovered from the possession and in that mobile phone, no incriminating material was found.

33. The case law ***Ramjhan Gani Palani Vs. National Investigating Agency***

and another (supra) is also of no help to respondents as the cited case law relates to the heavy recovery of 236.62 Kg. of Narcotic drugs. In that case, the evidence was there against the accused that accused remained in a fishing boat for five days and talked on different channels in Code Words and showing his involvement with the miscreants. Hence, the facts and circumstances of the case cited is entirely different from the case in hand.

34. The appeal deserves to be allowed and is accordingly ***allowed***. The impugned order dated 30.5.2022 passed by the Special Judge, NIA/ATS, Lucknow in Bail Application No.4344/ 2022 arising out of Case Crime No.0199 /2020, Police Station Manth, District Mathura is hereby set-aside and the appellant Alam @ Mohammad Alam is admitted to regular bail until conclusion of trial, subject to the following conditions :

a). The appellant shall furnish a personal bond in the sum of Rs.50,000/- (Rs. Fifty Thousands only) with 2 local sureties of the like amount, to the satisfaction of the learned trial court ;

b). The appellant shall furnish to the investigating officer/S.H.O. a cellphone number on which the appellant may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;

c). The appellant shall ordinarily reside at his place of residence and shall inform the investigating officer if he changes his usual place of residence

d). If the appellant has a passport, he shall surrender the same to the learned Trial Court and shall not travel out of the country without prior permission of the learned Trial Court;

e). The appellant shall not contact, nor visit, nor offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of the case. The appellant shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.

35. Here, it is made clear that observations made in this order shall not affect the trial, in any manner.

(2022) 8 ILRA 729
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Criminal Appeal No. 1833 of 2008

Bali Singh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri A.C. Srivastava, Sri Rajesh K. Sharma, Sri Yogesh Kumar Srivastava

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Section 304 – The Code of Criminal Procedure, 1973 –Section 313 - appeal against conviction - culpable homicide not amounting to murder - if public witnesses of fact examined by the prosecution are declared hostile their testimony does not get effaced from the record - can be utilized by the prosecution to the extent it

corroborates the prosecution case. (Para - 23,)

Deceased and her husband had a fight - consumption of liquor by her husband - husband poured kerosene on her and set her ablaze - incident is of night - fire was doused by throwing quilt on her - Incident occurred in house (matrimonial) of appellant - deceased brought to hospital in a burnt condition - died due to septicaemia as a result of ante mortem burn injuries - conviction by trial court – hence appeal. **(Para - 20,27)**

(B) Evidence Law - Dying declaration - court before accepting the dying declaration must be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination - person who records a dying declaration must be satisfied that the deceased was in a fit state of mind - Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful - non-examination of the doctor does not render the dying declaration unworthy of acceptance.(Para -25,26,27)

HELD:-Dying declaration wholly reliable and truthful and can on its own form the sole basis of conviction. Order of trial court convicting appellant upheld. Sentence of imprisonment for life awarded to appellant by trial court modified and reduced to period of sentence already undergone.**(Para -27,30)**

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

Laxman Vs St. of Maha., (2002) 6 SCC 710

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

1. We have heard Sri Yogesh Kumar Srivastava for the appellant; Sri J.K. Upadhyay, learned AGA, for the State; and have perused the record.

2. This appeal is against the judgment and order dated 22.02.2008 passed by the Additional District and Sessions Judge, Court No.9, Ghaziabad in S.T. No.787 of 1999, arising out of case crime no.52 of 1999, P.S. Muradnagar, district Ghaziabad, whereby the appellant Bali Singh has been convicted and sentenced under Section 304 IPC to imprisonment for life and fine of Rs.3,000/- coupled with a default sentence of one year.

INTRODUCTORY FACTS

3. A written report (Ex. Ka-3), signed by brother of the deceased, namely, Sunder (PW-5), was submitted at P.S. Muradnagar, district Ghaziabad on 17.02.1999 at 19.30 hrs, giving rise to case crime no. 52 of 1999, under section 308 IPC of which G D Entry No.42 (Ex. Ka-5) and Chik FIR (Ex. Ka-4) was prepared by PW-6. In the written report it was alleged that informant's sister Santosh was married to the appellant Bali Singh about 12 years ago; Bali Singh was addicted to liquor as a result whereof, her sister used to remain worried and for the last three years was staying with the informant; that 6-7 months before the incident, on insistence of mediators, informant's sister (the deceased) returned to her matrimonial home; that on 12.02.1999, at about 11.30 pm, the appellant in an inebriated state poured kerosene over informant's sister and set her ablaze; when she raised an alarm, her Devar Chatar Singh (PW-3) and Devrani Smt. Rajesh (PW-4) broke open the window of her room, saved her and got her

admitted at M.M.G. Hospital, Ghaziabad, where she is under treatment.

4. On 17.02.1999, a dying declaration of Smt. Santosh was recorded by Om Pal Singh (PW-8), Naib Tehsildar. The dying declaration (Ex. Ka-5) recites that there was a fight between her and her husband; during that fight, her husband poured kerosene on her and set her ablaze; whereafter, the fire was doused by putting quilt over her; later, her Devar, mother-in-law and father-in-law brought her to the hospital. She stated that she was married 15 years ago and has two children. The fight between her and her husband was on account of consumption of liquor by her husband.

5. During the course of investigation, burnt quilt and Dari were lifted from her matrimonial home of which seizure memo (Ex. Ka-11) was prepared. The initial medical examination report of the victim (Ex. Ka-13), dated 13.02.1999, which was produced by PW-10 indicates that she was brought to the hospital by Atar Singh (to be read as Chatar Singh) son of Ratan at about 1.20 am on 13.02.1999 at M.M.G. Hospital. The injury report (Ex. Ka-13) recites: "superficial to deep burn over face, neck except forehead, and left face and both eyes. Superficial to deep burn on both lower extremities, front and back of chest, and abdomen. Superficial to deep burn on both lower extremities, pelvic region. Singeing of hair present. Peeling off skin present. Blisters present. Smell of kerosene coming from body. Mental condition confused and irritable. General condition low. Blood pressure 90/94. Pulse 100."

6. Santosh died at 10 am on 18.02.1999 in the district hospital, Ghaziabad of which information was sent to the police station concerned at 12.35 hrs.. Inquest was conducted at the hospital on 18.02.1999. It was completed by 15.00 hours and an inquest report (Ex. Ka-1) was prepared, which was witnessed by PW-1 amongst others. Autopsy was conducted at 5 pm on 18.02.1999. The autopsy report (Ex. Ka-2) prepared by Dr. Rajendra Prasad (PW-2) recites ante-mortem injuries as follows:- "Extensive superficial to deep burn all over body except scalp and forehead and lateral aspect of arm and forearm on both side". Cause of death mentioned in the autopsy report is septicaemia due to ante mortem burns. Internal examination of the cadaver revealed gravid uterus (male foetus present 18-20 weeks old). Consequent to the death of Santosh, the case was converted to an offence punishable under Section 304 IPC.

7. After investigation, charge sheet dated 09.04.1999 (Ex. Ka-12) was submitted by O.P. Singh Chauhan (PW-9). After taking cognisance on the charge sheet, the case was committed to the court of session. The trial court, on 21.10.1999, charged the appellant for offence punishable under Section 304 IPC. The appellant pleaded not guilty and claimed trial.

PROSECUTION EVIDENCE

8. During the course of trial, the prosecution examined 10 witnesses. Their testimony, in brief, is as follows:-

9. **PW-1- Tara Chand**. He is a witness of the inquest proceeding. He proved the inquest report by identifying his signature thereon, which was marked Ex. Ka-1.

10. **PW-2- Dr. Rajendra Prasad**- Autopsy Surgeon. He proved the autopsy

report and confirmed the injuries recited therein. On the basis of his statement, the autopsy report was exhibited.

11. **PW-3- Chatar Singh- Devar of the deceased**. He stated that the deceased was his elder brother Bali Singh's (the appellant) wife. He denied having witnessed the incident. He denied of making an attempt to douse the fire. He stated that in the night of the incident he was at his Sasural and is not aware as to how his Bhabhi (the deceased) got burnt. He stated that he is not aware as to who got her admitted in the hospital.

At this stage, the witness was declared hostile by the prosecution and permission to cross examine him was granted.

During cross examination, PW-3 denied that the appellant was addicted to liquor. He stated that he never saw him drinking. He stated that he arrived at his house two days after the incident when he came to know that Santosh (the deceased) was admitted in the hospital. He stated that the investigating officer had not recorded his statement. When confronted with his previous statement recorded under Section 161 CrPC, PW-3 stated that he did not give any such statement. He denied the suggestion that to save his brother he is lying.

12. **PW-4- Smt. Rajesh - Devrani of the deceased**. She resiled from the prosecution case and stated that she was at her Maika (maternal home) with her husband since two days before the incident and she returned two days after the incident. PW-4 too, was declared hostile by the prosecution and permission to cross examine her was granted.

During cross examination, she stated that her Jeth (the appellant) was not addicted to liquor and that she had never seen her Jeth having a fight with his wife. On being confronted with her previous statement recorded under Section 161 CrPC, she stated that she never gave any such statement.

13. **PW-5- Sunder- brother of the deceased.** He stated that the deceased was his elder sister and was married 16 years ago to the accused Bali Singh. Bali Singh never harassed his sister and never assaulted her under the influence of liquor. On 12.02.1999 Bali Singh did not ablaze her. However, he is not aware as to how she got burnt. PW-5 denied having dictated the written report, which was scribed by Krishna Pal, but admitted his signature on it. The written report was marked Ex. Ka-3.

At this stage, the prosecution declared the witness hostile and sought permission to cross examine him, which was granted.

During cross examination, the witness stated that he gave the written report on the suggestion of the police because he feared the police and, at that time, was under stress due to death of his sister. PW-5 stated that whenever Bali Singh had come to his house he never took liquor and that he never reported that Bali Singh was addicted to liquor. He also stated that his sister never complained about Bali Singh. On being confronted with his previous statement recorded under Section 161 CrPC, the witness denied having given any such statement. He denied the suggestion that he has colluded with the accused.

14. **PW-6- Rajveer Singh**. He is the Chik maker of the written report and made

its GD entry. He stated that the written report was submitted by Sunder (PW-5) on the basis of which, vide GD Entry No.42 at 19.30 hours on 17.02.1999 Case Crime No.52 of 1999, under Section 308 IPC, was registered. He proved the Chik FIR and GD entry as Ex. Ka-4 and Ex. Ka-5 respectively.

During cross examination, he stated that he does not personally know the informant.

15 . **PW-7- Virendra Singh**. He is the constable who accompanied the police to the hospital on getting information about her death. He stated that on getting information about death of the deceased from ward boy of the hospital, he along with Constable Om Singh arrived at district hospital Ghaziabad where they met Daroga O.P. Singh Chauhan (PW-9). PW-9 prepared the inquest report and the body and papers were handed over to him for autopsy. He did not allow anyone to touch the body till it was given to the autopsy surgeon at the Mortuary.

16. **PW-8- Ompal Singh, Naib Tehsildar- Executive Magistrate, who recorded the dying declaration of the deceased.** PW-8 stated that on 17.02.1999 he was posted as Tehsildar at Tehsil Ghaziabad. On that day, he recorded the statement of Smt. Santosh wife of Bali Singh, aged about 25 years, who was a resident of village Bhovapur. He stated that the dying declaration was recorded by him in his own handwriting and signature. The dying declaration, which was kept in a sealed envelop, was opened in court and shown to him. PW-8 identified the document as the dying declaration recorded, written and signed by him. The same was marked Ex. Ka-5 and the envelop containing the dying declaration was marked material Ex.-1. He stated that the dying declaration carries thumb impression of the deceased, which was put by her in his presence after the dying declaration was recorded and read over to her. He stated that the declaration was recorded between 4.10 and 4.15 pm. Before recording the declaration, he had obtained permission of the then attending Emergency Medical Officer posted at M.M.G. District Hospital, Ghaziabad. He stated that the deceased was in a fit mental condition and was fully conscious when her declaration was recorded. He stated that after her statement was recorded, the same was sealed and the sealed envelop was sent to the Chief Judicial Magistrate, Ghaziabad. He stated that the envelop in which the dying declaration was sealed bears seal put by him. The envelop also bears his signature. The envelop sealed by him was also produced and marked material Ex.-2.

During cross examination, PW-8 stated that he is not aware of the date when Smt. Santosh was admitted in the hospital. When he had noticed her, she must have been 70% burnt but she was in a position to speak. Her face was not burnt though rest of her body was burnt. He stated that before recording her statement he had obtained written permission of the doctor regarding her fitness. The written permission regarding her fitness was not obtained on a separate document but was taken on the document wherein the statement was recorded. He specifically stated that fitness certificate/permission was obtained before recording the statement. When permission to record the statement was endorsed on the paper, the paper was blank. He stated that this certificate/permission was endorsed on the left margin of the paper. On further

questioning, PW-8 stated that at the time when he recorded the dying declaration, except him and the injured, no one else was present. However, when he had arrived to record the dying declaration one or two persons were there, but he does not know who they were. He stated that he does not know the deceased personally; that he himself got her thumb impression on Ex. Ka-5. He denied the suggestion that fingers and thumb of the deceased were burnt. He also denied the suggestion that thumb impression of the deceased was not obtained in his presence. He denied the suggestion that he recorded the declaration on the basis of information contained in the first information report and not by inquiring from the declarant.

17. **PW-9- O.P. Singh Chauhan-Investigating Officer.** He stated that on 17.02.1999 he was posted at P.S. Muradnagar. The case was registered in his absence but the investigation was assigned to him. After obtaining necessary papers, he recorded the statement of the informant (Sunder) and of the GD/Chik maker. On 18.02.1999, he came to learn that the deceased had expired at 10 am. He proceeded to the spot, appointed panches and conducted inquest proceeding. He proved his signatures on the inquest report (Ex. Ka-1). He proved preparation of various papers for autopsy which were marked as Ex. Ka-6 to Ex. Ka-9. He stated that after the death of Santosh, the case was converted from Section 308 IPC to Section 304 IPC. On 19.02.1999, he inspected the spot and at the instructions of the informant prepared a site plan (Ex. Ka-10). From the spot, he recovered a quilt and a Dari as also a printed Dhoti which was sealed and a seizure memo thereof (Ex. Ka-11) was prepared. The recovered articles were produced in court and marked material Ex.1 and 2. On 20.02.1999, he arrested the appellant and recorded his statement. On 09.04.1999, he recorded the statement of Smt. Rajesh and Chatar Singh and also received copy of the dying declaration. After completing the investigation, he submitted charge sheet (Ex. Ka-12).

During cross examination, PW-9 stated that the incident was of 12.02.1999 as per the written report lodged on 17.02.1999. On the day when the written report was lodged, he did not visit the hospital. He visited the hospital on 18.02.1999. When he visited the hospital, Santosh was already dead. He arrived at the hospital between 11 and 12 hours and thereafter the inquest was conducted. The deceased was fully burnt. He stated that on 19.02.1999 when he visited the place of occurrence, the house of the deceased was found open and no one was present there. Neighbours were around but they were not at the spot. Inspection was conducted at the instance of the informant. A cot was found in the room but the quilt (Material Ex. 1) and Dari (Material Ex.2) was lifted from the floor and not from the cot. He stated that he did not separately disclose in the site plan the place from where Dari and the quilt was lifted. On being questioned, whether the cot was burnt or not, PW-9 stated that he does not remember whether it was burnt. However, the cot was not seized. He stated that in that room the other household articles were noticed but no electricity supply was noticed in that room. PW-9 denied the suggestion that the material exhibits 1 and 2 were not there since the date of the incident but were planted later. PW-9 denied the suggestion that he had not interrogated persons in the vicinity. He also denied the suggestion that without properly and fairly conducting the investigation he submitted the charge sheet.

18. **PW-10- Brijesh Kumar**. He was employee of District Hospital Ghaziabad who produced the original record relating to medical examination of Smt. Santosh wife of Bali Singh on 13.2.1999. On production of the original record by him, photocopy of the medical examination report of the deceased dated 13.2.1999 was taken on record and marked Ex. Ka-13.

During cross examination, by looking at Ex. Ka-13, PW-10 stated that it records that the deceased was burnt to the extent of 90%. He admitted that the original of the record was not prepared in his presence.

Statement of the accused-appellant under section 313 CrPC

19. The incriminating circumstances appearing in the prosecution evidence were put to the appellant while recording his statement under Section 313 CrPC. The appellant though admitted that he was married to the deceased about 12 years before 12.2.1999 but denied the incriminating circumstances appearing in the prosecution evidence against him. He took no plea that the deceased did not suffer burn injuries or that she was not admitted in the Hospital on 13.02.1999 in connection therewith. He also did not dispute her death on 18.02.1999. He also did not take a specific plea that he was not present in the house when the incident occurred. Notably, no defence evidence was led.

Trial Court Findings

20. The trial court found from the prosecution evidence that it was proved that the incident had occurred in the house of the appellant; that the deceased was brought to the hospital in a burnt condition on 13.02.1999; and that she was under treatment at the hospital where she died on 18.02.1999 due to septicaemia as a result of ante mortem burn injuries. The trial court found that from the statement of PW-5 it was proved that the written report was signed by him; the Chik maker (PW-6) proved the submission of written report by PW-5; that the medical record produced by PW-10 proved that the deceased was admitted in the hospital on 13.2.1999 with burn injuries and the dying declaration was proved by PW-8, which proved that the appellant had caused those burn injuries. The trial court therefore held that the prosecution was successful in proving the guilt of the appellant beyond reasonable doubt. The trial court, accordingly, convicted the appellant and sentenced him as above.

Submissions on behalf of the appellant

21. The learned counsel for the appellant submitted that since all public witnesses of fact examined by the prosecution were declared hostile as they have not supported the prosecution story that the deceased was a liquor addict and was in a habit of ill-treating/ assaulting his wife; and, admittedly, the deceased was married to the appellant more than seven years before the incident, no presumption was available to the prosecution, hence, in absence of any evidence in respect of motive for the crime it was not appropriate to record conviction on the sole basis of dying declaration. It has been urged that the dying declaration has been recorded after four days. The deceased was admitted in the hospital on 13.02.1999 with about 90% burns. There is no reason available in the prosecution evidence as to why the dying declaration was recorded so late. From the

statement of the recording magistrate, it appears, one or two persons were present in the hospital from before, when her dying declaration was recorded. In such circumstances, the possibility of the dying declaration being tutored and that she was not in a fit mental condition at the time of giving her declaration cannot be ruled out therefore, the dying declaration is not worthy of acceptance as to form the sole basis of conviction.

Submissions on behalf of the State

22. Learned AGA has supported the judgment and order of the trial court and has submitted that the spot inspection by the I.O., recovery of burnt articles therefrom and the statement of the I.O. has proved beyond reasonable doubt that the place of incident is the house of the appellant. The appellant in his statement recorded under Section 313 CrPC has neither stated that he was present elsewhere nor claimed that the place of incident was not his house but some other place. The deceased was brought to the hospital in a burnt state by her Devar Chatar Singh (PW-3) on 13.02.1999 at 1.20 am, which fact though not admitted by PW-3 but was proved from the entry in the original record of the hospital produced by PW-10 as also by injury report (Ex. Ka-13). It is also proved from the recital in the inquest report (Ex. Ka-1) and the autopsy report (Ex. Ka-2) that the deceased died in the hospital on 18.02.1999 at 10 am therefore, from record it was proved that the deceased remained in the hospital from 13.02.1999 to 18.02.1999. Once the prosecution was successful in establishing those facts, the dying declaration (Ex. Ka-5), which was duly proved, finds support from the surrounding circumstances. The mental fitness of the deceased at the time of making her declaration and of her fitness during the course of recording her dying declaration are certified at the margin of Ex. Ka-5 by an endorsement to that effect. Nothing could be elicited from the statement of recording magistrate that he had failed to notice whether the deceased was mentally fit or not. In these circumstances, the dying declaration stands duly proved and as it finds corroboration from the surrounding circumstances proved on record, it can form the sole basis of conviction. The appeal be therefore dismissed.

ANALYSIS

23. Having noticed the rival submissions and the entire prosecution evidence on record before we proceed to evaluate the evidence, we must remind ourselves that if public witnesses of fact examined by the prosecution are declared hostile their testimony does not get effaced from the record. It can be utilised by the prosecution to the extent it corroborates the prosecution case. In this case though the informant - PW-5 (brother of the deceased), Dewar (PW-3) and Devrani (PW-4) of the deceased may have been declared hostile but from the statement of informant that the written report bears his signature, the lodging of the FIR at his instance, as proved by PW-6, is corroborated. PW-5 proved that the deceased was appellant's wife. This fact is admitted by the appellant in his statement recorded under section 313 CrPC. Even PW-3 (Chatar Singh) admits that Bali Singh (appellant) is his elder brother and the deceased Santosh was his wife. Similarly, Smt. Rajesh (PW-4) admits that she is wife of Chatar Singh. Thus, from the public witnesses examined by the prosecution even though they were declared hostile this much is established

that the deceased Santosh was married to the appellant; Chatar Singh (PW-3) was her Devar; and Smt. Rajesh (PW-4) her Devrani. Notably, the dying declaration (Ex. Ka-5) is to the effect that after she was set ablaze by her husband when fire was doused, her Devar, Saas and Sasur had got her admitted in the hospital. This portion of the dying declaration finds support from Ex. Ka-13 as also the medical record produced by PW-10 which discloses that she was brought to the hospital by Chatar Singh i.e. her Dewar.

24. In the instant case, by the testimony of the I.O. (PW-9) who inspected the spot, prepared site plan (Ex. Ka-10) and lifted burnt quilt/Dari from the room where the deceased was burned, it is proved that the deceased got burnt in a room of her matrimonial home. The I.O. had also disclosed that the quilt and Dari was found on the floor and not on the cot, which suggests that when the deceased was ablaze an effort was made to douse the fire by throwing a quilt/Dari on her. This evidence corroborates the dying declaration (Ex. Ka-5) wherein it is recorded that after she was set ablaze, fire was doused by throwing a quilt on her. Notably, the appellant in his statement recorded under Section 313 CrPC does not claim that his wife got burnt at some other place.

25. In so far as the dying declaration (Ex. Ka-5) is concerned, the same has been proved by the recording Magistrate (PW-8). He not only proved its recording but also proved declarant's fitness to depose and the endorsement/ certificate to that effect provided by the attending doctor on the margin of Ex. Ka-5. Perusal of Ex. Ka-5 indicates that on its left margin the attending doctor has endorsed that at 4.10 pm on 17.2.1999, the patient was found fully conscious and fit for dying declaration (DD). Thereafter, just below that it is endorsed that the patient remained fully conscious during dying declaration (DD). The recording magistrate has also confirmed that the declarant was in a fit mental condition and was in a position to speak when he recorded the dying declaration. PW-8 stated that the dying declaration was recorded by him between 4.10 and 4.15. The statement of the declarant comprises of six short sentences which can conveniently be recorded in that time. The argument of the learned counsel for the appellant that since the certifying doctor was not examined mental fitness of the declarant cannot be held proved, is not acceptable. In **Laxman V. State of Maharashtra, (2002) 6 SCC 710,** a Constitution Bench of the Supreme Court, held that the court before accepting the dying declaration must be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. In the instant case, there is no such suggestion to PW-8 during his cross-examination. In respect of necessity of medical certificate of fitness of the declarant, in **Laxman's case (supra),** in paragraph 3, it was held: "*Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit condition and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. .....What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where*

it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by a doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

26. In light of the law noticed above, on perusal of the record of the instant case, we find that not only there appears a certificate of fitness on the margin of the paper used for recording the dying declaration but there is a statement of the recording Magistrate (PW-8) also, about the declarant being fit to give her statement. Further, no effort has been there on the part of the defence to summon the medical records to demonstrate that the general or mental condition of that patient was so low that recording of the declaration was not feasible. In such circumstances, in our view, non-examination of the doctor does not render the dying declaration unworthy of acceptance.

27. When we come to the contents of the dying declaration, we find that it is straightforward and truthful. It states that the deceased and her husband had a fight; the fight was because of consumption of liquor by her husband; husband poured kerosene on her and set her ablaze; the incident is of night; thereafter, fire was doused by throwing quilt on her; whereafter, her Devar, Saas and Sasur brought her to hospital; that she was married 15 years ago and has two children. When we take into account the proven documents i.e. Ex. Ka-13 (medical examination report of the deceased), Ex. Ka-11 (seizure of semi burnt Quilt/ Dari from the room of the deceased), Ex. Ka-1 (Inquest report), Ex. Ka-2 (autopsy report) and site plan (Ex. Ka-10), it becomes clear that the deceased suffered burn injuries in the night of 12/13.02.1999; that an attempt to douse the fire by throwing a quilt on her was made; that she was brought to the hospital in the night by her Devar and was medically examined by the doctor at 1.30 am on 13.2.1999 for her burn injuries; that she remained admitted in the hospital till she died on 18.02.1999; and the autopsy report proved that she died due to septicaemia as a result of those burn injuries. The statement in the dying declaration that she was set ablaze by her husband, after pouring kerosene, in the night and was brought to the Hospital is corroborated by Ex. Ka-13. Similarly, statement that fire was doused by throwing quilt is corroborated by seizure of burnt quilt from the spot i.e. Ex. Ka-11. Likewise, the statement that she was brought by her Devar is corroborated by entry to that effect in Ex. Ka-13. Once, this is the position, we have no hesitation in coming to the conclusion that the dying declaration is wholly reliable and truthful and can on its own form the sole basis of conviction. We, therefore, uphold the order of the trial court convicting the appellant.

28. At this stage, an alternative submission was made by the learned counsel for the appellant. Learned counsel for the appellant submits that both from the written report as well as the dying declaration it is clear that there was a fight in between husband and wife on account of consumption of liquor by the husband (appellant), which suggests that the appellant was in a drunken state; and the deceased was set ablaze by her husband during the course of that fight. He submitted that from the declaration it

appears that the appellant tried to douse the fire by throwing a quilt. In these circumstances, the charge framed against the appellant is of an offence punishable under Section 304 IPC and not under Section 302 IPC. It is argued that it is not mandatory that on conviction for an offence punishable under Section 304 IPC, life imprisonment be awarded. In these circumstances, since the appellant has already served incarceration of over 14 years since the date of his conviction i.e. 22.02.2008 he be let out by reducing the sentence of imprisonment for life to the sentence already undergone.

29. Sri J.K. Upadhyay, who appears for the State, does not dispute that no premeditated plan to kill the deceased has been proved by the prosecution evidence. He accepts that as per the dying declaration the incident occurred during a fight in between husband and wife on consumption of liquor by the husband. He thus leaves it to the discretion of the court to alter the sentence.

30. Having considered the submissions on the question of sentence, and having noticed that the conviction of the appellant is under Section 304 IPC, we are of the view that as the appellant has already served over 14 years of sentence, though we affirm the conviction of the appellant under Section 304 IPC but, looking to the facts of the case and the mitigating circumstance of an effort to douse the fire, we are of the considered view that ends of justice would be served if the sentence of imprisonment for life awarded by the trial court is reduced to the period of sentence already under gone. Consequently, the appeal is **partly allowed** to the extent above. The sentence of imprisonment for life awarded to the appellant by the trial court is modified and reduced to the period of sentence already undergone. However, the fine and the default sentence awarded by the trial court is maintained. Subject to above, the accused-appellant shall be released forthwith, unless wanted in any other case, on compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court.

31. Let a copy of this order be forwarded to the court below along with the record for information and compliance.

(2022) 8 ILRA 739
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2022

BEFORE

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

Criminal Appeal No. 2493 of 1983

Ram Charan Singh & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri T. Rathore, Sri Gaurav Tripathi Ami Cu, Sri Rajrshi Gupta, Sri Dileep Kumar (Senior Adv.). Sri Rizwan Ahmad

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 302 & 34 - The Code of Criminal Procedure, 1973 - Sections 157 & 161 - no statutory requirement to send copy of the chik FIR and GD entry of the written report to the autopsy surgeon - case based on ocular evidence - if the court finds the ocular account truthful and reliable, the existence or non existence of motive for the crime has little relevance -

defective or illegal investigation, if it does not create reasonable doubt on the guilt of accused, cannot be taken as a ground to discard the prosecution case .(Para - 20,32,34)

Committing murder - incriminating circumstances - deceased killed in wee hours of morning - dragged with the aid of trouser knotted around the neck - ocular account corroborated by medical evidence on two counts - appears abrasion on chest/abdomen region and the knees suggesting that deceased was dragged in a prone position - abraded contusion on the front of the neck - reliance on ocular account - corroborated by medical evidence and material collected during course of investigation - trial court convicted appellants – hence appeal. **(Para -10,17,43)**

HELD:-Ocular account is trustworthy and reliable. Trial court committed no mistake .Charge against accused appellants proved. Conviction of appellants for charge of murder with the aid of section 34 IPC not sustainable. Injuries appeared grievous and reflected an intention to cause death. No justification to alter the conviction from Section 302 IPC to Section 304 IPC. **(Para - 51,52,53)**

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. Meharaj Singh Vs St. of U.P. ,(1994) 5 SCC 188

2. Ram Sanjiwan Singh Vs St. of Bihar, (1996) 8 SCC 552

3. Rajesh Singh Vs St. of U.P., (2011) 11 SCC 444

4. Anjanappa Vs St. of Karn., (2014) 2 SCC 776

5. Babu and Anr. Vs St., (2013) 4 SCC 448

6. Thaman Kumar Vs St. of U.T.C., (2003) 6 SCC 380

7. Anil Rai Vs St. of Bihar, (2001) 7 SCC 318

8. Abdul Sayeed Vs St. of M.P., (2010) 10 SCC 259

9. C.B.I. & anr. Vs Mohd. Parvez Abdul Kayyum & ors., (2019) 12 SCC 1

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

1. This appeal is against the judgment and order dated October 19, 1983 passed by third Additional Sessions Judge, Bulandshahr in S.T. No.780 of 1982 convicting and sentencing the appellants under Section 302 IPC read with Section 34 IPC to imprisonment for life.

INTRODUCTORY FACTS

2. The prosecution story, in a nutshell, as per the written report (Ex. Ka-1), lodged by Dharamveer (PW-1), is that in the morning of 10.09.1982, at about 6 am, while the informant was easing himself in the open field, he heard screams of his nephew Chiranji (the deceased) coming from the field of Ajab Singh, which had standing maize crop. Reacting to the screams, the informant, Kundan (PW-2) and Chiranji's mother (not examined) reached the spot. There, they witnessed Ram Charan (appellant no.1) and Rajpal (appellant no.2) pinning down Chiranji and putting pressure on him after having tied a knot around his neck by using his trouser. When the informant and others came to rescue him, Rajpal threatened them by saying that if anybody comes forward, he would be shot dead, as a result whereof, the informant party stayed away. Both the accused, thereafter, dragged the deceased into the Jwar (millet) field by pulling him with the aid of that trouser tied around Chiranji's neck. On raising alarm, when several persons arrived and tracking the drag marks they reached the neighbouring sugar cane field of Udayeer, they found

Chiranji dead with 3 to 4 knots of that trouser tied on his neck. It was alleged that body of Chiranji was lifted from the spot and brought to his house whereafter, they have come to lodge the report. With regard to the motive for the crime, it was disclosed that about 8-9 months ago, the deceased was caught with the sister of the accused; the accused had then beaten Chiranji as well as their sister. Since then the accused were inimical towards Chiranji. The written report, which was scribed by Jodha Singh (not examined), was lodged at 9.20 am on 10.09.1982 at P.S. Kotwali Dehat, District Bulandshahr, which is at a distance of 14 km from the spot, giving rise to case crime no.299 of 1982. The G.D. Entry in respect of lodgement of the written report was made vide report no.18 (Ex. Ka-10) by PW-5 who also prepared Chik Report (Ex. Ka-9).

3. Inquest was conducted by PW-4 while the body of the deceased was lying on a cot at the Baithak of the house of the deceased at village Shahpur. The inquest report (Ex. Ka-3) recites, inter alia, (a) that information was received from Dharamveer (PW-1) at 9.20 hours on 10.09.1982; (b) that the police left the police station to go to the spot at 11.45 hours on 10.09.1982; (c) that the distance of the spot from the police station was 16 km; (d) that the body of the deceased was carrying an open shirt and an underwear; and (e) that next to the body was a nylon trouser of the deceased, which was seized by the police. The inquest report was witnessed by Harish Chandra (village Pradhan), Charan Singh, Kundan Singh, Ajab Singh and Prahlad Singh. None of them has been examined. It be mentioned that in the second page of the inquest report there is recital of the case details i.e. Case Crime No.299 under Section 302 IPC. The inquest report also notices that PW-4 conducted the inquest under the direction of Inspector Sri Harinandan Singh.

4. The autopsy of the cadaver was conducted by Chandra Prakash (PW-3) on 11.09.1982 at about 3 pm. According to the autopsy report, the deceased was aged about 19 years. The autopsy report (Ex. Ka-2) records:-

External Examination:

Thin built body. Rigor mortis passing off. No sign of decomposition seen. Bleeding from both nostrils present. Tongue congested. Lips swollen.

Ante-mortem injuries:

(i) Abraded contusion 7" x 1" on anterior aspect of neck horizontally placed across wind pipe extending from below left angle of mandible to right neck.

(ii) Abraded contusion 10" x 7" on anterior lower chest and upper abdomen both sides, 2" above umbilicus.

(iii) Abraded contusion 1½" x ¾" on anterior aspect right knee joint.

(iv) Abraded contusion 1¼" x ½" on left knee joint anterior aspect.

Internal examination:

Right greater cornua of hyoid bone fractured; Pleura congested; first and second tracheal cartilages fractured; internal lining deeply congested; and (sic) muscles of neck and soft tissue around the wind wipes were lacerated and deeply congested; right carotid sheath ruptured along with its contents.

Opinion:- Death due to asphyxia as a result of injury no.1.

Duration since death:- About 1½ days back.

5. During the course of investigation, the police seized the trouser of the deceased of which a seizure memo (Ex. Ka-8) was prepared on 10.09.1982.

6. After recording the statement of witnesses and completing the investigation, the investigating officer submitted charge sheet (Ex. Ka-12) on 09.11.1982. After taking cognizance on the charge sheet, the case was committed to the court of session giving rise to S.T. No.780 of 1982 in the court of third Additional Sessions Judge, Bulandshahr.

7. On January 14, 1983, both the appellants were charged under section 302 read with 34 IPC for committing murder of Chiranji on 10.09.1982 at about 6 am. The accused pleaded not guilty and claimed trial.

8. During the course of trial, the prosecution examined six witnesses, namely, Dharamveer (PW-1) (informant and an eye witness of the incident); Kundan (PW-2) (another eye witness of the incident); Dr. Chandra Prakash (PW-3) (the autopsy surgeon who conducted the autopsy of the body of Chiranji); Yashvir Singh (PW-4) (the Sub-Inspector who prepared the inquest report); Sewati Lal (PW-5) (the constable who made GD entry of the written report and prepared Chik FIR); and Ramphal Singh Tyagi (PW-6) (the investigating officer).

9. The incriminating circumstances appearing in the prosecution evidence were separately put to the two appellants. The appellant Ram Charan denied the incriminating circumstances and, in response to a question as to why he has been falsely implicated, stated that the witnesses are related to each other and are supporters of village Pradhan Harish Chandra. Harish Chandra on account of a chak road dispute was inimical; hence, because of village party bandi, he had been falsely implicated. Similar is the statement of the other appellant, namely, Rajpal. The accused, however, led no defence evidence.

10. The trial court by placing reliance on the ocular account, finding the same corroborated by medical evidence and material collected during the course of investigation, convicted the appellants, as above.

11. We have heard Sri Dileep Kumar, learned Senior Counsel, assisted by Shri Rizwan Ahmad and Sri Gaurav Tripathi, Amicus Curiae, for the appellants; Sri H.M.B. Sinha, learned AGA, for the State; and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

12. The learned counsel for the appellants submitted that the prosecution has not been able to establish a cogent motive for the crime. Although, it is the case of the prosecution that the deceased had some relations with the sister of the accused but that relationship, and any specific incident arising therefrom, has not been proved to demonstrate that there existed a cogent motive for the crime. In the testimony of PW-1 the name of that sister of the accused is disclosed as Dharmo. According to PW-1, Chiranji (the deceased) had teased Dharmo 8-9 months

before the incident. There is no clear cut evidence with respect to the age of Dharmo though, at one place it is disclosed as between 9 and 10 years. In paragraph 10 of PW-1's deposition Chiranji's age is disclosed as between 10 and 13 years. If the two were that young, the motive for the crime is absurd and therefore, the prosecution story appears highly improbable.

13. It was next submitted that the ocular account does not inspire confidence because if the accused had carried a pistol, as is alleged by the witnesses in their deposition during trial, what was the occasion not to use the weapon and, instead, use the trouser of the deceased to strangulate him. Further, if the alarm raised by the witnesses had attracted the villagers, why no attempt was made to save the deceased. Further, the ocular account is in respect of strangulation by tying a trouser knot around the neck of the deceased but there is no ligature mark found. When the autopsy surgeon (PW-3) was questioned in that regard, he submitted that there is a high possibility that injury no.1, which was considered fatal, was a result of pressing the neck with the aid of lathi whereas in the ocular account there is no indication that the neck was pressed by a lathi or a blunt object therefore, the ocular account appears in conflict with the medical evidence.

14. Even the presence of prosecution witnesses at the spot appears doubtful because if they had been there, they would have made an attempt to save the deceased.

15. It was submitted that the FIR appears ante-timed for the following reasons:

(i) All papers entered in the inquest report and alleged to have been forwarded to the autopsy surgeon, did not reach the autopsy surgeon. The record reflects that documents such as the Chik FIR and the GD entry of the FIR were to accompany the inquest report as they find mention at the back of the inquest report but those were not received by the autopsy surgeon, which means that when the body was dispatched for autopsy, the FIR and the GD entry of the FIR was not in existence therefore, those papers were not forwarded to the autopsy surgeon.

(ii) The report that is to be forwarded forthwith to the Magistrate under Section 157 CrPC was forwarded by C.O. on 13.09.1982 as is clear from the statement of PW-5. This delay also suggests that the FIR had not come into existence by then and it came into existence after the autopsy was conducted on 11.09.1982.

(iii) That if the Chik report had been in existence at the time of inquest, the distance of the police station from the spot entered in the inquest report would have been same as in the Chik report. In the instant case, in the Chik report the distance entered is 14 km, whereas in the inquest report the distance entered is 16 km.

(iv) During cross examination of PW-1 (the informant), his attention was invited to the omission in the written report with regard to the parentage of the accused. In response thereto, PW-1 stated that he had told the scribe, after the written report was read out to him, that he has not mentioned the name of father of the accused but the scribe told him that it is not required as the accused have already been taken to the police station. It has been submitted that this statement of PW-1 is a clear indication of the fact that the accused were arrested even before the first

information report came into existence. Whereas, the statement of I.O. would suggest that the arrest was made after registration of the FIR therefore, it is a clear case where the FIR came into existence later than what is reflected in the records.

16. In addition to above, it has been submitted that there is contradiction in the testimony of PW-1 and PW-2. According to PW-1, the trouser, used as a weapon of assault, was left in the field and was brought by constable of police station Chandpur, whereas, according to PW-2, the trouser was brought by the informant party and handed over to the I.O.

17. It was next submitted that this is a case where the deceased was killed in the wee hours of the morning, when there was no light. It is customary for people to attend to nature's call before sun rise and, by the very nature of the activity, people tend to squat at a distance from each other so that they are not visible to each other. Thus, it appears to be a case where in the darkness of wee hours of the morning someone dragged the deceased and killed him, when no one was present. But as the drag marks appeared in the field, following the drag marks, body was found. Later, by guess-work, on the basis of enmity, first information report was lodged with the help of village Pradhan who visited the police station along with one Tota to lodge the report against the accused.

18. In a nutshell, the submission of the learned counsel for the appellants is that it is an incident not witnessed by any person; that the witnesses belong to the same family and can therefore be considered as partisan witnesses; that there was village party bandi in connection with Pradhan elections and there existed a chak road dispute, therefore, the witnesses fall in the category of interested witnesses; that no independent witness has been examined; that the medical evidence does not support the ocular account; and that the first information report appears ante-timed. All of this would suggest that the prosecution case is contrived and the appellants have been falsely implicated either on strong suspicion or on the basis of enmity. It was thus prayed that the appeal be allowed and the judgment and order of conviction be set aside.

SUBMISSIONS ON BEHALF OF THE STATE

19. **Per contra**, learned AGA submitted that considering the distance of the police station from the spot, the first information report has been lodged promptly. The presence of PW-1 and PW-2 has not been questioned and no suggestion has been put to the eye witnesses that they had not visited the spot to defecate at the time when the incident occurred. It was submitted that there is no specific reason disclosed for false implication other than village party bandi, which is general and vague. It has not come in the statement of any of the accused that there was any past case, regarding any incident between the parties, which may indicate that there was strong enmity between the accused and the informant/eye witnesses therefore, there was no good reason to falsely implicate the accused. Learned AGA submitted that the medical evidence does not rule out the ocular account. The autopsy surgeon in his deposition has not rule out the possibility of the deceased being strangulated with the aid of a trouser tied around his neck. Not only that, drag marks were noticed by the I.O. on the spot which correlate with the

abraded contusion found on the body of the deceased. All these circumstances signify that the witnesses had actually witnessed the incident. It has been submitted that the graphic description of the manner in which the deceased was dragged with the aid of trouser knotted around the neck, would indicate that it was witnessed by the witnesses and the ocular account is truthful. Even if there were lapses in sending the special report under Section 157 CrPC, the prosecution story cannot be disbelieved.

20. In response to the argument that the first information report was ante-timed, learned AGA submitted that the inquest report contains the case details suggesting that the first information report had already been lodged. Further, there is no statutory requirement to send copy of the chik FIR and GD entry of the written report to the autopsy surgeon. As the inquest report was forwarded to the autopsy surgeon and it bears the details of the case, the name of the informant and the date and time when the information was given by the informant, it cannot be said that the first information report was not in existence till the autopsy was conducted. Learned AGA therefore submits that this is a case where the ocular account finds support from the medical evidence and the surrounding facts and circumstances of the case therefore, the judgment and order of the trial court deserves to be affirmed and the appeal is liable to be dismissed.

PROSECUTION EVIDENCE

21. Having noticed the rival submissions and the introductory facts of the case, before we proceed further, it would be useful to notice, in brief, the testimony of the prosecution witnesses. Their testimony, in brief, is as follows:_

22. **PW-1- Dharamvir (the informant).** PW-1 stated that the deceased Chiranji is his nephew; the accused Ram Charan and Rajpal are real brothers; at the time of the incident, at about 6 am, while he was defecating in the field of Ajab Singh, he heard screams of his nephew Chiranji; hearing the screams, PW-1 rushed to the spot; Kundan (PW-2) and Ramkaur (mother of the deceased) also arrived; there, they noticed Ram Charan and Rajpal having tied a noose around the neck of Chiranji made out of Chiranji's trouser and were pressing his neck; when PW-1 and others tried to intervene, the accused threatened them to stay away or else they will be shot, as a result, the witnesses retreated; the accused dragged the deceased by pulling the trouser tied on Chiranji's neck and dragged him right through Ajab Singh's Jwar (Millet) field; when on the alarms of PW-1, PW-2 and deceased's mother, 4-6 men including Raghuveer, Ramveer, Sukkha and Bundu arrived, following the drag marks noticed in the fields, they found the body of Chiranji lying in the sugar cane filed of Udayveer; they all noticed that the trouser of Chiranji was tightly knotted, with 3-4 knots, around his neck. PW-1 stated that those knots were untied and the body of Chiranji was brought to his house and kept on a cot. PW-1 stated that the written report of the incident was got scribed by dictating it to Jodha. The written report was made Ex. Ka-1. In respect of the motive for the crime, PW-1 stated that 8-9 months before the incident, Chiranji had teased accused's sister Dharmo.

On a query of the court, PW-1 stated that he can write a little bit in Hindi.

During cross examination by the defence, PW-1 stated that accused

persons are sons of Lal Singh (some where it is stated Leela Singh); Lal Singh has three daughters, namely, Shikha aged 24 years, Rajpali aged 18 years and Dharmo aged 9-10 years. In respect of PW-1's relation with Kundan (PW-2), PW-1 stated that Meghraj and Lekhraj are real brothers. PW-1 is son of Lekhraj, whereas PW-2 (Kundan) is son of Meghraj. PW-1 stated that Neksa son of Lekhraj is in police and is posted at Dehradun. Neksa is the father of Chiranji. In respect of village party bandi, PW-1 stated that prior to the incident there was election of Pradhan in which Charan Singh, Bhabuti and Harish Chandra had contested. PW-1 and his family had supported Harish Chandra, whereas the accused and his family had supported Charan Singh. Harish Chandra had won the election. On account of Pradhan election, there is party bandi in the village. The leader of one side is Harish Chandra, whereas the leader of the other side is Charan Singh.

In respect of the dispute between Harish Chandra and Leela Singh over a chak road, PW-1 stated that he has no knowledge.

In respect of the parentage of the accused persons, he stated that both are sons of Leela Singh (Jat). He denied the suggestion that there is any other person by the name of Rajpal in the village.

In respect of omission of parentage of the accused in the written report, PW-1 stated that he had dictated the parentage of the accused for being mentioned in the report but it may have been left out inadvertently. PW-1 then clarified that when the report was read out to him, he had pointed out to the scribe that father's name of the accused has not been mentioned therefore, the same may be mentioned, upon which, the scribe stated that it can be filled later as the accused have already been taken to the police station. At this stage, it would be useful to reproduce the exact statement of PW-1 in that regard, which is as follows:-

"जब रिपोर्ट मुझे पढ़कर सुनाई गई तो मैंने लिखने वाले से कहा था कि तुमने मुलजिमों के बाप का नाम और जात नहीं लिखी है इसको लिख दो तो उसने कहा कि चलो रहने दो, मुलजिमान तो थाने पहुँच ही गये है आगे लिखवा देना।"

In respect of accused's sister Dharmo, PW-1 stated that her name was mentioned in the written report but if it was not written, he cannot give reason for the same. PW-1 stated that at the time when Chiranji died, Dharmo must have been aged 10-12-13 years old; and that the house of Chiranji and the accused persons were adjoining each other. PW-1 stated that no report was lodged by the accused in respect of Chiranji teasing Dharmo. He also stated that he does not remember the day and date of that incident but he was aware of that incident since before the death of Chiranji. The information of that incident was given by Rajendra Master to his brother Kundan Singh (PW-2) and PW-2 had informed PW-1. He denied the suggestion that there was no such incident of Chiranji teasing Dharmo.

In paragraph 12 of his statement, PW-1 stated that Chiranji and PW-1 are of the same Khandaan and since death of PW-1's father, Chiranji's family and PW-1's family have their food cooked at one place.

In respect of the field in which they had gone to defecate, PW-1 stated that that field was of Ajab Singh of about 28 Kachcha bigha. In about 8 bigha, Jwar was

sown whereas the rest had maize (Makka). In paragraph 17, PW-1 stated that at that time the maize crop was tall, equal to the height of a man. In the field of Udayveer, there was sugar cane crop which was taller than a man. He stated that Ajab Singh's field was adjoining the village and the accused had killed the deceased in the next field. He stated that he had shown the spot to the I.O.

In paragraph 18, PW-1 stated that at the time of the incident, the sun was not out. PW-1 stated that the spot where noose was tied around the neck of Chiranji was at a distance of 20-25 paces from the spot where PW-1 was defecating. PW-1 stated that when he heard the screams, he could gather that some untoward incident has occurred. He ran towards the spot while raising alarm but at that time nobody was working in the field. Nabiya, however, was harvesting his maize crop but all those who arrived there, did not have lathi/danda. PW-1 stated that the accused dragged Chiranji towards south east. At the time when the accused were dragging Chiranji, they had raised alarm but they all were bare handed. The accused Rajpal had a Katta (country made pistol). PW-1 stated that he had mentioned in the report that Rajpal had Katta in his hand but if it was left out, he cannot give the reason for the same. PW-1 also stated that he had disclosed to the I.O. that Rajpal had Katta in his hand but if it was left out while recording his statement, he cannot give the reason for the same. PW-1 stated that when the witnesses collectively entered the standing Jwar crop, the accused left Chiranji 10-15 paces away and escaped. In paragraph 19, PW-1 stated that he had disclosed in the report that the accused had tied a noose around the neck of the deceased with the aid of trouser but the word Phaansi was not used.

In paragraph 21, PW-1 stated that at the place where the body was lying, about 100 villagers had arrived including Pradhan Harish Chandra and Chowkidar Tota.

At this stage, on being questioned by the court, PW-1 stated that the body was left in the field for 15 minutes. Amongst those who had arrived there, 50% had arrived from their field whereas the balance came from their residence.

PW-1 stated that the body of Chiranji was brought to his house on a cot by Raghuveer, Ramveer and Nanak. The cot with the body was kept at the chabutara in front of the Baithak. PW-1 stated that the body was kept there till the police had arrived. Thereafter, he left to lodge the report.

In paragraph 22, PW-1 stated that the trouser was left in the field and was brought by a constable of P.S. Chandpur. In paragraph 22, PW-1 stated that to lodge the report, Harish Chandra and Tota had come with him. In paragraph 23, PW-1 stated that after leaving the body at home, they had first gone to Sahkari Nagar Chowki, thereafter, they came to Bulandshahr whereafter, they went to Kutchery. At Kutchery, they found Jodha Singh who scribed the report. They arrived there on a "*Tonga',* which took them 45 minutes. At *Kutchery*, it took them about half an hour to scribe the report. PW-1 stated that he did not know Jodha from before but Tota knew him. PW-1 stated that Jodha Singh was informed about the incident by him. When questioned by the court, PW-1 stated that to go to P.S. Chandpur from Sahkari Nagar Police Chowki one has to pass through Bulandshahr. In paragraph 24, PW-1 stated that after getting information of the

incident, Neksa came next day from Dehradun and went straight to the mortuary at Bulandshahr. He denied the suggestion that the first information report was lodged after arrival of Neksa in consultation with Harish Chandra and the police; and that the written report was ante-timed. PW-1 stated that after lodging the report, they arrived at the village by about 9.30 and within 15 minutes thereafter the police of police station Chandpur arrived. Thereafter, PW-1 stated that the police might have arrived about half an hour later.

In paragraph 26, PW-1 stated that about 10-12 police personnel had arrived from police station Chandpur in which 2-3 police personnel were of the rank of Daroga (sub inspector), rest were constables. He denied the suggestion that some unknown person had killed Chiranji and that no one witnessed the incident. He also denied the suggestion that the incident had not occurred in the manner alleged. He denied the suggestion that the accused were implicated on account of enmity and party bandi at the instance of Gram Pradhan, Neksa and the police. On being shown the trouser (material Ex. C-1), he identified the trouser as the one which was used to strangulate the deceased. When the trouser was taken out, its length was found to be equal to 4 and a half handspan.

On being cross examined by the defence, after the trouser was made material Ex. C-1, PW-1 denied the suggestions that at the time of the incident Chiranji was aged 18-20 years and that the trouser (Ex. C-1) was not of Chiranji.

23. **PW-2- Kundan.** PW-2 reiterated what has been stated by PW-1 in his examination in chief. He stated that after untying the trouser knots from the neck of the deceased, the body was brought on a cot to Chiranji's house and PW-2's son had brought that trouser of the deceased from the spot. PW-2 identified the trouser (Ex. C-1) and stated that it is that very trouser with which the accused tied a noose around the neck of the deceased. PW-2 stated that in the house of Leela Singh and Rajpal there is a Montessori school run by Master Rajendra. Chiranji was a student of that school; Rajendra Master had told him, about 8-7 months before the incident, that Chiranji will not be allowed to continue because he had been teasing Rajpal's sister Dharmo. PW-2 stated that because of this animosity the deceased Chiranji was killed.

In paragraph 8 of his statement, PW-2 stated that he had not disclosed to the I.O. that a Montessori school was being run in the house of Leela Singh and Rajpal. PW-2 stated that he forgot to disclose the same to the I.O. PW-2 also informed the court that when he came to know that Chiranji had teased Dharmo, he got Chiranji removed from the school. He denied the suggestion that Chiranji was stopped from going to the school. He also denied the suggestion that Chiranji had not teased Dharmo and that the story was developed on the suggestion of the police. Questions were also put to him in respect of the spot from where he witnessed the incident, PW-2 disclosed that he was also defecating at that time and had arrived at the spot on hearing screams. In respect of the height of the standing crop in the field, he stated, as was stated by PW-1, that the crops were tall. He reiterated that he had informed the I.O. that his son had brought the trouser of the deceased from the spot. In respect of time of arrival of the police, PW-2 stated that the police had arrived by about 10 hours. PW-2 stated that the trouser was handed over to the police by him and a

memorandum in respect thereof was prepared. PW-2 stated that in the memorandum he had signed but the memorandum, which is there, does not bear his signature.

Note:- It be noted that the trouser seizure memo (Ex. Ka-8) does not disclose that PW-2 is a witness thereof.

PW-2 stated that the inquest was held in his presence. PW-2 added that the body was taken from home at 11-11.30 am for being dispatched to Bulandshahr. PW-2 stated that the body was brought to the mortuary by about 2 pm but the autopsy was conducted next day. During this time, they were there at the mortuary. PW-2 also stated that the body was delivered at around 4.30 pm. PW-2 stated that the date when the autopsy was conducted, the deceased's father Neska arrived from Dehradun. PW-2 stated that he had not gone with Dharamvir to lodge the report though Tota had gone. PW-2 stated that his statement was recorded that very day at 1.30 pm. PW-2 denied the suggestion that he did not witness the incident and that on account of enmity and party bandi and relationship, he is telling lies.

24. **PW-3- Dr. Chandra Prakash**. PW-3 proved the autopsy report which was marked Ex. Ka-2. He was shown Ex. Ka-1 (trouser). He stated that if Ex. Ka-1 is tied around the neck and is pulled then the nature of the injury, recited as injury no.1, is possible. PW-3 stated that the injury no.1 by itself is sufficient to cause death. PW-3 stated that 7 out of 9 papers that were received by him at the time of autopsy are there before him.

During cross examination, PW-3 stated that injury no.1 was not all around the neck but towards the front. He clarified that if someone is pulled by tying a cloth on the neck then it is not necessary that injury would be caused all around the neck. He accepted the possibility that injury no.1 can also be caused if the front of the neck is pressed by a lathi. On being shown the cloth of the trouser, PW-3 stated that it is of nylon and of soft material. PW-3 stated that if this pant is tied around the neck and one is pulled, it might result in an abraded contusion. PW-3 stated that injury would be caused at that point where pressure is put. He denied the suggestion that no abrasion with contusion would be caused if the pant is tied on the neck and is pulled. PW-3 stated that the width of the injury would depend on the width of the cloth tied around the neck. He accepted that it is more probable that injury no.1 may be caused by a lathi pressing the neck. On further cross examination, he stated that it is also possible that the deceased might have been aged 21 years.

In respect of the time when the body was received, PW-3 stated that the body was received on 11.09.1982 at 2.45 pm and the concerned papers were received at about 12.30 pm. PW-3 stated that the time when the autopsy was conducted all the papers, that he received, were signed by him. He accepted that the deceased could have died at 3 am on 10.09.1982 or one or two hours earlier but not earlier than that.

25. **PW-4- Yashvir Singh.** PW-4 conducted the inquest proceedings. PW-4 stated that the body of Chiranji was kept in a cot in front of his Baithak. He proved the inquest report, which was marked Ex. Ka-2. He proved the letter making a request for autopsy, chalan lash and photo-nash. PW-4 stated that he had noticed the trouser kept near the body. It was seized and a seizure

memo (Ex. Ka-8) was prepared. He also identified the trouser seized, which was exhibited as Ex. C-1.

In his cross examination, PW-4 stated that at the time of inquest proceedings there were 30-40 men including Gram Pradhan Harish Chandra, who was one of the inquest witnesses. PW-4 stated that the trouser seized was found kept on the cot near the head of the body. On being shown Ex. Ka-6 (chalan lash), PW-4 stated that in the fifth column there appears some over writing and in Ex. Ka-4 to Ex. Ka-6 the name of the accused and the section is not mentioned. PW-4 stated that in the inquest report, he had stated that the death was on account of strangulation but he has not mentioned as to how he was strangulated. PW-4 also stated that in the inquest report, he had not made a mention of the trouser being soiled. In paragraph 3 of his statement, he stated that the body was dispatched at about 1 am on a ''*Tonga*'. He denied the suggestion that the trouser was not of Chiranji.

26. **PW-5- C.P. Sewati Lal.** He proved the registration of the FIR at 9.20 am on 10.09.1982 by proving the GD entry thereof and preparation of the Chik FIR. The Chik FIR was exhibited as Ex. Ka-9 and GD entry thereof was exhibited as Ex. Ka-10.

In his cross examination, PW-5 admitted that in the written report the parentage of the accused was not mentioned therefore he did not make entry of the parentage in the general diary. He denied the suggestion that the parentage of the accused was not disclosed as the identity of the accused was not confirmed. PW-3 stated that that very day there was no other cognizable report made at the police station concerned. He denied the suggestion that the GD entry was kept vacant to adjust the report. On being shown Ex. Ka-9, PW-5 stated that the report was received in the court by magistrate on 13.09.1982.

27. **PW-6- Ramphal Singh Tyagi - Investigating Officer.** PW-6 stated that on 10.09.1982 he was posted at Sahkari Nagar Chowki. The investigation of this case was marked to him. He started investigation on that very day and recorded the statement of Dharamvir and Kundan as well as others and made inspection of the spot and prepared site plan, which was exhibited as Ex. Ka-11. PW-6 stated that the accused were arrested on that very day. PW-6 stated that he conducted investigation upto 11.09.1982 and thereafter the investigation of the case was taken over by Harnandan Singh, Inspector, Chandpur. PW-6 stated that the investigation of the case was completed by 09.11.1982 and charge sheet was submitted by Harnandan Singh whose signature he could recognise. The charge sheet was exhibited as Ex. Ka-12.

During his cross examination, PW-6 stated that the case was not registered in his presence but in the presence of Harnandan. PW-6 stated that the informant had arrived on a police jeep with Harnandan at his Chowki at about 10 am. At the Chowki, the informant's statement was recorded and he was there at the Chowki for about an hour. He denied the suggestion that the statement of the informant was not recorded by the Inspector because by then the report was not lodged. PW-6 stated that he left the chowki at about 11 am and reached the informant's house by 11.30 am where a large number of people had already gathered and, in front of the Baithak, on a

cot the body of Chiranji was lying. In paragraph 4, PW-6 stated that he had not recorded the statement of Rajvir, Sukkha, Badiya, Tota, Nauvat and Nanakchand but had recorded the statement of Raghuvir and Bundu. PW-6 stated that neither he had recorded the statement of Master Rajendra Singh nor he ascertained whether he was running a Montessori school. PW-6 stated that the site plan was prepared by him. In paragraph 6, PW-6 stated that Kundan (PW-2) had not informed him as to why Master Rajendra Singh did not want Chiranji to continue in the school. In paragraph 6 of his statement, PW-6 stated that PW-2 had not informed him that there were 3-4 knots of the trouser tied on the neck of Chiranji and that PW-2 had also not informed him that his son had brought the trouser from the spot to the house. He denied the suggestion that the investigation was carried out in collusion with the informant, the village Pradhan and the father of the deceased.

Statement of the accused-appellants under section 313 CrPC

28. Both the appellants denied the incriminating circumstances appearing in the prosecution evidence against them and claimed that the witnesses of fact are of same family; that they are supporter of Pradhan Harish Chandra; they have a chak road dispute with Harish Chandra; there is village party bandi and, therefore, they have been falsely implicated. No defence evidence was led.

ANALYSIS

29. Having noticed the rival submissions and the entire prosecution evidence, before we proceed to evaluate the same in the context of the submissions made, there are certain features in the prosecution evidence in respect whereof no suggestions were put to the prosecution witnesses to refute there existence. These are:-

(i) The defence has not questioned, by way of suggestions, that the deceased was killed at about 6.00 am on 10.09.1982 in the field of Udayveer; and that from there the body was brought to deceased's house where inquest was held.

(ii) There is no suggestion to the investigating officer with regard to him not conducting spot inspection and preparing site plan (Ex. Ka-11), which disclosed that the standing crop in the field was disturbed by drag marks. Further, there is no suggestion to PW-1 and PW-2 in respect of there being no light and they being not able to notice and follow the drag marks to reach the spot where the body was lying.

(iii) There is no suggestion put to PW-2 to refute his deposition that the deceased Chiranji was a student of a Montessori school of which Rajendra Master was a Principal.

(iv) There is no suggestion to the prosecution witnesses that Dharmo was not sister of the accused persons.

(v) Further, there is no challenge to the prosecution evidence that the house of the deceased was adjoining the house of the accused.

30. Bearing in mind the aforesaid undisputed features in the prosecution evidence, we now proceed to evaluate the evidence led by the prosecution in the context of the submissions made. The thrust of the submissions made by the learned counsel for the appellants can

broadly be divided into following categories:-

(a) that there is no cogent motive for the crime;

(b) that the facts and circumstances of the case suggest that when the body of the deceased was discovered in the morning, on the basis of guess-work and strong suspicion the story was contrived which is evident from the following circumstances:-

(i) that the FIR appears ante-timed;

(ii) that the ocular account of the deceased being strangulated with the aid of his own trouser is not corroborated by medical evidence.

(iii) that there is improvement in the ocular account, inasmuch as, neither in the FIR nor in the statement recorded under Section 161 CrPC presence of a country made pistol in the hand of Rajpal is disclosed, whereas during the course of trial, to justify as to why the witnesses, despite their presence, did not intervene, a country made pistol in the hand of accused Rajpal has been disclosed.

(iv) there appears, contradiction in the testimony of PW-1 and PW-2 as regards who brought the trouser from the field to the place where the body was kept at the time of inquest. PW-1 stated that the trouser was left in the field and was brought by a constable, whereas PW-2 stated that it was his son who had picked up the trouser from the spot. All of this would suggest that the story of strangulation with the aid of trouser is an afterthought. Otherwise also, where was the occasion to untie the knots of the trouser, separate it from the body and carry the body away from the spot. All of this would suggest that the prosecution story is contrived.

31. On the issue that there is no motive for the crime, the learned counsel for the appellants submitted that the prosecution story is that the deceased Chiranji had teased the accused appellants' sister Dharmo and, therefore, the accused appellants killed him. It has been submitted that there is no clear evidence of the date and time when the deceased had teased the sister of the accused appellants. The prosecution evidence in this regard, according to the learned counsel for the appellants, is vague and indefinite. Other than that, the age of Dharmo reflected in the statement of the prosecution witnesses of fact appears to be about 10 years. At that young age, it is unacceptable that a girl would be eyed with an ulterior motive. The prosecution story therefore, according to the learned counsel for the appellants, is based on imagination and it does affect the truthfulness of the prosecution case.

32. In this regard, we may observe that this is a case based on ocular evidence. In a case based on ocular evidence, if the court finds the ocular account truthful and reliable, the existence or non existence of motive for the crime has little relevance. No doubt, while evaluating the prosecution evidence and testing the truthfulness of the prosecution case on the weight of probabilities, the entire case has to be considered and, therefore, the motive may assume importance, particularly, where there is a doubt. But, we should not be unmindful of the fact that motive is a mental state of which the person whose conduct is in question is the sole repository. It is difficult to assess whether the motive

is sufficient or not for the crime in issue. In the instant case, on the issue of motive for the crime, what is relevant is that the prosecution through the testimony of PW-2 has been able to establish that in the house of Leela Singh (father of the accused appellants) a Montessori school was being run by one Rajendra Master. In that school, the deceased Chiranji was a student of Class-V. Rajendra Master had complained about the conduct of the deceased and upon intervention of PW-2, he was taken out of that school. The testimony of PW-2 in this regard cannot be doubted as nothing much could come out during cross examination to doubt his deposition in this regard. Another key feature in the prosecution evidence is that the house of Leela Singh, whose daughter was Dharmo, was adjoining the house of the deceased. Notably, when PW-2 was questioned as to why he did not take the name of Dharmo in his statement recorded under Section 161 CrPC, in paragraph 7 of his statement in court, like a responsible citizen of the society, PW-2 stated that he did not disclose the name of Dharmo, because to guard reputation of a girl some disclosures are not to be made, but, when he was called upon to make the disclosure that disclosure was made. PW-2 stated that truth of the matter is that Chiranji had teased Dharmo. Notably, PW-2 was also questioned as to why he had not made a disclosure that in the house of Rajpal a Montessori school was being run. He stated that that omission was due to inadvertence but he had informed the I.O. that Rajendra Master, who managed the school, was questioned by PW-2 as to why he would not teach Chiranji (the deceased), in response to which, Rajendra Master told PW-2 that Chiranji had teased Rajpal's sister Dharmo. He stated that if that was not mentioned, he cannot give a reason for that. What is important here is that assuming that details were not given either in the FIR or in the statement recorded under Section 161 CrPC, but it was very much indicated in the FIR that some time ago Ram Charan had caught Chiranji (the deceased) in the company of his sister and had beaten both his sister as well as Chiranji. What is also important is that there is no specific suggestion to PW-2 that in the house of Leela Singh (the father of the accused appellants) no Montessori school is being run by Rajendra Master or that Chiranji had never studied in that school. Once this is the position, it is not a case where there was no motive for the crime. Whether that motive was strong and sufficient is not for the court to guess in a case which is based on ocular account as it is well settled that different persons react differently. We, therefore, reject the submission of the learned counsel for the appellants that the prosecution has failed to prove any motive for the crime.

33. Before we proceed further, we shall address the issue raised with regard to the FIR being ante-timed. In this regard, learned counsel for the appellants highlighted the following circumstances:-

(i) The inquest report (Ex. Ka-3) though mentions the case details (i.e. case crime) in its internal page; and its last page mentions that seven papers comprising nine sheets were sent for autopsy but, interestingly, the copy of the FIR which was mentioned at the back of the inquest report was not forwarded which suggests that it was not in existence at that time. (ii) As per the endorsement in the challan-lash (Ex. Ka-6) the autopsy surgeon received the body on 11.09.1982 at 2.45 pm, whereas he had received the papers on 11.09.1982 at 12.30 pm. If the inquest had been conducted and the body was handed

over at 12.50 hours on 10.09.1982 for being sent to the mortuary for autopsy, there was no justification not to send the body that very day, which clearly suggests that the police withheld the body as the papers were not ready and were waiting for the father of the deceased to arrive. (iii) The report under Section 157(3) CrPC, which is to be sent forthwith, as per the statement of PW-5, was received by the concerned Magistrate on 13.09.1982. Not only that, the Circle Officer made an endorsement on the report on 12.09.1982. The Chik FIR suggests that information regarding registration of the case was dispatched from the police station on 11.09.1982. All of this would clearly show that the first information report came into existence on 11.09.1982 after the father of the deceased, who is a police personnel, arrived from Dehradun. (iv) It was also argued by the learned counsel for the appellants that from the testimony of PW-1 it is clear that the accused were arrested before lodging of the first information report and this, coupled with the above circumstances, clinches the issue and proves beyond doubt that the first information report has been ante-timed.

34. In ***Meharaj Singh Vs State of U.P. (1994) 5 SCC 188, i***t was observed that FIR in a criminal case and particularly in murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. It was observed that delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. It was observed that on account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. After observing as above, in paragraph 12 of the judgment, it was observed as follows:-

"12. ...With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR"

In **Ram Sanjiwan Singh Vs State of Bihar, (1996) 8 SCC 552,** the

Supreme Court held that where the inquest report prepared in the morgue of the hospital and seizure list prepared makes a recital of the criminal case, it may be accepted that the FIR had come into existence. Similarly, in **Rajesh Singh Vs State of U.P., (2011) 11 SCC 444**, it was observed that merely because copy of FIR was received in office of Circle Officer on third day, it should not be assumed that the FIR was ante-timed. Further, in **Anjanappa Vs State of Karnataka, (2014) 2 SCC 776**, while noticing the decision in Meharaj Singh's case (supra), the apex court held that sending copy of special report to Magistrate is only an external check on working of police agency imposed by law, which is to be strictly followed. But, that delay, by itself, does not render prosecution case doubtful. Similarly, in **Babu and Another Vs State, (2013) 4 SCC 448,** it was held that defective or illegal investigation, if it does not create reasonable doubt on the guilt of accused, cannot be taken as a ground to discard the prosecution case. In light of the decisions noticed above, we are of the view that each case turn on its own facts and there can not be a straight jacket formula to ascertain, by applying time-tested external checks, whether the FIR is ante-timed.

35. I n the instant case, the inquest was conducted by PW-4 (Yashvir Singh). He proved conducting of inquest on 10.09.1982 and also proved preparation of the inquest report, which was exhibited on the basis of his statement. During cross examination, PW-4 stated that after registration of the report, he moved from the police chowki at 11 am and arrived at the spot at 11.30 am. In the column of the challan-lash, as to when the body was handed over to the constable, the date and time of handing over is recited as follows:- **"10.9.82 at 12.50"**, which corroborates the entry in the inquest report. There appears some overwriting over digit "5'. Consequently, question was put to PW-4 in respect of the overwriting on the digit "5'. He accepted that there was overwriting over digit "5'. During cross examination, he was also confronted with Ex. Ka-4 (letter to the Pratisar Nirikshak) and Ex. Ka-6 (challan-lash) where the details of the case crime number were not mentioned. He was also confronted with the entries in the inquest report which did not mention the weapon used for strangulation though they disclosed that the deceased was strangulated. Interestingly, no suggestion was put to PW-4:- (a) that the inquest was not conducted on 10.09.1982 at the time shown or that it was conducted on the next date (i.e. 11.09.1982) or that the inquest report was not prepared on 10.09.1982; (b) that there was no FIR by the time the inquest report was prepared; and (c) that the body was dispatched for autopsy not on 10.09.1982, but on the next day.

36. As we have noticed that PW-4 was not given suggestion in respect of preparation of the inquest report on any other day than 10.09.1982 and no suggestion was given to PW-4 that the body was not sealed and handed over to the constable on 10.09.1982 for carrying it to the mortuary, as is entered in the inquest report, one thing is clear that the inquest was conducted on 10.09.1982 and the inquest report was also prepared on 10.09.1982. Once that is the position, what is important to note here is that the inquest report bears the case details i.e. the case crime number and charging section 302 IPC in its internal page. It also contains recital about the name of the person from whom information was received including the time at which it was received which

correlates with the time of lodgement of FIR. That apart, in the opinion of inquest witnesses, death was due to strangulation. Thus, from the statement of PW-4 it is established that the inquest was conducted on 10.09.1982 by about 12.50 hrs and the inquest report prepared in connection therewith bears the case details.

37. In the instant case, the constable who made GD entry (Ex. Ka-10) of the receipt of the written report and who prepared the Chik report (Ex. Ka-9) was examined as PW-5. He proved GD entry of the receipt of written report and the preparation of the Chik report at 9.20 am on 10.09.1982. During cross examination, this witness was not given any suggestion that the written report was given on the next day (i.e. 11.09.1982). Further, nothing could be elicited from him during cross examination to demonstrate that the FIR is ante-timed. The questions put to PW-5, as would appear from his statement, were: (i) in respect of the GD entry of the written report not bearing the parentage of the accused; (ii) return of the constables Narottam and Bhan Prakash who carried the body for autopsy at quarter to 5 on 11.09.1982 and non mention of the reason for their delay in returning; and (iii) that there was no other report received on that day. In addition to above, PW-5 was questioned in respect of the dates of endorsement made by the Circle Officer and the Magistrate concerned, which were 12.09.1982 and 13.09.1982, respectively. What is interesting here is that no suggestion was put to PW-5 that the GD entry of the written report and the Chik FIR was prepared on any other date or time than mentioned. Thus, from the statement of PW-5 it is established that on 10.09.1982 the written report was received at the police station concerned and was registered at 9.20 am.

38. Once we find that the written report was received at the police station on 10.09.1982 and on 10.09.1982 itself the inquest was conducted and the inquest report prepared, the fact that the inquest report bears the case details would suggest that the first information report had come into existence at the time when the inquest was conducted. As no suggestion has been given to PW-4, the police personnel who conducted the inquest, that the inquest was conducted either on the next day or on any other date or time, in our view, merely on account of lapses on the part of the investigating agency in not forwarding the FIR along with the inquest report, or committing delay of a day or two in giving report to the magistrate concerned, it cannot be held that the first information report is ante-timed.

39. In so far as the statement of PW-1 that the scribe informed him that accused had already reached the police station therefore inclusion of parentage in the written report is not necessary is concerned, it may create an impression that the arrest of the accused was made even before the registration of the first information report. But this is not a clinching circumstance to indicate that the FIR was not lodged on the date and time it is purported to have been lodged. At this stage, we may notice that the I.O. (PW-6) in his deposition had clearly stated that the accused were arrested that very day. In these circumstances, even if the accused were arrested before the formal registration of the first information report, it would not have a material bearing on the issue whether the FIR was registered on the date and time at which it is

purported to have been lodged. In fact, the above statement of PW-1 would reflect that PW-1 lodged the first information report without deliberation and as a spontaneous reaction to what he witnessed therefore, he even omitted to mention the parentage of the accused. If this written report had been prepared next day, as suggested by the defence, there would have been ample time for the informant to double check the contents and ensure that the parentage of the accused is mentioned. In our view, therefore, this lapse, as has been pointed by the learned counsel for the defence, does not suggest that the FIR is ante-timed though, it may suggest that the accused were arrested even before lodging of the first information report. In addition to above, we notice that the seizure memorandum (Ex.Ka-8), which was prepared on 10.09.1982 itself, at the time of inquest, recites the case crime number. In view of the discussion above, we are of the considered view that the FIR had come into existence on 10.09.1982.

40. Now, we shall proceed to evaluate the ocular account rendered by PW-1 and PW-2. The contentions of the learned counsel for the appellants to question the credibility of the ocular account are three fold:- First, that it is an open field where the deceased was killed, away from the abadi and therefore the presence of the eye witnesses is not natural. There thus appears a strong possibility that in the morning when the disturbed crops were noticed in the field, the witnesses travelled the length of the disturbed crop to discover the body and, thereafter, weaved the story. Second, the story set up by the prosecution does not inspire confidence because if the accused had desired to finish off the deceased why they would use deceased's trouser to strangulate him and not the gun which they were carrying, as is alleged by the witnesses. Third, if the deceased had gone to defecate, his large intestine would not have been found loaded with faecal matter.

41. In addition to above, the defence counsel has also attacked the credibility of the ocular account by submitting that there has been an improvement therein by showing the presence of country made pistol in the hand of Rajpal of which there is no mention in the FIR.

42. In so far as the presence of the eye witnesses are concerned, it is a common practice in villages, particularly, 40 years ago, when facilities of toilets were not there, that to attend to nature's call, villagers used to go to the fields. Normally, when a person attends to nature's call, he maintains some distance from the other, even though, they may have gone together to attend to nature's call. The eye witnesses account in this regard is that the eye witnesses as well as the deceased had gone to the fields to attend to nature's call and during this process the witnesses heard shrieks of the deceased. It is at that stage that the witnesses saw the accused strangulating the deceased with the aid of his trouser and when the witnesses tried to intervene, the accused threatened the witnesses that they would be shot if they intervened. This part of the story is consistent throughout right from the stage of the first information report upto the deposition of witnesses during the course of trial. No doubt, in the first information report there is no mention of a country made pistol in the hand of accused Rajpal but since there is a statement in the FIR with regard to extension of threat that if the witnesses intervene, they would be shot, it would, by itself, suggest that Rajpal had a weapon. It is not the requirement of law

that the first information report discloses each and every detail. It is well settled that a first information report is not an encyclopaedia. In these circumstances, merely because the presence of country made pistol in the hand of Rajpal is not disclosed in the FIR, the ocular account cannot be discarded on the ground that in the deposition there is improvement that there was a country made pistol in the hand of Rajpal. In so far as the presence of the eye witnesses is concerned, we would have to bear in mind the common and usual practice in the villages. As per our understanding with regard to which there would hardly be a dispute, ordinarily, nature's call is attended early morning, particularly, in the villages as in those olden days toilets were not there and, therefore, to avoid public shame, people used to leave early morning to go to the fields. As this activity is at a large scale, members of same families, who live together, move together and squat at some distance from each other to attend to nature's call. Thus, the presence of the other family members at some distance from the deceased while they were attending nature's call is not unnatural or improbable to discard the ocular account as being rendered by a person who was not present. The submission of the learned counsel for the appellants that from the testimony of PW-1 and PW-2 it appears that they reached the spot by noticing the disturbed crop and not by witnessing the incident is not acceptable because the ocular account is in two parts. The first part is of the deceased raising alarm and of the witnesses reaching the spot to witness the accused having tied the trouser of the deceased around his neck and the second part of the ocular account is with regard to extension of threats, when the witnesses tried to intervene, and of the deceased being pulled away/ dragged with the aid of his trouser noosed around his neck. When we divide the ocular account into these two parts, we notice that in the first part the witnesses saw the accused having tied the trouser of the deceased around his neck and in the second part the witnesses saw the deceased being dragged into the standing crop by the accused by pulling the trouser noosed around his neck. There is a third part too, which is, that when other villagers arrived at the spot, the witnesses reached the spot by tracking the disturbed crop to find the deceased lying dead with the trouser noosed around his neck.

43. The above ocular account is corroborated by the medical evidence on two counts. First, there appears abrasion on the chest/abdomen region and the knees suggesting that the deceased was dragged in a prone position; and second, there was abraded contusion on the front of the neck. At this stage, we may notice the submission of the learned counsel for the appellants questioning the ocular account in the context of the medical evidence available on the record. The learned counsel for the appellants submitted that there is complete absence of ligature mark on the neck and from the testimony of the autopsy surgeon it appears that the abraded contusion found on the front of the neck of the deceased was from a hard blunt object.

44. Before we proceed to test the aforesaid submission of the learned counsel for the appellants, it would be useful to notice the law as to when an ocular account is to be discarded on the strength of medical evidence. In ***Thaman Kumar vs. State of Union Territory of Chandigarh, (2003) 6 SCC 380,*** in paragraph 16, it was observed as follows:

"16. 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 it 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."

45. In ***Anil Rai vs. State of Bihar (2001) 7 SCC 318,*** view taken earlier, in Punjab Singh vs. State of Haryana, 1984 Supp SCC 233, that, (1) if direct evidence is satisfactory and reliable, the same cannot be rejected on hypothetical medical evidence, and (2) if medical evidence when properly read shows two alternative possibilities but not any inconsistency, the one consistent with the reliable and satisfactory statements of the eye witness has to be accepted, was affirmed. Similarly, in A**bdul Sayeed vs. State of Madhya Pradesh, (2010) 10 SCC 259,** the legal position, in this regard, has been crystallised, in paragraph 39 of the judgment, as follows:

"39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis--vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

46. The above view has been affirmed in ***Central Bureau of Investigation and Another vs. Mohd. Parvez Abdul Kayyum and others, (2019) 12 SCC 1.***

47. Bearing in mind the legal principles noticed above, reverting to the present case, here, the autopsy surgeon was shown the trouser (Ex. C-1), which was used as a weapon of assault. He admitted the possibility of injury no.1 (abraded contusion on the front of the neck) as a consequence of noose being tied around the neck of the deceased from that trouser and he also accepted the possibility that if a tied noose is pressed on the neck and a person is dragged, injury of such kind may be found. Once the possibility of that injury in the manner alleged by the ocular account is accepted by the medical evidence, in the light of the legal principles noticed above, the ocular account is not to be discarded as

being in conflict with the medical evidence. In so far as the absence of ligature mark around the neck is concerned, it be noticed that in Modi's Medical Jurisprudence and Toxicology (Edition 24, at page 452) it is mentioned that in some cases, the ligature mark in the neck may not be present at all, or may be very slight, if the ligature used is soft and yielding like a stocking or scarf, and if it is removed soon after death.

48. In the instant case, the trouser is a nylon trouser. Nylon by its very nature is extendible. Further, according to the ocular account, the witnesses following the disturbed crop arrived contemporaneously with the event at the spot, and untied the knots of the trouser. In these circumstances, absence of ligature mark is not a clinching circumstance to discard the ocular account.

49. The submission of the learned counsel for the appellants that the statement of the witnesses that they reached the spot by noticing the track marks and the disturbed crop would suggest that they were not there on the spot, in our view, is not acceptable because, as we have already noticed, according to the ocular account, when the witnesses were threatened, they kept a distance from the accused and the deceased and during this time, the accused had dragged the deceased into the standing crop. It is only when more villagers arrived, the witnesses reached the spot where the body was lying by tracking drag marks and the disturbed crop, therefore, on this ground, the ocular account is not rendered untrustworthy.

50. The other submission of the learned counsel for the appellants is that there appears material contradiction in the testimony of PW-1 and PW-2 as regards the collection of the trouser from the spot. According to PW-1 the trouser was collected by the constable, whereas according to PW-2 the trouser was collected by PW-2's son from the spot. In our view, this minor contradiction in the testimony of the two witnesses is of no consequence. It is possible that PW-1 may not have noticed as to who collected the trouser from the spot, may be on account of being in a state of shock whereas, PW-2 may have noticed that his son had picked up the trouser and got it to the place where the body of the deceased was kept after being lifted from the open field. Therefore, in our view, this discrepancy in the statement of PW-1 and PW-2 has no material bearing on the substratum of the prosecution case.

51. In view of the discussion above, as we have already noticed that there is no suggestion to eye witnesses PW-1 and PW-2 that it was completely dark, bearing in mind that the incident is of September 10, 1982, at 6.00 a.m., even if the sun is not out and shining, there would be light of dawn, we are of the considered view that the ocular account is trustworthy and reliable and the trial court committed no mistake in accepting the same and finding the charge against the accused appellants proved.

52. At this stage, we may notice the alternative submission made on behalf of the appellants. The learned counsel for the appellants submitted that if we assume the prosecution story as correct, the accused had a firearm which they could have used to kill the deceased but they chose not to use the same. They might have dragged the deceased with the aid of his trouser with a view to teach him a lesson for having relations with their sister. It is quite possible that in that process the injury found on the neck might have been caused

but there was no intention to cause death of the deceased and there was no intention to cause any such injury which was likely to cause death of the deceased therefore, the case would not travel beyond Section 304 IPC. In this context, the learned counsel for the appellants also submitted that noticeably except for the abrasions, which could be co-related to dragging, no other injury is found on the body to suggest that the accused had physically assaulted the deceased with kicks and fists and, thereafter, strangulated him. The submission of the learned counsel for the appellants is that even if the ocular account is accepted, it is a simple case of tying a knot around the neck and pulling the deceased with a view to teach him a lesson. Hence, the conviction of the appellants for the charge of murder with the aid of section 34 IPC is not sustainable.

53. We have given our anxious consideration to the alternative submission. Upon a careful perusal of the autopsy report, we notice that there was internal damage also. The hyoid bone was found fractured. There was bleeding from both nostrils. First and second tracheal cartilages were also fractured and the right carotid sheath ruptured along with its contents which suggests that there was extraordinary pressure exerted on the neck. Once this is the position, there appears an intention to cause death. No doubt, the accused did have a country made pistol which they did not use but whether that country made pistol was loaded is not known. May be that country made pistol was taken to threaten intervention by others. Otherwise also, as to what was in the mind of the accused is only a matter of conjecture and speculation. What is to be seen is the nature of the injuries inflicted. The injuries inflicted were such that it cannot be an accidental strangulation. As already noticed above, the injuries appeared grievous and reflected an intention to cause death. We, therefore, find no justification to alter the conviction from Section 302 IPC to Section 304 IPC. Consequently, and for all the reasons detailed above, we find no merit in this appeal. The appeal is, accordingly, **dismissed**. The appellants are on bail. Their bail bonds are cancelled. They shall be taken into custody forthwith and shall serve out the sentence awarded by the trial court.

54. Let a copy of this order be certified to the court below along with the record for information and compliance

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(2022) 8 ILRA 761
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 3276 of 2013

Pappu & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ravindra Sharma, Sri A.P. Tewari, Ms. Abhilasha Singh, Sri Ashutosh Yadav, Sri Nagendra Kumar Singh, Sri Nayab Ahmad Khan, Sri R.S. Tripathi

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323/34, 506, 376(2)(g) & 342 - The Code of Criminal Procedure, 1973 - Section 313 – appeal against conviction -In the absence of a proper

proof accused persons could not be convicted under Section 376 (2)(g) - possibility of a false accusation could not be ruled out and the accused would entitled to acquittal.(Para - 34,35,)

Allegation in First Information report - 3 miscreants forcefully took wife of first informant to mustard field – gang-raped from 7:00 PM of 8.1.2010 to 4:00 AM of 9.1.2010 - contradictions in the testimonies of P.W. - 1, P.W. - 2, C.W. - 2 and C.W. – 3 - no semen or spermatozoa found in vaginal smears of victim – medical examination - prosecutrix had absolutely no external or internal injury - three young strong men commit crime of rape on a feeble woman who was 19 years of age - gang-rape highly improbable.(Para - 2,39,40)

HELD:-Prosecution had to prove its own case to the hilt and when no injuries, external or internal, were found on the body of the prosecutrix and no dead or live spermatozoa were found in her vaginal smear and the glan penis smear of the accused-persons then it can safely be said that at least there was no crime of rape committed on her. **(Para – 40)**

Criminal Appeal allowed. (E-7)

List of Cases cited:-

1. Nain Singh Vs St. of U.P. , 1991 (2) SCC 432

2. St. of U.P. Vs Rajveer , 2014 (2) ACR 1561 (DB)

3. Lalta Prasad Vs St. of M.P. , AIR 1979 SC 1276

4. Sakariya Vs St. of M.P. , 1991 CrLJ 1925(MP)

5. Zahoor Ali Vs St. of U.P. , 1989 CrLJ 1177(All)

6. Charan Singh Vs St. of Har., (1988) 3 Crimes 85 (P&H)

7. St. of St. of Orissa Vs Rama Swain & ors. , 2007 CrLJ 714 (Ori)

8. Mansingh Vs St. of M.P. , 2007 CrLJ 201(MP)

9. St. of Maha. Vs Abdul Hafees Faroki , 1998 CrLJ 3603 (SC)

10. Sampad Vs St. of Odisha , 2001 CriLJ 793(Odisha)

11. St. of Maha. Vs Rameshwar Sridhar Jaware , 2008 CrLJ 675(Bom.)

12. Suresh Govinda Nagdeve Vs St of Maha., 2008 CrLJ 2943 (Bom.)

13. Goverdhan Vs St. of M.P. , 2006 CrLJ 4118

14. Joseph Vs St. of Kerala , 2000 CrLJ 2467 (SC)

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

1. This appeal has been filed against the judgement and order dated 25.5.2013 passed by the Additional District and Sessions Judge, Court No. 6, Budaun, by which the appellants Pappu son of Bhole and Vijaypal son of Bhole have been punished under Sections 323/34, 506, 376(2)(g) and 342 of the I.P.C. They have been punished under Section 376(2)(g) of the IPC with life imprisonment and have been fined with Rs. 1 lac each. In the event of default it has been provided that they would have to further undergo ten months simple imprisonment. They have been punished under Section 342 IPC with an imprisonment of six months along with a fine of Rs. 600/- each. In the even of default, they have to further undergo three months of simple imprisonment. Under Sections 323/34 of the I.P.C., they have been punished with one month's imprisonment with a fine of Rs. 100/- each. In the event of default, they have to further undergo 15 days imprisonment. With regard to punishment under Section 506 IPC, the appellants have been punished with two years' of imprisonment with a fine

of Rs. 2,000/- each. In the even of default, they would have to further undergo two months' simple imprisonment. All the sentences were directed to run concurrently.

2. The case as had been narrated in the first information report was that the first informant along with his mother Smt. Ganga Dei, wife Rekha and two small daughters, on 8.1.2010, while were going from Rasoolpur Kalan to Aslaur, were at about 7PM in the evening stopped by Vijay Pal s/o Bhole, Pappu s/o Bhole and Rishipal son of Saudan. The three miscreants, after stopping them at pistol point took them to a field. There the first informant, his mother with the two daughters were made to stay at a particular place and one miscreant with a pistol remained with them. The two other miscreants forcefully took the wife of the first informant to a mustard field where they, one after the other, raped her.

3. As per the first information report, the whole incident started off at 7:00PM in the evening of 8.1.2010 and continued till 4:00AM of the next day i.e. till the morning hours of 9.1.2010. At 4:00 am of 9.1.2010, when Dharamveer and Danveer who were passing by saw the first informant and his family and recognized the three miscreants, the latter ran away. Through the first information report, action was prayed for.

4. Investigation, thereafter, commenced on 10.1.2010. The police in the presence of Roopkishore, the first informant and Dharamveer recovered the underwears of Vijaypal and Rishipal and kept them in a sealed cover.

5. On the next date, i.e. on 11.1.2010, the Police in the presence of the first informant, Roopkishore and Danveer took into custody the petticoat and the white underwear of the prosecutrix and kept them in a sealed cover. On the very same day, remains of the clothes which were burnt and the broken bangles of the prosecutrix were also taken by the Police and kept in sealed cover.

6. On 11.1.2010 at about 12:10PM, the prosecutrix was examined by Dr. Anita Dhasmana. On the same day, she found from the vaginal smear that there was no spermatozoa seen in the vagina and also gave her conclusion in the medical report that no definite opinion about rape could be given. In the medical examination, she had also categorically stated that no mark of injury was seen on the body of the prosecutrix.

7. Roopkishore, the first informant, was also medically examined on 10.1.2010 and likewise, the mother Ganga Dei was also examined on 12.1.2010. After the accused Vijay Pal and Rishipal were arrested they were also made to undergo medical examination on 10.1.2010. The Doctor who had examined the accused had also sent the smear of the penis of the accused for examination and thereafter, reports were also received with a comment that no spermatozoa was seen in them.

8. The police after investigation submitted the charge sheet on 9.3.2010. Thereafter, the Additional Sessions Judge, Court No. 4, Budaun, framed charges under Section 376(2)(g), 342, 323 and 506 IPC against the appellants Pappu and Vijay Pal on 4.2.2011.

9. In the meantime, Rishipal one of the accused was declared juvenile on 27.8.2010 and his file, after separating his case, was sent to Juvenile Justice Board.

10. The accused Pappu and Vijaypal were made to understand the charges but they denied the charges and prayed for trial.

11. From the side of the prosecution, the first informant, Roopkishore was examined as P.W. -1, the prosecutrix Rekha was examined as P.W. 2 and the Doctor Anita Dhasmana who had done the medical examination of the prosecutrix was examined as P.W. 3. The Investigating Officer Ram Surat Singh Yadav was examined as P.W. 4. Dr. A.K. Verma who had done the medical examination of the first informant and also that of the accused was examined as C.W. -1. Danveer and Dharamveer who as per the first information report had passed by the first informant and his family on 9.1.2010 at around 4:00AM were examined by the Court as court witnesses 2 and 3. The statements of the accused appellants Vijay Pal and Pappu were taken under Section 313 Cr.P.C. They, through their statements, denied the charges and in fact stated that because of the enmity which was there in the village due to the election of the Pradhan, the Gram Pradhan and the first informant together had planted a false case on them.

12. Thereafter when the trial took place and the Additional District and Sessions Judge, Court no. 6 on 25.5. 2013 convicted the appellants under Sections 323/34, 506, 376(2)(g) and 342 of the I.P.C., the instant criminal appeal was filed.

13. Ms. Abhilasha Singh was heard for the appellants and Sri Vikas Goswami was heard for the State.

14. Learned counsel for the appellant, in effect, essentially made the following arguments.

I. The place of occurrence has been differently given by the different witnesses. She submitted that as per the first informant, he along with his family had reached Rashoolpur Ghat and there the three accused persons stopped them and, thereafter, his wife was dragged into the mustard field wherein she was raped several times by the three accused one after the other between 7:00pm of 8.1.2010 and 4:00am of 9.1.2010. She tried to bring to the fore the fact that in the first information report the place of occurrence was shown to be Rashoolpur Ghat whereas in his examination-in-chief the P.W. 1 had stated that when the family had reached Kanua Nagla Ghat then the accused had accosted them and had taken away his wife. This was also as per the learned counsel stated by the P.W. - 2 the prosecutrix that the incident had occurred at Kanua Nagla Ghat.

15. Learned counsel for the appellant relying upon **Nain Singh vs. State f U.P.** reported in **1991 (2) SCC 432** and **State of U.P. v. Rajveer** reported in **2014 (2) ACR 1561 (DB)** stated that if there was a discrepancy in the statement of the various witnesses with regard to the place of occurrence then that would vitiate the prosecution case.

II. Learned counsel for the appellant further stated that there were various other contradictions in the evidence of the prosecution witnesses which went to the root of the matter and because of the contradictions the prosecution case would get demolished.

(a) The P.W. 1, Roopkishore the first informant had stated in his evidence that they had reached Kanua Nagla Ghat at about 7.30PM then the accused person had met them while the P.W. - 2, the

prosecutrix, had deposed that the accused persons had met them at Kanua Nagla Ghat at around 7:00pm.

(b) Learned counsel for the appellant pointed out that P.W. 1, Roopkishore had deposed that at about 4:00AM on 9.1.2010 Danveer and Dharamveer had reached the place of occurrence while they were passing by and they had questioned the accused persons as to why they had committed the crime and the three accused persons had fled away brandishing the pistol on the complainant and his family, Dharamveer and Danveer. On the other hand, learned counsel also pointed out that P.W. - 2 had deposed that when Danveer and Dharamveer had come to answer the call of nature, namely, for defecation then they had met the accused and, thereafter, the accused had fled away.

(c) The P.W. - 1, Roopkishore had mentioned in the First Information Report the names of the three accused, but in the cross-examination he had stated that when there was a hue and cry and the villagers had collected then the names of the accused were known to him. With regard to Pappu he states that the name came to the fore after he was apprehended. Learned counsel states that Pappu in fact was apprehended much later, about ten days after the incident. She states, therefore, that the P.W. - 1 could not have know his name also at the time of the lodging of the first information report.

16. To bolster her point, she specifically read out a certain portion of the testimony of the P.W.-1 :- "*जब शोर पर गांव वाले इकट्ठे हो गये थे तो गांव वालो ने इनके नाम पता पकडे जाने पर बताया था। पकड़े जाने पर पप्पू ने अपना नाम पता बताया व गांव वालो ने नाम पता बताये थे अगर यह बात मेरी रिपोर्ट व ब्यान में नहीं है तो वजह नहीं बता सकता। यह बात कि मै मुल्जिमों को पहले से जानता था यह बात न रपट लिखायी न दरोगा जी को बतायी।*"

17. Learned counsel categorically showed to the Court the statement of Ram Surat Singh Yadav, the P.W. - 4 who had stated that the accused Vijay Pal and Rishipal were arrested on 10.1.2010 and, therefore, learned counsel stated that if the names of Vijay Pal and Rishipal were known only on 10.1.2010 then it could not have been possible for the first informant to know the names of Vijaypal and Rishipal on 9.1.2010 when he had got the first information report lodged. Further, from the very statement of Ram Surat Singh Yadav, she had pointed out that Pappu was not arrested till 24.1.2010 and, therefore, again she argued that it was not possible for the first informant to know the name of even Pappu.

(d) At one place, it has been submitted by the learned counsel for the appellant that, the first informant says that he was illiterate and, therefore, he had got the first information report written on his dictation by one Sajjan Singh whereas later on he had said that he was a literate person and he had written the first information report himself and had given it to the Darogaji.

III. The next argument which the learned counsel for the applicant has made was that it was very unlikely that two real brothers would commit the crime of rape together. She has submitted that the appellant Pappu and Vijay Pal were real brother and therefore, there was very little likelihood of their committing the crime of rape together.

IV. The P.W.-2 had deposed in her cross-examination that the accused persons had covered their faces and, therefore, learned counsel had stated that there was no question of any identification. Learned counsel further states that no identification parade was undergone and, therefore, identification itself becomes doubtful.

V. Learned counsel for the appellant has further argued that the P.W. 2 the prosecutrix, had admitted that both Danveer and Dharamveer were relatives as they were uncle and nephew and both of them had brought the family on their bullockart from Asraul to Rasoolpur and they had on that date disclosed the names of the accused. Learned counsel, therefore, submits that this was also a fact which was demolishing the story of the prosecution as P.W. 1 had at one place in his cross-examination submitted that the accused had told their names only after they were apprehended.

VI. It is the contention of the learned counsel for the appellants that the prosecutrix, the P.W. 2, had deposed in her cross-examination that on account of continuous rape which continued throughout the whole night she had sustained injuries in her back and on her buttocks but in fact no external injury was found in the medical examination. Learned counsel for the appellants stated that if three strong young men had committed the crime of rape continuously from 8:00PM of 8.1.2010 which had continued till 4:00AM of 9.1.2010 then the prosecutrix would have been in an extremely bad shape and she would not have been able to even walk properly to the Police Station. In this regard, the statement of P.W. 1 is important which is mentioned below:-

" मेरी पत्नी रेखा को मुल्जिमान पप्पू व ऋषिपाल जबरजस्ती लहटा के खेत में ले गए फिर थोड़ी देर बाद पप्पू हमारे पास आ गया और विजयपाल हम लोगों के पास से मेरी पत्नी के पास चला गया। इसी प्रकार तीनो मुलजिमान का एक - एक करके हम लोगों के पास आना व मेरी पत्नी के पास जाना सुबह चार बजे तक चलता रहा । मेरी पत्नी ने चार बजे के करीब आने पर मुझे बताया की तीनो मुल्जिमान ने बारी -बारी से उसके साथ बुरा काम किया है ।"

18. Similarly, the P.W.-2, the prosecutrix has deposed that:

"सबसे पहले मेरे साथ बलात्कार ऋषिपाल ने किया था। उसके बाद पप्पू ने मेरे साथ बलात्कार किया था जो आज हाजिर अदालत है। मुल्जिम ऋषिपाल मेरे पास से चला गया तो उसके बाद विजयपाल हाजिर अदालत ने मेरे साथ मेरी मर्जी के बिना बलात्कार किया था। यह क्रम सुबह के चार बजे तक लगातार चलता रहा और सभी ने एक-एक करके चार बजे तक बलात्कार किया था। ..... तीनो लोगो ने रातभर बुरा काम किया जिससे मेरी पीठ, चूतड़ छिल गए थे। मैंने डॉक्टर को यह सब छिला हुआ दिखा दिया था। मेरी पेटीकोट, कच्छी, जांघ, पेट सब वीर्य से सन गए थे। डॉक्टर ने सब देखा।"

19. In this regard, the statement of P.W. - 3 is also material who deposed that:

"पीड़िता के शरीर पर किसी संघर्ष के निशान नही पाये गए। शुक्राणु भी पैथोलॉजी रिपोर्ट में नही पाये गए..... इसलिए कहा जा सकता है कि 80 घंटे की अवधि में पीड़िता के साथ मैथुन की संभावना नही होती।"

20. On the contrary learned counsel submits that the medical report states that neither was there any external injury and

nor was there any internal injury. What is more, the learned counsel for the appellant states that there were absolutely no signs of any spermatozoa found either in the vaginal smear of the prosecutrix or on the glan penis smear of the accused persons. Learned counsel for the appellant also brought to the notice of the Court the statement of the Doctor which said that in vaginal smear if sexual intercourse had taken place then spermatozoa would be found till as late as 80 hours. She also opined that no definite opinion about rape could be given. In the instant case when the vaginal smear sample was collected well in time and when there was absolutely no indication of any spermatozoa then it could be safely said that no sexual intercourse had taken place. Learned counsel stated that definitely no crime of rape had occurred.

VII. Learned counsel for the appellants has still further submitted that P.W. 1 had stated that he himself, his mother and the two daughters, one of whom was only 15 days old were left under the open sky in the cold January night. Learned counsel states that in the freezing conditions the children and the old mother would have died but in fact nothing at all had happened to them.

21. Learned counsel for the appellants states that there is no medical report with regard to any fever or with regard to any ailment which might have been there because of the cold freezing night.

22. Learned counsel for the appellant has also argued that statement of the Court Witness- 2 Danveer and the statement of the Court Witness - 3 Dharamveer were at absolute variance with the case which was taken by the P.W. -1 and P.W. - 2. Learned counsel states that C.W. - 2 Danveer upon reaching the spot had found that there was one male, one female and just one girl child. Therefore, she says that where exactly that 15 days old girl child had disappeared was not clear and, therefore, she states that the prosecution case cannot be said to be truthful.

23. Similarly, learned counsel for the appellants states that the statement of C.W.-3 Dharamveer was also not in consonance with the statement of P.W. - 1 and P.W.- 2 and C.W.-2. C.W. - 3 has deposed that he did not know Pappu and Vijay Pal at all who were present there in the Court. He states that on 8.1.2010 he had gone to bed at 9:00PM and had got up at around 8:00AM on 9.1.2010 and, thereafter, when he had gone to the field he had found one man, one old lady and just one girl sitting in the cold. He, of course, had also found prosecutrix shivering in the cold. This witness also does not speak about the second daughter who was only 15 days old. Even though the learned counsel for the appellants states that this witness was declared hostile by the prosecution, the statements of the C.W.-3 become very relevant specially in view of the medical examination reports of the prosecutrix and of the two accused.

VIII. Learned counsel for the appellants further submitted that a very important witness i.e. the mother of the first informant Ganga Dei was never brought to the witness box.

IV. Learned counsel also submits that if Rekha had a fifteen days old girl daughter she would not have ventured to

travel from Budaun to Delhi and also if the child was born fifteen days prior to the incident then there would have been evidence of this fact in the medical report.

24. Learned counsel for the appellant while summing up her argument stated that in view of the various contradictions, in view of the statement made by Dharamveer who, though was declared hostile and also in view of the medical report of the prosecutrix and the accused, the conviction of the appellants was wrongly done and the appellants, in fact, ought to have been acquitted.

25. Learned AGA, however, has opposed the appeal and has submitted that if there were any contradictions in the statements of the P.W. -1 and P.W. - 2 then they were there because of the fact that the witnesses were illiterate persons. Further submission is that the statement of Dharamveer should not be read in evidence on the account of the fact that he had turned hostile and, therefore, his testimony was not reliable. Still further, learned AGA submitted that the incident could not be attributed to any enmity because of the elections of the Pradhan etc. as no evidence was brought on record to that effect.

26. Having heard the learned counsel for the appellants and the learned AGA, we are of the view that the appeal deserves to be allowed and the appellants ought to be acquitted. Though we find that there were various contradictions in the testimonies of P.W. - 1, P.W. - 2, C.W. - 2 and C.W. - 3 , we cannot lose sight of the fact that P.W. - 1 and P.W. - 2 and also C.Ws. 2 & 3 were illiterate villagers and contradictions in their statements cannot be taken seriously. However, one fact definitely occurs to us and that is that the P.W. - 1, the first informant, had narrated the names of the accused in the first information report as if he knew them at that point of time but in his cross-examination he has stated that he came to know about the names after the accused were apprehended and he specifically states that Pappu had told his name only after he was arrested. From the statement of P.W. - 4, we find that Pappu was arrested much later after 20.1.2010. This does not appear to be an innocent aberration. The lodging of the first information report appears to be a motivated exercise on the part of the first informant. Further, we find that even though C.W.-3 has been declared hostile, his testimony cannot be ignored. He very truthfully has said that though the first informant, the mother and one child were found by him, he does not deny the finding of the prosecutrix in the field . He, however, does not in any manner say that the prosecutrix was raped by the appellants.

27. In the case of **Lalta Prasad vs. State of M.P. reported in AIR 1979 SC 1276,** it could not be established that the prosecutrix was ever subjected to any sexual intercourse by the accused against her will. On the other hand, there was the evidence of the Doctor that when she was examined after the occurrence, the Doctor found old torn hymen and no sign of any rape or any forcefully intercourse with her. That being so, the conviction of the appellant under Section 376 IPC was set aside.

28. In the case of **Sakariya vs. State of M.P.** reported in **1991 CrLJ 1925(MP)** there was an allegation of rape upon a married women who was alleged to have been dragged towards the place of occurrence and then raped but the report of medical examination was in the negative so

far as the seminal stains and presence of spermatozoa in the vagina was concerned and to top it all there was not even a scratch on her body and the accused was acquitted.

29. In the case of **Zahoor Ali vs. State of U.P**. reported in **1989 CrLJ 1177(All)** the Doctor did not find any recent injury on the private parts of the girl. Hymen was found to be torn from before and healed. Therefore, the charge was held to be not proved.

30. In the case of **Charan Singh vs. State of Haryana (1988) 3 Crimes 85 (P&H)** it was case of a girl above 16 years who was allegedly raped. In this case also the question was whether when she admitted of having suffered some injuries on her back during the incident and when the same were not found then what had to be done. The lady doctor, however, who examined her did not find any injury on her private parts or on her body during the medico legal examination. No tenderness, swelling or blood was found in the vagina. She further found that two fingers could easily be admitted into the vagina. During the cross-examination, she rightly admitted that the prosecutrix would have suffered tenderness and swelling of the vagina if she was subjected to rape by two young boys. The gap between the occurrence and her medico legal examination ruled out any possibility of any abrasion being healed. Giving the benefit of doubt the accused were acquitted.

31. In the case of **State of State of Orissa vs. Rama Swain and others reported in 2007 CrLJ 714 (Ori**) the accused persons were alleged to have committed a rape forcibly on the prosecutrix one after another but the evidence showed that there was dispute between the victim and the accused persons regarding damage of crop by the cattle of the victim over the land cultivated by the accused persons. There was no semen stain on the apparels of the victim found. Thus the evidence of prosecutrix did not inspire confidence and the judgement of acquittal was upheld.

32. Similarly due to non support of medical report, in the case of **Mansingh vs. State of M.P.** reported in **2007 CrLJ 201(MP),** the conviction of the accused was set aside as the prosecution case was not supported by the medical report.

33. In the case of **State of Maharashtra vs. Abdul Hafees Faroki** reported in **1998 CrLJ 3603 (SC)**, eight persons were accused for raping a girl twice by turns and pushing the girl out of the running train. However, when no serious injury was found on the person of the girl and evidence showed that there was possibility of prosecutrix going with the accused willingly, the acquittal of the accused was held proper.

34. In the case of **Sampad vs. State of Odisha** reported in **2001 CriLJ 793(Odisha),** there was charge of gang rape against the accused persons who allegedly had forcibly lifted the victim to a nearby river bank on knife point and had committed sexual intercourse with her but no sign of forcible intercourse or mark of violence was found either on the spot or during the medical examination of prosecutrix. It was held that in the absence of a proper proof they could not be convicted under Section 376 (2)(g).

35. In the case of **State of Maharashtra vs. Rameshwar Sridhar Jaware** reported in **2008 CrLJ 675(Bom.)**,

the accused persons were alleged to have committed rape on a girl of 16 years. Medical report as well as the report of the chemical analyst was contrary to the evidence of prosecutrix. It was held that the possibility of a false accusation could not be ruled out and the accused was entitled to acquittal.

36. In the case of **Suresh Govinda Nagdeve vs. State of Maharashtra** reported in **2008 CrLJ 2943 (Bom.),** the allegation was that the prosecutrix was subjected to rape by three accused person. It was alleged that in the night, the crime was committed in an open field but no injury on the private part or on the back of the prosecutrix was found and the Doctor could not confirm the theory of sexual intercourse. Similarly no corresponding injury was there on the private parts or on the body of the accused. Giving the benefit of doubt, the accused persons were acquitted.

37. In the case of **Goverdhan vs. State of M.P.** reported in **2006 CrLJ 4118,** the parties were not keeping good relations in the past and had lodged FIRs against each other. Medical report did not corroborate the version given by the prosecutrix. It was held that guilt was not proved and conviction was improper.

38. In the case of **Joseph vs. State of Kerala** reported in **2000 CrLJ 2467 (SC),** the dhoti of the accused contained no blood or semen stains and there was no injury caused to the private part of the body of the victim. The conviction was sought to be proved by the fact that vaginal smear's examination confirmed the presence of semen and spermatozoa. It was held that this was not a ground for conviction of accused for the offence of rape and the accused was entitled to acquittal on the basis of benefit of doubt.

39. In even this case no semen or spermatozoa was found in the vaginal smears of the victim. The facts of the above cited decisions are almost similar to the facts of the present case. It is the case of the appellant that due to enmity regarding election of gram pradhan they were falsely implicated and also no spermatozoa or semen or any injury was found during the medical examination of the victim and the accused person. Therefore, all the above citations are applicable to this case.

40. Furthermore, we find that when the C.W.-2 and C.W. - 3 give their statements they have conveniently forgotten about the presence of the 4th member i.e. the 15 days old child about whom the first informant had mentioned in the first information report. Furthermore, and most importantly, we find from the medical examination that the prosecutrix had absolutely no external or internal injury despite the fact that the prosecution has stated throughout that she was gang-raped from 7:00PM of 8.1.2010 to 4:00AM of 9.1.2010. This seems highly improbable. If three young strong men commit the crime of rape on a feeble woman who was 19 years of age and weighed only 37 kg as is clear from the medical report of Dr. Anita Dhasmana, then she would definitely have had at least some injuries. The prosecution had to prove its own case to the hilt and when no injuries, external or internal, were found on the body of the prosecutrix and no dead or live spermatozoa were found in her vaginal smear and the glan penis smear of the accused-persons then it can safely be said that at least there was no crime of rape committed on her.

41. Under such circumstances, the appeal is allowed. The order dated

25.5.2013 passed by Additional Sessions Judge, Court No. 6, Budaun, in S.T. No. 5 of 2011, State vs. Pappu and another, under Section 376(2)(g), 342, 323, 506 IPC, P.S. Jarifnagar, District - Budaun, is quashed and set aside.

42. The accused-appellants- Pappu and Vijaypal, who are in jail if they are not wanted in any other criminal case be set free forthwith.

(2022) 8 ILRA 771
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 3505 of 2012
(U/S 372 Cr.P. C.)

Ram Sudhar ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri C.J. Yadav. Sri Shailendra Kumar Tripathi

Counsel for the Opposite Parties:
Govt. Advocate

A. Criminal Law – Appeal against acquittal - Jurisdiction - Mere fact that a view, other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. (Para 10 to 25)

While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not. (Para 10 to 25)

From the meticulous analysis of the ocular testimony as well as the documents in support thereof, it reveals that the **present case (if to any extent) falls within the index of circumstantial evidence. There is no direct testimony**. Moreover, **no recovery whatsoever, has been made from the accused**. None the less, on one hand PW-1 being Ram Teerath has come up with the stand that the deceased was watching movie till 3:00 in the morning, however, according to the testimony of the brother of the deceased, the accused were found near a canal in the canal strip near farm of Lal Sahai Katheria, wherein the corpus of the deceased was found. **Even the motive is also not found attributable to the commission of crime by the appellant**, as merely because there had been certain heated conversation between the accused and the deceased cannot be a ground to hold the guilty of commission of crime. Notably, **the prosecution has miserably failed to build up the chain of evidence and sequence so as to link the commission of crime by the accused.** More or less, **the entire chain of events do not match with the prosecution**, as even **the circumstantial evidence do not link with the commission of offence**. **Less to say about last seen theory as there is a big cloud over the fact** that the accused were with the deceased before commission of the alleged offence. (Para 30)

This Court has given anxious consideration to the pleadings so set forth in the appeal as well as the documents available on record, and after

marshaling the factual and legal aspect, the Court finds its inability to subscribe to the prosecution case as for the purposes of discarding the view taken by the learned Trial Court. The prosecution case, if taken into face value does not cumulatively complete the chain of linking the accused to have committed the crime, as neither any motive is attributed nor there is any ingredient of eye witness testimony, nor the theory of last seen stands attracted. Even otherwise, there is no recovery so made from the accused. This Court further finds that the prosecution case proceeds on weak evidence and in any view of the matter, this is not a case wherein the appellant/complainant can insist the Court to take a different view from the view taken by the Trial Court while acquitting the accused, while reversing the judgment in question. (Para 31, 32)

Criminal appeal dismissed. (E-4)

Precedent followed:

1. Tota Singh & anr. Vs St. of Pun., (1987) 2 SCC 529 (Para 10)

2. Ramesh Babulal Doshi Vs St. of Guj., (1996) 9 SCC 225 (Para 11)

3. State of Rajasthan Vs St. of Guj., (2003) 8 SCC 180 (Para 12)

4. St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755 (Para 13)

5. Chandrappa & ors. Vs St. of Karn., (2007) 4 SCC 415 (Para 14)

6. Ghurey Lal Vs St. of U.P., (2008) 10 SCC 450 (Para 15)

7. Siddharth Vashishtha @ Manu Sharma Vs State (NCT of Delhi), (2010) 6 SCC 1 (Para 16)

8. Babu Vs St. of Kerala, (2010) 9 SCC 189 (Para 17)

9. Ganpat Vs St. of Har., (2010) 12 SCC 59 (Para 18)

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Mah., (2010) 13 SCC 657 (Para 19)

11. St. of U.P. Vs Naresh, (2011) 4 SCC 324 (Para 20)

12. St. of M.P. Vs Ramesh, (2011) 4 SCC 786 (Para 21)

13. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219 (Para 22)

14. Jafarudheen & ors. Vs St. of Kerala, JT 2022 (4) SC 445 (Para 23)

15. St. of U.P. Vs Subedar & ors., Government Appeal No. 3804 of 2010 (Para 24)

16. Virendra Singh Vs St. of U.P. & ors., 2022 (3) ADJ 354 (Para 25)

Present appeal assails judgment and order dated 09.02.2011, passed by Special Judge (D.A.A.)/Additional Session Judge, District Kannauj.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal under Section 372 of Criminal Procedure Code, 1973 (in short 'Cr.P.C.'), has been instituted by the informant being Ram Sudhar son of Chhote Lal against the judgment and order dated 9.2.2011, passed by Special Judge (D.A.A.)/Additional Session Judge, Court No. 2, District Kannauj, passed In S.T. No. 186 of 2006 (State Vs. Rajesh @ Tillu), under section 302/34, 201 I.P.C. arising out of case Crime No. 169 of 2006, Police Station. Tirwa, District Kannauj, whereby learned trial court has acquitted the accused, who are respondents-opposite parties no. 2 and 3.

2. This appeal was initially presented before the Registry of this Court on 24.5.2011 with the delay of 38 days and on 26.5.2011, in Criminal Misc. Delay Condonation Application No.161441 of 2011, notices were issued. Thereafter, on 24.8.2012, learned counsel for the appellant

was not present, however, after hearing the learned A.G.A, the Delay Condonation Application was allowed and it was directed that a regular number be allotted to this appeal. The order dated 24.8.2012 is being reproduced hereinunder: -

"24.8.2012

Counsel for the appellant is not present.

Heard learned AGA.

The office report shows that notices have been served upon the accused respondents, but no-one appears on their behalf. This application has been filed with a prayer that the delay in filing the appeal may be condoned.

This appeal has been filed beyond the period of limitation by 39 days.

The grounds taken for condoning the delay had not been controverted by the accused respondents, therefore, the delay in filing the appeal is hereby condoned. The appeal shall be deemed to be filed within the period of limitation.

Office is directed to allot regular number to this appeal.

Accordingly, this application is allowed."

"Counsel for the appellant is not present.

Heard learned AGA.

Summon the lower court record within a period of six weeks from today.

List for admission on 19.10.2012."

3. Yet on 19.10.2012, 27.11.2012, 29.1.2013, 15.11.2017, 24.11.2017, 10.8.2017 and lastly on 9.5.2022, the following orders were passed:-

"19.10.2012

Sri C.J. Yadav, counsel for the appellant, has sent his illness slip.

In the present case, lower court record has been summoned on 24.8.2012. There is no endorsement with regard to its receiving.

List on 27.11.2012."

"27.11.2012

Learned counsel for the appellant is not present. The order sheet shows that the lower court record has not been received.

List on 29.01.2013."

"29.1.2013

Counsel for the appellant is not present.

Heard learned AGA for the State of U.P.

From the perusal of record, it appears that in the present case the lower court record has been summoned vide order dated 24.08.2012, but the same has not been received.

The office is directed to send a reminder to District & Sessions Judge, Kannauj for sending the lower court record

within a month. In case, the lower court record is not received by this Court on or before 6th March, 2013, In-charge of the Record Room of Sessions Court, Kannauj shall appear in person to explain as to why the lower court record has not been sent and the action may not be taken for non-compliance of the orders, passed by this Court.

List on 6th March, 2013.

Let a copy of this order be communicated to District & Sessions Judge, Kannauj forthwith for compliance."

"**15.11.2017**

The present appeal has been taken up in the revised call. No-one has appeared on behalf of the appellant to address the Court. Learned AGA is present. Lower Court record has already been received. The present appeal pertains to the year 2012 against the order of acquittal dated 9.2.2011. It cannot be kept pending sine die on the dint of mere condoning the delay in filing the appeal. Mere filing of the appeal by the appellant will not accrue any right in his favour.

Let this appeal be listed in the next cause list peremptorily."

"24.11.2017

Sri C. J. Yadav, learned counsel for the appellant has again sent illness slip despite the case has been listed peremptorily. On last occasion also the learned counsel has sent illness slip and it was clearly mentioned that the appeal cannot be kept pending for indefinite period. The learned counsel for the appellant has only sent illness slips successively on each and every date, there is no other option but to issue notice to Ram Sudhar to engage another counsel.

Office is directed to issue notice to Ram Sudhar son of Chhotey Lal, R/o. village Napura, police station Tirwa, district Kannauj to engage another counsel.

Let the matter be listed after one month.

"**10.8.2018**

Passed over on the illness slip of learned counsel for the appellant.

"9.5.2022

Matter is taken up.

None appeared on behalf of the appellant.

Learned A.G.A. on behalf of the State is present.

Appeal is yet to be admitted.

In the circumstances, list this matter in the week commencing 4th July, 2022 for hearing on admission.

If on the next date fixed none will appear on behalf of the appellant Court will proceed to decide the matter appointing Amicus Curiae/with the help of the learned A.G.A. "

4. Orders so passed from time to time in the present appeal show that the counsel for the appellant is avoiding to participate in the proceedings in order to facilitate in the disposal of the matter and even on 24.11.2017, notices were also issued to the

complainant/appellant to engage another counsel, however, nobody appeared on behalf of the appellant and thus, this Court was constrained to pass an order dated 9.5.2022 while directing and observing that in case on the next date so fixed, none appears on behalf of the appellant before this Court, the Court will have no option but to appoint Amicus Curiae / to decide the matter with the help of learned A.G.A.

5. Till the dictation of the order, nobody appears for the appellant and thus this Court is proceeding to decide the matter with the assistance of the learned A.G.A.

6. The factual matrix as worded in the present appeal are that the appellant/ informant happens to be the father of the deceased being Man Singh who was at relevant point of time when the unlucky event occurred was working in an establishment in Delhi. According to the version, so contained in the FIR, the appellant / informant received a phone call from his maternal nephew Ram Pal son of Mewa Ram on 9.5.2006 at 9:00 P.M. apprising the appellant that his son was murdered in the intervening night of 7/8.5.2006 and his corpus was found near a canal towards the strip, which was adjacent to Lal Sahai Katheria farm behind the bushes. It has further come on record that on 8.5.2006, the corpus of the deceased was taken in possession by the Police authorities and sent to Fatehgarh for postmortem. It has been further alleged that the appellant after taking the leave came to his house on 10.5.2006 at 08:00 hours, whereat from the information so gathered by the appellant, it was revealed to him that on 7.5.2006, the deceased had gone to participate in the marriage function of the daughter of one Ram Chandra Pal, who is also resident of the same village and thereafter at 10:00 P.M. one Sri Akhilesh son of Het Ram and Ramanand and others saw the deceased with the accused, who are two in number being Rajesh @ Tillu and Ram Milan. It has further come on record that on 7.5.2006 at about 11:00 P.M, one Ram Kishor who happens to be the real brother of the deceased and the son of the complainant, when he was returning from the marriage to his residence then he found some commotion near the canal and when he switched on the torch and pointed it towards canal strip, then he found in the place of the occurrence, the accused, who are two in number, but he could not gauge the fact that his deceased brother was present there with the said two accused had disposed the deceased. According to the version of the prosecution when the deceased did not come back to his house, then constant search was made with respect to the whereabouts of the deceased, however, on 8.5.2006 at about 10 O'clock in the morning, one Seetu Yadav son of Balak Ram Yadav informed the family members of the deceased that the corpus of the deceased was found beside the canal strip near Lal Sahai Katheria's farm near the bushes along with the slippers of the deceased. It has further come on record that the appellant's nephew reported the same to the concerned police station on 08.05.2006. The appellant after returning from his work place at Delhi, lodged the FIR before the police station Tirwa, District Kannauj under Section 302/34/201 IPC being Case Crime no. 169 of 2006. Statements under Section 161 CrPC were recorded, and the corpus was sent for post mortem. The matter was committed to Sessions Court for trial, charges were framed purported to be under Section 302/34/201 IPC and they were read over to the accused, who are two in number. Proceedings purported to be

under Section 313 CrPC was also undertaken. The accused, who are two in number denied the charges and claimed to be tried. A plea was taken that they had been falsely implicated and roped in the criminal proceedings so lodged against him by the prosecution on account of the fact that the accused, who are two in number, had witnessed the illicit relationship between wife of Ram Kishor and Bhajan Lal and the same became the very basis to falsely implicate the accused, who are two in number.

7. To bring home the charges, the prosecution produced following witnesses, namely:

1	Ram Teerath	PW1
2	Ram Sudhar	PW2
3	Akhilesh	PW3
4	Ram Kishore	PW4
5	Anil Kumar	PW5
6	Dr. Brijesh Singh	PW6
7	S.I. L.R. Diwakar, I.O	PW7

8. We have heard Sri Ratan Singh, learned A.G.A. for the State and with his assistance appeal is being decided.

9. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would be required to be discussed.

10. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***Tota Singh and another vs. State of Punjab, reported in (1987) 2 SCC 529***, the Hon'ble Apex Court in paragraph-6 has observed as under: -

"6. The High Court has not found in its judgment that the reasons given by the learned Sessions Judge for discarding the testimony of PW 2 and PW 6 were either unreasonable or perverse. What the High Court has done is to make an independent reappraisal of the evidence on its own and to set aside the acquittal merely on the ground that as a result of such reappreciation, the High Court was inclined to reach a conclusion different from the one recorded by the learned Sessions Judge. This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a reappreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court

below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."

11. Further, in the case of ***Ramesh Babulal Doshi vs. State of Gujarat, reported in (1996) 9 SCC 225***, in paragraph 7, the Hon'ble Apex Court observed as under:

"7. Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above-quoted conclusions. This Court has repeatedly laid down that the mere fact that a 'view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."

12. In the case of ***State of Rajesthan vs. State of Gujarat,*** reported in ***(2003) 8 SCC 180, in paragraph 7,*** the Hon'ble Apex Court observed as under:

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.[1]) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial

reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra², Ramesh Babulal Doshi v. State of Gujarat³ and Jaswant Singh v. State of Haryana."

13. In the case of ***State of Goa vs. Sanjay Thakran***, reported in ***(2007) 3 SCC 755, in paragraph 15***, the Hon'ble Apex Court observed as under:

"15. Further, this Court has observed in Ramesh Babulal Doshi v. State of Gujarat: (SCC p. 229, para 7)

"7.... This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then - and then only - reappraise the evidence to arrive at its own conclusions." and in State of Rajasthan v. Raja Ram8: (SCC pp. 186-87, para 7) -

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra 10, Ramesh Babulal Doshi v. State of Gujarat and Jaswant Singh v. State of Haryana11"."

14. Further in the case of ***Chandrappa and others vs. State of Karnataka,*** reported in ***(2007) 4 S.C.C. 415,*** the Apex Court has observed as under:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the

accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

15. In the case of ***Ghurey Lal vs. State of U.P.,*** reported in ***(2008) 10 SCC 450***, in **paragraph 43 and 75,** the Hon'ble Apex Court observed as under:

"43. The earliest case that dealt with the controversy in issue was Sheo Swarup v. King Emperor. In this case, the ambit and scope of the powers of the appellate court in dealing with an appeal against acquittal has been aptly a elucidated by the Privy Council. Lord Russell writing the judgment has observed as under (at AIR p. 230): (IA p. 404)

"... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he b has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

The law succinctly crystallised in this case has been consistently followed by this Court. On proper analysis of the ratio and findings of this case, it is revealed that the findings of the trial court are based on the fundamental principles of the criminal jurisprudence. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the trial court. The appellate court undoubtedly has wide powers of reappreciating and re-evaluating the entire evidence but it would be justified in interfering with the judgment of acquittal only when the judgment of the d trial court is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.

...

75. On careful analysis of the entire evidence on record, we are of the view that the reasons given by the High Court for reversing the judgment of acquittal is unsustainable and contrary to settled principles of law. The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable."

16. In the case of ***Siddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi),*** reported in ***(2010) 6 SCC 1, in paragraph 303(1)***, the Hon'ble Apex Court observed as under:

"303. Summary of our conclusions:

(1) The appellate court has all the necessary powers to re-evaluate the evidence let in before the trial court as well as the conclusions reached. It has a duty to specify the compelling and substantial reasons in case it reverses the order of acquittal passed by the trial court. In the case on hand, the High Court by adhering to all the ingredients and by giving b cogent and adequate reasons reversed the order of acquittal. ..."

17. In the case o***f Babu vs. State of Kerala,*** reported in ***(2010) 9 SCC 189***, in ***paragraph 12 and 19***, the Hon'ble Apex Court observed as under:

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P.[1], Shambhoo Missir v. State of Bihar2, Shailendra Pratap v. State of U.P.3, Narendra Singh v. State of M.P.4, Budh Singh v. State of U.P.5, State of U.P. v. Ram Veer Singh6, S. Rama Krishna v. S. Rami Reddy7, Arulvelu v. State8, Perla Somasekhara Reddy v. State of A.P.9 and Ram Singh v. State of H.P.10).

...

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

18. In the case of ***Ganpat vs. State of Haryana,*** reported in ***(2010) 12 SCC 59,*** in ***paragraph 14 and 15***, the Hon'ble Apex Court observed as under:

"14. The only point for consideration in these appeals is whether there is any ground for interference against the order of acquittal by the High Court. This Court has repeatedly laid down that the first appellate court and the High Court while dealing with an appeal is entitled and obliged as well to scan through and if need be reappreciate the entire evidence and arrive at a conclusion one way or the other.

15. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal: (i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. (Vide Madan Lal v. State of J&K[1], Ghurey Lal v. State of U.P.2, Chandra Mohan Tiwari v. State of M.P.3 and Jaswant Singh v. State of Haryana4.)"

19. In the case of ***Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra,*** reported in ***(2010) 13 SCC 657***, in paragraph 38, 39 and 40, the Hon'ble Apex Court observed as under:

"38. It is a well-established principle of law, consistently reiterated and followed by this Court that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanour of the witnesses is the best judge of the credibility of the witnesses.

39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration. The appellate court should bear in mind the presumption of innocence of the accused, and further, that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference.

40. In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding material or by taking into consideration irrelevant/inadmissible material. A finding may also be said to be perverse if it is "against the weight of evidence", or if the

finding so outrageously defies logic as to suffer from the vice of irrationality. (See Balak Ram v. State of U.P.9, Shailendra Pratap v. State of U.P.10, Budh Singh v. State of U.P.11, S. Rama Krishna v. S. Rami Reddy¹2, Arulvelu v. State 13, Ram Singh v. State of H.P.14 and Babu v. State of Kerala¹5.))"

20. In the case of ***State of U.P. vs. Naresh***, reported in ***(2011) 4 SCC 324***, in ***paragraph 33 and 34,*** the Hon'ble Apex Court observed as under:

"33. We are fully aware of the fact that we are entertaining the appeal against the order of acquittal. Thus, the Court has to scrutinise the facts of the case cautiously and knowing the parameters fixed by this Court in this regard.

34. Every accused is presumed to be innocent unless his The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India. The law in this regard is well settled that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. An appellate court must also consider whether the court below has placed the burden of proof incorrectly or failed to take into consideration any admissible evidence or had taken into consideration evidence brought on record contrary to law? In exceptional cases, whether there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of acquittal. So, in order to warrant interference by the appellate court, a finding of fact recorded by the court below must be outweighed evidence or to suffer from the vice of guilt is proved. such finding if outrageously defies logic as irrationality. [Vide Babu v. State of Keralall and Sunil Kumar Sambhudayal Gupta (Dr.)8.]"

21. In the case of ***State of M.P. vs. Ramesh***, reported in ***(2011) 4 SCC 786,*** in ***paragraph 15,*** the Hon'ble Apex Court observed as under:

"15. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to reappreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal."

22. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (****2018) 7 SCC 219*, has laid down the principles for laying down the powers of appellate court

in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"13. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

14. It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

23. The Apex Court recently in ***Jafarudheen & Ors. vs. State of Kerala, JT 2022(4) SC 445*** has observed as under:-

"DISCUSSION Scope of Appeal filed against the Acquittal:

25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened.

Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. Precedents:

Mohan @Srinivas @Seena @Tailor Seena v. State of Karnataka, *[2021 SCC OnLine SC 1233] as hereunder: -*

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under :

(Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179]) "20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality.

(Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

14.3. In the recent decision of Vijay Mohan Singh [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586], this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of this Court right from 1952 onwards. In para 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai [Umedbhai Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108]. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence.

This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption

of a very material and clinching aspect in the peculiar circumstances of the case.'

31.1. In Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320], the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable.

Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under:

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 : 1996 SCC (Cri) 972] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case.' 31.2. In K. Ramakrishnan Unnithan [K. Ramakrishnan Unnithan v. State of Kerala, (1999) 3 SCC 309: 1999 SCC (Cri) 410], after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived

at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653], in para 5, this Court observed and held as under:

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order. It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State [Surajpal Singh v. State, 1951 SCC 1207 : AIR 1952 SC 52]; Wilayat Khan v. State of U.P. [Wilayat Khan v. State of U.P., 1951 SCC 898 : AIR 1953 SC 122]) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.' 31.4. In K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305], this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere

in the interest of justice, lest the administration of justice be brought to ridicule."

N. Vijayakumar v. State of T.N., [(2021) 3 SCC 687] as hereunder: - "20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325 has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432) "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. Further in the judgment in Murugesan [Murugesan v. State, (2012) 10 SCC 383: (2013) 1 SCC (Cri) 69] relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the

said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction.

xxx xxx xxx

23. Further, in Hakeem Khan v. State of M.P., (2017) 5 SCC 719 : (2017) 2 SCC (Cri) 653 this court has considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court. Para 9 of the judgment reads as under: (SCC pp. 722-23) "9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This reason, coupled with the fact that the only independent witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned counsel for the respondent may be right in stating that the trial court went overboard in stating that the complainant party was the aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case. This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

24. By applying the abovesaid principles and the evidence on record in the case on hand, we are of the considered view that having regard to material contradictions which we have already noticed above and also as referred to in the trial court judgment, it can be said that acquittal is a "possible view". By applying the ratio as laid down by this Court in the judgments which are stated supra, even assuming another view is possible, same is no ground to interfere with the judgment of acquittal and to convict the appellant for the offence alleged. From the evidence, it is clear that when the Inspecting Officer and other witnesses who are examined on behalf of the prosecution, went to the office of the appellant-accused, the appellant was not there in the office and office was open and people were moving out and in from the office of the appellant. It is also clear from the evidence of PWs 3, 5 and 11 that the currency and cellphone were taken out from the drawer of the table by the

appellant at their instance. There is also no reason, when the tainted notes and the cellphone were given to the appellant at 5.45 p.m. no recordings were made and the appellant was not tested by PW 11 till 7.00 p.m."

24. This Court had the occasion to consider the scope and the extent of interference in the cases, wherein this Court has to delve into the issues, which gets encompassed in the proceedings, where the judgment and the order under challenge is of acquittal and this Court in Government Appeal no. 3804 of 2010, ***State of U.P. vs. Subedar and others,*** has held that it is a settled principle of law that while exercising powers even if two reasonable views/conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court.

25. Recently, the Division Bench of this Court in the case of ***Virendra Singh vs. State of U.P. and others*** reported in **2022(3) ADJ 354** had held that while deciding appeals against acquittal, the High Court has to first record its conclusion on the question whether approach of the Trial Court dealing with the evidence was patently illegal or the conclusion arrived was based on no evidence or it was equated by perversity and in case two views are possible then the High Court should detain itself from the order of acquittal.

26. On the contours of the decisions, referred to hereinabove, as well as the legal proposition so culled out, the judgment of the Trial Court is to be scanned and scrutinized.

27. Undisputedly, as per the prosecution case, the corpus of the deceased was found near the canal strip in the farm of one Lal Sahai Katheria. It is further not in dispute that the deceased also sustained injuries and according to the medico legal report, the cause of the death was certain injury in the neck which was related to fatal injury, pursuant whereof the deceased could not breathe. According to the prosecution version, the deceased had gone to attend the marriage function of the daughter of Ram Chandra Pal and he was shown to be in company of the accused, who are two in number. Thereafter, his whereabouts were not traced.

28. As per the statement of the PW-1 Ram Teerath, the deceased was watching movie till 3:00 in the morning along with him and thereafter he was not traced. However, further as per the own statement of the PW-1 Ram Teerath, the said fact was not got reported in the first information report. Further PW-1 in his own statement has come up with the stand that he happens to be the cousin brother of deceased and the body of the deceased was not found till 8th morning. On the contrary, PW-2, who happens to be the father of the deceased in his statement, has stated that on the date of the alleged commission of the offence, he was in Delhi and further being informed regarding the death, he came to the village. Thus neither the PW-1, nor the PW-2 had seen the commission of the offence. So far as PW-3 is concerned, he being one Akhilesh has deposed that on the fateful day, when the marriage ceremony was solemnized and he was present in the marriage of the daughter of Sri Ram Chandra Pal. According to PW-3 Akhilesh in the house of his brother being Ram Bhajan, T.V. and CD was put to show and the deceased was also there. And about 10-11 P.M, on the fateful day, the accused, who are two in number, along with the

deceased were shown to be present and thereafter he did not see the accused along with the deceased. Thereafter, the corpus of the deceased was found near the bushes. As per the statement of the PW-3 Akhilesh, the deceased was with the accused at about 10-11 P.M. and further according to him, the baraat had come at 10 P.M. and the same got stationed just in front of the door of one Jagdish and took two hours to proceed from there and he witnessed the deceased along with two accused. According to PW-3 Akhilesh, he had not seen the deceased going along with the accused, who are two in number. Further he has deposed that he had seen the accused along with the deceased around 12 P.M. He has further deposed that he at no point of time reported to the Investigating Officer regarding the commission of the crime by the accused, despite the fact that the Investigating Officer came to the village and met him 10-15 times.

29. So far as PW-4 Ram Kishore is concerned, he happens to be the real brother of the deceased, and according to him, he was in his house when the baraat had come over there and he had gone to his second house at 10:30 P.M. for taking rest and according to him, when he saw certain commotion he had switched on his torch and saw the deceased over there. None the less, PW-5 was also produced by the prosecution as Sri Anil Kumar Yadav, who happens to be the witness to the Panchayatnama. Similarly, so far as, PW-7 is concerned, he happens to be the Investigating Officer and according to his statement, no offending articles or weapons were recovered.

30. From the meticulous analysis of the ocular testimony as well as the documents in support thereof, it reveals that the present case (if to any extent) falls within the index of circumstantial evidence. There is no direct testimony. Moreover, no recovery whatsoever, has been made from the accused. None the less, on one hand PW-1 being Ram Teerath has come up with the stand that the deceased was watching movie till 3:00 in the morning, however, according to the testimony of the brother of the deceased, the accused were found near a canal in the canal strip near farm of Lal Sahai Katheria, wherein the corpus of the deceased was found. Even the motive is also not found attributable to the commission of crime by the appellant, as merely because there had been certain heated conversation between the accused and the deceased cannot be a ground to hold the guilty of commission of crime. Notably, the prosecution has miserably failed to build up the chain of evidence and sequence so as to link the commission of crime by the accused. More or less, the entire chain of events do not match with the prosecution, as even the circumstantial evidence do not link with the commission of offence. Less to say about last scene theory as there is a big cloud over the fact that the accused were with the deceased before commission of the alleged offence.

31. This Court has given anxious consideration to the pleadings so set forth in the appeal as well as the documents available on record, and after marshaling the factual and legal aspect, the Court finds its inability to subscribe to the prosecution case as for the purposes of discarding the view taken by the learned Trial Court. The prosecution case, if taken into face value does not cumulatively complete the chain of linking the accused to have committed the crime, as neither any motive is attributed nor there is any ingredient of eye witness testimony, nor the theory of last

seen stands attracted. Even otherwise, there is no recovery so made from the accused. This Court further finds that the prosecution case proceeds on weak evidence and and in any view of the matter, this is not a case wherein the appellant/ complainant can insist the Court to take a different view from the view taken by the Trial Court while acquitting the accused, while reversing the judgment in question.

32. Hence, in any view of the matter applying the principles of law so culled out by the Hon'ble Apex Court in the facts of the present case, we have no option but to concur with the view taken by the learned Sessions Judge.

33. We find that it is not a case worth granting leave to appeal. The application for granting leave to appeal is rejected.

34. Since the application for granting leave to appeal has not been granted, consequently, present criminal appeal also stands dismissed.

35. Records of the present case be sent back to the court concerned.

(2022) 8 ILRA 793
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 3507 of 2012
(U/S 372 Cr.P. C.)

Kaju Singh ...Appellant
Versus
State o U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Sri C.S. Sharma, Sri G.S. Sharma

Counsel for the Opposite Parties:
Govt. Advocate, Sri V.B. Rao

A. Criminal Law – Appeal against acquittal - Arms Act: Section 302, 201 IPC r/w S.425 - Jurisdiction - Mere fact that a view, other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. (Para 10 to 25)

While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not. (Para 10 to 25)

In the present case in hand, the entire prosecution story, is erected on the premise that the father of the appellant-informant went missing from 23.11.2007 at 2:00 P.M., while according to the prosecution he had gone to cut the grass for cattle feed and he did not return back. However it is one Sri Mani Singh, who happens to be PW-2, who witnessed that the accused was with the deceased and according to his statement, the accused sat in the tractor on the next date, and proceeded from the village on 24.11.2007 at 7:00 in the morning and thereafter he was not seen. It is also not in dispute that the FIR has been lodged on

27.11.2007 and nobody had seen the accused committing the crime as the present case does not fall within the parameters as envisaged under eye-witness count. Rather to the contrary, the case (if it is) would come under the parameters of circumstantial evidence. PW-1 was not an eyewitness, however the only witness who had seen the accused with the deceased on 27.11.2007 at 5:00 P.M., was PW-2 Mani Singh. Records further reveal that as per the statement of PW-1, the deceased were three brothers, elder one being Indrabhan Singh, then Chunni Singh and the deceased. The deceased happens to be the son of Balram Singh as well as the accused is the son of Indrabhan Singh. Meaning thereby, the informant and the accused belong to the same family. According to the statements of the prosecution witness, there was a dispute w.r.t. some landed property, which was the basis for commission of the crime by the accused. (Para 27)

So far as the issue with relation to the para-meters regarding delay in lodging of FIR is concerned, admittedly, the deceased went missing on 23.11.2007 and the FIR has been lodged on 27.11.2007, after four days. The court below has analyzed each and every aspect of the matter while recording a categorical finding that there has been no explanation regarding delay in lodging of the FIR. It is not disputed that the informant was in his house and rather in the village on 23.11.2007 when the deceased went missing. However, no explanation whatsoever, either plausible or justifiable has been given regarding delay in lodging of the FIR. It is further improbable and unconceivable that, once one of the slippers of the deceased was recovered and the deceased was not traceable on 23/24.11.2007, then in normal situation, an FIR ought to have been lodged, as no aggrieved party, whose near relative is missing would not approach the police station while putting search of the missing person in motion. The learned trial court has rightly disbelieved the prosecution case on the additional count of delay in the lodging of the FIR. (Para 28)

B. Delay in lodging the FIR and its impact upon the prosecution theory - It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. (Para 30)

Unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case. (Para 29 to 31)

In the present case, by all eventualities (Para 33 to 35), this Court finds that there has been no plausible explanation offered by the prosecution as to why there has been delay in lodging the FIR, coupled with the fact that neither any motive is attributed or proved, nor there is eyewitness testimony, nor the chain of events link the basic index of circumstantial evidence and less to say the last seen theory also does not attract, coupled with defective investigation and further delay in lodging the FIR (Para 32, 34, 35)

This Court further finds that the prosecution case proceeds on weak evidence and in any view of the matter, this is not a case wherein the appellant/complainant can insist the Court to take a different view from the view taken by the Trial Court while acquitting the accused, while reversing the judgment in question. (Para 36)

Criminal appeal dismissed. (E-4)

Precedent followed:

1. Tota Singh & anr. Vs St. of Punj., (1987) 2 SCC 529 (Para 10)

2. Ramesh Babulal Doshi Vs St. of Guj., (1996) 9 SCC 225 (Para 11)

3. St. of Raj. Vs St. of Guj., (2003) 8 SCC 180 (Para 12)

4. St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755 (Para 13)

5. Chandrappa & ors. Vs St. of Karn., (2007) 4 SCC 415 (Para 14)

6. Ghurey Lal Vs St. of U.P., (2008) 10 SCC 450 (Para 15)

7. Siddharth Vashishtha @ Manu Sharma Vs State (NCT of Delhi), (2010) 6 SCC 1 (Para 16)

8. Babu Vs St. of Kerala, (2010) 9 SCC 189 (Para 17)

9. Ganpat Vs St. of Har., (2010) 12 SCC 59 (Para 18)

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Mah., (2010) 13 SCC 657 (Para 19)

11. St. of U.P. Vs Naresh, (2011) 4 SCC 324 (Para 20)

12. St. of M.P. Vs Ramesh, (2011) 4 SCC 786 (Para 21)

13. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219 (Para 22)

14. Jafarudheen & ors. Vs St. of Kerala, JT 2022 (4) SC 445 (Para 23)

15. St. of U.P. Vs Subedar & ors., Government Appeal No. 3804 of 2010 (Para 24)

16. Virendra Singh Vs St. of U.P. & ors., 2022 (3) ADJ 354 (Para 25)

17. Apren Joseph Alias Current Kunjukunju & ors. Vs The St.of Kerala, (1973) 3 SCC 114 (Para 29)

18. Tara Singh & ors. Vs St. of Pun., 1991 Supp (1) SCC 536 (Para 30)

19. P. Rajagopal & ors. Vs St. of T.N., (2019) 5 SCC 403 (Para 31)

Present appeal assails judgment and order dated 15.07.2011, passed by Additional Sessions Judge, District Banda.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal under Section 372 of Criminal Procedure Code, 1973 (in short 'Cr.P.C.'), has been instituted by the informant being Kaju Singh son of Balram Singh against the judgment and order dated 15.7.2011 passed by Addl. Sessions Judge, Court No. 5, District Banda, passed in S.T. No. 70 of 2008, under Sections 302, 201 IPC arising out of Case Crime No. 281 of 2007, and S.T. No. 71 of 2008, under Section 25/4 Arms Act (State Vs. Munna Singh alias Karan) arising out of Case Crime No. 15 of 2008, Police Station. Bisanda, District Banda, whereby learned trial court has acquitted the accused, who is respondent-opposite party no. 2.

2. This appeal was presented before this Court accompanied with a delay condonation application on 26.9.2011, and on 23.8.2012, this Court proceeded to pass the following order: -

"23.8.2012

Heard learned counsel for the appellant, learned AGA and Sri V.B. Rao, counsel appearing on behalf of the accused respondent.

This application has been filed with a prayer to condone the delay in filing the appeal.

The grounds taken for condoning the delay had not been controverted by the

accused respondent because no counter affidavit has been filed.

This appeal has been filed beyond the period of limitation by 9 days.

Sufficient cause has been shown to condone the delay in filing the appeal. Therefore, the delay in filing the appeal is hereby condoned. The appeal shall be deemed to be filed within the period of limitation.

Office is directed to allot regular number to this appeal.

Accordingly, this application is allowed."

"Heard learned counsel for the appellant, learned AGA and Sri V.B. Rao, counsel appearing on behalf of the accused respondent.

Learned counsel for the appellant prays for and is granted three weeks' time to file an application for granting leave to appeal.

Summon the lower court record within a period of six weeks from today.

List on 18.10.2012 for admission. "

3. Thereafter on 30.10.2012, 10.12.2012, 16.1.2013, 25.8.2021, and lastly on 9.5.2022, the following orders were passed:-

"30.10.2012

Learned counsel for the appellant is not present.

In this case lower court record has been summoned on 23.8.2012 but the same has not been received.

List on 10.12.2012."

"10.12.2012

The learned counsel for the appellant is not present. In this case lower court record has been summoned, the same has not been received.

The office is directed to send reminder to the District Judge, Banda for sending the lower court reocrd within a month.

List on 16.1.2013."

"16.1.2013

Heard learned counsel for the appellant, learned A.G.A. for the State of U.P. and Sri V.B. Rao appearing on behalf of the accused respondents.

In this case lower court has not been received whereas the reminder has been sent to learned Sessions Judge, Banda on 10.12.2012.

List on 25.2.2013."

"25.8.2021

Put up on 15.9.2021 in the additional cause list before the appropriate Bench."

*"***9.5.2022**

Matter is taken up.

None appeared on behalf of the appellant.

Learned A.G.A. on behalf of the State is present.

Today accused respondent is also not represented by any counsel nor he appeared in person before the Court.

Appeal is yet to be admitted.

In the circumstances, list this matter in the week commencing 4th July, 2022 for hearing on admission.

If on the next date fixed none will appear on behalf of the appellant Court will proceed to decide the matter appointing Amicus Curiae/with the help of the learned A.G.A."

4. Orders so passed from time to time in the present appeal show that the counsel for the appellant is avoiding to participate in the proceedings in order to facilitate in the disposal of the matter and thus, this Court was constrained to pass an order dated 9.5.2022 while directing and observing that in case on the next date so fixed, none appears on behalf of the appellant before this Court, the Court will have no option but to appoint Amicus Curiae / to decide the matter with the help of learned A.G.A.

5. Till the dictation of the order, nobody appears for the appellant and thus this Court is proceeding to decide the matter with the assistance of the learned A.G.A.

6. The factual matrix as worded in the present appeal are that the appellant/ informant happens to be the son of the deceased being Man Singh who was at relevant point of time when the unlucky event occurred was working in an establishment in Delhi. As per the prosecution version, Balram Singh (deceased) on 23.11.2007 at 2:00 P.M, had gone to the disputed agricultural field in order to harvest grass & plants being cattle feed. However, he did not return back and after constant search and enquiry, when Maini son of Rajju Yadav had apprised the informant on 23.11.2007 at 5:00 P.M. that he had seen the deceased with accused. As per the prosecution story, one slipper of the deceased was found in the field and the accused at 7:00 in the morning was going in a tractor (no. UP90A9351) which was owned by one Ganga Singh son of Chhikaudi towards Atarra, and the accused after the said day, did not return to the village. Records further reveal that on 27.11.2007, the matter was reported to the concerned Police Station regarding the missing of the deceased. It has been further alleged that on 9.12.2007, the informant received a phone call that the corpus of the deceased was found in a gadara naala of the said village. Consequently, the inquest report was also prepared and the body was put up for post mortem on 10.12.2007. It was further alleged that on the pointing out of the accused, spade as well clothes which included the Kurta an inner wear were found which were blood stained. Consequently, investigating Officer was nominated, who conducted the investigation, pursuant whereto a charge sheet was submitted purported to be under Section 302, 201 IPC read with Section 4/25 of the Arms Act. The charges were read over to the accused. The accused denied the charges and claimed to be tried. Thereafter the case was committed to the Sessions.

7. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Seerdhwaj Singh @ Kaju Singh	PW1
2.	Maini Singh	PW2
3.	Constable Chhedi Lal	PW3
4.	Dr. Mukesh Kumar	PW4
5.	S.I. H.D. Singh, I.O.	PW5
6.	S.I. Parashuram Singh	PW6
7.	Constable Ram Vishal Pal	PW7

8 We have heard Sri Ratan Singh, learned A.G.A. and with his assistance the present appeal is being decided.

9. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

10. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***Tota Singh and another vs. State of Punjab,*** reported in ***(1987) 2 SCC 529***, the Hon'ble Apex Court in paragraph-6 has observed as under: -

"6. The High Court has not found in its judgment that the reasons given by the learned Sessions Judge for discarding the testimony of PW 2 and PW 6 were either unreasonable or perverse. What the High Court has done is to make an independent reappraisal of the evidence on its own and to set aside the acquittal merely on the ground that as a result of such reappreciation, the High Court was inclined to reach a conclusion different from the one recorded by the learned Sessions Judge. This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a reappreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."

11. Further, in the case of ***Ramesh Babulal Doshi vs. State of Gujarat, r***eported in ***(1996) 9 SCC 225,*** in paragraph 7, the Hon'ble Apex Court observed as under:

"7. Before proceeding further it will be pertinent to mention that the entire

approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above-quoted conclusions. This Court has repeatedly laid down that the mere fact that a 'view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."

12. In the case of ***State of Rajesthan vs. State of Gujarat,*** reported in ***(2003) 8 SCC 180, in paragraph 7,*** the Hon'ble Apex Court observed as under:

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.[1]) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra[2], Ramesh Babulal Doshi v. State of Gujarat[3] and Jaswant Singh v. State of Haryana."

13. In the case of ***State of Goa vs. Sanjay Thakran,*** reported in ***(2007) 3 SCC 755,*** in **paragraph 15,** the Hon'ble Apex Court observed as under:

"15. Further, this Court has observed in Ramesh Babulal Doshi v. State of Gujarat: (SCC p. 229, para 7)

"7.... This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then - and then only - reappraise the evidence to arrive at its own conclusions." and in State of Rajasthan v. Raja Ram8: (SCC pp. 186-87, para 7) -

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra 10, Ramesh Babulal Doshi v. State of Gujarat and Jaswant Singh v. State of Haryana11"."

14. Further in the case of ***Chandrappa and others vs. State of Karnataka***, reported in ***(2007) 4 S.C.C. 415***, the Apex Court has observed as under:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the

evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

15. In the case of ***Ghurey Lal vs. State of U.P.***, reported in ***(2008) 10 SCC 450,*** in **paragraph 43 and 75,** the Hon'ble Apex Court observed as under:

"43. The earliest case that dealt with the controversy in issue was Sheo Swarup v. King Emperor. In this case, the ambit and scope of the powers of the appellate court in dealing with an appeal against acquittal has been aptly a elucidated by the Privy Council. Lord Russell writing the judgment has observed as under (at AIR p. 230): (IA p. 404)

"... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he b has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

The law succinctly crystallised in this case has been consistently followed by this Court. On proper analysis of the ratio and findings of this case, it is revealed that the findings of the trial court are based on the fundamental principles of the criminal jurisprudence. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the trial court. The appellate court undoubtedly has wide powers of reappreciating and re-evaluating the entire evidence but it would be justified in interfering with the judgment of acquittal only when the judgment of the d trial court is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.

...

75. On careful analysis of the entire evidence on record, we are of the view that the reasons given by the High Court for reversing the judgment of

acquittal is unsustainable and contrary to settled principles of law. The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable."

16. In the case of S***iddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi),*** reported in ***(2010) 6 SCC 1,*** in ***paragraph 303(1)***, the Hon'ble Apex Court observed as under:

"303. Summary of our conclusions:

(1) The appellate court has all the necessary powers to re-evaluate the evidence let in before the trial court as well as the conclusions reached. It has a duty to specify the compelling and substantial reasons in case it reverses the order of acquittal passed by the trial court. In the case on hand, the High Court by adhering to all the ingredients and by giving b cogent and adequate reasons reversed the order of acquittal. ..."

17. In the case of **Babu vs. State of Kerala**, reported in ***(2010) 9 SCC 189***, in ***paragraph 12 and 19,*** the Hon'ble Apex Court observed as under:

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P.1, Shambhoo Missir v. State of Bihar2, Shailendra Pratap v. State of U.P.3, Narendra Singh v. State of M.P.4, Budh Singh v. State of U.P.5, State of U.P. v. Ram Veer Singh6, S. Rama Krishna v. S. Rami Reddy7, Arulvelu v. State8, Perla Somasekhara Reddy v. State of A.P.9 and Ram Singh v. State of H.P.10).

...

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

18. In the case of ***Ganpat vs. State of Haryana,*** reported in ***(2010) 12 SCC 59***, in ***paragraph 14 and 15***, the Hon'ble Apex Court observed as under:

"14. The only point for consideration in these appeals is whether

there is any ground for interference against the order of acquittal by the High Court. This Court has repeatedly laid down that the first appellate court and the High Court while dealing with an appeal is entitled and obliged as well to scan through and if need be reappreciate the entire evidence and arrive at a conclusion one way or the other.

15. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal: (i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. (Vide Madan Lal v. State of J&K[1], Ghurey Lal v. State of U.P.2, Chandra Mohan Tiwari v. State of M.P.3 and Jaswant Singh v. State of Haryana4.)"

19. In the case of ***Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra***, reported in ***(2010) 13 SCC 657***, in ***paragraph 38, 39 and 40***, the Hon'ble Apex Court observed as under:

"38. It is a well-established principle of law, consistently reiterated and followed by this Court that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanour of the witnesses is the best judge of the credibility of the witnesses.

39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration. The appellate court should bear in mind the presumption

of innocence of the accused, and further, that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference.

40. In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding material or by taking into consideration irrelevant/inadmissible material. A finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (See Balak Ram v. State of U.P.9, Shailendra Pratap v. State of U.P.10, Budh Singh v. State of U.P.11, S. Rama Krishna v. S. Rami Reddy¹2, Arulvelu v. State 13, Ram Singh v. State of H.P.14 and Babu v. State of Kerala¹5.))"

20. In the case of ***State of U.P. vs. Naresh, re***ported in ***(2011) 4 SCC 324***, in ***paragraph 33 and 34,*** the Hon'ble Apex Court observed as under:

"33. We are fully aware of the fact that we are entertaining the appeal against the order of acquittal. Thus, the Court has to scrutinise the facts of the case cautiously and knowing the parameters fixed by this Court in this regard.

34. Every accused is presumed to be innocent unless his The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India. The law in this regard is well settled that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. An appellate court must also consider whether the court below has placed the burden of proof incorrectly or failed to take into consideration any admissible evidence or had taken into consideration evidence brought on record contrary to law? In exceptional cases, whether there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of acquittal. So, in order to warrant interference by the appellate court, a finding of fact recorded by the court below must be outweighed evidence or to suffer from the vice of guilt is proved. such finding if outrageously defies logic as irrationality. [Vide Babu v. State of Keralall and Sunil Kumar Sambhudayal Gupta (Dr.)8.]"

21. In the case of ***State of M.P. vs. Ramesh,*** reported in ***(2011) 4 SCC 786,*** in ***paragraph 15,*** the Hon'ble Apex Court observed as under:

"15. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to reappreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any

limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal."

22. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC*** 219, has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"13. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

14. It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

23. The Apex Court recently in ***Jafarudheen & Ors. vs. State of Kerala, JT 2022(4) SC 445*** has observed as under:-

"DISCUSSION Scope of Appeal filed against the Acquittal:

25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. Precedents:

***Mohan @Srinivas @Seena @Tailor Seena v. State of Karnataka**, [2021 SCC OnLine SC 1233] as hereunder: -*

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before

it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under : (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179]) "20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality.

(Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

14.3. In the recent decision of Vijay Mohan Singh [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586], this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of this Court right from 1952 onwards. In para 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai [Umedbhai Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108]. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons

given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence.

This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case.'

31.1. In Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320], the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable.

Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under:

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 : 1996 SCC (Cri) 972] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the

judgment of the trial court in this case.' 31.2. In K. Ramakrishnan Unnithan [K. Ramakrishnan Unnithan v. State of Kerala, (1999) 3 SCC 309: 1999 SCC (Cri) 410], after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653], in para 5, this Court observed and held as under:

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order. It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State [Surajpal Singh v. State, 1951 SCC 1207 : AIR 1952 SC 52]; Wilayat Khan v. State of U.P. [Wilayat Khan v. State of U.P., 1951 SCC 898 : AIR 1953 SC 122]) In our opinion, there is no

substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.' 31.4. In K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305], this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."

N. Vijayakumar v. State of T.N., [(2021) 3 SCC 687] as hereunder: - "20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325 has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432) "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not

disturb the finding of acquittal recorded by the trial court."

21. Further in the judgment in Murugesan [Murugesan v. State, (2012) 10 SCC 383: (2013) 1 SCC (Cri) 69] relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction.

xxx xxx xxx

23. Further, in Hakeem Khan v. State of M.P., (2017) 5 SCC 719 : (2017) 2 SCC (Cri) 653 this court has considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court. Para 9 of the judgment reads as under: (SCC pp. 722-23) "9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This reason, coupled with the fact that the only independent witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned counsel for the respondent may be right in stating that the trial court went overboard in stating that the complainant party was the aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case. This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

24. By applying the abovesaid principles and the evidence on record in the case on hand, we are of the considered view that having regard to material contradictions which we have already noticed above and also as referred to in the trial court judgment, it can be said that acquittal is a "possible view". By applying

the ratio as laid down by this Court in the judgments which are stated supra, even assuming another view is possible, same is no ground to interfere with the judgment of acquittal and to convict the appellant for the offence alleged. From the evidence, it is clear that when the Inspecting Officer and other witnesses who are examined on behalf of the prosecution, went to the office of the appellant-accused, the appellant was not there in the office and office was open and people were moving out and in from the office of the appellant. It is also clear from the evidence of PWs 3, 5 and 11 that the currency and cellphone were taken out from the drawer of the table by the appellant at their instance. There is also no reason, when the tainted notes and the cellphone were given to the appellant at 5.45 p.m. no recordings were made and the appellant was not tested by PW 11 till 7.00 p.m."

24. This Court had the occasion to consider the scope and the extent of interference in the cases, wherein this Court has to delve into the issues, which gets encompassed in the proceedings, and the judgment and the order under challenge is of acquittal and this Court in Government Appeal no. 3804 of 2010, *State of U.P. vs. Subedar and others*, has held that it is a settled principle of law that while exercising powers even at two reasonable views/conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court.

25. Recently, the Division Bench of this Court in the case of ***Virendra Singh vs. State of U.P. and others*** reported in ***2022(3) ADJ 354*** had held that while deciding appeals against acquittal, the High Court has to first record its conclusion on the question whether approach of the Trial Court dealing with the evidence was patently illegal or the conclusion arrived was based on no evidence or it was equated by perversity and in case two views are possible then the High Court should detained itself from the order of acquittal.

26. On the contours of the decisions, referred to hereinabove, as well as the legal proposition so culled out, the judgment of the Trial Court is to be scanned and scrutinized.

27. In the present case in hand, the entire prosecution story, is erected on the premise that the father of the appellant-informant went missing from 23.11.2007 at 2:00 P.M, while according to the prosecution he had gone to cut the grass for cattle feed and he did not return back. However it is one Sri Mani Singh, who happens to be PW-2, who witnessed that the accused was with the deceased and according to his statement, the accused sat in the tractor on the next date, and proceeded from the village on 24.11.2007 at 7:00 in the morning and thereafter he was not seen. It is also not in dispute that the first information has been lodged on 27.11.2007 and nobody had seen the accused committing the crime as the present case does not fall within the parameters as envisaged under eye-witness count. Rather to the contrary, the case (if it is) would come under the parameters of circumstantial evidence. PW-1 was not an eye-witness, however the only witness who had seen the accused with the deceased on 27.11.2007 at 5:00 P.M, was PW-2 Mani Singh. Records further reveal that as per the statement of PW-1, the deceased were three brothers, elder one being Indrabhan Singh, then Chunni Singh and the deceased. The deceased happens to be the

son of Balram Singh as well as the accused is the son of Indrabhan Singh. It has further come on record that 8-10 years ago from the date of the statement so sought to be recorded of PW-1, Indrabhan Singh had died and so far as Chunni Singh is concerned, he happens to be in police and he is not blessed with any child. Meaning thereby, the informant and the accused belong to the same family. According to the statements of the prosecution witness, there was a dispute with respect to some landed property, which was the basis for commission of the crime by the accused. The basic question, which falls for consideration before this Court is as to whether the ingredients for holding the accused guilty of commission of offence qualifies the following tests:

A- Motive

B- Eye-witness testimony

C- Circumstantial evidence

D- Last Seen Theory

E- Delay in lodging the FIR

F- Defective investigation, etc.

28. So far as the issue with relation to the para-meters regarding delay in lodging of FIR is concerned, admittedly, the deceased went missing on 23.11.2007 and the FIR has been lodged on 27.11.2007, after four days. The court below has analyzed each and every aspect of the matter while recording a categorical finding that there has been no explanation regarding delay in lodging of the FIR. It is not disputed that the informant was in his house and rather in the village on 23.11.2007 when the deceased went missing. However, no explanation whatsoever, either plausible or justifiable has been given regarding delay in lodging of the FIR. It is further improbable and unconceivable the , once one of the slippers of the deceased was recovered and the deceased was not traceable on 23/24.11.2007, then in normal situation, an FIR ought to have been lodged, as no aggrieved party, whose near relative is missing would not approach the police station while putting search of the missing person in motion. The learned trial court has rightly disbelieved the prosecution case on the additional count of delay in the lodging of the FIR.

29. Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory has observed in the case of **(1973) 3 SCC 114 Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala** wherein para 11 following was mandated:

11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory

fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.

30. In the case of **Tara Singh and others Vs. State of Punjab 1991 Supp (1) SCC 536,** the Hon'ble Apex Court in paragraph 4 has observed as under:-

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

31. Yet, in the case of **P. Rajagopal and others Vs. State of Tamil Nadu (2019) 5 SCC 403,** the Hon'ble Apex Court in paragraph 12 has held as under:-

12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely.

32. Applying the ratio so culled out by the Hon'ble Apex Court in the above quoted decisions and inescapable

conclusions stands drawn that mere delay in lodging of the FIR does not ipso facto can be a ground to hold the prosecution case as weak or the proceedings vitiated. However, this Court finds that there has been no plausible explanation offered by the prosecution as to why there has been delay in lodging the FIR, coupled with the fact that neither any motive is attributed or proved, nor there is eye-witness testimony, nor the chain of events link the basic index of circumstantial evidence and less to say the last theory also does not attract, coupled with defective investigation.

33. So far as the statement of PW-2 Maini Singh is concerned, the same is also not reliable and it does not link the commission of the crime with the accused, particularly in view of the fact that as per the statement of the PW-2 Maini Singh though he has come up with the stand that on 23.11.2007, he had seen the accused talking with the deceased at 5:00 P.M, but he has deposed that there was no heated exchange of words or hurling of abuses, but he could only hear certain sound. The presence of the accused and the deceased as stated by PW-2 Maini Singh does not in any manner whatsoever, complete the chain while linking the accused while commission of crime as to said event was dated 23.11.2007 at 5 hours, as well as the corpus of the deceased was recovered on 9.12.2007. In so far as the presence of motive for commission of the crime is concerned undisputedly, as per the deposition of the prosecution witnesses and the documents available on record, it reveals that there was a landed dispute between the accused and the informant fraction as an appeal under Section 210 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 was instituted which culminated in passing of the order dated 30.6.2006, wherein the accused got victory and the informant fraction lost the case. None the less, the motive also does not appear to be a factor for commission of the crime by the accused as a party, who is victorious in the legal proceedings is a beneficial party and how could a beneficial party bore enmity or motive against the loosing party, particularly, in view of the fact that all the accused and the informant fraction happens to be close relatives. Even otherwise, the court below had also noticed the fact that accused had gone on 23.11.2007 for cutting grass in order to provide cattle feed for the cattle. It has come on record that the deceased was aged about 67 years on the date of the incident and he was not doing agricultural work, but getting it done from others and he did not own a single cattle. Thus it has been rightly observed by the court below, as there was no occasion for the deceased to have cut grass in order to feed the cattle, as stated in the FIR. None the less, none of the prosecution witnesses had disputed the fact that the deceased did not own cattle. The court below has further recorded a categorical finding that the investigation itself was defective as so far as the recovery of the slipper of the deceased is concerned, as according to the prosecution version on 9.12.2007, the body of the deceased was found near the gadara nala, whereat slipper was also found. It has been further alleged that the slipper of the deceased was not sealed by the I.O. and it was also not produced before the Court and further no signatures whatsoever was appended on recovery memo. Further as per the statement of PW-1 being Seerdhwaj Singh @ Kaju Singh, the information regarding the recovery of the body of the deceased was apprised to him by his brother Rajjan on 9.12.2007 through mobile phone at about 7:30 A.M to 8:00

A.M. According to the statement of PW-1, he has apprised the said fact to the S.O. Bisanda on his mobile number. It has been further deposed that PW-1, at the relevant point of time, did not possess any mobile phone, but he called S.O. Bisanda from a S.T.D. booth. As per the further statement of PW-1, he reached the site, where body of the deceased was recovered at 15:30 to 4:00 hours and after 1-1/2 hours, S.O. Bisanda came to the site. The Trial Court has analyzed the said aspect of the matter and has observed that it is highly improbable and inconceivable that the informant/ complainant appellant, who happens to be the real son of the deceased would wait for such a long time and then get himself present at the site, where body of the deceased was recovered. In normal circumstances, as soon as recovery or whereabouts of a missing person, who happens to be a close relative, which is in the shape of the dead body is found, then the immediate reaction would be that a suffering party will reach within a short span and will not take such a long time. None the less the panchayatnama was prepared on 9.12.2007 at 15:15 / 16:15 hours, which itself creates a doubt regarding the manner, in which the prosecution case is being sought to be engineered for implicating the accused.

34. None the less, so far as the recovery at the point out of the accused on 4.1.2008 is concerned with respect to offending and objectionable articles which became the basis for implicating the accused in the said criminal case is concerned, the trial court has categorically observed that there was no independent witnesses available there and however, whoever were the witnesses were the close relatives of the informant. Taking into consideration the import and the impact of the post mortem report itself, it reveals that the post mortem was conducted on 10.12.2007 at 2:00 P.M, as well as, as per the statement of PW-2 Maini Singh, the accused was lastly sent with the deceased on 23.11.2007 at 5:00 P.M, i.e, after a period of 16 days and as per the death occurred one week or two weeks before it. Thus in case, the opinion of the Dr. who conducted the post mortem is taken into consideration that death occurred on 25.11.2007 and as per the statement of P.W.-2 Maini Singh, the accused was lastly seen on 23.11.2007 and he went out of village on 24.11.2007 at 7:00 in the morning. Thus by all eventualities the complete chain so as to encompass the accused with relation to circumstantial evidence or the factors relating to last seen theory does not apply in the present case. Notably, there is no eye witness of commission of crime.

35. An additional fact may also be put to notice that there has been no recovery of wooden stick and shackle (hasiya), particularly in the light of the fact that the deceased is stated to have gone to the disputed agricultural field for cutting the grass for the cattle. Even otherwise, no investigation whatsoever has been conducted by the Investigating Officer with respect to the deposition so made by PW-2 being Maini Singh regarding the accused sitting in the tractor on 24.11.2007 while going outside the village in question. According to this Court, the prosecution has failed to prove existence of motive and the present case is not a case of eye-witness testimony, circumstantial evidence, the last seen theory, but it is nothing but a classic example of defective investigation and further delay in lodging the FIR.

36. This Court has given anxious consideration to the pleadings so set forth in the appeal as well as the documents

available on record, and after marshaling the factual and legal aspect, the Court finds its inability to subscribe to the prosecution case as for the purposes of discarding the view taken by the learned Trial Court. The prosecution case, if taken into face does not cumulatively complete the chain of linking the accused to have committed the crime, as neither any motive is attributed nor there is any ingredient of eye witness testimony, nor the theory of last seen stands attracted. Even otherwise, there is no recovery so made from the accused. This Court further finds that the prosecution case proceeds on weak evidence and and in any view of the matter, this is not a case wherein the appellant/ complainant can insist the Court to take a different view from the view taken by the Trial Court while acquitting the accused, while reversing the judgment in question.

37. Hence, in any view of the matter applying the principles of law so culled out by the Hon'ble Apex Court in the facts of the present case, we have no option but to concur with the view taken by the learned Sessions Judge.

38. We find that it is not a case worth granting leave to appeal. The application for granting leave to appeal is rejected.

39. Since the application for granting leave to appeal has not been granted, consequently, present criminal appeal also stands **dismissed.**

40. Records of the present case be sent back to the concerned court below.

(2022) 8 ILRA 817
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Jail Appeal No. 5100 of 2011

Aman Singh ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
Sri Vijay Bahadur Singh (A.C.)

Counsel for the Opposite Party:
Sri Shrawan Kumar (A.G.A.)

(A) Criminal Law - Indian Penal Code, 1860 - Sections 363,366, 376 & 506 - The Code of Criminal Procedure, 1973 - Sections 164 & 313 - Statement of the prosecutrix alone is sufficient to convict the accused if the same inspires confidence and is of impeccable character and quality.(Para - 15)

Rape - appellant enticed away daughter of complainant - aged about 16-17 years **-** agreed her to marry **-** testimony of prosecutrix varies from every stage - place of occurrence disputed - by investigating officer and from testimony of P.W.2. .**(Para - 13,16)**

HELD:-Prosecution failed to prove its case beyond reasonable doubt. Every part of the testimony of the prosecutrix is infirm, doubtful and contradictory which does not pose confidence. No corroborative evidence in support of the testimony of the prosecutrix.**(Para - 18)**

Jail appeal allowed. (E-7)

List of Cases cited:-

1. Vijay @ Chinee Vs St. of M.P., 2010(8)SCC 191

2. St. of Kerala Vs Kundumkara Govindan & anr., 1969 Crl.L.J. 818

3. Mod. Ali @ Guddu Vs St. of U.P., (2015)7 SCC 272

4. Takhaji Hiraji Vs Thakore Kubersing Chamansing & ors., 2001 Criminal Law Journal 2602

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Present jail appeal has been preferred against the judgment and order dated 7.7.2011 passed by Additional Sessions Judge, Court No.5, Kanpur Nagar whereby the accused appellant Amar Singh has been convicted and sentenced under section 366 I.P.C. to undergo five years rigorous imprisonment and fine of Rs.2000/- and under section 376 I.P.C. for seven years R.I. and fine of Rs.3,000/-, with default provision in each of the offences. The appellant has been acquitted of the charge under section 363 I.P.C.

2. Heard Mr. Vikram Bahadur Singh, learned amicus curiae, appearing for the appellant and Mr. Shrawan Kumar Ojha, learned Additional Government Advocate for the State.

3. The prosecution case is that the complainant Bablu, P.W. 1 lives in Swaroop Nagar, Kanpur in a hut and carries on the business of selling eggs for livelihood. Amar Singh, the present appellant works in Arya Nagar karkhana. He also lives in Swaroop Nagar. On 22.3.2010, Amar Singh enticed away daughter of the complainant aged about 16-17 years, from her home. He agreed her to marry. The complainant apprehended both, the accused Amar Singh and his daughter from karkhana and gave them in the custody of police. A written report was given by him to the police station on the basis of which case crime No.60 of 2010 under sections 363, 366 I.P.C. was registered.

4. Investigation was conducted by the investigating officer. Statement(s) of the prosecutrix and other prosecution witnesses were taken. The prosecutrix was medically examned. Her statement was recorded under section 164 CrPC. On pointing out of the prosecutrix, place of occurrence was inspected and site plan was prepared and consequenly charge-sheet against the accused appellant under secctions 363, 366, 376, 506 I.P.C. was filed. Against the accused appellant, charges under sections 363, 366, 376 I.P.C. were framed. The accused denied the charges and claimed to be tried.

5. From the side of the prosecution, P.W.1 Bablu, P.W.2 prosecutrix, P.W.3 Dr. Jyotsana Kumari, P.W.4 S.I. Ram Chandra Pal and P.W.5 Constable Pradeep Kumar were examined. The written report has been exhibited as Ext.Ka-1, supurdaginama as Ext. Ka-2, medical report of the victim as Ext.Ka-3, supplementary medical report as Ext.Ka-4, site plan as Ext.Ka-5, charge-sheet as Ext.Ka-6, chik FIR as Ext.Ka-7 and G.D. entry as Ext.Ka-8. Statement of the accused under section 313 CrPC was recorded where the case of the accused is of denial.

6. The prosecutrix in her statement under section 164 CrPC has stated that she went with the accused to Arya Nagar Karkhana. She was forcibly raped there and was threatened. She was subjected to rape thrice. She became unconscious and in the morning, she came home and told the incident to her mother and then her parents and brother Deepu went to karkhana and caught the accused from there and gave him to the police.

7. P.W.1 Bablu has stated that on 22.3.2010, the accused enticed away the

prosecutrix from his home. He also went to karkhana. Both of them were found there and he agreed them to marry. From the karkhana, he apprehended the accused and the prosecutrix, and handed them over, to the police.

In cross-examination, he changed the time of the incident and stated that the incident took place in the month of November, then stated that the incident occurred on December 28 evening. He further stated in his cross examination that his daughter has not told him that she was enticed away. He knew the accused. He is a resident of the same mohalla. He caught the accused from karkhana and stated that he will get them married. It is further stated that he has shown the place of incident to the investigating officer. He stated that he got the written report written by Rajvansh of mohalla. He told the investigating officer that his daughter has agreed for the marriage. He did not agree for the marriage. However, he stated that if the daughter is ready, he can marry her. The accused was caught from Karkhana by P.W.1 and his wife. He also stated that his nephew Deepu was also with him. He denied the suggestion that he did not tell the investigating officer that his daughter has given consent for marriage. He did not agree for that, nor tried to get them married.

P.W.2 has stated that on 22.3.2010, the accused took her to his karkhana at Arya Nagar by enticing her away. He pressed her mouth from her clothes and subjected her to rape thrice. She got unconsious. Someone opened the door of the karkhana. Then, she went to her parents and told them about the incident. Thereafter, her parents and her brother Deepu took the accused from karkhana to the police station. She was also taken along with the accused.

In her cross-examination, she stated that she did not remember the date and time of the incident. Then she says that it was Monday. The accused used to come to her house when P.W.1 was away and talked her and her mother. She further stated that the accused used to come to her house for the past one year and they used to crack jokes in the house and her family members did not mind accused coming to her house. Then he says that she went alone on foot from the house towards mandir in the evening. Along with her, her younger sister Pinki also went.

She further stated that she told the investigating officer that she is 18 years old. She was enticed away by the accused. She told her parents that she is going to temple. They did not stop her. On the pretext of taking her mandir, the accused took her, his home and thereafter to karkhana. She stated that she on her own accord went away with the accused to temple. The accused has not forced her to go to temple. However, when instead of taking her to temple, he was taking her to karkhana, she objected. On the way, she has not opposed while she was taken by the accused. She had full faith on the accused. Chowkidar was present at the karkhana. He was under influence of liquor. Both had taken liquor. In the karkhana, the prosecutrix P.W.2, Chowkidar and the appellant were present. No one else was there. The door of the karkhana was locked from inside. She then stated that she went in karkhana on her own accord. She denied the suggestion that she has not given statement to the investigating officer that from karkhana, his parents and uncle apprehended her and Amar Singh, present appellant. She further denied the suggestion that she has told the investigating officer that she has stayed with Amar Singh at his

house for the entire night. Her clothes were not seized by the investigating officer.

P.W.3 Dr. Jyotsana Kumari has examined the prosecutrix, P.W.2. No injury was found on the person of the proseccutrix, including her private part.

According to pathological report, no spermatozoon was seen. P.W.3 Dr. Jyotsana Kumari has stated that no definite opinion regarding rape with P.W.2 can be given and in the medical examination, redness and swelling was found on the vagina. However, no blood was found. There was no injury on any part of the prosecutrix body. P.W.3 further stated that she has not seized any cloth of the prosecutrix. As per report of the Chief Medical Officer, the prosecutrix was 19 years old.

P.W.4 S.I. Ram Chandra Pal, investigating officer in his statement has said that on the pointing out of P.W.2, he inspected the place of occurrence and has prepared the site plan in his writing. He further stated that P.W.1 has told him that the accused has agreed for marriage. He further stated that P.W.1 told him that he went at the place of occurrnece with his wife and brother Pappu. P.W.4 further stated that P.W.1 has told him that the accused enticed away his daughter and had taken to his home. The investigating officer has stated that P.W.1 has not told him that the accused took his daughter to karkhana. P.W.4 further stated that the prosecutrix told him that on the pretext of taking her to temple and after visiting the temple, the accused took her to his home and kept her entire night at his house. She further stated that the accused raped her at his house, however, she did not tell him that how many times she was raped. P.W.4 further stated that the prosecutrix has not told him regarding any threat or marpeet done by the accused. She had not told him regarding taking the accused to karkhana. P.W.4 has further stated that he has not inspected karkhana. He further stated that the prosecutrix in her statement told him that the accused enticed away the prosecutrix to his home and he made her agreed for marriage.

The mother of the prosecutrix also told him that the accused took the prosecutrix from his home to karkhana in the morning. Mother of the prosecutrix further told that when they reached to karkhana, then the accused and the prosecutrix were found standing there. During investigation, he has not received the blood stained clothes of the prosecutrix. He has not recovered the sample and soil from the place where the prosecutrix was allegedly raped. He has not taken any mark from the place of occurrence. He further stated that the place of occurrence is room of the accused appellant. He has not shown the place where the accused and the prosecutrix were apprehended, in the site plan. He has denied the suggestion that he has prepared a baseless site plan. He has further denied the suggestion that he has not shown place of occurrnece in the site plan. He has not shown karkhana in the site plan. The suggestion that the place which he has shown in the site plan is not the place of occurrence has been denied by the witness and further he denied the suggestion that on the saying of the family members of the prosecutrix and under pressure by senior police officers, he completed the formality and filed false charge sheet against the accused.

P.W.5 Constable Pradeep Kumar is a formal witness, who has proved the first information report, Ext. Ka.7.

8. It is submitted on behalf of the appellant that the room of the accused from

the hut of P.W.1 is a few paces away. The prosecutrix has not raised any alarm while going to the room of the accused. He submits that the prosecution has failed to prove its case beyond reasonable doubt. The testimony of the prosecutrix is not worthy of credence.

9. Learned Additional Government Advocate has opposed the appeal and has submitted that the testimony of the prosecutrix is intact. She has levelled clear allegation against the appellant. The same statement has been given by her in her statement under section 164 CrPC. It is lastly submitted that minor irregularity in the prosecution case will not come in the aid of the accused. In support of his contention, learned A.G.A. has relied on judgment of Supreme Court in **Vijay alias Chinee** versus **State of Madhya Pradesh** 2010(8)SCC 191 and **State of Kerala** versus **Kundumkara Govindan and another** 1969 Crl.L.J. 818.

10. Having heard learned amicus curiae, appearing for the appellant and learned A.G.A. as well as perusal of the record, I find that as regards the date of occurrence, in the written report, there is no mention of the date of occurrence. In the chick F.I.R. also, date of occurrence is not mentioned. P.W.1 in his statement has stated that the date of occurrnece is 22.3.2010, i.e. the date his daughter was enticed away by the accused. In the cross-examination, he has changed the time of occurrnece and has stated that the incident is of November month. Then he says that the incident is of December.

P.W.2 in her examination-in-chief has not stated the exact date of incident; rather she has stated that it was Monday. In her cross-examination, she has stated that the incident occurred on 22.3.2010.

P.W. 4 S.I. Ram Chandra Pal has stated in his chief that on 23.3.2010 when he was posted at police Swaroop Nagar, the accused was given in his custody which shows that according to testimony of P.W.1, the date of occurrnece comes to 22nd March. As regards the place of occurrence, P.W.1 in his statement has stated that the place of occurrnece is karkhana where the appellant was an employee. P.W.2 in her examination-in-chief has stated that she was subjected to rape at karkhana. However, in her cross-examination, she has changed it. She has denied the suggestion that she stayed with the accused at his home for the entire night. She further stated in her cross that she told the investigating officer that she was first taken to the house of the accused, then to karkhana.

The investigating officer in his statement has stated that it was P.W.1 who told him that the appellant took his daughter to his house. P.W.4 has stated that the prosecutrix has also told him that she was kept for the entire night at the house of the appellant. She further stated to P.W.4 that she was raped at the house of the appellant. She has not told P.W.4 regarding the incident at karkhana. The mother and the younger sister of P.W.2 and P.W.2 herself - all have stated in their statement to P.W.4 that the accused took the prosecutrix to his home because the appellant had got the consent of the prosecutrix for marriage. P.W.4 further stated that he inspected the place of occurrence at the pointing out of the prosecutrix and prepared the site plan. He pointed out the room where the incident took place in the site plan, i.e. the room of the accused appellant. He further stated that

in the site plan, he has not shown karkhana. The site plan prepared by the investigating officer is Ext. Ka-5 wherein the place of occurrnece is shown at the room of the accused.

11. Collective reading of the statements of P.W.1, P.W.2 and the statement of P.W.4 as also the site plan does not show as to whether the place of occurrence is karkhana or the house of the accused appellant and thus, exact place of occurrence is doubtful.

12. Now. coming to the testimony of the prosecutrix who in her statement has stated that on the date of incident, she went alone from her house to J.K. Mandir. Thereafter, she stated that on 22.3.2010 in the evening, she went to J.K. Mandir with her younger sister Pinki. Thereafter, again she says that she on her own accord and free will went away with the appellant to Mandir and no force was applied by the appellant to take her to temple. While she was going with the accused to Mandir, when she found that instead of taking her to Mandir, the appellant was taking her to karkhana, she objected and raised alarm.

Then she says that on the way, she has not made any resistance while she was taken by the accused as she had full faith on the accused. She further says that she went to karkhana on her free accord. She denied the suggestion that she has told the investigating officer that she remained with the appellant at his house for theentire night.

13. A perusal of the statement of the prosecutrix shows that the same is self contradictory and inconsistent and does not inspire confidence. At one place, she says that she was enticed away by the appellant and was subjected to rape at karkhana and also was threatened by the accused appellant. Then, in her cross-examination, she says that she went to karkhana at her own accord. She was aware that the accused was taking her on the opposite route which does not go to temple. She did not make any resistance as she had full faith on the appellant. She has stated that the accused has never persuaded for going out from the house. The appellant used to come to her house for the last one year with the consent of family members and they did not mind that. P.W.2 further says that they never went to the house of the accused. She further says that on the pretext of taking to Mandir, the accused took her to his home and then to karkhana. She denied the sugestion that she has told the investigating officer that she remained with the accused appellant for the entire night at his home; rather she stated that she told the investigating officer that she was in karkhana with the accused appellant. She further stated that she went alone from her house to J.K. Mandir. Then she says that she was going along with her younger sister. She further stated that no first information report was written in front of her at the police station. Thus, the testimony of the prosecutrix varies from every stage and does not inspire confidence, hence, to convict the appellant on testimony of P.W.2, some corroboration is required as held by Supreme Court in **Mod. Ali alias Guddu** versus **State of U.P.** (2015)7 SCC 272 (Emphasis is on paras 29 and 30).

P.W.3 Dr. Jyotsana Kumari has stated that according to report of the Chief Medical Officer, the prosecutrix was 19 years old. She has not given any clear opinion on rape. No external or internal injury has been found on the person of the

prosecutrix. No spermatozoon has been found in the pathological report. There was no bleeding. Redness or swelling on the private part/vagina could have come from some stimulant substance like red pepper, petrol and therefore, has not given any definite opinion about rape. P.W.4 has disputed the place of occurrence as told by P.W.1. Statement of P.W.2 regarding place of occurrence is also doubtful. P.W.4 has stated that he has not collected any soil or mark from the place of occurrnece. He has not visited even karkhana which according to the prosecutrix is the place of occurrence. He has stated that he has not shown karkhana in the site plan.

14. On overall consideration of the prosecution evidence, statement of the prosecution witnesses and the material collected by the investigating officer, it is clear that in the written report and the first information report, no date of incident has been mentioned. Scribe of the first information report Rajvansh has not been produced. The prosecutrix in her statement has stated that she went to temple along with the appellant at her free will and accord, however, she told the investigating officer that Amar had taken her to his home and she was kept there whole night. This shows contradictory statement of the prosecutrix. Whether the place of occurrence is karkhana or the house of accused becomes doubtful as per the site plan itself. In the site plan, karkhana has not been shown. P.W.4 has not visited the place of occurrence, i.e. karkhana. Neither the soil nor the clothes of the prosecutrix has been collected by the investigating officer. Chowkidar of karkhana has not been produced by the prosecution. The younger sister of the prosecutrix who could have been the eye-witness has also not been produced by the prosecution; rather has been withheld. Hence for not examining Chowkidar and Pinki, younger sister of P.W.2, adverse inference is to be taken against the prosecution as held by Supreme Court in 2001 Criminal Law Journal 2602 **Takhaji Hiraji** versus **Thakore Kubersing Chamansing and others**. Relevant paragraph 19 is reproduced as under :

"19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. ***It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself - whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of***

drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coning from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defe*nce that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading into a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not pre-meditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near the house of the accused persons then it could probably be held to be a case of self-defence of the accused persons in which case non-explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and the circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tight rope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tight-rope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinised the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinising and analysing the ocular findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case. "*

(Emphasised by me)

15. In Kundumkara Govindan's case (supra), relied on by learned Additional Government Advocate, Assistant Sessions Judge acquitted the accused giving benefit of doubt, holding that the evidence of the prosecutrix in a rape case cannot be believed unless it is corroborated in material particulars. It is not the case here. Law in this regard is settled. Statement of the prosecutrix alone is sufficient to convict the accused if the same inspires confidence and is of impeccable character and quality. In case the statement is infirm, then some corroboration is needed.

The facts of the present case are different from the above case law. Hence, in the facts of the present case, rule of prudence cannot be dispensed with as in view of the self contradictory and shaky testimony of the prosecutrix, corroborative

material is required which is absent in this case.

16. So far as the judgment in Vijay alias Chinee versus State of M.P. (supra) is concerned, relied on by learned A.G.A., place of incident was not disputed and admittedly, the prosecutrix at the place of incident was subjected to rape and therefore, there are concurrent finding of facts by the two courts. Here, in the present case, place of occurrence is itself disputed by the investigating officer and from the testimony of P.W.2. In that regard also, it does not inspire confidence. Therefore, this judgment also is not applicable in the facts of the present case.

17. Since the place of occurrence in this case is not clear, coupled with the fact that the testimony of P.W.2 is quite shaky and does not inspire confidence as also the fact that younger sister Pinki of P.W.2 who was an eye-witness has not been produced by the prosecution, Chowkidar of karkhana at Arya Nagar has also not been made accused along with the appellant and has not been produced by the prosecution, scribe of the first information report has also not been made witness in this case, I am of the opinion that such kind of testimony of P.W.2 does not inspire confidence.

18. Thus, in view of the aforesaid discussion, the prosecution has failed to prove its case beyond reasonable doubt. Every part of the testimony of the prosecutrix is infirm, doubtful and contradictory which does not pose confidence. There is no corroborative evidence in support of the testimony of the prosecutrix. The prosecution has not been able to prove the place of occurrence, the time of occurrence and manner of occurrence. The exact place of occurrence has not been established and there is variation in the evidence about place of occurrence as per the evidence of the investigating officer and the witnesses. The court below has not taken note of this contradiction which was a material contradiction and therefore there has been a total wrong appreciation of evidence on record which has resulted in miscarriage of justice. There appears to be suppression of material facts relating to occurrence because of the contradiction as indicated. Unusual manner of shifting the place of occurrence and the fact of the prosecutrix having a company of the accused appellant at her free will and accord while going to temple and then to karkhana as also they having been acquainted with each other leaves doubt on the veracity of the incident. The investigating officer has not collected any evidence from the place of occurrence. Two important and available witnesses have been withheld by the prosecution from the Court, therefore, it is hard to convict the appellant on this quality of evidence and it is a fit case to draw adverse inference against the prosecution for withholding two important witnesses from the Court.

19. In view of what has been stated hereinabove, the jail appeal is allowed and the judgment and order of conviction and sentence dated 7.7.2011 passed by Additional Sessions Judge, Court No.5, Kanpur Nagar in S.T. No.759 of 2010, is set aside.

20. As per report dated 12.6.2017, sent by Superintendent, District Jail, Kanpur Nagar, the appellant has already been released after serving full sentence and giving benefit of remission period.

21. Let a copy of this judgment be transmitted to the learned trial Court. The lower court records be also sent back to the lower court.

(2022) 8 ILRA 826
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 5369 of 2009

Aniraka Prasad Yadav ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ramesh Sinha, Sri Ravindra Balkrishna Kanhere

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Section 302 - The Code of Criminal Procedure, 1973 - Section 313 - appeal against conviction -murder - proof of motive immaterial - when the facts are clear and the absence of motive does not break the links in the chain of circumstances connecting the accused with the crime - Proof of motive or ill will is unnecessary to sustain conviction where there is clear evidence. (Para - 25)
accused (husband of deceased) - living under same roof - present at his house on day of incident - homicidal death - established from medical evidence & inquest report- accused tried to show his presence elsewhere - accused gave false explanation that deceased committed suicide – established - homicide of deceased portrayed - suicide by hanging - rules out possibility of involvement of an outsider in crime - behavior of accused not good with deceased - torture and beat - motive of crime. **(Para - 23)**

(B) Evidence Law - Indian Evidence Act, 1872 - Section 106 – last seen theory - burden of proving fact especially within knowledge - last seen theory comes into play - where the time gap between the point of time when the accused and the deceased were last seen alive -when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible - accused-appellant to explain the circumstances leading to the death of the deceased - held - failed to discharge the burden cast upon him by section 106 of Evidence Act. **(Para - 18,19)**

(C) Evidence Law - case based on circumstantial evidence - circumstances from which conclusion of the guilt is to be drawn is fully established - consistent only with the hypothesis of the guilt of the accused - circumstances are of a conclusive nature and point towards the guilt of the accused - exclude every other possible hypothesis - chain of evidence is so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused - shows that in all human probability the act must have been done by the accused.(Para - 26)

HELD:-Prosecution case stands proved beyond reasonable doubt. Trial court properly appreciated evidence. Conclusion drawn by trial court is just and proper. No illegality or perversity in the findings of trial court. No ground to interfere in the findings and conclusion recorded by trial court. **(Para -27)**

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. S.K. Yusuf Vs St. of W.B., (2011) 11 SCC 754

2. Sharad Birdhichand Sarda, AIR 1984 SC 1622

3. Haresh Mohandas Rajput Vs St. of Maha., 2011 (12) SCC 56

4. Sadddik Vs St. of Guj., 2016 (10) SCC 663

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. We have heard Sri Ravindra Balkrishna Kanhere, for the appellant and Sri H.M.B. Sinha, learned AGA for the State.

2. This Criminal Appeal has been filed against the judgment and order dated 31.07.2009 passed by Sessions Judge, Sonbhadra in S.T. No. 32 of 2008 (State vs. Aniraka Prasad Yadav and ors), arising out of case crime no.263 of 2007, P.S. Babhani, District Sonbhadra, convicting the accused-appellant under Section 302 IPC and sentencing him to undergo imprisonment for life, and fine of Rs.1000/- and in default of payment of fine, one month rigorous imprisonment.

Narration of Facts

3. The factual matrix is as follows:

Aniraka Prasad Yadav (appellant) gave an application at P.S. Babhani on 20.12.2007. It was alleged in the application that applicant Aniraka S/o Bechu Yadav is resident of Village-Chainpur, P.S. Babhani, District Sonbhadra. His marriage was solemnized with Chun Kuwar, D/o Hira Lal, Village Semaria, P.S-Raghunathpur, District Sarguja Chattisgarh, 10-12 years before. The age of his wife is 31 years. He has three children namely Mahavir aged about 6 years, Raghuvir aged about 5 years and Jagvir aged about 3 years. His wife was 7-8 months pregnant. She had a stomach-ache from 19.12.2007. Today on 20.12.2007 at about 9:00 am, he has gone to fetch medicine from the village. When he returned back he saw that his wife Chun Kuwar has committed suicide by hanging herself in the osara (veranda) of his house. Her dead body is lying there in the same position. He has given the information of this incident to his in-laws through Ram Dulare. He has informed through telephone No.09977437032 and STD No.07772262138. The aforesaid information was entered in the GD at serial No.20 at 12:30 hrs. The inquest proceeding of the dead body was conducted and it was sent for postmortem examination.

On 21.12.2007, the father of Chun Kuwar (deceased) namely Hira Lal (complainant) P.W.-1 gave a written information at P.S. Babhani alleging therein that he has married his daughter Chun Kuwar to Aniraka S/o Bechu in the year 1995. His daughter was being tortured by her husband and his elder brother and they have beaten her several times. A Panchayat was also held in the village Chainpur. In February-2007 his daughter had gone for labour work at Chainpur Bawali. On issue of preparing meal, Aniraka Prasad went to Brahaman Basti at a distance of 1 km and in front of hundred of labourers brutally assaulted Chun Kuwar, causing her serious injuries and bleeding started from her ears. Labourers rescued her. On receiving this information the complainant with his wife went to the house of his daughter at village Chainpur. Then his son-in-law, his elder brother-Dwarika and Udai Narayan abused them and became ready to assault them. He and his wife went to the village Pradhan and told him about the matter and returned to their house with his daughter, Chun Kuwar. His daughter lived there for 7 months but his son-in-law did not come to take her back. After 7 months his son-in-law came then, after counseling his son-in-law and on his assurance, he sent his daughter back with him but he again beat her two times. On receiving the information, he could not go to the village Chainpur. On 18.12.2007, Jwala Prasad Yadav of village Chainpur

told Aniraka and Dwarika Prasad that Aniraka's wife was having illicit relation with Udai Narayan. On this, his son-in-law beat his daughter. On 19.12.2007 his daughter went to the village Pradhan and told him about this incident. At that time, Vijay, Raghuvir, Kamta etc., were sitting there. Pradhan said that he will counsel Aniraka when he returns back but Aniraka did not return till late night. In the night of 19.12.2007 in furtherance of criminal conspiracy hatched by Jwala Prasad, Udai Narayan and Dwarika Prasad and with their aid, Aniraka committed the murder of his daughter. His daughter was having 7 months pregnancy. After committing murder they are trying to portray it as suicide by hanging. None of the villagers of Chainpur who has seen this incident is accepting it as suicide. His another daughter is living in the village Chainpur and she has narrated the entire incident.

On the aforesaid written information crime No.263 of 2007 under section 302 was registered at 16:00 hrs against Aniraka Prasad Yadav, Dwarika Prasad, Udai Narayan and Jwala Prasad. The investigation of the case was taken by S.O., Shubh Narayan. On the same day, he recorded the statements of Chick/ GD writer, complainant Hira Lal and other witnesses. On the indication of complainant, he inspected the place of occurrence and prepared the site plan (Ex. Ka-8). From the place of occurrence the Investigating Officer seized one rope allegedly used in the hanging and prepared its memo. In subsequent dates, he recorded the statements of other witnesses and after completion of the investigation submitted the charge-sheet against the accused Aniraka Prasad Yadav and Dwarika Prasad Yadav for offence under Section 302 IPC exonerating the other named accused of the FIR namely Udai Narayan and Jwala Prasad.

4. The case was committed to the court of session. The sessions Judge on 28.03.2008 framed charge under Section 302 IPC against the accused Aniraka Prasad Yadav and Dwarika Prasad Yadav. The accused pleaded not guilty and claimed for trial. In oral evidence, the prosecution examined eight witnesses while in documentary evidence 13 documents Ex.Ka.1 to Ex.Ka.13 were produced.

The statements of the accused were recorded under Section 313 Cr.P.C. and incriminating circumstances put to them. Both the accused denied the prosecution evidence. Accused Aniraka Prasad Yadav in his additional statement said that he is living separately from Dwarika before the incident. He has informed the police about the incident. Accused Dwarika Prasad in his Additional statement has said that he is living separately with his brother and does labour work. In defence one witness Ram Keshwar Dubey (D.W.-1) was examined.

The learned trial court after hearing the arguments, by the impugned judgment and order held Aniraka Prasad Yadav guilty for the offence under Section 302 IPC and sentenced him as above while acquitted Dwarika Prasad Yadav.

Prosecution Evidence.

5. According to autopsy report, postmortem was conducted on 21.12.2007 at 12 noon.

External Examination

The deceased was of average built body. Rigor mortis was present over upper limb, lower limb and back, paused in the neck. There was no putrefaction. Eyes were opened and mouth was closed. Tongue was inside tooth margins. Vaginal

discharge was present. The following ante-mortem injuries were found on the body:

1. Depressed contused mark over neck upper part, 25 cm x 1 cm. Directed anterior ward upward, depressed on back and lateral side of neck anteriorly, skin thinned out, 6 cm below ear right side, 5 cm below ear left side. Depressed mark to heel length was 133 cm.

2. Another mark left side neck, 4 cm x ½ cm beginning from previous mark up left side thyroid cartilage, 6.5 cm below left ear.

3. Abrasion 1.5 cm x 0.3 cm transverse from right side mark, 6 cm below mid chin point, depressed mark just below chin 3x2 cm.

Internal Examination:

The skin became thin at place of mark on the neck. Blood was found in tissue. Carotids both side compressed, veins compressed Membrane was congested. Brain was congested. Tongue and hyoid bone were intact. Trachea was congested. No bruising. Both lungs were congested. Fine frothy secretion on cutting. Left side of heart was empty. Right side of heart was half filled with dark blood. Thick liquid matters about 50 ml, was found in stomach. Pregnancy of about 28 weeks was in the womb.

According to opinion of the doctor, cause of death was asphyxia due to pressure over neck. Viscera was preserved.

The autopsy surgeon Dr. U.P. Pandey (P.W.-8) has proved autopsy Report Ex.Ka-13.

6. Prosecution has produced 6 other witnesses. **Hira Lal (P.W.-1)** is the complainant. In his examination-in-chief he has stated that deceased Chun Kuwar was his daughter and was married to accused Aniraka in the year 1995. 5-6 years before the incident, his daughter was doing labor work at a pond. His son-in-law brutally assaulted her there. Bleeding started from her ears. On information, he went to her Sasural where his son in law and Dwarika got ready to assault him. Jwala Prasad and Udai exhorted them. Thereafter he went to the house of Pradhan and told him the entire incident who promised to settle the things. His daughter was at his house for about seven months and thereafter, she was sent back to her husband's house. When he got the information of the death of his daughter on telephone at 12- O' Clock he went to the house of Pradhan of village Chainpur, the sasural of his daughter and enquired. Then he got the tehrir scribed by Pradhan. He submitted the Tehrir at police station Babhani and lodged the report.

7. **Bali Ram Yadav (P.W.-2**) is brother-in-law (Sister's husband) of the deceased. The witness has stated that the marriage of his sister-in-law (sali) Chun Kuwar was solemnized with Aniraka of his village. Out of the wedlock, three issues were born. One year before the incident, on occasion of Holi, his father-in-law Hira Lal came to the house of Aniraka for vidai of Chun Kuwar. But Aniraka started to abuse and assault Hira Lal. Then Hira Lal went to the house of Pradhan. Pradhan said that matter will be settled. After some days Hira Lal took away Chun Kuwar to his house. She remained there for 7 months. Thereafter she was sent to her in-laws house where she was being ill-treated by her husband. Jwala Prasad and Udai Narayan counselled Aniraka but he

continued to beat Chun Kuwar. The witness stated that in the night before the incident he was returning from his sasural to his village Chainpur. When he reached in front of the house of Aniraka he heard cries and saw the maar-peet. He remained there for 10 minutes witnessing the maar-peet and abusing. One day before it, his sister-in-law Chun Kuwar had made a complaint to the Pradhan that Jwala, Udai Narayan, Dwarika and Aniraka will kill her. The Pradhan told that he will counsel them tomorrow but in the night, the incident happened. In the morning, he came to know that Chun Kuwar hanged herself and died. On this information, he went to the house of Aniraka with other villagers. He saw that rope was tied in the neck of Chun Kuwar, her left hand was resting on the cot. Her both knees were on the ground. This scenario indicated that she did not hang herself. Rather, she was killed and thereafter hanged with a rope. He gave the information of the incident to his father-in-law.

8. **Smt. Sita Kunwar (P.W.-3)** is the sister of the deceased. In her examination-in-chief, she has stated that Chun Kuwar was her younger sister. She was married with Aniraka who resided in her village. In the previous night of the day of the incident at 11:00 pm she along her husband were returning from her maternal home (Maika). When they reached in front of the house of Aniraka they heard cries and shrieks of Chun Kunwar. They stopped there for 5 to 10 minutes. Thereafter shrieks stopped. Then they proceeded to their house. On the next day, in the morning, her husband had gone to in-laws house. She had gone to graze her cattle at bandhi. There her jeth-Suraj Prakash came and asked her to go home. She asked what is the matter then she was told that her sister Chun Kuwar had hanged herself. Then she came at the house of Chun Kuwar. The door of the house was closed. It was opened in front of her. She saw from the entrance that Chun Kuwar was hanging. Her knees were resting on the ground and one hand was on the cot. It appeared from looking at her dead body that she had not hanged herself, rather she has been murdered and then hanged.

9. **Lal Babu Sharma (P.W.-4)** is the formal witness of Panchayatnama. In his examination in chief, the witness has stated that Aniraka lives in his village. His wife Chun Kuwar died, one and a half-two years earlier. The inquest proceeding of the dead body was conducted by police in his presence and the body was sealed. The witness has identified his signatures on the inquest report. The witness has further stated that at the time of inquest proceeding, the police also took into possession the rope which was tied on the neck of the deceased and prepared its memo. The witness has also identified his signature on the memo.

10. **S.I. Raj Kumar (P.W.-5)** has conducted the inquest proceedings. The witness has stated that on 20.12.2009. He was posted as SI in police station Babhani, District Sonbhadra. On written information about death given by Aniraka Yadav, he along with SI Triveni Prasad reached village Chainpur. On the spot they saw that Chun Kuwar W/o Aniraka Yadav was hanging dead in her osara (veranda). Her both feet were resting on the ground and toes of her feet were touching the ground, her left hand was resting on the cot, three feet rope was tied on the neck of the deceased. There was a black spot of rope. He conducted the inquest proceeding and prepared related papers and sent the body

for postmortem examination. The witness has proved the inquest report Ex. Ka-2 and related papers Ex.Ka-3 to Ka-6. The witness has also stated that the rope tied on the neck of the deceased was taken into custody and a memo was prepared. The witness has proved this memo as Ex.Ka-7.

11. **S.I. Shubh Narayan (P.W.-6)** is the Investigating Officer. In his examination-in-chief the witness has stated that on 19.12.2007, he was posted as SO Babhani, District Sonbhadra. On written application of Hira Lal S/o Munna alias Prem case crime no.263/2007, under section 302 IPC was registered in his presence and he took up the investigation. He recorded the statement of the complainant Hira Lal and other witnesses, visited the place of occurrence and on the indication of the complainant, prepared the site plan. The witness has proved it as Ex.Ka-8. The witness has further stated that on different dates, he recorded the statements of other witnesses and after collecting sufficient evidence, submitted the charge-sheet on 29.12.2007 . The witness has proved it as Ex.Ka-9.

12. **Constable Jai Nath Tiwari (P.W.-7)** is also a formal witness who has registered the FIR and made its GD entry. The witness has stated that on 21.12.2007 he was posted at P.S. Babhani, Sonbhadra as constable Moharrir. On that date on the written application of Hira Lal, he registered case crime no.263 of 2007 under Section 302 IPC on chik No.63 of 2007. The witness has proved the chik FIR as Ex.Ka-10. The witness has further stated that he entered the description of the case in GD No.24 at 16:00 hrs on the same date. The witness has proved the carbon copy of the GD as Ex.Ka-11.

Defence Evidence.

13. One witness **Ram Keshwar Dubey (D.W.-1)** has been examined in defence. The witness in his examination-in-chief has stated that he knows Aniraka and Dwarika who lives in his village. Both the accused are living separately before the incident. They are labours and in connection with their work they used to visit different places like Dala, Shaktinagar, Renukoot etc. When they go for work they stay out for a week or 10 days. The witness further stated that incident occurred one and a half year ago. 3 to 4 days before the incident, the accused- Aniraka had gone to Dala for labour work. The wife of Aniraka was pregnant and sick. This information was given to Aniraka, who arrived at his house in the morning at 4-5 am. In the morning, Aniraka visited Dr. Ram Prasad in the village where he and 8 - 10 persons were present. Aniraka told the doctor about the illness of his wife and after taking medicine, Aniraka along with him came to the house of Aniraka. There he saw that in the osara (veranda) of the house of Aniraka, his wife was hanging with a rope tied on her neck and she was dead. The witness further stated that his house is in the neighbourhood of Aniraka. In the night of 19.12.2007, Aniraka was not present at his house. Aniraka visited Dr. Ram Prasad at about 6-7 am.

Submissions on behalf of appellant:-

14. The learned counsel for the appellant contended that there is no eye witness account of the incident. The prosecution case is based on circumstantial evidence. The marriage of the deceased was solemnized with the accused in the year 1995 and they have three male issues. Deceased was also pregnant at the time of incident. No cogent averments have been made regarding motive of the incident.

Whatever has been alleged in the FIR is not proved because the public witnesses examined by the prosecution have stated that the deceased was living with the accused happily and peacefully. There was no dispute between them. It is further contended that as the case is based on circumstantial evidence, motive is important and prosecution has failed to prove it. Learned counsel also contended that the information of the incident was given by the accused himself to the police on the same day which has been entered in the GD. On the basis of information given by the accused, the inquest proceeding was conducted and the body was sent for postmortem examination. The accused has also informed the family members of the deceased regarding the incident. This fact has been admitted by the complainant Hira Lal (P.W.-1). The appellant remained present and did not try to escape, which shows his innocence. It is further contended that on the information given by the appellant, the family members of the deceased came and in their presence the last rites were performed. Till then neither any complaint was made nor any allegations were levelled. After two days of the incident on 21.12.2007 at the behest of someone, the complainant lodged the FIR which establishes that FIR has been lodged after consultation. It is next contended that in the postmortem report except the injuries on the neck no other mark of injuries has been found on the body. Trachea and hyoid bone are found intact. At the time of inquest the dead body was hanging with a rope which has been seized by the Investigating Officer and its memo has been prepared. One of the contusion found on the body is measuring 25 c.m. x 1 c.m. There is no sign of strangulation or throttling, it may be a case of partial hanging due to which ligature mark was not found on the body. It is established from the evidence that deceased was pregnant. The accused has produced the evidence in defence that at the time of the incident he has gone to fetch medicine from doctor as the deceased was having stomach-ache. So the circumstances suggest that as the deceased could not tolerate the stomach-ache, she committed suicide by hanging with a rope. It is further contended that P.W.-3 Smt. Sita Kunwar is the sister of deceased and Bali Ram P.W.-2 is the husband of Sita Kuwar and they have inimical terms with the accused. They have admitted it in their statements. There are major contradictions between the statements of the witnesses on material points. Hence, their testimony is not reliable. As the marriage is beyond 7 years, no presumption will apply. The chain of the circumstances is not complete and there is no sufficient evidence on record to prove that the accused has committed the murder of his wife. The learned trial court has failed to appreciate the evidence. The finding of the learned trial court that it is a case of homicide is against the evidence on record. It is not proved from the evidence that the accused has committed murder by strangulation or throttling rather it is established that the deceased has committed suicide but the court below has given a perverse finding upon this point. The finding of conviction recorded by the learned trial court is perverse and illegal.

Submissions of behalf of respondent-State

15. Per-contra learned AGA contended that from the prosecution evidence, it is established that the conduct of the accused was not good. The deceased was ill-treated by the accused. On one occasion the accused had assaulted her

severely in front of other labourers causing bleeding from her ears. These facts and circumstances establishes the motive of the incident. It is further contended that Bali Ram Yadav (P.W.-2) and Smt. Sita Kuwar (P.W.-3) are residents of same village. So they are natural witnesses. They have stated that in the previous night of the incident at 11:00 pm when they were returning from maika of Sita Kuwar, they heard the cries and shrieks of Chun Kuwar. They remain there for 5-10 minutes and when shrieks stopped, they went to their house. In the next morning, Smt. Sita Kuwar got the information that her sister Chun Kuwar has died. It is next submitted that no ligature mark was found on the neck of the deceased and in postmortem, the cause of death is mentioned as asphyxia due to pressure on neck. Dr. U.P. Pandey P.W.-8 in his cross-examination has categorically ruled out the possibility of death by hanging. So from the medical evidence on record, it is fully established that it is a case of homicide and not of suicide. The accused to save himself has tried to create a scenario to indicate that it is a case of suicide. This fact itself shows the culpability of the accused. It is also contended that from the statement of defence witness and the information given by the accused at police station, his presence in the house is established, so burden shifts on him to explain that in what circumstances the deceased has died. The explanation given by the accused is improbable and false. The provision of Section 106 of Evidence Act will apply. From the prosecution evidence, a complete chain of circumstances is established which clearly points toward the guilt of accused. The finding of conviction recorded by the trial court is just and proper. It is neither perverse nor illegal.

Analysis

16 . The first point for consideration is whether the death is homicidal or suicidal. According to inquest report Ex.Ka-2 the dead body was found hanging from a rope in osara (verandah) in front of the door. Both the knees of the victim were resting on the ground with both legs bent from the knees and toes touching the ground with ankle up. Left hand was resting on the cot while the right hand was by the side. S.I. Raj Kumar (P.W.-5) who has conducted the inquest proceeding has confirmed the aforesaid body position in his statement. In such a position of the body, it is not possible that the weight of the body will exert any pressure on the neck. So hanging seems improbable from the position in which the body was noticed. In autopsy report Ex.Ka-13, three ante mortem injuries were found on the neck. The first one is depressed contused mark over upper part of the neck 25 cm x 1 cm, 6 cm below ear on right side and 5 cm below ear on left side. Autopsy Surgeon Dr. U.P. Pandey has stated that this mark was more depressed in the back and side of the neck while in front of the neck, it was less depressed. The skin was thinned off. The second injury is another mark on left side of neck 4 cm X 0.5 cm beginning from first mark up left side of thyroid cartilage and 6.5 cm below left ear. Third one is abrasion 1.5 cm X 0.3 cm, transverse from right side mark, 6 cm below mid chin point. In Autopsy report, no ligature mark was found on the neck. In case of hanging the ligature mark is a prominent sign which is lacking in this case. In internal examination, carotids of both side were compressed, membranes were congested. The cause of death is mentioned as asphyxia due to pressure on the neck. Dr. U.P. Pandey (P.W.-8) in his cross examination has categorically ruled

out death as a result of hanging and has stated that in the case of hanging, such marks are absent. It is true that in autopsy report trachea and hyoid bone have been found intact. The doctor has admitted this and stated that no fracture was found in the neck of the deceased. But this cannot be conclusive to establish that it is a case of hanging because fracture of hyoid bone and trachea is not necessary in all cases of strangulation. It depends upon the pressure applied. So the position of the dead body as described in the inquest report, the internal & external examination as mentioned in the autopsy report and the opinion of autopsy Surgeon (P.W.-8) establishes that it is a case of homicide and not of suicide by hanging. So from the medical evidence on record it stand proved that it is not a case of suicide but it is a case of homicide.

17 . It is undisputed that accused is the husband of the deceased and both were living in the same house. From the defence evidence, it is also established that on the date of the incident accused was present at his house. Ram Keshwar Dubey (D.W.-1) in his examination-in-chief has stated that on getting information about the illness of his wife, the accused Aniraka had reached his house in the morning at about 4-5 am on the day of the incident. The written information of the death of the deceased was given by the accused himself at police station. In this information, it is alleged that the wife of the accused was 7-8 months pregnant, she had stomach-ache from 19.12.2007. On 20.12.2007 at about 9 am, he had gone to fetch medicine from the village. So from this information also it is established that on the day of incident, accused was present at his house and the deceased was last alive in his company.

18. The accused has denied his presence at the time of incident in the house. The defence version is that the accused at the relevant point of time was away from home as he had gone to fetch medicine for the deceased who was suffering from stomach-ache. There is material contradiction in the defence evidence, on the point of time, when the accused had gone to fetch medicine. In the written information about the death of his wife, the accused has alleged that on 20.12.2007 at about 9 am he had gone to fetch medicine in the village, while Ram Keshwar Dubey (D.W.-1) has stated that Aniraka visited the doctor at about 6-7 am. So there is a difference of about 2-3 hrs in the timing between the oral statement of Ram Keshwar Dubey (D.W.-1) and the written information given by the accused. According to postmortem report Ex.Ka-13 the postmortem was conducted on 21.12.2007 at 12 noon. The estimated time of death is about 28 hrs before the autopsy. So, according to medical evidence, the death may have occurred in the morning of 20.12.2007. It is also established from the evidence that the incident occurred in the morning of 20.12.2007. Thus, the aforesaid contradiction in defence evidence is very material. It is also established from the evidence that the accused has not gone outside the village. Rather, according to defence evidence, he was in the village and had gone to fetch medicine which, in ordinary course should not consume much time. So there is not much gap between the point of time when the deceased was in the company of accused and when she was found dead. In the case of ***S.K. Yusuf vs. State of West Bengal (2011) 11 SCC 754***, the Hon'ble Apex Court has made the following observations:

The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

19. The aforesaid analysis clearly establishes that the last seen theory will come into play and Section 106 of Evidence Act will apply. The accused had to explain the circumstances leading to the death of the deceased. The defence case in this respect is that the deceased has committed suicide which is ruled out from the evidence on record as analyzed above. The explanation offered by the appellant-accused regarding the circumstance under which the deceased has died is improbable, unsatisfactory and not sustainable. The accused-appellant has failed to discharge the burden cast upon him by section 106 of Evidence Act.

20. The most incriminating circumstance is that a scenario has been created to indicate that the deceased has committed suicide. It clearly rules out the possibility of involvement of any outsider. If the murder has been committed by an outsider, there was no occasion and necessity to portray it as a suicide. This circumstance clearly rules out the possibility of involvement of any outsider in the offence.

21. In the FIR, it is alleged that marriage of Chun Kuwar the daughter of the informant was solemnized with accused Aniraka in the year 1995. He used to torture and harass her and on several occasions beat her. In the FIR while specific incident of February, 2007 has also been narrated and it is alleged that in February, 2007 her daughter was engaged in labor work and on the issue of preparation of meal Aniraka assaulted his wife (the deceased) in front of hundreds of labourers. The assault was so brutal that she started bleeding from her ears. The labours had to intervene.

Hira Lal (P.W.-1) the father of the deceased, from his statement has corroborated that on one occasion his daughter was brutally assaulted in front of other labourers by the accused when she had gone to work as a labour. Her ears started bleeding. On getting information, he went to sasural of his daughter where Aniraka and Dwarika became ready to assault him. He made a complaint to the Pradhan where a Panchayat was held and he came back with his daughter who remained at his house for 7 months and no one from her-in-law's side came for her vidai. The aforesaid statement establishes that behavior of accused was not good with the deceased and he used to torture her and beat her. Bali Ram Yadav (P.W.-2) has also deposed about the bad behavior of the accused with his wife. This witness has also stated that the accused used to beat her and he continued it despite counseling. In his cross-examination, the witness has admitted that his relations with the accused was not normal and they were not on talking and visiting terms. So it can be said that the oral evidence of the witness may be hearsay and no reliance can be placed on it. However, even if the testimony of P.W.-2 on this point is disbelieved, from the statement of Hira Lal (P.W.-1), it is established that behavior of accused was not good with the deceased and he used to torture and beat her. This is other circumstance which establishes the motive of the incident against the accused.

22. Prosecution has also relied on the testimony of Bali Ram Yadav (P.W.-2) and Sita Kuwar (P.W.-3) who have deposed that in the previous night of the incident at 11 p.m. they were returning from maika of Sita Kuwar and when they reached in front of the house of accused Aniraka, they heard the cries and shrieks of Chun Kuwar, they stopped there for 5 to 10 minutes. When the cries and shrieks of Chun Kuwar stopped they went to their house. On the next day, the incident happened. It is established from the evidence that both these witnesses reside in the same village. They have admitted in their statement that their relations with accused Aniraka was sour and they were not on visiting and talking terms. So these witnesses are related as well as chance witnesses and also inimical. Hence cautious approach is required while evaluating their oral testimony. There are material contradictions in their statements. Bali Ram Yadav (P.W.-2) in his cross-examination has stated that he had gone to his sasural with his wife 4-5 days before, reached there in the day time and stayed in the night. Thereafter returned back. While Sita Kuwar P.W.-3 has stated that she has gone to her maika alone 6-7 days before. Further, Bali Ram P.W.-2 has stated that they returned by bus. It is 3 hrs journey by bus. They boarded the bus at 3-pm while Sita Kuwar (P.W.-3) on this point has stated that they proceeded from maika village Gaina at 9-10 am. They came by bus which takes 4-5 hrs. So according to Bali Ram Yadav, he boarded the bus at 3 pm while Sita Kuwar (P.W.-3) has stated that they proceeded at 9-10 am. Further, according to Bali Ram P.W.-2 it is 3 hrs journey so according to his statement they would have reached village Chainpur at about 6 pm while according to Sita Kuwar P.W.-3 they boarded the bus at 9-10 am and it is 4-5 hrs journey so according to her statement, they would have reached village Chainpur at about 2-4 pm. In their examination-in-chief they have stated that when they were returning from village Gaina they reached in front of the house of Chun Kuwar at 11 pm. Neither from the statement of Bali Ram (P.W.-2) nor from the statement of Sita Kuwar (P.W.-3) the time of reaching village Chainpur, at 11 pm is established. Being relative, inimical, and chance witnesses, strict scrutiny and cautious approach is required in analysis of their oral testimony. The material contradictions mentioned above makes their testimony untrustworthy and no reliance can be placed on their oral statements. So this piece of prosecution evidence is neither trustworthy nor reliable.

23. But even if the aforesaid piece of evidence is excluded from consideration then too, from the evidence on record, following circumstances are established:-

(i) The accused Aniraka is the husband of the deceased, living under same roof and was present at his house on the day of the incident.

(ii) The death of the deceased is homicidal which is established from the medical evidence as well as from the position of the body mentioned in the inquest report.

(iii) The accused has tried to show his presence elsewhere at the time of the incident but it is not established rather it is established that the accused has given a false explanation that deceased has committed suicide.

(iv) The last seen theory will apply, as the time gap between the accused and deceased were together and when the

deceased was found dead is so small that possibility of any other person being the author of the crime becomes impossible.

(v) The circumstances that homicide of the deceased was portrayed as suicide by hanging, further rules out the possibility of involvement of an outsider in the crime.

*(vi) The behavior of the accused was not good with the deceased and he used to torture and beat her. This establishes the motive of the cri*me.

24. The law with regard to circumstantial evidence has been settled in the case of ***Sharad Birdhichand Sarda AIR 1984 SC 1622.*** The Supreme Court has laid down the following five golden principles to prove a case based on circumstantial evidence:-

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

(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 unerringly point towards the guilt of the accused.

(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."

In the case of ***Haresh Mohandas Rajput v. State of Maharashtra 2011 (12) SCC 56*** following its earlier decisions, the Apex Court held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:-

"(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing toward the guilt of the accused.

(iii) 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 none else; and

(iv) 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 and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

25. In ***Sadddik vs. State of Gujarat (2016) 10 SCC 663***, it has been held that proof of motive is immaterial when the facts are clear and the absence of motive does not break the links in the chain of circumstances connecting the accused with the crime. It has been stated that proof of motive or ill will is unnecessary to sustain conviction where there is clear evidence.

26. Applying the principle of law as noted above, on the present case, it is quite clear that the test as laid down by the Apex Court for the cases of circumstantial evidence, stands fulfilled. The circumstances from which the conclusion of the guilt is to be drawn is fully established and it is consistent only with the hypothesis of the guilt of the accused. The circumstances are of a conclusive nature and point towards the guilt of the accused. It exclude every other possible hypothesis. The chain of evidence is so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and it shows that in all human probability the act must have been done by the accused.

Conclusion

27. From the analysis of the evidence on record, it is clear that the prosecution case stands proved beyond reasonable doubt. The learned trial court has properly appreciated the evidence and conclusion drawn by the trial court is just and proper. There is no illegality or perversity in the findings of the learned trial court. There is no ground to interfere in the findings and conclusion recorded by the learned trial court. The sentence imposed is also appropriate and this criminal appeal is liable to be dismissed.

Accordingly, the appeal is hereby **dismissed.**

(2022) 8 ILRA 838
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJENDRA KUMAR -IV, J.

Jail Appeal No. 5446 of 2007

Om Prakash ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri M.P.S. Chauhan, Sri Noor Mohammad, Sri Rahul Gaur, Sri Rajesh Kumar Dubey, Sri Sandeep Singh, Sri Sunil Kumar Upadhyay, Sri V.S. Choudhary, Ms. Vijata Singh (Amicus Curiae)

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 302 & 352 - The Code of Criminal Procedure, 1973 - Sections 161 & 174 - Section 433/433A - Inquest report - claim for remission or commutation - if the prosecution case is fully established by reliable ocular evidence cou (Para - 40,44)

(B) Evidence Law- eyewitness - Once the eyewitness account tallies with the injuries found on the body of the deceased - such statement would be entitled to weight - unless it is shown that eyewitness account is unreliable or the testimony of eyewitness lacks credibility.(Para – 30)

Deceased done to death by his brother (Appellant) - Inflicting repeated blows on neck and face of deceased - by a Tabal (a sharp edged weapon) – direct evidence - two eyewitnesses - ocular version of prosecution story -supported by medical evidence - postmortem report - conviction – hence appeal . **(Para - 22,23,29)**

HELD:-No error in the impugned judgment . Appellant convicted and sentenced for an offence under sections 302 and 352 IPC.**(Para - 41)**

Jail Appeal Dismissed. (E-7)

List of Cases cited:-

Lokesh Shivakumar Vs St. of Karn., (2012) 3 SCC 196

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Heard Ms. Vijata Singh, learned Amicus Curiae for the appellant and Mrs. Archana Singh, learned AGA for the State.

2. This jail appeal is directed against judgment and order dated 16.10.2006, passed by the Additional District & Sessions Judge (Special), Baghpat in Sessions Trial No. 188 of 2005, State vs. Om Prakash whereby the appellant has been convicted under sections 302 and 352 IPC, in Case Crime No.324 of 2004, Police Station Ramala, District Baghpat and consequently sentenced to life imprisonment along with fine of Rs.20,000/- for the offence under Section 302 IPC and three months imprisonment for the offence under Section 352 IPC. In the event of failure to deposit the fine appellant was to undergo six months additional imprisonment. Both the sentences are to run concurrently.

3. Briefly stated, the prosecution case is that a written report dated 14.9.2004 was received from applicant Kallu Ram (PW-1) (Ext. A-1), scribed by Praveen Kumar S/o Kallu Ram (PW-6), stating that the elder son of informant i.e. accused appellant Om Prakash is a person of criminal antecedents and has been sent to jail multiple times. Few days prior to the incident accused Om Prakash attempted to assault the informant and his wife, which was not liked by the other two sons of the informant, namely Arvind and Praveen. Om Prakash on account of aforesaid was annoyed with his brothers Arvind and Praveen. At about 11.00 pm on 14.9.2004 the deceased Arvind alongwith informant and the informant's brother Hukum Singh (PW-2) had gone to sleep outside the house while Om Prakash was sleeping inside the house. At about 4.00 a.m. the next morning the informant and his brother woke up on hearing some noise to find that accused Om Prakash was inflicting repeated blows on the neck and face of deceased Arvind with Tabal/Daav, a sharp edged weapon. The informant and his brother raised alarm on which Om Prakash rushed towards them also but as neighbours Rajveer Singh, etc., came on the spot the accused appellant fled. The dead body of the informant's son was lying on spot and a request was made in the written report to lodge the report and to do the needful. On the basis of aforesaid written report a First Information Report dated 14.9.2004 (Ext. A-16) was registered as Case Crime No. 324 of 2004, under Sections 302 read with 352 IPC.

4. After lodging of aforementioned FIR the police of Police Station - Ramala came into action. Accordingly, proceedings for conducting the inquest of the body of deceased were undertaken. An Inquest report was thereafter prepared in terms of Section 174 Cr.P.C. at about 9.00 am on 14.9.2004. As per the inquest report Chandra Prakash, Dilawar Singh, Mahipal, Ankur Kumar and Ranveer are the witnesses of inquest. In the opinion of the witnesses of inquest (Panch-witnesses) the deceased was found to be of average height and aged about 25 years. The inquest witnesses opined that the death of deceased was homicidal as the dead body of deceased was found lying on the cot having multiple injuries on face and neck. The panch witnesses also opined that as the deceased had died due to injuries sustained by him the postmortem of the body of deceased be also carried out.

5. Subsequent to above the blood stained clothes of the deceased were recovered. A recovery memo of the same was prepared i.e. Ext. Ka-9. Thereafter Investigating Officer collected blood stained earth and plain earth from the place of occurrence and prepared its recovery memo i.e. Ext. Ka-10. Thereafter the detailed police scroll was prepared and the body of the deceased was dispatched for postmortem on 14.9.2004. The same was carried out on the same day at about 3.00 pm by Dr. R.G. Verma (PW-7). In the opinion of the autopsy surgeon, the cause of death of deceased was shock and hemorrhage as a result of the following ante-mortem injuries:-

"1. Incised wound 10cm x 4cm x mandible cut extend from (R) angle of mouth to lower part of (R) ear.

(2) Incised wound 9cm x 3cm x bone deep present on (R) side neck, B an below injury No. (1)

(3) Incised wound 6 x 1cm x bone deep present on (R) side Neck, 1/4cm below injury No. (2).

(4) Incised wound 5 x 1cm x bone deep on (L) side chin.

(5) Incised wound 8 x 2 cm x trachea cut present on front of Neck."

6. The autopsy surgeon thereafter prepared the postmortem report of the deceased (Ext. Ka-15).

7. Investigating Officer proceeded with the investigation and in the course of investigation he examined the first informant, brother of first informant, brother of deceased, etc. under Section 161 Cr.P.C.. The accused, however, absconded. Resultantly his properties had to be attached. Upon his surrender he was given in police remand. On his pointing out the weapon of assault (Tabal/Daav) was recovered from the sugarcane field of one Ram Mehar. Accordingly a recovery memo of same dated 18.1.2005 (Exhibit Ka-8) was prepared. Upon completion of investigation Investigating Officer submitted the chargesheet dated 25.11.2006 (Ext. Ka-7) against the appellant whereby and whereunder accused appellant has been chargesheeted under Sections 302 and 352 IPC.

8. After submission of aforementioned chargesheet, the concerned Magistrate took cognizance upon the same. As offence complained of is triable by Court of Sessions, concerned Magistrate accordingly committed the case to the Court of Sessions, Baghpat. Resultantly Sessions Trial No. 188 of 2005 (State Vs. Om Prakash) under Sections 302 and 352 IPC, P.S. Ramala, District Baghpat came to be registered. Separate and distinct charges were framed against the accused for offence under Sections 302 and 352 IPC. The accused appellant denied the charges so framed and demanded trial.

9. Resultantly the trial procedure commenced before the Court of Sessions, Baghpat. The prosecution in order to bring home the charges so framed adduced Kallu Ram (PW-1), Hukum Singh (PW-2), Babu Ram Nayyar (PW-3), Richhpal (PW-4), Rajesh Kumar Singh (PW-5), Praveen Kumar (PW-6), Dr. R.G. Verma (PW-7) and Mahendra Singh Yadav (PW-8).

10. PW-1 - Kallu Ram S/o Teekaram is the first informant and also an eyewitness of the occurrence. In his sworn testimony,

he has stated that accused appellant Om Prakash is his elder son and is a man of criminal antecedents against whom several criminal cases are pending at Muzaffar Nagar and Baghpat. He has been to jail multiple times. He has further stated that few days prior to the incident accused Om Prakash had tried to assault the informant and his wife which was not liked by other sons namely Praveen and Arvind and for this reason Om Prakash maintained enmity with them. He has supported the prosecution version by stating that he was sleeping outside the house along with Hukum Singh and deceased Arvind while Om Prakash was sleeping inside the house. He claims to have woken up on hearing noise to find that accused Om Prakash was inflicting repeated blows on the deceased by Tabal (Daav). Four or five blows had been inflicted by the appellant on the deceased. PW-1 alongwith his brother raised an alarm on which Rajveer Singh and Indrapal alongwith others came on the spot who also saw Om Prakash leaving with Tabal (Daav). This witness was cross-examined by the accused. However, this witness in his examination-in-chief has stated that his brother Hukum Singh is unmarried. The incident is stated to have occurred at around 3.00-4.00 am on 14.9.2004. PW-1 has further stated that he was not having any watch and the disclosure about the time of incident is based on his assessment. He has stated that few blows had already been inflicted upon the deceased by the time this witness woke up and some more blows were inflicted later. The deceased had died on the spot. The written report was thereafter scribed by Praveen Kumar on his instruction outside the police station. He has further disclosed that the police station is 7-8 kilometers away from his village where he had gone on his own tractor. He denied the suggestion that accused has been falsely implicated on account of enmity in respect of agricultural property. Inspite of lengthy cross examination defence could not dislodge this witness. As such he is a credible and reliable witness.

11. PW-2 - Hukum Singh is the uncle of deceased aged about 64 years. This witness has also supported the prosecution story. He is an eyewitness of the occurrence alongwith PW-1 Kallu Ram. In his statement-in-chief this witness has clearly stated that accused Om Prakash is a man of criminal antecedents inasmuch as he had indulged in theft and dacoity, etc. This witness was also cross-examined by defence. However, he remained firm and consistent. Defence failed to cull out any statement from this witness so as to make his testimony unworthy of trust on account of exaggeration, embellishment and contradiction. As such this witness is credible and his testimony is worthy of trust.

12. PW-3 Sub-Inspector Ram Babu Nayyar had prepared the inquest report dated 14.9.2004 (Ext. Ka-2) and has proved the same. Except for the above his testimony is not relevant.

13. PW-4 Constable Richhpal had gone to village Kirthal alongwith other police personnel where the dead body of deceased was lying. This witness was involved in the preparation of police papers and had brought the dead body of the deceased to the mortuary. Except for the above his testimony has no other relevance.

14. PW- 5 Sub-Inspector Rajesh Kumar Singh is the Investigating Officer. This witness has clearly stated that he is the Investigating Officer of the concerned case

crime number. This witness claims to have obtained the copies of the check FIR and the general diary and thereafter entered the same in the case diary. According to this witness he thereafter visited the place of occurrence and prepared the site plan of the place of occurrence (Ext. Ka-11). He thereafter collected plain earth and earth mixed with blood from the place of occurrence and prepared its recovery memo (Ext. Ka-9). He also collected the blood stained ropes (badh) from the cot of the deceased, and prepared its recovery memo (Ext. Ka-10). According to this witness the weapon of assault was recovered by him on the pointing of accused. It is this witness who had prepared the recovery memo of the same (Ext. Ka-8). He proved the aforementioned recovery memos. He has also stated that the accused has criminal history of following cases:-

"1. Crime No. 60/89, u/s 452/323/504 IPC, P.S. Ramala

2. Crime No. 70/89, u/s 395/397 IPC, P.S. Ramala.

3.Crime No. 87/89, u/s 394/302/412 IPC, P.S. Ramala.

4. Crime No. 125/94, u/s 307 IPC, P.S. Kotwali Muzaffarnagar.

5. Crime No. 126/94, u/s 25 Arms Act, P.S. Kotwali Muzaffarnagar."

15. PW-6 Praveen Kumar S/o Kallu Ram aged 31 years is the brother of the deceased and is working as Home Guard. On the fateful day this witness alleges to be on duty at Tehsil Baraut where he received information about the death of his brother. He claims to have come to his village. According to this witness, it is he, who had scribed the written report (Ext. Ka-1) which was submitted by his father at the police station. He has also proved the written report (Ext. Ka-1) scribed by him.

16. PW-7 Dr. R.G. Verma is the autopsy surgeon who had conducted the autopsy of the cadaver of the deceased. This witness had prepared the postmortem report dated 14.9.2004 (Ext. Ka-15) and has proved the same. This witness has opined that the cause of death of deceased was the ante-mortem injuries sustained by the deceased and specified in the postmortem report. According to this witness at the time of postmortem of the body of deceased rigor mortis was present. He opined the time of death of deceased to be around 4.00 am on 14.9.2004. The medical evidence thus supports the prosecution story.

17. PW-8 - Mahendra Singh Yadav is a Police Constable who was posted at Police Station Ramala at the relevant point. According to this witness he prepared the check FIR on the basis of written report. This witness has proved the check FIR (Ext. Ka-16) and the copy of the G.D. (Ext. Ka-17).

18. After the prosecution evidence was over all the adverse circumstances were disclosed to the accused in question answer form for his version of the occurrence. As a result the statement of the accused was recorded under Section 313 Cr.P.C. The accused in his reply to the questions put to him has denied the allegations alleged against him. According to accused, he was neither present at the time and place of occurrence, as such, he is ignorant about the manner of occurrence. He also claims to have been falsely implicated due to family enmity.

19. Accused appellant neither adduced any evidence to prove his innocence nor he has come out with his version of occurrence. As such, the only version of the occurrence is the prosecution version.

20. On the basis of aforesaid material, the Sessions Court has found the charges levelled against the accused appellant to be proved and has consequently convicted the appellant for an offence under Section 302 read with 352 IPC and consequently sentenced him to life imprisonment alongwith fine of Rs. 20,000/- vide judgment and order dated 16.10.2006.

21. Feeling aggrieved by aforementioned judgment and order the accused appellant has filed present appeal from Jail. We have heard Ms. Vijata Singh, the learned Amicus Curiae for the appellant and Mrs. Archana Singh, the learned AGA for the State.

22. As per the prosecution case, the deceased has been done to death by his brother Om Prakash who had inflicted multiple injuries upon the deceased by a Tabal (a sharp edged weapon). The motive behind the occurrence is clearly discernible from the record i.e. enmity with the deceased on account of the objection raised by him to the act of accused appellant in attempting to assault his parents. The five ante-mortem injuries found on the body of the deceased are in the nature of incised wound which could be caused by a sharp edged weapon. The ocular version of the prosecution story is supported by the medical evidence on the record which is the postmortem report as well as the oral testimony of PW-7 Dr. R.G. Verma whose testimony regarding the approximate time of death and manner of death also corroborates the prosecution story.

23. The two eyewitnesses of the incident i.e. PW-1 Kallu Ram is the father of the deceased as well as accused whereas PW-2 Hukum Singh is the uncle of the deceased and accused. Nothing has come on record on the basis of which the testimony of aforesaid eyewitnesses who are also related to the accused could be discarded on the grounds that they are interested witnesses or partisan witnesses.

24 . The conviction and sentence of the accused appellant is challenged before us primarily on the ground that there are material contradictions in the prosecution story which have not been adverted to by the court below. It is also sought to be urged that the FIR is anti timed, inasmuch as, the time of death opined in the postmortem report does not tally with the timing of the alleged offence disclosed in the FIR. Learned counsel for the appellant also contends that appellant has been falsely implicated in the crime in question on account of a dispute regarding agricultural land and its distribution amongst brothers, particularly as the uncle of the deceased was unmarried and his share would devolve upon the accused appellant who is sought to be deprived of his rightful share in the agricultural property.

25. The above submissions urged by learned Amicus Curiae regarding innocence of appellant are strongly contradicted by the learned AGA. According to learned AGA in a case of direct evidence motive becomes irrelevant. Secondly, there is nothing on record on the basis of which it could be even inferred that appellant has been falsely implicated in the crime in question. The two eyewitnesses of the

occurrence though are interested witnesses yet they are credible and reliable witnesses. The occurrence has taken place in front of the house at around 3.00 to 4.00 am and, therefore, there could not be an independent eyewitness of the occurrence at the point of time. The two prosecution witnesses of fact who are also an eyewitness of the occurrence have remained consistent throughout. Inspite of cross-examination defence failed to dislodge them nor could it cull out any such statement from them so as to make their testimonies unworthy of credit on account of exaggeration, contradiction and embellishment. Both the eyewitnesses have narrated almost the same story. According to learned AGA the testimony of one witness cannot be contradicted with reference to the testimony of another witness nor it is possible to have a carbon copy of the occurrence in the statement of two witnesses. Even if minor variation exists with regard to the manner of occurrence in the statements of the two eyewitnesses same shall be immaterial as it will not amount to contradiction but a natural phenomena that two person cannot be given exact deposition. Present case is a case of direct evidence and the two eyewitnesses have fully supported the prosecution story which the prosecution set out to prove. The doubts raised by learned Amicus Curiae are fanciful doubts and do not create such dent so as to dislodge the prosecution case. It is thus vehemently urged by learned AGA that the impugned judgment and order passed by court below is not liable to be interfered with by this Court and consequently the appeal be dismissed.

26. We have perused the records of the present appeal and have carefully gone through the evidence brought on record.

27. Learned Amicus Curiae has made following submissions in support of this appeal:

(i) Postmortem report shows that intestine and bladder of deceased were half full, which is usually indicative of the fact that the deceased had his meal about two hours back and, therefore, the likely time of death is around 12 pm and the entire prosecution story suggesting injuries on deceased to be inflicted at around 3.00-4.00 am in the morning is inconsistent with the medical evidence on record.

(ii) PW-1 in his statement has disclosed that he woke up on hearing some noise while PW-2 in his statement has stated that he was woken by PW-1. It is, therefore, stated that the statement of the two eyewitnesses are contradictory.

(iii) The recovery of the weapon of assault i.e. Tabal on the pointing of accused appellant is not reliable since there is no independent witness of the alleged recovery.

(iv) PW-6 Praveen Kumar is an interested witness and his testimony cannot be relied upon.

(v) Appellant has been falsely implicated in the crime in question so as to dis-entitle him from inheriting agricultural property and with the motive that Praveen Kumar could get the entire land which otherwise would have also fallen in the share of the appellant.

(vi) The motive on the part of appellant for committing the crime in question is not substantiated, inasmuch as, no specific date, time and place of assault by accused on his parents has been disclosed, nor it could otherwise constitute sufficient provocation for causing the murder of his own brother.

28. It is in the above context that we are required to determine as to whether the prosecution has succeeded in establishing the charge levelled against the accused appellant of causing the death of the deceased Arvind Kumar beyond doubt.

29. The prosecution in order to bring home the charge levelled against the accused appellant has essentially relied upon the statements of the two eyewitnesses namely Kallu Ram and his brother Hukum Singh (PW-1 & PW-2) respectively. Both the eyewitnesses are father and uncle of the deceased as also the father and uncle of the accused appellant. Both the eyewitnesses are elderly persons, who have categorically supported the prosecution version by stating that they had gone to sleep at around 11.00 pm in front of the house along with the deceased. They claim to have woken up on hearing the noise and saw that the accused appellant was inflicting injuries upon deceased by a Tabal (a sharp edged weapon). The statement of both the eyewitnesses are consistent on this score. The eyewitness account of PW-1 and PW-2 also stand supported from the ante-mortem injuries found on the body of the deceased which have been clearly mentioned in the postmortem report of the body of the deceased also. The five ante-mortem injuries found on the body of the deceased have already been referred to in the earlier part of this judgement. However this much can be inferred that injuries were inflicted upon the deceased on the sensitive part of the body whereby themselves sufficient for causing the death of deceased. The autopsy surgeon who was examined as PW-7 has specifically opined that the nature of injuries caused to the deceased could have been caused by a sharp edged weapon i.e. a Tabal/Daav. As such, the prosecution story get supported by the medical evidence as well as the testimony of the autopsy surgeon also.

30. The eyewitness account in the facts of the case is clearly consistent with the injuries found on the body of the deceased and, therefore, is entitled to due weight. Once the eyewitness account tallies with the injuries found on the body of the deceased such statement would be entitled to weight unless it is shown that eyewitness account is unreliable or the testimony of eyewitness lacks credibility.

31. In order to impeach the credibility of eyewitness account the defence has attempted to highlight contradictions in their statement. Much emphasis was laid to the contradictions in the testimonies of PW-1 and PW-2 after drawing a parallel with each other. It is on the basis of above that it was strenuously urged by the learned Amicus Curiae that while PW-1 has stated that he and PW-2 woke up on hearing the noise, PW-2 has stated that he was woken up by PW-1.

32. We have examined the testimonies of PW-1 and PW-2 and do not find any material contradiction in them. PW-1 in his statement has stated that he and his brother woke up on hearing shouts at about 3.00-4.00 am and they saw the accused inflicting blows by a Tabal (a sharp edged weapon) on the deceased. PW-2 in his cross examination has stated as under in his cross examination:-

"मै, अरविन्द और कालू चौक में सोए थे। हमने आहट सुनी ऑख खुली देखा कि, ओमप्रकाश अरविन्द को तबल से काट रहा था।.....

.....जब ओमप्रकाश आया तो हमें पता नही चला। मृतक की पहली आवाज पर उठ गए थे। उससे पहले ओमप्रकाश तीन बार वार कर चुका था उससे पहले नहीं चिल्लाया था। कालू ने मुझे उठाया था।"

33. The statement of PW-2 in substance matches with the facts stated in the statement of PW-1. On a conjoint reading of the statements of PW-1 and PW-2 the synthesis which emerges is that both the eye-witnesses i.e. PW-1 and PW-2 alongwith the deceased were sleeping outside the house. PW-1 and PW-2 woke up on hearing shouts of deceased. Both the witnesses have stated that they saw the appellant inflicting multiple blows by a Tabal on the face and neck of the deceased which is consistent with the prosecution story. Even in the cross examination PW-2 has stated that he could not know when Om Prakash came and he woke up on hearing the first shout of deceased. The sentence that PW-2 was woken up by PW-1 cannot be read out of the context so as to suggest any contradiction in the statement of PW-2. Even otherwise such minor variation in the statement of PW-2 is by itself not sufficient to dislodge the credibility and reliability of PW-2. The presence of PW-2 at the time and place of occurrence has not been denied by the accused. Thus this Court has no hesitation to conclude that the contradiction pointed out by learned Amicus Curiae for the appellant in the statement of PW-2 with reference to the statement of PW-1 is just a fanciful doubt as it neither creates a doubt much less a reasonable doubt in the prosecution case nor does it singularly wipe out the prosecution case.

34. When two persons are sleeping close to each other and are woken up by some noise/sound at odd hours which in this case is 3.00-4.00 am it can always be that one person may feel that he was woken up by the other. At that spur of the moment which of the two sounds was heard first by PW-2 may not carry much weight, particularly when their disclosure of the incident is otherwise fully consistent with each other and stands corroborated with the medical evidence as well as the statement of the doctor.

35. The deceased Arvind Kumar is the real younger brother of accused appellant Om Prakash. It is the consistent case of prosecution that Om Prakash is a man of criminal antecedents as he is involved in various other cases of theft and dacoity. The statements of PW-1 and PW-2 (eyewitnesses) are consistent in this regard. Details of criminal history and arrest of accused Om Prakash have been categorically disclosed by PW-5 S.I. Rajesh Kumar Singh. The accused was specifically confronted with aforesaid in the questions put to him under Section 313 Cr.P.C., which were vaguely denied.

36. So far as the argument with regard to the FIR being anti-timed is concerned, learned counsel for the appellant has relied upon the autopsy report in which the bladder and intestine are shown to be half full. With reference to aforesaid fact alone it is urged by learned counsel for appellant that the deceased was done to death much before the disclosed time of occurrence i.e. 3.00-4.00 am.

37. The argument raised by learned Amicus Curiae emanates from the postmortem report of the deceased. However, PW-7 the autopsy surgeon who had conducted the autopsy of the body of the deceased had opined that the occurrence leading to the death of the deceased could have occurred around 3.00 to 4.00 am in the night of 14.9.2004. However, no attempt was made by the accused to cross-examine the doctor regarding above. The eye-witnesses of the occurrence namely PW-1 and PW-2 have

also stated the same time of occurrence. Even after cross examination defence could not dislodge the statements of the two eye-witnesses regarding the time of occurrence. Thus no credence can be attached to the doubt raised by learned amicus curiae regarding the timing of occurrence or the FIR being anti timed. Thus the argument that the FIR is anti timed cannot be sustained.

38. With regard to the submission urged by learned amicus curiae that appellant has been falsely implicated only to deny him rightful share in the agricultural property, the court is constrained to observe that the argument has been raised only to be rejected. It is well settled that a recorded tenure holder is exclusive owner of agricultural holding. He also has the privilege to bequeath his property and also sell his property. Sons of a recorded tenure holder cannot claim any right, title or interest in the agricultural property during the lifetime of a recorded tenure holder. Moreover, in case there is no male successor of a recorded tenure holder/co-tenure holder the agricultural property i.e. tenure of such tenure holder shall devolve upon the other surviving heirs per strip in the second preference and upon the person next in the generation of the deceased in first preference. Even if it is assumed that the uncle of the deceased i.e. PW-2 was unmarried in the first preference his share shall devolve upon the father of deceased and only after death of the father the property in the share of uncle could devolve upon deceased and his brothers in equal share.

39. Learned amicus curiae has further sought to impeach the impugned judgment by submitting that no motive can be attached to the appellant for causing the crime in question. Admittedly the present case is a case of direct evidence. In a case of direct evidence motive does not play an important role. It is only in a case of circumstantial evidence that motive on the part of accused to commit the crime in question is required to be proved.

40. We may at this stage refer to the judgment of the Supreme Court in Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196 wherein Court has observed as under in paragraph 13 of the report:-

13. As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive loses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case is wholly reliable and see no reason to discard it. The submission, therefore, that the appellant had no motive for the commission of offence is not of any significance.

41. In view of the discussion made above, we find no error in the impugned judgment whereby appellant has been convicted and sentenced for an offence under Sections 302 and 352 IPC.

42. Accordingly, this jail appeal fails and is liable to be dismissed. It is, accordingly, dismissed.

43. However, before parting we record our appreciation for the valuable assistance rendered by learned Amicus Curiae Ms. Vijata Singh. She shall be entitled to her fees which we quantify at Rs.15,000/-. The same shall be payable to her by the High Court Legal Services Authority.

44. Considering the facts and circumstances of the case, we provide that since the appellant has remained under incarceration for a period of more than 16 years, without any remission, his claim for remission or commutation in terms of Section 433/433A Cr.P.C. shall be accorded consideration by the State Government in accordance with its policy within a period of three months from today.

(2022) 8 ILRA 848
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 5506 of 2021

Smt. Anita ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Nanhe Lal Tripathi

Counsel for the Opposite Parties:
Govt. Advocate, Sri Bhagwan Das

(A) Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 302 & 120-B - The Schedule Castes & The Schedule Tribes (Prevention of Atrocities) Act , 1989 - Section 3(1)Da, Dha and 3(2)V - The Code of criminal procedure, 1973 - Section 161 appeal against rejection of protest petition.

Wife of deceased (appellant) - applied for Welfare Scheme (Mukhyamantri Krishak Durghatana Kalyan Yojna) - claiming compensation showing an accidental death of her husband - received Rs.5 lacs as compensation - site plan shows deceased died due to accident - post mortem report shows deceased died due to excessive bleeding - vain attempt by appellant/complainant to prosecute private respondents 3 to 8 - to get additional compensation under SC/ST Act - claim totally contradictory to material on record - pleadings in counter affidavit not rebutted. **(Para -8 to 12)**

HELD:- Case is a perfect example of abuse of process of the court, for ulterior monetary gain. Appeal dismissed with cost of Rs.5,000/- . To be recovered from appellant as arrears of land revenue. **(Para -12,13)**

Criminal Appeal dismissed. (E-7)

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard learned counsel for the appellant, learned counsel for respondents 3 to 8 and learned A.G.A. as also perused the record.

2. It is informed at bar that respondent No.2 Vijay has died.

3. Present criminal appeal has been filed against the order dated 9.9.2021 passed in f.R. No.119 of 2020 Smt. Anita versus Vijay relating to case crime No.163 of 2020 under sections 147, 148, 149, 302, 120-B I.P.C., 3(1)Da, Dha and 3(2)V of Scheduled Castes & Scheduled Tribes(Prevention of Atrocities) Act, 1989, P.S. Madwara, district Lalitpur whereby while accepting the final report, learned Special Judge, SC/ST has rejected the protest petition Paper No.25Ka filed by the appellant.

4. Learned counsel for the appellant has submitted that the investigating officer has not conducted fare and impartial investigation. Merely in one day, the investigation has been completed and final report has been filed. The deceased has given dying declaration, however, same has not been recorded by the investigating

officer. The final report has been submitted in active connivance by the investigating officer with the accused persons.

5. Per contra, learned A.G.A. and learned counsel for the complainant have opposed the appeal. It has been submitted that the post mortem report clearly shows that the deceased died due to accident. Statement of the doctor has been filed along with the counter affidavit, according to which, the injuries sustained by the deceased were due to accident. Shivraj, the informant on the same day, i.e. on 13.5.2020 gave an application to the police stating that the deceased met an accident while he was on a motorcycle and was under an influence of liquor.

6. Statement of the independent witness Rammupal, eye-witness Nanhebhai are also on record with the counter affidavit which denies the story of the appellant and have categorically stated that it was a case of accident.

7. The informant Shivraj has also given his statement under section 161 CrPC which is also on record along with the counter affidavit. He has also said that the deceased as well as two other persons were heavily drunk and met an accident with a buffalo. All the three were injured. They were taken to government hospital. Doctor also told that they were heavily drunk. Thereafter, they were brought home where the deceased died. He further stated that he gave the information to the police station. Inquest was made and he is the inquest witness.

8. Learned counsel for the complainant has also drawn attention of this court towards the report of Revenue Inspector dated 18.6.2020 wherein the wife of the deceased, present appellant applied for Mukhyamantri Krishak Durghatana Kalyan Yojna. The report has been submitted in view of the application given by the appellant for claiming the aforesaid compensation showing an accidental death of her husband.

9. He further informed that the appellant has received a sum of Rs.5 lacs as compensation.

10. Perusal of the impugned order and the relevant record shows that the accident took place on 12.5.2020 between 2.00 and 8.00 p.m.. The first information report was lodged on 26.9.2020 after an application under section 156(3) CrPC was given on 1.6.2020. No plausible explanation of delay of 17 days was given by the appellant for lodging the first information report. The application given at the local police station by Shivraj, the informant was on record with the trial court which is numbered as 12ka stating that on 12.5.2020, his brother Shivcharan (deceased) and Vijai Lodi went to take diesel and they met an accident. Thereafter, the deceased was taken to hospital, Madwara where the doctor informed him that he was under influence of wine and will get well and thereafter he brought him to the village where he died.

11. According to the site plan, the deceased died due to accident. According to post mortem report also, the deceased died due to excessive bleeding from the injury in the lungs and liver of the deceased. Statement of the doctor under section 161 CrPC is also on record. The learned court below has perused the medical report of the doctor at Community Health Centre, Madwara dated 12.5.2020, prepared at 9.38p.m., according to which Vijai and Shiv Charan after the accident came to him for treatment which

contradicts the statement of the appellant that on 12.5.2020 at 8.00p.m. she along with her brother in law went to see her husband. The claim of the appellant has been found totally contradictory to the material on record of the Special Judge as the brother in law of the appellant himself has stated that the deceased met an accident which corroborates the statement of the doctor and the medical report which also shows that the appellant did not go with the deceased husband to the hospital. The post mortem report also shows that the deceased met an accident as apart from the injuries shown for cause of death, there are six other ante mortem injuries on the shoulder, knee, foot, shin and thigh which shows that it is a case of accident.

12. On due consideration to the argument advanced by the parties' counsel and perusal of the record as also findings recorded by the learned Special Judge, coupled with the fact that the appellant on one hand has filed this appeal against rejection of her protest petition, on the other hand according to the report of the Revenue Officer dated 18.6.2020 she has applied for Mukhyamantri Krishak Durghatana Kalyan Yojna and as per statement given by learned counsel for the complainant, she has also received a sum of Rs.5 lacs as compensation in the said Scheme which shows that this is the vain attempt by the appellant/complainant to prosecute the private respondents 3 to 8 for the offences under sections 147, 148, 149, 302, 120-B I.P.C., 3(1)Da, Dha and 3(2)V of Scheduled Castes & Scheduled Tribes(Prevention of Atrocities) Act, 1989 and only with a view to get an additional compensation under SC/ST Act by putting altogether not only a different but totally contradictory story. This case is a perfect example of abuse of process of the court, for ulterior monetary gain. The statement of the learned counsel for the complainant that the appellant has received an amount of Rs.5 lacs under the above Welfare Scheme and the pleadings in the counter affidavit have not been rebutted by learned counsel for the appellant.

13. The appeal is accordingly dismissed with cost of Rs.5,000/- which shall be recovered from the appellant within three months from today as arrears of land revenue under intimation to the Registrar General of this Court by the concerned District Magistrate.

(2022) 8 ILRA 850
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Jail Appeal No. 5752 of 2007

Gabbar Patel @ Dharmendra Patel ...Appellant

Versus

State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Bhanu Pratap Singh A/C, Sri Satya Prakash Rathor (A.C.)

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

(A) Criminal Law - Indian Penal Code, 1860 - Section 307 - Arms Act, 1959 - Section 3/25 - Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 8/22 - The Code of Criminal Procedure, 1973 - Section 313 - plead guilty – Confession -Mere recovery of a weapon and one empty cartridge would not be sufficient to prove the use of the said weapon without any corroborating

evidence - statement under Section 313 Cr.P.C. is not evidence - used for appreciating evidence led by the prosecution to accept or reject it. (Para - 15,16)

Accused confessed his guilt in his statement under Section 313 Cr.P.C - solitary fire by accused - did not hit anyone - no injury - overpowered and apprehended - 12 bore country made pistol with one empty cartridge - one live cartridge in possession.**(Para - 13,14,)**

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 313 - It cannot be said that merely by pleading guilty in the statement under Section 313 Cr.P.C. the accused can be pinned down and a conviction can be recorded against him. (Para - 17)

HELD:- Accused-appellant extended the benefit of doubt. Appellant acquitted of charges levelled against him.**(Para -18)**

Jail Appeal Allowed. (E-7)

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

1. Heard Sri Satya Prakash Rathor, learned Amicus Curiae for the appellant and Sri S.B. Maurya, learned counsel for the State and perused the material on record.

2. This jail appeal has been filed by the appellant Gabbar Patel @ Dharmendra challenging the impugned judgement and order dated 25.09.2006 passed by Additional District & Sessions Judge, Court No. 14, Varanasi in Sessions Trial No. 784 of 2004, by which he has been convicted and sentenced under Section 307 I.P.C. to undergo three years and six months rigorous imprisonment.

3. The prosecution case as per the First Information Report lodged on 04.03.2003 at about 01:40 am is that the police informer informed the police that one person standing at Jalalpur Mod and is about to commit an incident who is having narcotics and a country made pistol with him, on which, the S.O. Sunil Kumar Bisnoi along with his accompanying police personnels proceeded towards the said person. They had torch with them. The said person all of sudden fired upon them to which they escaped and then they followed him after which near Jalalpur Mod he showed them his weapon but they arrested him on 03.03.2003 at about 23:40 hrs after overpowering him. They recovered a 12 bore country made pistol from his right hand and immediately upon opening its barrel found an empty cartridge. The said person was asked about his identity to which he disclosed that his name is Gabbar Patel @ Dharmenndra Patel and told his father's name and address. He further told them that he has diazepam tablets with him. He told them to take his search after which from his left pocket something wrapped in paper was found, on opening of which small tablets were recovered which were on counting found to be 300 tablets. The country made pistol, empty cartridge and the tablets were recovered and a recovery memo was prepared which was duly signed by him. The said recovery memo is Exb: Ka-1 to the records.

4. On the basis of the said recovery memo, a First Information Report was lodged on 04.03.2003 at 01:40 am as Case Crime No. 29 of 2003 under Section 307 IPC, Case Crime No. 30 of 2003, under Section 3/25 Arms Act and Case Crime No. 31 of 2003, under Section 8/22 of N.D.P.S. Act, Police Station Bada Gaon, District Varanasi.

5. The matter was investigated and a charge sheet no. 34 of 2003 dated

24.03.2003 was filed against the accused-appellant Gabbar Patel @ Dharmendra under Section 307 I.P.C. The same is Ex. Ka- 5 to the records.

6. Vide order dated 03.05.2005 passed by the Additional Sessions Judge, Court No. 14, Varanasi charge was framed under Section 307 I.P.C. against the accused Gabbar Patel @ Dharmendra. He pleaded not guilty and claimed to be tried.

7. In the trial, Sup-Inspector Ajay Srivastava was examined as PW-1. Amongst the prosecution documents, the recovery memo was produced as Exb: Ka-1, the Chik FIR was Exb: Ka-2, the GD of registration of the FIR was Exb: Ka-3, site plan was Exb: Ka-4 and the charge sheet was Exb: Ka-5 to the records.

8. After recording of the evidence of PW-1, the accused in his statement recorded under Section 313 Cr.P.C. in reply to question no. 4 stated that he committed a fault. He pleads guilty. Further, to question no. 6 he states that he is in jail since long time and as such leniency be shown. The trial court thus after his confession under Section 313 Cr.P.C. concludes the trial as passed the impugned judgment by stating that on the basis of statement of PW-1 and the recovery memo along with the confession of the accused-appellant, the prosecution has succeeded its case beyond reasonable doubt and convicts him as stated above.

9. PW-1 Ajay Srivastaava was posted as Chowki In-charge Harhua, Police Station Bada Gaon, District Varanasi. On the day of the incident, he was standing with the S.O. at Jamalpur Mod and were talking about miscreants, on which, the police informer came and on his information and pointing out an effort was made to arrest the accused-appellant after which he fired upon the police party from his country made pistol but the police party was saved and no one received injury. He was overpowered and was apprehended along with 12 bore country made pistol, one live cartridge and one empty cartridge along with 300 tablets of diazepam. The recovery memo was prepared on the dictation of S.O. Sunil Kumar. The articles were sealed and the accused was brought to the Police Station and the First Information Report was lodged. He proves the handwriting of the Head Constable who transcribed the First Information Report. The investigation was given to Sup-Inspector Vipin Kumar Rai who concluded it and filed a charge sheet. He proves the handwriting of Vipin Kumar Rai also. No cross examination was done.

10. The accused then in reply to question no. 4 in his statement recorded under Section 313 Cr.P.C. was asked as to why a case has been lodged against him, to which, he states that he is at fault. He admits his guilt. In reply to the question no.1 with regards to his making a fire on the police party, he states that it is true. He further with regards to the recovery of the weapon and the recovery memo, does not say anything. Further, in reply to the documents and investigation he does not say anything. In the last reply to a question no. 6 as to whether he wants to say anything, he states that he is in jail since a long time and leniency be shown to him.

11. The trial court came to a conclusion that the prosecution has proved its case beyond reasonable doubts on the basis of the statement of PW-1 Ajay Srivastava, the recovery memo Exb: Ka-1 and acceptance of guilt by the accused in

his statement recorded under Section 313 Cr.P.C. and thus convicts him as stated above.

12. Learned Amicus Curiae argued that the view as taken by the trial court is fully perverse and illegal. The prosecution has to stand on its own leg and prove its case beyond reasonable doubt. It is argued that admittedly the present case is a case of no injury. The recovery memo although is on record and has been exhibited by the prosecution but there is no corroborative evidence to show the use of the said weapon in the present case. There is no opinion of any expert or even evidence to the effect that the said weapon was sent for analysis to show that there was fire made by the accused-appellant. The corroboration in so far as the use of the said weapon is concerned, is missing. It is argued that even the prosecution has not come forward to show that the said weapon was sent to the ballistic expert for its testing which would go to corroborate its use in the present case. It is argued that merely by pleading guilty in the statement recorded under Section 313 Cr.P.C., the accused cannot be held guilty. At the stage of framing of charge, the accused had pleaded not guilty and claimed to be tried. It was the duty of the prosecution to stand on its leg to show the involvement of the appellant. It is argued that the impugned judgment and order deserves to be set aside and the appellant deserves be acquitted.

13. Per contra, learned counsel for the State opposed the arguments of learned Amicus Cruiae and argued that the statement of PW-1 has clinched the issue. The implication of the appellant is there. He was apprehended at the spot with the weapon by which he made a fire. The accused has confessed his guilt in his statement under Section 313 Cr.P.C. The same are sufficient to reach to a conclusion of his being involved in the matter and convict him. Hence, the appeal deserves to be dismissed.

14. After having heard learned counsels for the parties and perusing the records, the issue involved in the present matter lies in a small compass. It is as to whether after pleading guilty in the statement recorded under Section 313 Cr.P.C. and the prosecution proving the recovery memo and one witness coming and the deposing against the accused who was one of the team members of the arresting team, is sufficient for conviction or not. Admittedly, the present case is a case of no injury. It is stated that the accused made a solitary fire but the same did not hit anyone. He was later on overpowered and apprehended and stated to be having a 12 bore country made pistol with one empty cartridge along with one live cartridge in his possession. The said articles were recovered from him.

15. The prosecution is silent as to whether the said weapon was sent to the ballistic expert for examination which would corroborate its use at that point of time. Mere recovery of a weapon and one empty cartridge would not be sufficient to prove the use of the said weapon without any corroborating evidence.

16. The next question which crops up is as to whether the accused if pleads guilty in his statement under Section 313 Cr.P.C. is also the circumstance to rest against him or not. In the present case, as has been stated above after charges were framed by the concerned court, the accused had pleaded not guilty and had claimed to be tried.

In his statement recorded under Section 313 Cr.P.C. he has not given any reply to certain questions and further states of his being guilty and then in addition states of the court taking a lenient view in the sentence as he is in jail since long time. Law as it stands undisputed is that the statement under Section 313 Cr.P.C. is not evidence. It is not a substantive peace of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. However, it cannot be said to be a substitute for the prosecution evidence. It is only the version or stand of the accused by way of explanation to a question put by the prosecution regarding incriminating material appearing against him which are brought to his notice and he is given a chance to reply them. The statement is not made on oath. Yet it can be taken into consideration at the trial against an accused for arriving at his guilty or otherwise but the prosecution has to at the very first instance prove its case beyond reasonable doubts against him and then his explanation or answer to such incriminating circumstance should be looked into. It cannot be said that mere stating of being guilty in the statement under Section 313 Cr.P.C. will end the issue and would lead the route only to the guilt of the accused without prosecution establishing its case beyond reasonable doubt against him through cogent, reliable and admissible evidence.

17. In the present case, there is no other witness examined by the prosecution. Although, the quality of evidence is needed in a case and not the quantity. In the present case, only one witness was examined who was a member of the said police team. He has deposed for each and everything of the case. The corroboration of the use of the weapon is not present. The weapon was not sent for expert analysis. The case is a no injury case. It cannot be said that merely by pleading guilty in the statement under Section 313 Cr.P.C. the accused can be pinned down and a conviction can be recorded against him.

18. Looking to the facts and circumstances of the case and in view of the above discussion as done, the accused-appellant deserves to be extended the benefit of doubt and as such the present appeal is allowed. The appellant is acquitted of the charges levelled against him. The appellant if is in jail, shall be released forthwith.

19. Office is directed to transmit the lower court records along with the copy of this judgment to the trial court forthwith for its compliance and necessary action.

20. Sri Satya Prakash Rathor, learned Amicus Curiae who was appointed Amicus Curiae vide order dated 04.08.2022 passed by this Court assisted the Court in deciding the appeal.

21. Office is directed to pay a sum of Rs. 8,000/- for assistance of the Court to learned Amicus Curiae within two months from today.

(2022) 8 ILRA 854
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 5765 of 2011
WITH
Government Appeal No. 6752 of 2011

Lakhan @ Babblu ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Vivek Kumar Singh, Sri Ajay Kumar Singh, Sri Atul Tej Kalshrestha, Ms. Neeharika Singh, Sri Vinay Singh Khokher, Sri Vivek Dhaka

Counsel for the Opposite Party:
Govt. Advocate, Sri Niraj Tripathi, Sri Raj Kumar Dhama, Sri Rai Sahab Yadav

Criminal Law- Code of Criminal Procedure, 1973 - Section 378 (1) – Appeal against acquittal- It is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court-It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper-The appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court-Where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

Settled law that the presumption of innocence of the accused further stands fortified by his acquittal and the appellate court should not disturb the finding of acquittal only because two views are possible unless the judgement of acquittal by the trial court is wholly perverse.

Indian Penal Code, 1860- Sections 302 & 304 (Part- I)- Evidence on record goes to show that it is the case of prosecution in First Information Report that accused-Lakhan @ Babblu made a single fire only, that too by putting barrel of the weapon on the left arm of the deceased. Ante mortem injuries in post-mortem report go to show that bullet made entry wound on the left arm of the deceased and made exit wound also and then it entered the chest of the deceased. No second fire was made, hence, it appears that appellant-Lakhan @ Babblu had no intention to commit the murder of deceased but he intentionally caused such bodily injury as was likely to cause death-It appears that the death caused by the accused was not intended but he intentionally caused such bodily injury, which was likely to cause death, therefore, the instant case false under the Exceptions 4 to Section 300 IPC-Appellant-Lakhan @ Babblu is held guilty for commission of the offence under Section 304 (Part-I) IPC instead of offence under Section 302 IPC.

As the present case is one of single shot, aimed at the left arm but piercing the chest of the deceased, hence it is apparent that the accused had no intention of committing the murder of the deceased but he committed such bodily injury intentionally that was likely to cause death, hence the present case will fall within the purview of Section 304 (Part-I) IPC, instead of Section 302 IPC. (Para 23, 28, 32, 38, 39, 40, 41)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case Law relied upon:-

1. M.S. Narayana Menon @ Mani Vs St. of Ker. & anr, (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Kar, (2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr, (2007) 3 S.C.C. 75

4. St. of U.P. Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.R.s Vs St. of M.P., 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors., (2009) SCC 749

7. Mookkiah & anr. Vs St. Rep. by the Inspr. of Police, T.N, AIR 2013 SC 321

8. St. of Kar. Vs Hemareddy, AIR 1981, SC 1417

9. Shivasharanappa & ors. Vs St. of Kar, JT 2013 (7) SC 66

10. St. of Punj. Vs Madan Mohan Lal Verma, (2013) 14 SCC 153

11. Jayaswamy Vs St. of Kar, (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs St. of Guj, (2020) 14 SC 750

13. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

14. Ram Swaroop & ors. Vs St. of Raj, 2004 (0) Supreme (SC) 314

15. Tukaram & ors. Vs St. of Maha., (2011) 4 SCC 250

16. B.N. Kavatakar & anr. Vs St. of Kar., 1994 SUPP (1) SCC 304

17. Rajendra @ Rajappa & ors. Vs St. of Kar, (2021) 6 SCC 178 (cited)

18. Phool Singh & anr. Vs St. of U.P., 2022 (0) Supreme (All) 377 (cited)

19. Gulab Vs St. of U.P., 2021(12) ADJ 271 (SC)(cited)

(Delivered by Hon'ble Ajai Tyagi, J.)

1. The first appeal (Criminal Appeal No. 5765 of 2011) has been preferred by the appellant-Lakhan @ Babblu against the judgment and order dated 19.08.2011, passed by learned Additional Sessions Judge (Special), Baghpat in Session Trail No. 306 of 2009 (State of UP vs. Lakhan @ Babblu and Others), arising out of Case Crime No.192 of 2009, under Section 302 Indian Penal Code (IPC), Police Station-Khekhara, District Baghpat whereby the appellant is convicted and sentenced for the offence under Section 302 IPC for life imprisonment with a fine of Rs.10,000/- and in default of payment of fine, further imprisonment for two months.

2. The appeal (Government Appeal No. 6752 of 2011) has been preferred by the State of U.P. against the same judgment and order dated 19.08.2011, passed by learned Additional Sessions Judge (Special), Baghpat in Session Trail No. 306 of 2009 (State of UP vs. Lakhan @ Babblu and Others), arising out of Case Crime No.192 of 2009, Police Station- Khekhara, District Baghpat whereby the accused persons Jagat Singh, Ramesh and Suresh @ Lala were acquitted for the offence under Sections 307, 504 I.P.C. and Section 7 of Criminal Law Amendment Act and in Session Trial No.365 of 2009 (State of U.P. Vs. Suresh @ Lala), arising out of Case Crime No.196 of 2009, Police Station Khekhara, District Baghpat whereby the accused-Suresh @ Lala was acquitted for the offence under Section 25 of Arms Act, 1959.

3. Brief facts of the case giving rise to this appeal are that a First Information Report was registered at Police Station Khekhara, District Baghpat, in which the complainant alleged that on 14.05.2009 at about 10:00 AM, the informant informed that Krishna Pal, his wife Rajesh, younger brother-Indrapal and his nephew-Praveen were uprooting the bricks of their old house. At that time, accused Lakhan @ Babblu, Jagat Singh, Suresh and Ramesh came there, holding the country made pistol in their hands and started abusing the person who were present. Jagat Singh, Suresh and Ramesh caught hold Rajneesh

in their arms and Lakhan @ Babblu fired at Rajneesh from close range, rather putting the barrel of Tamancha on his left upper arm. Rajneesh fell on the ground and died.

4. As per the informant, they shouted and due to that all the four accused persons fired towards them also and they saved their lives by hiding behind the wall. The First Information Report was registered immediately within 40 minutes of the occurrence. The investigation was taken up by the Investigating Officer, during the course of investigation, I.O. recorded the statement of witnesses, collected the sample of plain and blood stained earth. Inquest report of the deceased was prepared. After that, post-mortem was conducted and its report was prepared by the doctor. Investigating Officer arrested the accused persons. At the time of arrest, a country made pistol of 0.315 bore was recovered from the possession of accused Suresh and its recovery memo was prepared. After completion of investigation, a charge sheet was filed against Lakhan @ Babblu, Jagat, Suresh and Ramesh under Sections 302, 307, 504 I.P.C. another charge sheet was also submitted against the accused-Suresh under Section 25 of Arms Act,1959.

5. Learned Trial Judge framed the charges against the aforesaid accused persons under Sections 302, 307, 504 I.P.C. and Section 7 of Criminal Law Amendment Act, another charge was also framed under Section 25 of Arms Act against the accused-Suresh. Accused persons denied the charges and claimed to be tried.

6. Prosecution examined following witnesses:

1.	Krishna Pal	P.W.-1
2.	Praveen	P.W.-2
3.	Smt. Rajesh	P.W.-3
4.	Satya Narayan Dahiya	P.W.-4
5.	Dr. Ashok Kumar	P.W.-5
6.	Laxi Narayan	P.W.-6
7.	Vindhyachal Tiwari	P.W.-7
8.	Vinod Kumar Tyagi	P.W.-8
9.	Anil	P.W.-9
10.	Khadak Singh	P.W.-10

7. Apart from aforesaid witnesses, prosecution submitted following documentary evidence, which was proved by leading the evidence:

1.	FIR	Ex.ka-
2.	Written report	Ex.ka-
3.	Recovery memo of arrest of accused	Ex.ka-
4.	Recovery memo of plain earth	Ex.ka-
5.	Recovery memo of blood stained earth	Ex.ka-
6.	Post-mortem report	Ex.ka-
7.	Panchayatnama	Ex.ka-
8.	Charge sheet	Ex.ka-
9.	Order of District Magistrate	Ex.ka-
10.	Site plan with index	Ex.ka-

8. After completion of prosecution evidence, the statement of accused persons were recorded under Section 313 of

Criminal Procedure Code,1973(Cr.P.C.), in which they denied their involvement in the crime and told that false evidence was led against them. The accused persons have not examined any witness in defence.

9. Heard Mr. Vivek Dhaka, learned counsel for the appellant, Mr. Raj Kumar Dhama, learned counsel for the original complainant and Mr. N.K. Srivastava, learned A.G.A. for the State. Perused the record and Paperbook.

10. Learned counsel for the accused-appellant, Lakhan @ Babblu made his submissions challenging the conviction. It is submitted by the learned counsel and appellant that in this case, learned Trial Court has acquitted three accused persons on the same set of evidence while only Lakhan @ Babblu was convicted, which is bad in eye of law and requires interference by this court. It is next contended that all the witnesses of fact are of the same family, there was no independent public witness of the occurrence and no undue reliance could not be placed on the evidence of interested witnesses. Deceased was having a long criminal history and he was a member of a gang, on whose arrest reward of amount of Rs.50,000/- was declared. The deceased was killed by someone else and on the basis of previous enmity, accused-appellant, Lakhan @ Babblu has been implicated falsely.

11. Learned counsel for the accused-appellant has further submitted that occurrence of this case had taken place at 10:00 AM and First Information Report was lodged at 10:40 AM while the distance of police station from the place of occurrence is about 4 kilometres. It is also submitted that no FIR could have been registered so promptly unless the false implication of the named accused persons is in the mind of informant. There are several improvements in the evidence of P.W.-1, P.W.-2 and P.W.-3. Place of occurrence is also not fixed by the prosecution because P.W.-1 and P.W.-3 have deposed that deceased fell on the spot where he was shot while P.W.-2 says that deceased ran from the place after sustaining bullet injuries and fell in the "Gher' of Charan Singh, which is 10-15 steps away from the place of firing.

12. It is further submitted by counsel for appellant that plain and blood stained earth was collected by the I.O. but it is not mentioned in the recovery memo from which place or where the earth was collected. It is also submitted that acquitted accused persons were rightly acquitted by the learned trial court because their presence was not proved. It is further argued that as per the prosecution case and testimony of so called eye witnesses, they were also fired at them by the accused persons but no one sustained any injury, which goes to show that the witnesses were not on the spot and they had not seen the occurrence or the accused were named in FIR due to previous enmity.

13. With regard to the medical evidence, learned counsel for the accused-appellant and acquitted accused has submitted that according to the version of the F.I.R. only a single fire was shot by the accused while ante mortem injuries in post-mortem go to show that there were **two entry wounds of fire arm on the body and one exit wound,** which was not possible by one fire. Learned counsel for the accused-appellant and acquitted accused drew our attention to the recovery memo and country made pistol, said to be recovered from the possession of the

accused Suresh, who had admitted to the I.O. that he had fired two round at deceased while as per the First Information Report only one gun fire was mentioned by placing the barrel on the arm of the deceased and post-mortem report shows that the wound was on left hand of the deceased.

14. With regard to the acquitted accused persons, learned counsel for the accused-respondents has submitted that they were rightly acquitted by the learned trial court because their presence on the spot was doubtful. According to the prosecution version, the acquitted accused had also fired at the witnesses but there is no injury to anyone, nor any other weapon is recovered. It is also submitted that catching hold of the deceased by three persons was also not possible. Gun fire were opened by all accused on persons present.

15. After some length of arguments, learned counsel for the convicted accused-appellant has submitted that if prosecution case is believed then also it is version of F.I.R. that accused-Lakhan @ Babblu fired at the deceased by putting the barrel of Tamancha on his body, which was left hand, as is evident from ante mortem injuries. Accidently the bullet pierced into the heart of the deceased by making exit wound after entering the hand. It shows that accused Lakhan @ Babblu had no intention to commit the murder of the deceased because if it had been the intention then he could have fired on chest directly. Hence, this case cannot go beyond the scope of Section 304 of I.P.C.

16. Mr. Raj Kumar Dhama, learned counsel for the informant and learned A.G.A. for the State has vehemently objected the submissions of learned counsel for the accused-appellant and submitted that fire-arm was recovered from the possession of accused Lakhan @ Babblu. The Investigating Officer, P.W.-7 has deposed that S.I. Laxmi Narayan copied the recovery memo of weapon, recovered from the possession of accused-Lakhan @ Babblu in C.D. It is further submitted that weapon was also recovered from the possession of acquitted -accused, Suresh and role of firing is assigned to all the accused persons. Hence, two gun shots cannot be ruled out. It is further submitted that acquitted accused persons also fired towards the family members of the deceased, which is the version of F.I.R. and all the witnesses of fact have deposed so in their testimony.

17. Learned counsel for the informant has also submitted that specific role of catching hold was assigned to acquitted accused persons and there was exhortation on their part also. Learned trial court did not consider the evidence in its right perspective and wrongly acquitted the accused persons. In support of his arguments, learned counsel for the complainant has placed reliance on the judgments of Apex Court in ***Rajendra Alias Rajappa and Others Vs. State of Karnataka, (2021) 6 Supreme Court Cases 178, (2) Phool Singh and Another Vs. State of U.P., 2022 (0) Supreme (All) 377 and (3) Gulab Vs. State of U.P., 2021(12) ADJ 271 (SC).*** It is contended that the acquittal is bad and is based on perverse finding.

18. As far as the acquittal of accused persons Jagat Singh, Suresh and Ramesh are concerned, learned trial court has held that P.W.-1, Krishna Pal, P.W.-3 Smt. Rajesh are parents of the deceased and P.W.-2 Praveen is cousin brother of the

deceased and they are interested witnesses and hence then evidence must be scrutinised with care. Learned trial court has scrutinised their testimony meticulously and cautiously. Their testimony was not found,wholly reliable. There are many contradictions in their evidence which go to the root of the case.

19. We have also found various improvements in the testimony of prosecution evidence before the trial court. It is also very hard to believe that despite there being firing by accused persons on willingness but no one has sustained any injury and on analysing the evidence from the angle that three acquitted accused persons caught hold of the deceased simultaneously then also there was every possibility of sustaining injury by them also, which has not come in ocular version of prosecution.

20. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

21. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another, (2006) 6 S.C.C. 39***, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

22. Further, in the case of ***Chandrappa vs. State of Karnataka, reported in (2007) 4 S.C.C. 415,*** the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of

the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

23. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

24. Even in the case of ***State of Goa vs. Sanjay Thakran and another, reported in (2007) 3 S.C.C. 75,*** the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

25. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others, 2007 A.I.R. S.C.W. 5553 and in Girja Prasad (Dead) by L.R.s vs. State of MP, 2007 A.I.R. S.C.W. 5589.*** Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

26. In the case of ***Luna Ram vs. Bhupat Singh and others, reported in (2009) SCC 749,*** the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who

conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

27. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives*** by the Inspector of Police, Tamil Nadu, reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

28. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy, AIR 1981, SC 1417,*** wherein it is held as under:

*" ... This Court has observed in **Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124)** that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."*

29. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others vs. State of Karnataka, JT 2013 (7) SC 66*** has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be

kept in mind that acquittal results into double presumption of innocence."

30. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma, (2013) 14 SCC 153***, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

31. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,*** has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of ***Ramanand Yadav vs. Prabhu Nath***

Jha & Ors., (2003) 12 SCC 606, *which reads thus:*

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

32. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750,*** has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

33. The Apex Court has held in ***Ram Swaroop and Others Vs. State of Rajasthan, 2004 (0) Supreme (SC) 314***, that if the view taken by the trial court while acquitting the accused was a possible, reasonable view of on basis of sifting the evidence, the High Court ought not to interfere with such acquittal merely because it was possible to take contrary view. Paragraph of the said judgment is relevant, which is quoted here:-

"Having regard to the findings recorded by the trial court and having gone through the evidence on record, we are of the view that this was not a case in which the High Court ought to have interfered with the order of acquittal passed by the trial court. It is well settled that if two views are reasonably possible on the basis of the evidence on record, the view which favours the accused must be preferred. Similarly it is well settled that if the view taken by the trial court while acquitting the accused is a possible, reasonable view of the evidence on record, the High Court ought not to interfere with such an order of acquittal merely because it is possible to take the contrary view. It is not as if the power of the High Court in any way is curtailed in appreciating the evidence on record in an appeal against acquittal, but having done so, the High Court ought not to interfere with an order of acquittal if the view taken by the trial court is also a reasonable view of the evidence on record and the findings recorded by the trial court are not manifestly erroneous, contrary to the evidence on record or perverse."

34. Considering the evidence of the witnesses and also considering the medical

evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant.

35. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

*"299. **Culpable homicide**: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

36. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.C. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely tocause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

37 . Dr. Ashok Kumar, P.W.-5, had conducted the post-mortem of the body of the deceased. In post-mortem report, the following ante mortem injuries were found:-

(i) A gun shot wound of entry size 1.5 X 1.5 cm, present on posterior lateral aspect of left arm, 16.0 cm below top of shoulder, blackening present in area of 2.0 cm X 2.0 cm around wound and tattooing present in area 28.0 cm X 14.0 cm around.

(ii) A exit wound size 2.25 cm X 1.0 cm inner side of left arm and 4.0 cm below the axilla and correspond to injury no.i.

(iii) A gun shot wound of entry size 2.75 cm X 1.5 cm present on lateral aspect of left chest and 12.0 cm away from left nipple at 3.0 O' Clock position. This injury correspond to injury no.ii in continuation.

38. Evidence on record goes to show that it is the case of prosecution in First Information Report that accused-Lakhan @ Babblu made a single fire only, that too by putting barrel of the weapon on the left arm of the deceased. Ante mortem injuries in post-mortem report go to show that bullet made entry wound on the left arm of the deceased and made exit wound also and then it entered the chest of the deceased. No second fire was made, hence, it appears that appellant-Lakhan @ Babblu had no intention to commit the murder of deceased but he intentionally caused such bodily injury as was likely to cause death.

39. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of ***Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250 and in the case of B.N. Kavatakar and Another Vs. State of Karnataka, reported in 1994 SUPP (1) SCC 304,*** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

40. From the upshot of the aforesaid discussion, it appears that the death caused by the accused was not intended but he intentionally caused such bodily injury, which was likely to cause death, therefore, the instant case false under the Exceptions 4 to Section 300 IPC.

41. In the light of the foregoing discussions, the appeal is liable to be allowed in part. Appellant-Lakhan @ Babblu is held guilty for commission of the offence under Section 304 (Part-I) IPC instead of offence under Section 302 IPC.

42. Hence, the conviction and sentence awarded to the appellant-Lakhan @ Babblu for the offence under Section 302 IPC is converted into the offence under Section 304 (Part-I) IPC and appellant is sentenced under Section 304 (Part-I) IPC for 10 years rigorous imprisonment and fine of Rs.10,000/-. The appellant shall undergo further simple imprisonment for one year in case of default of payment fine.

43. In our view, the view, taken by the learned trial court with regard to the acquitted accused persons was possible view, hence, there is no need to interfere with their acquittal and the appeal preferred by the State is liable to be dismissed.

44. Accordingly, the appeal preferred by appellant-Lakhan @ Babblu is **partly allowed,** as modified above. The appeal preferred by State stands **dismissed.**

45. Record be sent to trial court immediately.

(2022) 8 ILRA 867
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.07.2022

BEFORE

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

Criminal Appeal No. 5806 of 2006
Connected with
Criminal Appeal No. 6421 of 2006
Connected with
Criminal Appeal No. 6412 of 2006
Connected with
Criminal Appeal No. 6146 of 2006
AND
Criminal Appeal No. 598 of 2021

Piyush Gupta ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Pankaj Bharti, Sri Alok Ranjan Mishra, Sri Anand Prakash Srivastava, Ms. Beenu Singh, Sri Noor Mohammad, Sri Satya Dheer Singh Jadaun, Sri Ved Prakash Pandey, Sri Vishal Agarwal, Sri Rishi Mehrotra

Counsel for the Opposite Party:
Govt. Advocate, Sri Dileep Kumar, Sri R.K. Srivastava, Sri S.P.S. Raghav, Sri Rajarshi Gupta

(A) Criminal Law - Indian Penal Code, 1860 - Sections 364-A, 302 & 201 - The Uttar Pradesh Dacoity Affected Areas Act, 1983 - Sections 5,26 & 27 - appeal against conviction -where it is proved that the accused has kidnapped or abducted any person from dacoity affected area, it shall be presumed, unless the contrary is proved, that the accused has kidnapped or abducted such person for ransom - held - presumption arises under Section 27 that kidnapping was done with the motive to realise ransom - authenticity of the recoveries made from the accused cannot be doubted, merely for the reason that there was no public witness - to establish reliability in the recordings - it has to be ensured that said recording has been preserved and prepared safely by an independent authority, the police and not by any party to the case. **(Para -70,76,95,97)**

Case relates to gruesome and heinous crime of kidnapping and murder of a ten years boy (victim) - no body witnessed actual commission of crime - prosecution case based on circumstantial evidence - statement of all three witness consistent - no material contradiction or variation to raise suspicion – demand of ransom - medical evidence fully corroborates prosecution case - victim was done to death a day prior to the arrest of the accused-appellants – criminal revision by complainant - for enhancement of sentence of convicted appellants from life imprisonment to capital punishment.**(Para -2,3,23,38,58)**

(B) Evidence Law - Evidentiary Value of Confessional Statements - Indian Evidence Act, 1872 - Section 24,25,26,27 - confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage, the question whether it is true or false, does not arise - question whether a confession is voluntary or not is always a question of fact - held - confessional statement of accused appellants not admissible, being hit by Section 25 and 26 of the Evidence Act, except the portion which led to recovery of the dead body - No evidence to establish that victim was killed by accused appellants to save themselves from being identified and punished. **(Para - 43,93)**

HELD:-Conviction of appellants upheld under Section 302,364-A and 201 IPC . Punishment of life sentence death for offences held to be just, fair and reasonable. Instant case not to be the rarest of rare cases so as to convert sentence of life imprisonment to capital punishment.**(Para - 98,99)**

Criminal Appeals, Criminal Revision and Government Appeal dismissed. (E-7)

List of Cases cited:-

1. St. of U.P. Vs Rajju & ors., (1971) 3 SCC 174,

2. Indra Dalal Vs St. of Har., (2015) 11 SCC 31

3. St. of U.P. Vs Deoman Upadhyay, 1960 Cr.L.J. 1504

4. St. of Raj. Vs Rajaram, (2003) 8 SCC 180

5. Balvinder Singh Vs St. of Punj. ,1995 Supp. (4) SCC 259

6. Kavita Vs St. of T.N., (1998) 6 SCC 108

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

8. St. (NCT of Delhi) Vs Navjot Sandhu @ Afsan Guru, (2005) 11 SCC 600

9. St. of U.P. Vs Anil Singh, 1989 SCC (Cri) 48

10. Ram Swaroop Vs St. (Govt. of N.C.T. of Delhi), (2013) 14 SCC 235

11. Yusufalli Esmail Nagree Vs St. of Maha., (1967) 3 SCR 720

12. R.M. Malkani Vs St. of Maha., (1973)1 SCC 471

13. Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, (1976) 2 SCC 571

14. Raju Manjhi Vs St. of Bihar, (2019) 12 SCC 784

15. Shaik Ahmad Vs St. of Telangana, Criminal Appeal No. 533 of 2021

16. Sonu @ Amar Vs St. of Haryana, 2017 (8) SCC 570

17. Shyam Babu & Ors. Vs St. of Har., 2008 (15) SCC 418

18. Vikram Singh @ Vicky Vs U.O.I., (2015) 9 SCC 502

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Om Prakash Tripathi, J.)

1. Appeals bearing No.5806 of 2006, 6421 of 2006 and 6412 of 2006 are by accused persons against the judgment by the Court of Special Judge (D.A.A.), Agra dated 26.8.2006 convicting them under Sections 364-A, 302, 201 IPC and sentencing them to rigorous life imprisonment and fine of Rs.10,000/- each under Section 364-A IPC and same punishment for offence under Section 302 IPC and seven years rigorous imprisonment and fine of Rs.10,000/- each for offence under Section 201 IPC and in case of default in payment of fine, additional simple imprisonment of one year for each offence. All the sentences so awarded were to run concurrently and default sentences consecutively. Half of the fine was to go to the complainant, PW-1.

2. Criminal Revision No.6146 of 2006 is by complainant for enhancement of sentence of the convicted appellants from life imprisonment to capital punishment. The same prayer has been made in G.A. No.598 of 2021. Since all these matters relate to the same offence and involve common questions of facts and law, therefore, all the matters were heard together and are being decided by this common judgement.

3. The case relates to gruesome and heinous crime of kidnapping and murder of a ten years boy Gaurav Mittal (victim).

4. According to the prosecution story, the victim had gone missing since 19.02.2004. Initially, a missing report was lodged by his father Rakesh Kumar Mittal (PW-1) on 22.2.2004 at 03:30 p.m. at P.S. MM Gate (Ext. Ka-12) stating that his son Gaurav Mittal aged 10 years had gone from

his house to his grandfather's house who lived nearby at about 5:00 p.m. on 19.02.2004. After sometime, it transpired that his son did not reach his grandfather's house. Consequently, they made hectic search for him. He was wearing full sleeves green coloured bush shirt, grey coloured pant and sleepers. His complexion is fair and on his right eye, there is a black coloured mark.

5. On 21.2.2004, suspecting foul play, PW-1 got installed ID Caller on his land-line number 0562-2363149. PW1 received a ransom call on 22.2.2004 on his land-line number. The kidnappers asked for ransom for safe release of his son. They said that the sum would be disclosed to him on the following day.

6. S.S.P., Agra, looking to the seriousness of the crime, handed over the investigation to SOG. It was headed by Sub-Inspector Avaneesh Dixit (PW3).

7. Second ransom call according to PW-1 was received by him on 23.2.2004. The kidnappers demanded Rs. 15 lakhs as ransom money. On 24.2.2004, he again received call from the kidnappers and ultimately the deal was settled for a sum of Rs. 5 lakhs. Some calls were received from mobile number 9899580426 and some from land-line number 22311244. On 22.2.2004 at 3:20 p.m., the missing report was converted into first information report, bearing Crime Case No. 29 of 2004, under Section 364-A IPC, against unknown persons (Ext.-14).

8. The SOG team came to know that ransom calls were being made from Delhi. They headed for Delhi and reached Police Station Vivek Vihar on 25.2.2004 at 10:30 a.m. They apprised SI Atul Tyagi (PW6) and SI Vinay Tyagi about the episode. On investigation, it transpired that landline number 22311244 from which ransom calls were received, was that of a PCO at Balbir Nagar, Shahdra, Delhi, owned by one Sachin Chauhan and the Service Provider was Hutch company.

9. At 11:15 a.m., they reached the said location. They could not gather any clue as Sachin Chauhan told the police that it was not possible for him to remember identity of every customer who uses PCO.

10. At about 11:20 a.m., when the police party was returning after making enquiry from Sachin Chauhan, Sub-Inspector Atul Tyagi (PW6) received information from mukhbir (police informer) that since last 2-3 days, a boy aged 10 years was seen in company of Piyush Gupta (C1), who lives in a room on rent in Balbir Nagar, and his two companions Lokesh alias Babloo (C2) and Manoj Sharma (C3). Piyush Gupta is introducing him as his bhanja (sister's son). Their activities appear to be suspicious. When the photograph of the victim was shown to the Mukhbir, he immediately identified him as the same child who was seen in company of Piyush Gupta and his friends. He also informed that they were planning to go to Karkardooma at around 12.00 - 01.00 p.m. through Jhilmil Industrial Area and in case timely action is taken, they can be trapped.

11. The police party reached the railway pulia at Pratap Khand, Shahadara at 11:50 a.m., along with the mukhbir and PW1. At about 12:30 p.m. the mukhbir pointed out towards three persons coming on Rajdoot Motorcycle bearing number DL55/6977. He identified them as Piyush Gupta and his companions and went away.

The police succeeded in catching them. It had to use force to control them. In the scuffle that followed, Sub-Inspector Atul Tyagi and Assistant Police Inspector Majid Khan also received minor injuries. They revealed to the police that they had kidnapped the child for ransom on 19.2.2004 at 5:30 p.m. and they made calls to Rakesh Mittal (PW1) demanding ransom. The deal was struck at a sum of Rs. 5 lakhs. As the victim knew Piyush Gupta, being son-in-law of younger brother of Rakesh Mittal, therefore, fearing that their identity will get disclosed, they had done him to death in the morning of 23.2.2004 and the dead body was burried in a pit caused by uprooting of a tree on the backside of Institute of Human Behaviour and Allied Sciences, Shahadra and GTB Hospital Shahadra. All the three were arrested and their arrest memos were prepared (Ext. Ka16, Ka17, KA18). The confessional statement of the accused were recorded separately (Ext. Ka1, Ext. Ka2, Ext. Ka3). They admitted having abducted and killed the victim by strangulating him with the aid of a shoe lace and that they continued to demand ransom money even after Gaurav was killed.

12. Upon search, the police succeeded in recovering a mobile SIM Card bearing Number 9899580426 (Ext. Ka5) and one Motorola Mobile set (Ext. Kha1) from Piyush Gupta. In his confessional statement, Piyush Gupta admitted that it was the same SIM from which they used to make ransom calls to Rakesh Mittal over his land-line number 05622363149. On search of Manoj Sharma, a mobile phone of Nokia make-model 3315 bearing IMEI number 351479600989140 was recovered (Ext. Ka6). Another mobile of Siemens make was also seized (Ext. Kha3). A seizure memo in respect of motorcycle was also prepared (Ext.Ka-7).

13. Thereafter the police party on pointing out of the accused went to open ground on the backside of GTB Hospital, where they had dumped the body of the victim. The body was found lying in a pit caused by uprooting of a tree. It was duly identified by PW-1 as that of his son. The police prepared recovery memo of dead body (Ext.Ka-10) and inquest report (Ext. Ka-20). While the said proceedings were in progress, a mob assembled at the site and it got emotionally charged on coming to know about the incident. Despite best efforts by the police to disperse the crowd they attacked the accused resulting in minor injuries to them (Injury report-8A/1, 8A/2, 8A/3).

14. Information regarding recovery of dead body was given to police station Dilshad Garden Delhi over telephone and whereupon S.H.O. of the said police station Satish Sharma, Sub-Inspector Virendra and other police personnel came to the spot. The body was taken in possession and its fard (Ext. Ka-10) was prepared. There was a black shoelace tied around the neck of Gaurav and he was wearing a white coloured slippers. The left eye of the victim was found damaged. The right eye and mouth were found closed.

15. All the three accused as well as Sub-Inspector Atul Tyagi and Majid Khan had undergone medical examination at S.D.N. Hospital, Shahadara at 5:00 p.m. onwards and thereafter the accused were brought to police station Vivek Vihar, Delhi. On the same day, police added Section 302, 201 IPC. On the next date, at about 11:00 a.m., post mortem of the dead body (Ext. Ka-5) was carried out.

Thereafter the police obtained transit remand of the accused from the local court at Delhi and brought them to Agra. On 27.04.2004, the Investigating Officer took in his custody the audio cassette attached to I.D. Caller from PW-1 and prepared fard Ext. Ka-11. The Investigating Officer also obtained CDR of the mobile phone from which ransom calls were received (Ext. Ka-29). After completing the investigation, a charge sheet under Section 364-A, 302, 201 IPC was submitted to the concerned court against the accused persons. The accused denied the charges and claimed to be tried.

16. The prosecution in support of its case examined the following witnesses:-

(1) PW-1 - Rakesh Kumar Mittal, complainant,

(2) PW-2 - Rajendra Prasad, neighbour of PW-1,

(3) PW-3 - Avaneesh Dixit, SOG Incharge, Agra,

(4) PW-4- Ram Autar Singh, Constable Clerk, P.S. M.S. Gate, Agra,

(5) PW-5 - Dr. S. Lal who carried out post mortem,

(6) PW-6 - Atul Tyagi, SI, P.S. Vivek Vihar, Delhi as on 25.02.2004,

(7) PW-7 - Virendra Kumar, SI, P.S. Dilshad Garden, Delhi,

(8) PW-8 - SI Virendra Singh, P.S. M.S. Gate, Agra, Investigating Officer,

(9) PW-9 - Chhatrapal, witness of last seen,

(10) PW-10 - Gulshan Arora, Nodal Officer, Hutch Company.

17. The accused did not examine themselves. They examined one S.M.P. Singh, retired employee of Private Security Company as DW-1.

18. The accused were confronted with the incriminating circumstances and evidence under Section 313 Cr.P.C. C1 admitted that he knew PW-1 and also disclosed that he is distantly related to him, but alleged that he was falsely implicated. C2 Lokesh Sharma denied having known PW-1 and alleged that he was falsely implicated. Similar stand was taken by C3. The Special Judge (D.A.A.), Agra after hearing the parties and considering the evidence on record convicted and sentenced the accused of offences under Sections 364-A, 302, 201 IPC by judgement dated 26.8.2006.

19. We have heard Sri Rishi Mehrotra and Sri V.P. Pandey for the appellants, Sri Rajarshi Gupta for the complainant and learned A.G.A. Sri A.N. Mulla for the State and perused the record.

20. Learned counsel for the accused appellants attacked the prosecution case and the judgement of the trial court on the following grounds:-

(a) The prosecution case which is based on circumstantial evidence has several missing links in the chain of circumstances. The mukhbir who forms the most important link in the prosecution story was not examined. He, according to the prosecution story, was the last person who saw the accused with the victim. His non-examination is thus fatal to the prosecution case.

(b) The evidence of PW-1 was unreliable. He was an interested witness and he had falsely implicated the accused appellants on account of matrimonial discord between Pramod Agrawal, his Buwa's son and his spouse (Preeti), younger sister of C1.

(c) PW-1 admits that the confessional statements of accused persons were made before the police, consequently, the same is inadmissible being hit by Section 25/26 of the Evidence Act.

(d) PW-1 admitted that he had conversation with the victim on 22.02.2004 and even at that time, he did not inform him that he was with his uncle Piyush Gupta (C1).

(e) PW-9 Chhatrapal was a planted witness. PW-8 admitted that he did not inquire from the employer of PW-9 about his employment. He despite knowing that the victim was seen in company of accused persons on 19.02.2004, did not inform any one about the same for almost a month. Moreover, it was admitted by PW-9 that no TIP was done to ascertain the identity of accused persons.

(f) According to the prosecution case, the accused-appellants had killed the deceased not because of non payment of ransom money, but because of fear of being caught and as such, ingredients of Section 364-A IPC are not made out.

21. Per contra, learned counsel for the complainant and learned A.G.A. contended that:-

(a) The prosecution has been successful in leading cogent and credible evidence to complete the chain of circumstances which conclusively establishes the guilt of the accused persons and also excludes role of any other person in the crime and thus, the judgement of the trial court requires no interference.

(b) The discovery of dead body at the pointing out of the accused persons from an isolated place is admissible under Section 27 of the Indian Evidence Act and is a crucial incriminating circumstance.

(c) The recovery of sim card as well as mobile phone by which ransom calls were made by the accused persons establishes their involvement in the crime.

(d) The demand of ransom stands corroborated by the audio recordings.

(e) The making of call by accused persons by use of sim card and mobile phone recovered from them matches with the CDR and EMEI number. The same has been duly proved by the Nodal Officer of Hutch Company (PW-10).

(f) The evidence of last seen of PW-9 Chhatrapal clinches the case in favour of the prosecution. His testimony is of unimpeachable character. He has identified all the three accused.

(g) At the time of discovery of dead body, the general public in a fit of rage attacked the accused, resulting in injuries to them. It establishes the presence of the accused at the place from where dead body was recovered.

(h) C1 being distantly related to the family of PW-1 and on visiting terms, was aware of the financial status of the complainant. Moreover, he also had grudge against PW-1 on account of differences

between his younger sister and her spouse who is related to PW-1 and whom C1 believed to be the person instrumental in their separation.

(i) The victim was kept alive only till the complainant's family was made to believe that he had been kidnapped so as to extract the ransom amount. After ensuring that, even before ransom money was received, he was done to death.

(j) As PW-9 knew that C1 is related to PW-1 and was on visiting terms, there was no incriminating circumstance in existence on 19.02.2004 so as to alarm him to report about his seeing the victim in the company of the accused-appellants. As soon as he returned from Vaishno Devi and came to know of the murder of the victim, he reported the matter. Consequently, short delay after which he became part of the investigation would be of no significance nor in any manner raises any doubt about the credibility of the witness.

(k) The identity of the mukhbir of the police is generally not disclosed. Moreover, there is other clinching evidence which fully establishes the prosecution case.

22. Some of the facts which are not in dispute are as follows:-

On 22.2.2004, PW-1 lodged a report mentioning that his son Gaurav Mittal was missing since 19.02.2004. On 23.02.2004 the police added Section 364-A IPC and the missing report was registered as Crime Case No.29 of 2004 against unknown persons. On 25.02.2004 the police added Section 302/201 IPC. Piyush Gupta (C1) in his statement under Section 313 Cr.P.C. admitted that he knew PW-1 Rakesh Kumar Mittal and also the fact that he was resident of 9/409 Karigar Ki Bageechi, Noori Darwaja, P.S., M.S. Gate, Agra. He also admitted that he is brother in law (Sala) of younger brother of PW-1. He further stated that his second sister Preeti was married to Pramod Agrawal who is son of aunt (Buwa) of PW-1. He stated that Pramod Agrawal used to assault his sister physically and about which he had made complaint to PW-1 several times. He further stated that PW-1 was instrumental in causing rift between his sister and her husband and cases under Section 498-A IPC and 125 CrPC were pending against Pramod Agrawal. He alleged that he was falsely implicated for the above reason. He thus admitted close relationship between him and PW-1. The above facts supports the version of PW-1 and PW-9 that C1 used to visit Rakesh Kumar Mittal (PW-1) and his family in Agra and thus had knowledge of the status of PW-1.

23. However, no body had witnessed the actual commission of crime and prosecution case is based on circumstantial evidence.

24. The first and most crucial part of the prosecution story in the chain of events is the evidence of last seen of the accused persons with the victim. We, therefore, first proceed to consider the said aspect.

Evidence of last seen

25. PW8 (Investigating Officer), in his cross-examination stated that on 24.02.2004, he was informed by PW-1 that certain persons of the Mohalla were heard saying that on 19.02.2004 victim was seen going towards Rajamandi at about 6:00 p.m. with certain persons. He enquired from one or two persons of the Mohalla but their names have

not been mentioned in the case diary. He could not get any relevant information on that date. On 19.03.2004 he went for making investigation to Mohalla- Karigaron Ki Bageechi where PW1 resides. There he was informed by certain persons that one Chhatrapal who works with Gopal Kachcha Petha Arhat and now with Keshav & Company, Chitra Talkies, saw certain persons taking the victim alongwith them at about 5:30 p.m. towards Raja Mandi crossing. They also informed that he recognizes one of them. The Investigating Officer stated that he searched for Chhatrapal on that day but could not find him. Ultimately, he succeeded in tracing him out and recorded his statement on 21.03.2004 at Keshav & Company, Chitra Talkies (place where he works). He told the Investigating Officer that he had seen the victim alongwith Piyush Gupta (C1) and his two accomplices (C2, C3) on 19.02.2004 at 5:30 p.m.

26. Chhatrapal about whom Investigating Officer has stated as above, was examined as PW-9. In his examination-in-chief, he stated that he knew PW-1 since last 3 - 3½ years. PW-1 is engaged in business of Petha. He stated that he himself works with Keshav & Company, commission agent in front of Chitra Talkies. He clarified that he was working as an employee in the said Company. He also disclosed that raw Petha was supplied by Keshav & Company to PW-1 and he used to visit his shop in connection with realization of money for the supplies made to PW-1. He was introduced to Piyush Gupta (C1) by PW1. He had told him that C1 is brother-in-law of his younger brother Pappu. He further stated that when he used to visit the shop of PW-1, many a time, C1 was found sitting there. On 19.02.2004 at about 5:30 p.m. when he was standing near a paan shop (in front of Venus Studios) eating Gutka, he saw Piyush Gupta taking the victim alongwith him holding his finger. His two accomplices were also there. He further stated that he could identify those two persons if they come before him. He admitted that he did not know them from before. He further stated that at that time, he had no reason to get alarmed and, therefore, after making his purchases, he went away. Thereafter on 21.02.2004 he went to Vaishno Devi for pilgrimage. He returned after 25 days. He came to Arhat (place where he works) on 15-16.03.2004 and there he heard from the employer Holu Keshav that son of PW-1 has been murdered. Then he informed that on 19.02.2004 he saw Piyush Gupta and his two accomplices alongwith the victim near Venus Studio. He again stated that he can identify the two persons who were accompanying C1. He thereafter identified Piyush Gupta (C1), who was present in the court. He further stated that the persons, who were accompanying Piyush Gupta on that day, are standing alongwith him in court. He admitted that he did not know the names of two other persons. He was put to lengthy cross-examination wherein he reiterated his version during examination-in-chief. He denied that he had any family terms with Rakesh Mittal (PW-1).

27. Learned counsel for the appellants vehemently urged that PW-9 was a planted witness. It is submitted that if PW-9 had seen the accused persons taking away the victim on 19.02.2004, he would have disclosed the said fact immediately, or soon after his kidnapping and not after more than one month. Recording of his statement on 21.03.2004 under Section 161 CrPC with delay of one month clearly reveals that he was a planted witness and had made a false deposition.

28. It is clear from the statement of PW-9 that he was knowing C1 since last 3 -

3 ½ years. He also knew that he is brother-in-law of Pappu, younger brother of PW-1. He thus knew about the relationship between the victim and C1.

29. In the above backdrop, the statement of PW-9 that on 19.02.2004 when he saw the victim accompanying C1 and his two accomplices, there was no incriminating circumstance so as to get alarmed, seems very natural and devoid of any suspicion.

30. The credibility of a witness has to be decided on fact of each case. In the instant case, the Investigating Officer has given specific reasons for not examining PW-9 in the initial stages of investigation. PW-9 himself has given valid explanation for not reporting the matter to any one immediately as there was nothing suspicious in seeing the victim along with C1. He reported the matter as soon as he returned from pilgrimage and came to know of the death of the victim.

31. PW-9 had no enmity with accused persons. There is no evidence that he was puppet witness of the police and had deposed in any other criminal case in favour of the prosecution. The defence had also tried to dent his testimony by suggesting that he was employed as a clerk of Achal Kumar Sharma, who was one of the Advocates for the prosecution. He had denied having worked as clerk with Achal Kumar Sharma, though he admitted that he lived for some time in one kothari belonging to him. The trial court has given valid and convincing reasons for not discarding the testimony of PW-9 on the said ground and this Court fully concurs with the same. There is no major contradiction in the testimony of PW-9 except for some minor variation at few places. When considered as a whole, there is a ring of truth in his deposition and we find no reason to discard the same. Accordingly, the submission of learned counsel for the appellants that PW-9 is not reliable witness or was planted by the prosecution does not merit acceptance.

32. Learned counsel for the appellants submitted that the prosecution case hinges upon the information given by the informer to the police. However, he was not examined and this is fatal to the prosecution case.

33. A mukhbir or a police informer is generally a person who gives lead to the police regarding suspicious activities or crime coming to his knowledge. Such persons are generally paid by the police department, when any important lead is given by them. A police informer/mukhbir never comes on the forefront of a crime scene, so that the general public may not come to know of his link with the police. He is able to deliver results till the time his identity is not known to general public. The police usually does not discloses identity of such person in trial, nor examines its mukhbir. The examination of a police mukhbir is never considered an important part of criminal trial as even otherwise, no importance would be attached to his version. He would be labelled as a pocket witness of the police. Moreover, as noted above, where there was other witness available who had witnessed the victim in company of the accused, and his testimony is found to be reliable and trustworthy, the non-examination of the mukhbir does not have any adverse impact on the prosecution case.

34. In **State of Uttar Pradesh Vs. Rajju and others, (1971) 3 SCC 174**,

similar plea regarding non-examination of the police informer was raised, but it was repelled by the Supreme Court disagreeing with the contrary observations made in this behalf by the High Court. The observation which was made by the High Court in the said case was as follows:-

"The informer would have been the best person to corroborate the story as given by Sri Siddiqi. It is correct that it is not necessary for the police to produce the informer, but, as mentioned above, he would have been the best person to corroborate the story of Sri Siddiqi."

35. The Supreme Court disapproved the said view making the following observations:-

"With great respect, the learned Judge has not given any good reason for disagreeing with the judgment of the learned Sessions Judge. The fact that the informer has not been produced does not weaken the prosecution case, especially as PW1 had recorded the information in the general diary."

36. The next crucial circumstance in the chain of events is the arrest of accused and recovery of dead body of the victim on the pointing out of the accused. We now proceed to examine whether the prosecution has been successful in proving these events.

37. PW1, PW3, PW6 and PW8 are eye witnesses of the arrest of C1, C2 and C3 and recovery of dead body of the victim. According to the prosecution case, on receipt of information from mukhbir about the movements of accused, they reached a pulia of a railway crossing, near Kakarduma Court at about 11:50 a.m. on 25.2.2004. The police carried out naka bandi. At about 12:30 noon, they saw a rajdoot motorcycle coming towards them with three persons riding it. The mukhbir pointing out towards them, informed the police that they were same persons and then went away. The police succeeded in catching the accused persons. They disclosed their identity to the police and also confessed having committed the crime. The police searched them (jama talashi) and prepared recovery memos of goods and articles recovered from them (Ext. Ka5, KA6, Ext. 7).

38. They confessed before the police about their crime. On their pointing out, the police succeeded in recovering the dead body of the victim. The statement of all the three witness on the above aspect is consistent and there is no material contradiction or variation so as to raise suspicion or discard the same. We now proceed to examine whether it stands corroborated by other evidence on record or not.

39. We first proceed to examine the evidentiary value of the alleged confessions (Ext. Ka1, Ka2, Ka3).

Evidentiary Value of Confessional Statements-

40. There are three witnesses of the confession memos. They are S.I. Atul Tyagi (PW-6), S.I. Avaneesh Dixit (PW-3) and Rakesh Kumar Mittal (PW-1). In their confessional statements, the accused have admitted having kidnapped the victim with intention to extort a heavy amount of ransom. They stated that after kidnapping the victim, they brought him to Delhi and kept him at 1/5679 Gali 18, Balbeer Nagar, Shahadara, Delhi. They demanded ransom money from the house at Rohtas Nagar and

Loni Road, M.I.G. flat by using mobile no.9899580426. Initially, they demanded Rs.15 lakhs, but ultimately the deal was struck at Rs.5 lakhs. In case they would have left the victim after realising ransom, he would have revealed their names and consequently, they planned to kill him. Accordingly, they took him to open ground between G.T.B. Hospital, Shahadara and Institute of Human Behaviour and Allied Sciences at 10.00 a.m. on 23.02.2004 and murdered him by strangulating him with the use of a shoe lace. Thereafter, they dumped his body under the roots of a tree which had fallen. Even after killing him, they kept demanding ransom money. Now the police has arrested all three of them and also recovered the mobile phone from which ransom calls were made. They also stated that they can help in recovery of the dead body. In the end, they accepted their mistake in committing the offence and prayed for mercy.

41. Learned counsel for the appellants vehemently urged that Ext Ka1, Ka2 and Ka3 are inadmissible in evidence, being hit by Section 25 and 26 of the Evidence Act. In support of his contention, he has placed reliance on **Indra Dalal vs. State of Haryana (2015) 11 SCC 31**, wherein the Supreme Court has held that if confessional statement is made in presence of police officer, it is inadmissible in evidence as per Section 26 of the Evidence Act.

42. The Supreme Court in the case: **State of Uttar Pradesh Vs. Deoman Upadhyay, 1960 Cr.L.J. 1504** interpreted Section 24 to 27 of the Indian Evidence Act, 1872 and also Section 162 of the Criminal Procedure Code and laid down the following propositions: -

"(a) Whether a person in custody or outside, a confession made by him to a police officer of the making of which is procured by inducement, threat or promise, having reference to the charge against him and proceeding from a person in authority, is not provable against him in any proceeding in which he is charged with the commission of an offence.

(b) A confession made by a person whilst he is in custody of a police officer to a person other than a police officer is not provable in a proceeding in which he is charged with the commission of an offence unless it is made in the immediate presence of a Magistrate.

(c) That part of the information given by a person whilst in police custody, whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.

(d) A statement, whether it amounts to a confession or not, made by a person when he is not in custody, to another person, such latter person not being a police officer may be proved if it is otherwise relevant.

(e) A statement made by a person to a Police Officer in the course of an investigation of an offence under Chapter 14 of the Criminal Procedure Code cannot except to the extent permitted by Section 27 of the Indian Evidence Act, be used for any purpose at any enquiry or trial in respect of any offence under investigation at the time when the statement was made in which he is concerned as a person accused of an offence."

43. **State of Rajasthan Vs. Rajaram (2003) 8 SCC 180,** deals in some detail the law in relation to extra judicial confessions. It was observed that the confession made to the police is not admissible in view of Section 24 of the Evidence Act. A confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage, the question whether it is true or false, does not arise. If any doubt arises in relation to voluntariness of the confession, the court may refuse to act upon the confession even if it is admissible in evidence. One important question in regard to which the court has to be satisfied with is whether when the accused made the confession, he was a freeman and his movements were controlled by the police either by themselves or through some other agency implied by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. So where the statement is a result of harassment or continuous interrogation for several hours, such statement must be discarded, being involuntary.

44. In **Balvinder Singh Vs. State of Punjab [1995 Supp. (4) SCC 259**], the Supreme Court stated the principle that:-

"an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance."

45. In **Kavita Vs. State of Tamil Nadu (1998) 6 SCC 108,** the Supreme Court held that:-

"there is no doubt that conviction can be based on extrajudicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made."

46. In a more recent judgement in **Sahadevan and another Vs. State of Tamil Nadu (2012) 6 SCC 403,** the Supreme Court after considering large number of previous judgemens on the point laid down the following principles in relation to admissibility of extra judicial confession:-

"Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra- judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law."

47. Keeping the above principles in mind, we now proceed to find out whether the confessions made by the accused passes the muster laid down in various pronouncements of the Apex Court.

48. It is noteworthy that all the confessions though given by different persons are almost identically worded. Most of the portion is exactly similar. In the instant case, the accused persons were arrested, while they were in process of executing their plan. It seems highly improbable that at the said stage when they were abruptly taken in custody, they immediately confessed to their guilt. The normal human behaviour is of denial. They were not caught alongwith the victim. Two of the witnesses were police personnel. The third one is the complainant. The confession were recorded while the accused were in police custody. The trial court while relying on the confessions of the accused has not considered the said aspects at all. The trial court has altogether ignored the fact that these statements were made to the police while investigation was in progress. Undoubtedly, the confessions were hit by Sections 25 and 26 of the Evidence Act. However, so much of the statement as has led to discovery can be admissible under Section 27. We therefore proceed to examine the said aspect.

Discovery of the body of the victim on the pointing out of C1, C2, C3 -

49. The seizure memo of the dead body is Ext. Ka-10. It is witnessed by Rakesh Kumar Mittal (PW-1), Constable Moti Lal (not examined) and Sub-Inspector Vinay Tyagi (PW-6). It mentions that on the pointing out of accused-appellants, the body was recovered from a pit caused by uprooting of a tree on the backside of G.B.T. Hospital. A black thread was found tied around the neck of the deceased. The photographs of the site were taken. Left eye of the deceased was found damaged. The site plan is Ext. Ka-27. PW8 SI Virendra Singh stated in his testimony that after taking the accused in custody, they went to the place of incident. The site plan was prepared by him on the spot. He identified his signatures on the site plan. It is clear from his cross-examination that the pit from which body was recovered was about 100 meter inside, from the main road. It is an open deserted place. The pit and the uprooted tree have been shown in the site plan. The defence examined a retired officer of Security Service (DW-1) of Institute of Human Behaviour and Allied Sciences, in an effort to prove that security guards remained posted in the adjoining building and it was not possible to commit crime at that place. However, he himself admitted that on that day no security guard was on duty between GBT Hospital and Institute of Human Behaviour and Allied Science. He further stated in his cross-examination that there is a gate on the eastern wall of Institute of Human Behaviour and Allied Sciences but it remains closed and no security guard was ever deputed at that gate. He also admitted that nobody goes to that place. His testimony rather supports the prosecution version that the site of recovery of body was a deserted place where no one used to go.

50. Rakesh Kumar Mittal (PW-1), father of the deceased, stated that all the three accused, interrogated separately,

stated that they were instrumental in killing his son and they have dumped his body in a pit on the backside of G.T.B. Hospital. The accused also stated that they can show the place where the dead body was hidden by them. On their pointing out, the body was recovered from a pit on the back side of GTB Hospital. He stated that the police prepared the fard of the recovery of dead body on the spot. He also stated that the police, after preparing the fard, read over the same to him and it bears his signature. He identified his signatures on the fard and it was marked as Ext. Ka-10.

51. Sub-Inspector Atul Tyagi, another witness of the fard was examined as PW-6. He stated that after arrest of the accused, on their pointing out, they went to open land lying between G.T. B. Hospital and Institute of Human Behaviour and Allied Sciences at 2.00 p.m. The dead body of the victim was found in a pit caused by uprooting of Shahtoot tree by the side of wall of Institute of Human Behaviour and Allied Sciences. The fard of identification of place of recovery of dead body of victim was prepared on the spot by Sub-Inspector Vinay Tyagi. It was witnessed by PW6. He identified his signatures over it and it was marked as Ext. Ka-4. He was put to a lengthy cross-examination. A suggestion was made to him that the police party had prior information of the dead body. He was also given a suggestion that the wards of police officers of Delhi were involved in the incident and that the police did not take any action against them under pressure of higher officers. These suggestions were categorically denied by the witness. He also emphatically denied the suggestion that the body was not discovered on the pointing out of the accused.

52. During cross-examination, the defence tried to dent the testimony by reading over his statement under Section 161 Cr.P.C. in which the factum of dead body lying near the roots of Shahtoot tree, with slippers near it, was not mentioned. The above omission in statement under Section 161 is not of much significance, so as to raise suspicion and reject the otherwise consistent statement relating to recovery of the dead body on the pointing out of the accused persons.

53. There is enough evidence on record to establish presence of C1, C2 and C3 at the place and time from where the dead body of the victim was recovered. The said place was a deserted place. The body was dumped in a pit so that it remains beyond public gaze.

54. Avinash Dixit, SOG Incharge, Agra (PW-3) stated that at about 2 p.m. information about recovery of dead body was given to Police Station, Dilshad Garden. While paper work was in progress, a big crowd gathered at the site after coming to know of the incident. The crowd got infuriated on coming to know of the incident and started beating the accused. While controlling the mob, the police party also received injuries. Atul Tyagi, Investigating Officer (PW-6) in his examination-in-chief also narrated the episode relating to attack on C1, C2 and C3 by the general public. In his cross-examination, he stated that the police party remained at the site of recovery of body for about 2 - 2 ½ hrs. After about 15-20 minutes a crowd assembled there. The police succeeded in driving the crowd away from the site. There was no suggestion to the witness that crowd had not assembled or that it did not get charged with anger and emotions or that the police party present there had a tough time in controlling them. There was no suggestion that the accused

persons were not present at the place and time of recovery of body of the victim, rather a suggestion was made that the public got angry after coming to know that innocent persons were being falsely implicated and it was for the said reason they attacked the police party, resulting in injuries. There is on record injury reports of C1, C2 and C3, all dated 25.02.2004 as well as injury reports of SI Atul Tyagi and Majid Khan, also of the same date and the doctor's note mentions about history of physical assault on C1, C2 and C3 and their having received simple but multiple bruises and injuries on various parts of their body. In case of Sub-Inspector Atul Tyagi and Majid Khan, the medical report mentions about history of physical assault and pain in right hand and other parts of the body. Although the medical reports were not proved by examining the doctor but even if the same are ignored, the ocular evidence on record conclusively proves that C1, C2 and C3 were present at the site of recovery of body; that a mob assembled while the police party was busy in completing legal formalities; that the mob got charged with emotions and made an attack and that police had tough time in controlling the mob.

55. Thus, while the confessional statements Ext. Ka 1, 2, 3 are not admissible as a whole, but the limited part which led to discovery of dead body is admissible under Section 27 of the Evidence Act. The prosecution has been successful in proving that dead body of the victim was discovered on the pointing out of the accused appellants. The discovery was from a deserted place. The body was found dumped in a hole caused by uprooting of a shehtoot tree, apparently in an attempt to destroy evidence of crime and thus escape from the clutches of law.

Medical Evidence- Whether corroborates the prosecution story ?

56. Post mortem report is Ext Ka-15. It has been proved by Dr. S. Lal (PW-5) who conducted the post mortem. According to the post mortem report and statement of PW-5, there were several ante mortem and post mortem injuries. They are as follows:-

Ante-mortem Injury

"1. Reddish abrasion 0.4 x 0.1 cm present over Rt above of nose.

2. Reddish abrasion 0.4 x 0.2 cm present over Lt above of nose.

3. Linear scratch abrasion 1 x 0.1 cm present Lt side of neck, just lateral to midline 5.0 cm above the mid point of clavicle.

4. Linear scratch abrasion 1.5 x 0.1 cm present Lt side neck, 2.0 cm lateral to midline and lower end of wound 4.0 cm above the mid point of clavicle.

5. Linear scratch abrasion 1 x 0.1 present Lt side of neck, 5.5 cm lateral to midline and upper end, i.e. 4.0 cm below the angle of mandible.

6. Linear scratch abrasion 1 x 0.1 cm present Lt side of neck and 5.0 cm above the clavicle, and 3.5 cm lateral to midline.

7. Linear scratch abrasion 1.2 x 0.1 cm present on Rt side of neck, 0.5 cm above the ligature mark and 3.0 cm below the angle of midline.

8. Reddish abrasion associated with bruise in size of 1.5 x 0.5 cm present Lt side of upper lib.

9. Reddish abrasion association with bruise in size of 2.0 x 0.5 cm present Lt side of lower lib.

10. Reddish bruise 0.7 x 0.4 cm present on tip of chin."

Post Mortem Injuries:-

"Neck circumference : 28 cm.

A Black colour nylon shoe lash wrapped double around the neck. After cutting the ligature material opposite to throat, a grooved pale ligature mark present around the neck, horizontally placed, complete, above the thyroid cartilage.

In front it is 0.8 broad and 5.0 c.m. below the chin going horizontally back on Rt side of neck, where it is 0.8 cm broad and 3.0 cm below the angle of mandible on left side it is 0.7 cm broad and 3.0 cm below the angle of mandible and going back of neck, where it is 0.8 cm broad and 6.0 cm below the occipital protuberance. After fine dissection of neck, no subcutaneous haemorrhage and extravasation of blood in soft tissue of neck seen and underlying bone are intact."

57. According to the post mortem report, the time since death was about 2-3 days and cause of death was axphyxia as a result of ante-mortem smothering. Ext Ka-10 which is recovery memo of dead body reveals that left eye of the victim was found damaged. A black thread (lace of shoe) was found tied around his neck. The body was exhumed from a pit caused by uprooting of a tree. The witnesses Rakesh Mittal (PW-1) and SI Vinay Tyagi (PW-6) have duly proved the recovery memos (Ext. Ka-10). The statement of PW-1, PW-3, PW-5 and PW-6 fully supports the prosecution case that the cause of death was a result of ante-mortem smothering and the time since death was about 2-3 days from the date and time when post mortem was conducted. The post mortem was conducted on 26.02.2004 between 11:10 a.m. to 12:20 p.m. It would mean that the victim was done to death sometime on 24.02.2004. It fully supports the prosecution case that when they went to the spot on the pointing of the accused persons on 25.02.2004 in the after noon, they found the dead body dumped in a pit caused by the uprooting of a tree.

58. Thus, the medical evidence fully corroborates the prosecution case that the victim was done to death a day prior to the arrest of the accused-appellants.

59. The next incriminating circumstance is the recovery of Sim Card and (Nokia) mobile phone from the accused, which were used in making ransom calls. We thus proceed to delve on the said aspect.

Recovery of Sim card and Mobile Phone:-

60. According to the recovery memo Ext Ka 5, a SIM Card of Hutch Company (bearing Number 20012453451) of mobile No.9899580426 was recovered from the right pocket of pant of C1 at the time of physical checking on 25.02.2004. The recovery memo is witnessed by SI Atul Tyagi (PW-6) SI, Avaneesh Dixit (PW-3) and Rakesh Mittal (PW-1). PW-10 is Gulshan Arora who was Nodal Officer in Hutch Company. He produced the CDR of Mobile No.9899580426 before the court. He stated that the CDR is automatically generated by the computer and is preserved and maintained in normal and ordinary

course of business. He further stated that it bears the seal of the Company and his signatures. It was marked as Ext Ka 29. In his cross-examination, he stated that a copy of the CDR was also provided to the Investigating Officer in pursuance of request made by SSP by his letter dated 2.04.2004. He also stated that every mobile set has a unique IMEI number. The first fourteen digits of IMEI number always match. He further stated, after perusing Ext. Ka 29, that mobile No.9899580426 was used in three different mobile sets.

61. Ext Ka-29 (CDR) reveals that on 22.02.2004 call was made from mobile No. 9899580426 to phone no.05622363149 (land line number of PW-1) at 22-56-49 hrs and it lasted for 279 seconds and another on 23.02.2004 for 457 seconds. It also shows that the mobile set with which these calls were made was having IMEI No.3514796009891419. It further reveals that three more calls were made from the same mobile number to the land line number of PW-1 on 24.02.2004 with some other mobile set having IMEI No.4491255534167046.

62. Ext Ka-6 is recovery memo of mobile phone from Manoj Sharma on 25.02.2004 at the time of his arrest. It is a Nokia mobile set model 3319 of blue and grey colour with IMEI No.351479600989140. The first fourteen digits i.e. 35147960098914 matches with the IMEI of mobile No. 9899580426 as got recorded in the CDR.

63. As noted above, PW-10 in his statement clarified that the first fourteen digits of IMEI number always matches. He was not cross-examined by the prosecution on the said aspect.

64. In **State (NCT of Delhi) Vs. Navjot Sandhu Alias Afsan Guru, (2005) 11 SCC 600,** the same aspect was considered by the Supreme Court. In that case, the seized mobile set was having first fourteen digits of IMEI numbers of the mobile phone matching with the call records. The subsequent numbers did not match. The Supreme Court while dealing with the said discrepancy, relied on statement of Manager of the Mobile Company who deposed that out of fifteen digits, one digit is a spare digit and according to GSM specifications, it is transmitted as "0". The relevant passage where the said aspect was considered is reproduced below:-

"195. One more point has to be clarified. In the seizure memo (Ext. 61/4), the IMEI number of Nokia phone found in the truck was noted as 52432. That means the last digit '2' varies from the call records wherein it was noted as 52430. Thus, there is a seeming discrepancy as far as the last digit is concerned. This discrepancy stands explained by the evidence of PW 78 a computer Engineer working as Manager, Siemens. He stated, while giving various details of the 15 digits, that the last one digit is a spare digit and the last digit, according to GSM specification should be transmitted by the mobile phone as '0'. The witness was not cross-examined."

65. The recovery memo of SIM Card and Nokia mobile were duly approved by Rakesh Mittal (PW-1), SI Atul Tyagi (PW-6) and SI Avnish Dixit (PW-3). The above evidence supports the prosecution story that SIM Card recovered from Piyush Gupta (C1) was used in making calls from Nokia phone recovered from Manoj Sharma (C3) to the land line number of PW-1. PW-1 in his statement categorically stated that these calls were received for demanding ransom money from him. As discussed in latter part

of the judgement, the audio recording corroborate the statement of PW-1 that the kidnappers demanded ransom money from him for releasing the victim.

66. Although the police has failed to recover other mobile set with IMEI No.4491255534167046 from which also calls were received on 24.02.2004, but the same is not fatal to the prosecution case as the police had succeeded in recovering at least one mobile phone and that too, from the custody of one of the co-accused by which ransom calls were made on 22.02.2004 and 23.02.2004.

67. Learned counsel for the appellants submitted that the recoveries were planted and the recovery memos were prepared sitting at the police station. There was no public witnesses to the alleged recovery. The said aspect has been specifically dealt with by the trial court and while placing reliance on several judgments of the Supreme Court and different High Courts, it has rightly been observed that merely because the recoveries were not witnessed by member of general public, its authenticity cannot be doubted.

68. In **State of U.P. Vs. Anil Singh, 1989 SCC (Cri) 48,** the Supreme Court considered the fact that generally the public at large is reluctant to be a witness in criminal proceedings done by the police to obviate interrogation and appearance before the court. It was observed that keeping in mind the above factual reality, it is not necessary to have public witness. A similar contention was repelled in **Ram Swaroop Vs. State (Govt. of N.C.T. of Delhi) (2013) 14 SCC 235**, as follows:-

"10. Keeping in view the aforesaid authorities, it can safely be stated that in the case at hand there is no reason to hold that non-examination of the independent witnesses affect the prosecution case and, hence, we unhesitatingly repel the submission advanced by the learned counsel for the appellant."

69. PW-6 in his statement disclosed that the police party requested members of the public to be part of the raiding party but no one was ready for that. In such circumstances, the police officers themselves have to witness of arrest and recoveries. It is noteworthy that the recoveries made from the accused-appellants were huge. We have already held that prosecution has been successful in proving that on pointing out of the accused-appellants, the dead body of the victim was recovered from a pit at an isolated place. The prosecution has also successfully proved the presence of the accused-appellants at the site of recovery of dead body. The recovery of Sim Card and mobile phone from C1 and C3, used in making ransom calls, corroborates the prosecution case that the crime was committed by them. The accused-appellants were nabbed by the police while all the three were going towards Karkardooma court on motorcycle No.DL-55 M- 6977 (Ext.Ka-7 seizure memo).

70. In the above facts and circumstances, the authenticity of the recoveries made from the accused cannot be doubted, merely for the reason that there was no public witness.

71. Thus, the prosecution has successfully proved that Sim Card of mobile No.9899580426 recovered from C1 and Nokia mobile having IMEI No.3514796009891419 recovered from C3

were used in making ransom calls to land line number (0562) 2363149 of PW-1.

72. One more submission of learned counsel for the appellants was that the prosecution had not produced Seimens and Motorola mobile sets in court and it demolishes the prosecution case. It was also submitted that statement of prosecution witnesses regarding these sets is at variance and contradictory. We have held above that Nokia mobile set recovered from the accused-appellants was used in making ransom calls. The IMEI numbers in the CDR were not matching with the other mobiles seized from the accused. Therefore, non-production of other mobile sets was in no manner fatal to the prosecution case. Likewise, any minor variation in the statement in relation to these mobile phones does not create any doubt in the prosecution story.

Evidentiary Value of Tape Recording and Transcript: -

73. Seizure memo of audio cassette (Ext. Ka-11) mentions that audio cassette (Mat. Ext. III) was handed over by PW-1 to the police in presence of witnesses Rajendra Prasad (PW-2) and Vijay Gopal @ Kalloo (not examined). PW2 stated that the seizure memo was prepared in his presence. He identified his signatures on the same. The trial court has recorded finding that the audio cassette was heard by it on 5.8.2006 and by his predecessor on 18.5.2006. The transcript matches with the conversation recorded, except for some minor variations. The trial court also held that it contained voice of PW1, his wife and the abductors. The relevant extract from the judgement of trial court, on above aspect, is as follows:-

"-----मैंने स्वयं भी दिनांक 5–8–06 को उक्त आडियो कैसैट न्यायालय में सुना। लेखबद्ध विवरण व वार्तालाप में कुछ मामूली अन्तर है लेकिन वह महत्वपूर्ण प्रकृति के नहीं है, केवल सुनकर लिखने में कुछ शब्दों का अन्तर है। मूल भाव जो कैसेट में थे वे लेखबद्ध विवरण में भी है। टेलीफोन वार्ता में अभियोगी राकेश कुमार मित्तल, उसकी पत्नी, अपहृत गौरव व एक अभियुक्त (मनोज शर्मा) की बातचीत रिकार्ड है जिसमें फिरौती की मांग के सम्बन्ध में है और फिरौती की धनराशि पर मोल भाव सम्बन्धी बातचीत है। अभियुक्त पॉच लाख रूपये की मॉग कर रहा है और अभियोगी कम देने की मूल रूप से बात कर रहे हैं। अभियोगी व उसकी पत्नी अपने पुत्र से बात कराने के लिये गिड़गिड़ा रहे हैं। दिनांक 22–2–04 को रात 10–56 बजे की वार्तालाप में अभियुक्त ने गौरव की राकेश मित्तल से बात भी करायी है, लेकिन गौरव केवल "आप कौन" और "हलो पापा" शब्द ही बोल पाया और अभियुक्त ने इससे अधिक बात नहीं कराने दी। अभियुक्त की ओर से यह तर्क दिया गया है कि यदि गौरव की उसके पिता से बातचीत हुई थी तो वह पीयूष का नाम बता सकता था लेकिन ओडियो कैसेट व वार्तालाप में गौरव को केवल दो शब्द बोलने का अवसर दिया गया था, ऐसे में पीयूष का नाम बताने का अवसर नहीं था।"

74. Learned counsel for the appellants contended that the voice in the audio cassette was not got matched and therefore the trial court erred in relying on the same.

75. In the case of **Yusufalli Esmail Nagree Vs. State of Maharashtra, (1967) 3 SCR 720**, the appellant was convicted under Section 165-A of the Indian Penal Code. Here, the Hon'ble Supreme Court admitted tape recordings as evidence. It was held that the time, place and accuracy of the recording has to be proved by a competent witness and the voice of the speaker must be clearly identifiable. The court also noted that since magnetic tape recordings can easily be subjected to tampering, great caution needs to be

exercised while admitting them as evidence.

76. The court also held that to establish reliability in the recordings it has to be ensured that the said recording has been preserved and prepared safely by an independent authority, the police and not by any party to the case.

77. In the case of **R.M. Malkani Vs. State of Maharashtra, (1973)1 SCC 471**, the Supreme Court laid down broad guidelines relating to admissibility of a recorded conversation as follows:-

"Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice'; and. thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act."

78. **Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, (1976) 2 SCC 571,** is a case where the appellant, an election candidate, was accused of corruption charges and to maliciously influence the people to vote for him, otherwise there will be "divine displeasure or spiritual censor" if they vote for the opponent. In the above context, the court while examining the issue of admissibility of tape recorded speeches, held that tape recordings of speeches will hold the same value as a "documents" under section 3 of the Indian Evidence Act, 1972 and stands on same footing as that of "photographs". The Supreme Court also laid down the conditions for making the tape recordings admissible. These are:

"1. Voice of the speaker must be duly identified by the one who recorded and who knows it.

2. The accuracy of the recording has to be substantiated by the maker of the record and satisfactory evidence has to be there, direct or circumstantial to prove that the record cannot be tempered with.

3. The subject matter of the recordings has to pass the test of relevancy as provided in the Indian Evidence Act, 1972."

79. In the instant case, the prosecution did not make any effort to identify the voice in the tape recorded conversation. In the impugned judgment, the trial court relied on the confessions of the accused Ext. Ka-1, 2 and 3 respectively in holding that the accused therein admitted having demanded ransom money over telephone. They also stated that the ransom money was demanded by use of mobile phone by accused Manoj Sharma. PW-1 Rakesh Kumar Mittal no doubt was in a position to recognize his own voice and that of his wife and son (victim), however, Manoj Sharma was not known to him in the past and, therefore, he did not recognize his voice. The only evidence relating to identification of voice of Manoj Sharma in the audio cassette is his alleged self incriminating confession, which has already been held to be inadmissible in evidence. However, the audio recording definitely proves that PW-1 and his wife were begging for release of their son and

found settling the ransom. It corroborates the prosecution story that ransom calls were made by the abductors and PW-1 and his wife had to bargain with them. The audio recording is undoubtedly admissible to the limited extent that there was demand of ransom money from PW-1 and his wife.

80. Learned counsel for the appellants submitted that when victim had the occasion to converse with PW-1 and his mother on phone, and had he been in custody of C1, whom he recognised, he would have immediately revealed his name. The argument is specious and is to be rejected. The trial court rightly noted that the abductors permitted the victim to say few words only to ensure that his family comes to know of his abduction and that he was alive so as to agree to the demand of ransom. The abductors ensured that victim did not talk beyond few words so that he does not get opportunity to disclose the name of the abductors.

81. One other contention of learned counsel for the appellants was that Test Identification Parade (TIP) was not done and therefore, the prosecution has failed to establish the identity of the accused-appellants.

82. In **Raju Manjhi Vs. State of Bihar (2019) 12 SCC 784**, the Supreme Court held that a Test Identification Parade is a step in aid of investigation. There is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. Weight to be attached to such identification would be a matter for courts of fact. In appropriate cases, the court may accept the evidence of identification even without insisting on corroboration. In that case, the accused were charged of offence of dacoity. The role of appellant was that of guarding the house from outside with another accused while dacoity was being committed inside the house. The accused-appellant confessed that he alongwith another accused were guarding the house from outside while the other was committing the theft. At the behest of the appellant and other accused, recovery of several incriminating articles was made. The confessional statement of the appellant was held to be admissible in so far as it satisfied the test of Section 27 of the Evidence Act. In the said backdrop, it was held that test identification parade was not essential to prove the prosecution case. The relevant observations and conclusions are as follows:-

"14. In the case on hand, before looking at the confessional statement made by the accused-appellant in the light of Section 27 of the Evidence Act, may be taken into fold for limited purposes. From the aforesaid statement of the appellant, it is clear that he had explained the way in which the accused committed the crime and shared the spoils. He disclosed the fact that Munna Manjhi was the Chief/Head of the team of assailants and the crime was executed as per the plan made by him. It is also came into light by his confession that the accused broke the doors of the house of informant with the aid of heavy stones and assaulted the inmates with pieces of wood (sticks). He categorically stated that he and Rampati Manjhi were guarding at the outside while other accused were committing the theft. The recoveries of used polythene pouches of wine, money, clothes, chains and bangle were all made at the

disclosure by the accused which corroborates his confessional statement and proves his guilt. Therefore, the confessional statement of the appellant stands and satisfies the test of Section 27 of the Evidence Act.

15. As regards the claim of appellant that non- identification of the accused by the witness would not substantiate the prosecution case, admittedly no prosecution witness has identified the accused--appellant which does not mean that the prosecution case against the accused is on false footing. As a general rule, identification tests do not constitute substantive evidence. The purpose of identification test is only to help the investigating agency as to whether the investigation into the offence is proceeding in a right direction or not. In our view, non-dentification of the appellant by any prosecution witness would not vitiate the prosecution case. It is evident from the confessional statement of the accused that at the time of occurrence he and another accused Rampati Manjhi were guarding outside the informant's house while other accused were committing dacoity inside.We do not think that there is any justification to the argument that as none of the prosecution witnesses could be able to identify the appellant, he cannot be termed as accused. In our view, such non-identification would not be fatal to the prosecution case in the given facts and circumstances.

16. The identification parade belongs to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration [See : Kanta Prashad v. Delhi Administration, 1958 CriLJ 698 and Vaikuntam Chandrappa and Ors. v. State of Andhra Pradesh, AIR 1960 SC 1340]."

83. In the instant case, PW-9 who had seen the victim in company of accused-appellants on 19.02.2004 knew C1 from before. He stated before the court that if two other accused come before him, he is in a position to identify them. Thereafter he identified them in the court. The statement of PW-9 was recorded in court on 13.12.2005 i.e. shorty after the incident. The dead body of the victim was recovered on the pointing out of C1, C2 and C3. When they were arrested by the police, they were riding the same motorcycle. As already discussed above, all the three accused received injuries as the mob attacked them while inquest and other proceedings were in progress at the place where the body was dumped by them. All the above, evidence leaves no manner of doubt that all three of them were involved in the abduction and killing of the victim, as such the contention that the prosecution case stands vitiated, as TIP was not held, is wholly untenable.

84. The theory of false implication also does not hold any ground. In case, PW-1 had to falsely implicate the accused-appellants, he could have lodged a named F.I.R. against them. But, as noted above, he initially lodged a missing report.

Thereafter, when evidence of ransom calls surfaced, the police registered the missing report as F.I.R. u/s 364-A IPC against unknown persons. In case there was any ill motive to falsely implicate the accused, PW-1 could have pointed his finger of suspicion towards them and the police would have named them in the F.I.R. But it was not done. The accused-appellants were named when during investigation police succeeded in apprehending them with incriminating evidence.

85. The recovery of Nokia mobile phone from the pocket of C3 and Sim from the pocket of C1, their use in making ransom calls on the land line of PW-1, discovery of body of the victim on the pointing out of C1, C2 and C3 unerringly completes the chain of events leading to the guilt of the accused-appellants. The prosecution has been successful in proving the role of C1, C2 and C3 in commission of crime beyond all reasonable doubts and in excluding all other possible hypothesis.

86. Thus, there is overwhelming evidence on record to prove that:-

(1) the accused appellants had kidnapped the victim and kept him in detention after such kidnapping.

(2) demanded ransom.

(3) intentionally caused bodily injury knowing that the injuries were sufficient in ordinarycourse of nature to cause death, and

(4) knowing that they had committed grave offence, dumped the body of the victim at an isolated place in a hole caused by uprooting of tree, with the intention of destroying evidence and screening themselves from legal consequences.

87. The aforesaid acts and omissions on part of the accused appellants clearly brings them within the clutches of Section 302 and 201 IPC. In relation to offence under Section 364 IPC, for which also they have been convicted by the trial court, it is contended on behalf of the appellants that since according to prosecution story, the victim was killed not because of non-payment of ransom, but because of fear of being caught and as such, offence under Section 364-A IPC is not made out.

88. Elaborating their submissions, learned counsel for the appellants submitted that Section 364-A IPC has three distinct components, namely: -

"(i) the person concerned kidnaps or abducts or keeps the victim in detention after kidnapping or abduction;

(ii) threatens to cause death or hurt or causes apprehension of death or hurt or actually hurts or causes death; and

(iii) the kidnapping, abduction or detention and the threats of death or hurt, apprehension for such death or hurt or actual death or hurt is caused to coerce the person concerned or someone else to do something or to forbear from doing something or to pay ransom....."

89. It is submitted that in the instant case, although first ingredient may be present, but in the absence of evidence that the victim was killed for extracting ransom or for not paying the ransom, offence under Section 364-A IPC is not made out. In support of the above contention, reliance

has been placed on judgment of Supreme Court in Criminal Appeal No. 533 of 2021 (Shaik Ahmad vs. State of Telangana), decided on 28.6.2021. In para 12 of the said judgment, the Supreme Court has mentioned the ingredients of Section 364-A as follows: -

"(i) "Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction"

(ii) "and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt,

(iii) or causes hurt or death to such person in order to compel the Government or any foreign State or international intergovernmental organisation or any other person to do or abstain from doing any act or to pay a ransom"

(iv) "shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

90. In para 21 of the said judgment, the Supreme Court has given the following interpretation: -

"21. Thus, applying the above principle of interpretation on condition Nos. 1 & 2 of Section 364-A which is added with conjunction "and", we are of the view that condition No.2 has also to be fulfilled before ingredients of Section 364-A are found to be established. Section 364-A also indicates that in case the condition "and threatens to cause death or hurt to such person" is not proved, there are other classes which begins with word "or", those conditions, if proved, the offence will be established. The second condition, thus, as noted above is divided in two parts- (a) and threatens to cause death or hurt to such person or (b) by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt."

In para 33 and 34, the Supreme Court has concluded as follows ; -

"33. After noticing the statutory provision of Section 364-A and the law laid down by this Court in the above noted cases, we conclude that the essential ingredients to convict an accused under Section 364-A are required to be proved by 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.

34. 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."

91. In the instant case, there is no dispute that the first condition is fully

proved. Now, according to the law laid down by Supreme Court, either of the second or third condition has to be proved to sustain conviction under Section 364-A IPC. In respect of Condition No. 2, there is no evidence. It is thus to be seen whether Condition No. 3 is attracted to complete the offence under Section 364-A IPC.

92. It is not in dispute that in the instant case, the victim was put to death even before ransom was realised. The prosecution case that the victim was put to death as the accused appellants were afraid of getting caught, developed during course of investigation as the story unfolded and the accused appellants were alleged to have confessed to the above effect.

93. We have already held that the confessional statement of accused appellants is not admissible, being hit by Section 25 and 26 of the Evidence Act, except the portion which led to recovery of the dead body. Thus, in effect, there is no evidence on record to establish that the victim was killed by the accused appellants to save themselves from being identified and punished.

94. Now it has to be seen whether the kidnapping followed by murder was with intent to compel the family of the victim to pay a ransom, which if proved, would establish the third ingredient.

95. It is noteworthy that the kidnapping was done at Agra which comes within dacoity affected areas. It is for the said reason that the accused appellants were tried by the Special Court (D.A.A.), Agra, constituted under Section 5 of the Uttar Pradesh Dacoity Affected Areas Act, 1983. Section 26 of the Act confers exclusive jurisdiction on the special court in respect of any action taken or to be taken in pursuance of any power conferred by or under the said Act. Section 27 of the said Act raises a presumption in trial of scheduled offences under the Act. It provides that where it is proved that the accused has kidnapped or abducted any person from dacoity affected area, it shall be presumed, unless the contrary is proved, that the accused has kidnapped or abducted such person for ransom.

96. Section 27 is quoted in verbatim for ready reference:-

"27. Presumption in respect of kidnapping and abduction. *- In any trial of scheduled offence under this Act where it is proved that -*

(i) the accused has kidnapped or abducted any person from dacoity affected area, it shall be presumed, unless the contrary is proved, that the accused has kidnapped or abducted such person for ransom,

(ii) the accused has wrongfully concealed or confined any person kidnapped or abducted from dacoity affected area, it shall be presumed, unless the contrary is proved, that the accused has concealed or confined such person knowing that such person has been so kidnapped or abducted."

97. The offence of kidnapping or abducting any person for ransom is specifically covered under Item No.(ii) of the Schedule. Therefore, a presumption arises under Section 27 that the kidnapping was done with the motive to realise ransom. The accused-appellants have not led any evidence to the contrary to discharge their burden of proof.

Consequently, in the facts of the instant case and also in view of Section 27 of the U.P. Dacoity Affected Areas Act, 1983, a presumption can safely be drawn to the effect that kidnapping was done for ransom and thus, we are of considered opinion that condition no.3 also stands fulfilled.

98. Accordingly, we uphold the conviction of the appellants under Section 302, 364-A and 201 IPC as recorded by the trial court. The sentence and fine in respect of offences under Section 302, 364-A and 201 IPC, as awarded by the trial court, are also maintained, in absence of any mitigating or extenuating circumstances being placed before us. In almost similar facts and circumstance, the Supreme Court upheld the conviction and life sentence of accused in **Sonu @ Amar Vs. State of Haryana, 2017 (8) SCC 570 and Shyam Babu and others Vs. State of Haryana, 2008 (15) SCC 418.**

99. The punishment of life sentence death for offences under Section 364-A and 302 IPC was held to be just, fair and reasonable by the Supreme Court in **Vikram Singh @ Vicky Vs. Union of India, (2015) 9 SCC 502.**

100. We do not find the instant case to be the rarest of rare cases so as to convert sentence of life imprisonment to capital punishment.

101. In the result, all the appeals, revision and Government Appeal stand dismissed. The judgment be communicated to the court concerned forthwith.

102. Let a copy of this order be placed on record of each case.

(2022) 8 ILRA 892

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 5950 of 2010

Ram Gati @ Prem Chandra
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Sanjay Kumar Srivastava, Sri Amit Kumar Singh, Sri Lav Srivastava, Sri R.P. Srivastava, Sri Vinod Kumar Sahu

Counsel for the Opposite Party:
Govt. Advocate, Sri P.K. Singh, Sri Tripathi B.G. Bhai

(A) Criminal Law - Indian Penal Code, 1860 - Sections 120-B , 302 & 452 - The Code of Criminal Procedure, 1973 - Sections 107,145 & 313 - Arms Act, 1959 - Section 25/27 - Criminal conspiracy - appeal against conviction - House - trespass after preparation for hurt ,assault or wrongful restraint - interested witness testimony not necessarily unreliable evidence - evidence of interested witness 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.(Para - 36)

Young girl (PW-2) whose sister was shot dead in front of her eyes - PW-2 & PW-10 (younger sister and mother)- category of interested witnesses - present at the spot - room of their house - natural - date and time duly established by PW-1 as well as documentary evidence - source of light i.e. presence of

lanterns - disclosed by eye-witnesses - ocular account corroborated by - medical evidence and collected plain/blood stained earth from inside the room. **(Para - 40,41,43)**

HELD:-Prosecution succeeded in establishing that deceased was killed inside the room of the house of the informant(father of deceased). Prosecution successfully proved the guilt of the accused-appellant beyond the pale of doubt in respect of the offences punishable under Sections 452 and 302 I.P.C. .**(Para - 44)**

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. Hari Obula Reddy & ors. Vs St. of A.P., (1981) 3 SCC 675)

2. Shahaja @ Shahajan Ismail Mohd. Shaikh Vs St. of Maha., Criminal Appeal No.739 of 2017

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. This appeal is against the judgment and order dated 04.08.2010, passed by the Sessions Judge, Basti in Sessions Trial No.137 of 2007, arising out of Case Crime No.178 of 2007 (State Vs. Ram Gati alias Prem Chandra and others), P.S. Khalilabad, district Sant Kabir Nagar, whereby the appellant has been convicted under Sections 302 and 452 I.P.C. and sentenced as follows: imprisonment for life and fine of Rs.5,000/-, coupled with a default sentence of six months, under Section 302 I.P.C.; and four years R.I. and fine of Rs.3,000/-, coupled with default sentence of three months, under Section 452 I.P.C. Both sentences to run concurrently.

2. Four persons, namely, Ram Gati @ Prem Chandra (the appellant), Vijay Kumar, Daya Shankar and Krishna Chandra were put to trial. The appellant was charged for offences punishable under Sections 302 and 452 I.P.C. and Section 25/27 Arms Act whereas, co-accused Vijay Kumar and Krishna Chandra were charged for offences punishable under Sections 452 and 302 read with Section 34 I.P.C. The fourth accused, namely, Daya Shankar, was charged for offence punishable under Section 120-B I.P.C. The appellant though was acquitted of the charge of offence punishable under Section 25/27 Arms Act but has been convicted for other offences as noticed above; whereas, co-accused, Vijay Kumar, Krishna Chandra and Daya Shanker have been acquitted. Hence, this appeal is confined to the accused-appellant (Ram Gati alias Prem Chandra) in respect of his conviction for offences punishable under Sections 452 and 302 I.P.C.

INTRODUCTORY FACTS

3. The prosecution case is that there was an old standing enmity between informant-Ram Shabad (PW-1) and the appellant on account of land dispute; that on account of this enmity, the appellant had always been on the lookout to cause harm to the informant and his family; that on 24.01.2007, while the informant was at his Baithak, his wife-Kishori (PW-10) and his elder daughter Nirmla (the deceased) inside the house and his younger daughter-Pramila (PW-2) outside, near the tap/tube-well, filling water, at about 7.15 pm, Ram Gati (the appellant), co-accused Vijay Kumar, Daya Shanker and Krishna Chandra came at the door of informant's house with country made pistol, Lathi/Danda and asked informant's younger daughter, namely, Pramila (PW-2), as to where her father and brothers were, when PW-2 refused to divulge any information about them, the accused persons entered the house; at this stage, informant's elder

daughter Nirmla (the deceased) objected and warned the accused not to enter the house; on account of her intervention, Daya Shankar exhorted the accused, upon which, Ram Gati (the appellant) fired a shot at Nirmla, as a result, Nirmla died on the spot; on hearing the noise of gunshot, the informant, his wife (PW-10) and other villagers, namely, Surendra, Jhinku (PW-3), Babu Lal etc. arrived with Lathi/Danda and torch and challenged the accused, as a result, all the four accused escaped. By making all these allegations, written report (Exb.Ka-1) was lodged by PW-1 at police station Kotwali Khalilabad, district Sant Kabir Nagar where it was registered as Case Crime No.178 of 2007 at 20.35 hrs on 24.01.2007 of which chik FIR (Exb.Ka-5) and GD entry (vide report no.52) (Exb.Ka-6) was made by PW-5.

4. After registration of the FIR, Chhedi Prasad Yadav, SSI (PW-7) proceeded to the spot with his team of officers and carried out the inquest proceedings. On completion of inquest proceedings by 22.50 hrs, the inquest report (Exb.Ka-9) was prepared by S.I. Paras Nath Mishra whose signatures were identified and proved by PW-7.

5. During investigation, Chhedi Prasad Yadav (PW-7) lifted plain earth/blood stained earth from the spot and prepared its seizure memo (Exb.Ka-10). PW-7 also prepared challan nash, photo nash and other documents in connection with autopsy, which were exhibited as Exb.Ka-11 and Ka-14 and, after sealing the body of the deceased, sent the same for autopsy. On 25.01.2007, Station House Officer of the police station concerned, namely, Vijay Shankar (PW-8), took over the investigation of the case.

6. On 25.01.2007, Vijay Shankar (PW-8) visited the spot and prepared site plan (Exb.Ka-15). He recorded the statement of informant-Ram Shabad and eye witnesses, namely, Kishori Devi (PW-10), Pramila (PW-2), Jhinku (PW-3), Babu Lal, Surendra including witnesses of inquest. In between, Jhinku (PW-3) produced a torch before the Investigating Officer in the light of which he witnessed the incident. The same was found in a running condition and a custody memo of that torch (Exb.Ka-3) was prepared with a direction to produce it in court as and when required. Similarly, custody memos of the torch used by witnesses Surendra and Babu Lal were prepared and were exhibited during the course of trial as Exb.Ka-2 and Ka-4. Likewise, the custody memo of lantern and torch used by the informant and his family to witness the incident was prepared and proved by the I.O. (PW-8), which was exhibited as Exb.Ka-26.

7. On 25.01.2007, at about 3.30 pm, the autopsy of the body was conducted by Dr. Pankaj Khare (PW-6). The autopsy report (Exb.Ka-8) records :

(i) Female body, aged about 20 years, average built, mouth and eye closed, rigor mortis present in all the four limbs. Blood clot present over face and head;

(ii) Ante-Mortem injuries :

(a) **Wound of Entry** - Firearm wound of entry 2 cm x 1.5 cm x bone deep on left side of parital area of head just above the left eyebrow. Margins of wound irregular & inverted about one cm diameter of bone chip absent; Direction-oblique. Tattooing and charring present in an area of 10 cm x 9

cm around the wound; Singing of eyebrows & scalp present;

(b) **Exit wound** - of firearm present 3 cm x 2.5 cm on right side of back of head in occipital area 6 cm above and behind right ear. Margins of wound are irregular and everted. On probing, the probe passed from wound of entry to exit. Left to right oblique. Underneath, the left side frontal and parital and right back occipital and parital bone fractured. Wide spread laceration and haematoma present in brain substance and brain matter popping out from wound of exit.

(iii) **Internal Examination** -

semi-digested food about 150 grm present in stomach; pasty material and gases in small intestine; whereas, faecal material and gases found in large intestine.

(iv) Opinion :

Death due to shock and haemorrhage as a result of ante-mortem firearm injury.

(v) **Duration :**

About one day before.

8. During the course of investigation, police custody remand of the appellant was obtained. On 24.02.2007, a country made pistol .315 bore, one live cartridge and one empty cartridge of .315 bore were recovered from the house of the appellant on his pointing in respect of which recovery memo (Exb.Ka-16) was prepared by PW-8. After conclusion of the investigation, charge-sheet (Exb.Ka-13) was submitted against the appellant under Sections 452 and 302 IPC and 25 Arms Act whereas the other accused, except Daya Shankar, were charged for offences punishable under Sections 452 and 302 IPC. Daya Shankar was charged for offence punishable under Section 120-B IPC.

9. After taking cognizance on the charge-sheet, the case was committed to the court of session. On commital of the case, the appellant Ram Gati was charged for offence punishable under Sections 302 and 452 IPC and Section 25/27 Arms Act; whereas, accused Vijay Kumar and Krishna Chandra were charged for offence punishable under Section 302 read with Section 34 and 452 IPC; and accused Daya Shankar was charged for offence of conspiracy for murder punishable under Section 120-B IPC. All the accused pleaded not guilty and claimed to be tried.

PROSECUTION EVIDENCE

10. During the course of trial, the prosecution examined eleven witnesses. Their testimony, in brief, is as follows :

11. **PW-1 - Ram Shabad.** He is the father of the deceased. He proved the lodging of the FIR, which was marked as Exb.Ka-1. He stated that at the time of the incident, he was at the Baithak, outside the house. He witnessed the incident as narrated in the FIR through the Jangla (window) of the room in which the deceased was at the time the shot was fired at her and could recognize all the accused persons.

During cross-examination, he stated that he is employed in a workshop at Gorakhpur where he works in a paint shop.

His duty hours are from 7 am to quarter to 12 noon and, thereafter, from 12.30 pm to quarter to 5 pm. He stated that in connection with his job, on a daily basis, he goes to and comes back from Gorakhpur. He stated that he has two sons and two daughters, the daughter who has been murdered was the eldest, younger to her is Jeet Narayan. The third is Pramila (PW-2) and the youngest is Surya Narayan. He stated that Jeet Narayan is aged 19 years and is un-married, whereas, Surya Narayan is aged about 10 years. Nirmla, the deceased, was aged 20 years at the time of the incident; whereas, Pramila is aged 14-15 years. He stated that Nirmla was a student of B.A. PW-1 admitted that prior to the incident, there was a case registered against him in respect of assaulting Salwal and others of which there was a cross case as well. He stated that on 01.01.2007, the appellant, Vijay Kumar, Daya Shankar and Salwal had assaulted PW-1's relative and had damaged his motorcycle in respect of which a case was registered against them. Prior to that incident, on report of Salwal, proceeding under Section 107 CrPC was instituted against Shiv Narayan, Jeet Narayan and others wherein surety bonds were furnished by them. He, however, admitted that he had received information about a proceeding under Section 145 CrPC. With regard to his presence at the place and time of the incident, PW-1 was asked as to by which train he arrived in the village on that day. In response to that question, PW-1 stated that he does not remember the name of the train but, probably, it might be Vaishali. He stated that he boarded the train at about 5.00 pm and reached Khalilabad station by quarter to 6 pm and from there he cycled to his house and reached his house by 6.30 pm.

In respect of the structure of his house, PW-1 stated that his house is double storeyed having one outer door. Both door and window are towards north. He stated that except that outer door, which opens towards north, there is no other entry/exit point to his house. He stated that the door on the north is actually located in the Verandah of his house and is in the form of two channel shutters facing north, making the Verandah look like a room. PW-1 stated that towards north of that door, at a distance of 8, or may be 5, Kattha he has his Baithak.

On further examination, PW-1 stated that though the night was dark, about 1 and ½ hours had passed after sun set, but there was lantern light in his house. Though, there was no lantern lit near the Baithak where he was sitting. PW-1 stated that in the south-west corner of his house, about one Bigha away, there is house of appellant-Ramgati. PW-1 denied the suggestion that at the time of incident he was sitting at the Baithak with his wife-Kishori (PW-10), Babu Lal, Jhinku (PW-3) and Surendra and drawing heat from Kauda (fire place). He reiterated that at the time of the incident, he was alone at the Baithak whereas, his daughter Pramila (PW-2) was near the tap/tube-well; his wife Kishori (PW-10) was inside the house; his elder daughter Nirmla (the deceased) was in the room near the Verandah; his elder son Jeet Narayan had gone to visit a relative; and his younger son Shiv Narayan had gone to have dinner on an invite. PW-1 specifically stated that his wife (PW-10) was in a room on the ground-floor of the house. He stated that at 7.15 pm he spotted all the four accused arriving at the door of his house. They were spotted in the light of lantern and torch. The accused had not covered their faces. The accused were spotted from a distance of 20-25 paces or may be 20-25 meters. He stated that when he spotted the accused at the door of his house, he raised

no alarm. Rather, he hid himself and kept silent.

PW-1 further stated that Ram Gati held Katta, whereas, the others were armed with Lathi/Danda. He stated that in the room where Nirmla was present, there was a big door and that room's dimensions must be 15' x 9'. A lantern was lit in that room. The room had a wooden cot, Sandook (box) and Almirah where household goods were kept. He stated that from PW-10's room, the room of Nirmla was clearly visible through its door. On further questioning, he reiterated that accused Ram Gati fired a shot at Nirmla. He stated that he witnessed the incident through the window of that room. PW-1 also stated that the other three accused were trying to break the lock put on the box. He stated that when the gunshot was fired, PW-10 and PW-2 entered that room. The accused abused PW-10 and PW-2 but did not assault them. PW-1 clarified that though he saw the incident from the window but did not enter that room at that time. He specifically stated that when the accused left the spot, witnesses Babu Lal, Jhinku and Surendra arrived. PW-1 clarified that the accused did not spot him. He also stated that witnesses arrived at the spot upon hearing the gunshot and they, including him, chased the accused for about 4-5 Kattha but did not succeed because the accused had country made pistol and were extending threats. PW-1 stated that the accused also fired a shot in the air to threaten them. However, no empty cartridge could be noticed on the spot. He stated that after the accused had escaped, he entered the room and came near the body of his daughter. The body was lying on the floor. He stated that the body was taken to the Baithak to ascertain whether the deceased was alive and whether she should be taken to the hospital but, she was found dead. PW-1 stated that the body was taken out from the room by him, Bablu Lal, Surendra, Subhash and Dinesh. He stated that the gunshot had hit the deceased near her eye and blood had fallen on the spot. He stated that his hands and clothes were also blood-stained.

The witness denied the suggestion that the police had arrived at the spot before he could reach the police station. He stated that despite threat extended by the accused he had lodged the report on that very night; that Jhinku and Babu Lal had accompanied him to the police station; that he reached the police station at about 8.30 pm and gave a written report there, which was registered as FIR.

PW-1 stated that immediately after registration of the FIR, the police had arrived at the spot. At the spot, near the place of occurrence, people had gathered. When the police inspected the spot and the body, the place was lit up by torches, batteries and lanterns and in their light inquest was conducted. Whereafter, their statements were recorded. The body was taken. He had accompanied the body. The autopsy was conducted on the next day and thereafter, cremation took place. He stated that in connection with the investigation, the I.O. visited his house two or three times.

In respect of the distance from where the deceased was shot, PW-1 stated that at the time when the deceased was shot, the accused were 2 ½ to 3 ft away from the deceased. PW-1 again reiterated that he witnessed the incident through the window of that room in which the deceased was, from a distance of 30-35 ft; and that the accused Ram Gati had fired only one

shot at the deceased from a distance of 2 to 2 ½ ft upon which the deceased fell on the spot near the Jangla (window) where she was standing.

PW-1 denied the suggestion that he was stating for the first time in court that he witnessed the incident from the window. He, however, admitted that this fact was not disclosed in the written report inasmuch as at that time he was in a state of shock and panic. He denied the suggestion that the deceased was killed by dacoits in a dacoity committed in his house. He also denied the suggestion that he had not witnessed the incident.

12. **PW-2 - Pramila**. She is the younger sister of the deceased. She stated that on 24.01.2007, at about 7.15 pm, while she was filling water from the tap/tube-well located just outside her house, her father was near the Baithak and her mother was in the adjoining room, while her sister (the deceased) was in a room next to the Verandah, Ram Gati (the appellant), Daya Shankar, Vijay Krishna and Krishna Chandra came. Ram Gati had country made pistol in his hand whereas the rest were having Lathi. They enquired from her about her father and brothers. Sensing danger, she did not divulge any information about her father and brothers because Ram Gati and others had a land dispute with her father. She stated that outside in the Sahan there was a lantern lit and inside the room, adjoining it, there was another lantern lit. When she did not give any information to the accused, they forcibly entered the room. The deceased Nirmla tried to stop them. Annoyed by this, Daya Shankar, Krishna Chandra and Vijay Kumar exhorted by saying that she (the deceased) is very talkative, finish her off. On this, Ram Gati (the appellant) fired a shot from a country made pistol at Nirmla. She witnessed the entire incident while standing near the tap in front of the window. She stated that after the shot was fired at the deceased, Ram Gati and others came out from the room. She stated that the entire incident was witnessed by her, her father and her mother. On their alarm, villagers arrived at the spot with Lathi/Danda, lanterns and torches. The accused threatened them and escaped.

During cross-examination, the witness stated that she is un-married and by mistake instead of Pita (father), it was mentioned Pati (husband), after her name and before the name of her father Ram Shabad. She clarified that Ram Shabad is her father. She stated that she is a student of Class-IX and the deceased was student of B.A. 1st year. She stated that her father (informant) had arrived from his work place at about 6.30 pm. At this stage, the witness stated that she is not aware whether the night was dark or bright but she denied that her father was sitting near a fire place at the time of the incident. She clarified that the room in which the deceased was killed had a window facing north, which is 5-6 paces away from the tap. The tap is towards north of the window. She stated that at the time of the incident when she was filling water from the tap, his father must have been 20-25 paces away, alone at the Baithak. There was no lantern lit near the Baithak though lantern was lit near the channel gate and in the room next to it as well as in the room where the deceased was murdered. In all there were three lanterns lit. She specifically stated that four accused had arrived and they had not covered their faces. She disclosed that she divulged no information to the accused about her father and brothers because she felt that if she had disclosed, they would have killed her father who was at the Baithak. On further examination, she specifically stated that she

witnessed the deceased being shot at from the window of the room wherein the deceased was present at the time of the incident. She stated that at the time when the deceased was shot at, the deceased was standing near the window of that room. She denied that the accused had surrounded the deceased though they were present in that room. She also stated that the accused had not broken any article present in the room. She specifically stated that when the deceased was shot at, the deceased fell on the spot near the window of that room and blood also fell there. She denied that information was given to the police on phone; rather, her father had gone to the police station. She stated that at the time when her father had gone to the police station, 2-3 persons had accompanied him to the police station. She stated that the police arrived there at about 8.30 pm. and had carried the body to the Baithak. She did not witness as to what happened thereafter because she was crying. She stated that her mother had not witnessed the incident from the place from where she witnessed the incident. She concluded by stating that the accused had fired a single shot; that when she witnessed the incident there was no village person except the accused present; that the accused did not fire any shot while effecting their escape; that in the room where the incident occurred, no empty cartridge was noticed; that there was no dacoity in her house; and that her sister was not killed in a dacoity. She also denied the suggestion that whatever she is stating has been tutored to her.

13. **PW-3 - Jhinku @ Jhinak**. He stated that the incident occurred on 24.01.2007 at about 7.15 pm. At the time of the incident, he was sitting in the house of Babu Lal. When he heard gunshot and alarms, he and Babu Lal rushed to the house of Ram Shabad (informant) with Lathis and torches to notice Ram Gati with country made pistol and other accused with Lathis exiting the Verandah of the house of Ram Shabad and Ram Shabad's wife (PW-10) and daughter Pramila (PW-2) shouting. In that Verandah, a lantern was lit and in the light of that lantern they could recognize the accused. He stated that they made an effort to apprehend the accused but were threatened by them. He proved the custody memo of torches, which were marked as Exb.Ka-2, Ka-3 and Ka-4.

During cross-examination, PW-3 stated that at the time of the incident he was not sleeping but was near the fire place of his house. He stated that the distance of his house from the house of Ram Shabad is about 2 ½ Kattha; that though the night was dark but lantern was lit; and that information to the police was given by Ram Shabad on telephone. On further cross-examination, he stated that Ram Shabad had told him that his daughter was killed by accused Ram Gati, Vijay Kumar, Daya Shankar and Krishna Chandra. He stated that he noticed the body of Nirmla in the room. Later the body was taken out. He stated that when he arrived at the spot, the accused were exiting the house of the deceased. They had not covered their face. He stated that he witnessed the accused escaping from a distance of 100 paces. He stated that when he entered the room i.e. where murder had taken place, he did not notice Almirah, boxes etc. open. PW-3 stated that the body was lying in the room near the window. He denied the suggestion that he did not notice the accused escaping from the spot. He also denied the suggestion that un-known dacoits had killed the deceased and because of pattidari and friendship with the informant he is levelling false allegations.

14. **PW-4 - Kamta**. This witness was examined by the prosecution to prove prior conspiracy for the murder but since the court below has acquitted the accused of the charge of conspiracy, we do not propose to notice the testimony of PW-4.

15. **PW-5 - H.C. Ravikant Mani.** He proved receipt of the written report and making GD entry in respect thereof, vide report no.52 at 20.35 hrs, and preparation of chik FIR. On his statement, the GD entry was marked Exb.-Ka-6 and the chik FIR was marked Exb.Ka-5. During cross-examination, he stated that Ram Shabad (informant) had brought a written report. He denied the suggestion that the report was lodged after deliberation while sitting at the police station.

16. **PW-6 - Dr. Pankaj Khare** - Autopsy surgeon. He proved the autopsy report and the entries therein as already noticed above. He accepted that death could have occurred at or about 7.15 pm on 24.01.2007. The autopsy report was marked Exb.Ka-8 on his statement.

During cross-examination, the witness stated that he cannot say with certainty whether the gunshot injury was from a rifle or not, but it was certainly from a firearm. He stated that the injury was not caused by two shots but by one shot because there was one entry wound and the other was an exit wound. In respect of the direction of the shot, PW-6 stated that if a person of the height of quarter to 6 ft fires at a person of the height of 5 ft, the injury of the nature found could be caused. He also stated that the injury caused was from a close distance, which could be between 1 - 2 ft. He stated that his estimate about death having occurred a day before may have a variation of three hours on either side.

17. **PW-7 - Chhedi Prasad Yadav**. He proved the initial steps of the investigation undertaken on 24.01.2007 including preparation of the inquest report and papers relating to autopsy. He stated that he visited the spot immediately after receipt of information and completed the inquest proceeding by 22.15 hrs. He also proved lifting of plain/blood stained earth from the spot. He denied the suggestions that he did not visit the spot in the night and that the body was called to the police station on the next day to complete formalities of inquest.

18. **PW-8 - Vijay Shankar.** He is the I.O. of the case, who stated that the case was registered on 24.01.2007 while he was not present at the police station; the investigation of the case was started by PW-7 (SSI, Chhedi Prasad Yadav) and, on 25.01.2007, he took over the investigation. He stated that he prepared the site plan; recorded the statement of the witnesses of the incident as also of inquest; copied the contents of autopsy report in the case diary on 26.01.2007; recorded the statement of other witnesses, namely, Shiv Prasad, Kanta Harijan; arrested the accused Daya Shankar on 02.02.2007 and, thereafter, applied for police custody remand of the remaining accused who had surrendered in court. He stated that after obtaining police custody remand, the accused Ram Gati was taken from jail to his house and from the house of Ram Gati, at his pointing out, a country made pistol, one empty cartridge and one live cartridge was recovered of which seizure memo (Exb.Ka-16) was prepared. He stated that he prepared site plan of the spot from where the country made pistol was recovered; and that the recovered country made pistol, etc was sealed. The same were produced in court as material Exb.Ka-2, Ka-3 and Ka-4. He

stated that after conducting investigation, he filed charge-sheet (Exb.Ka-13). He also obtained sanction for prosecution of appellant under Section 25 Arms Act. He proved the custody memo of lantern and torches produced by the informant and his family members, which was marked as Exb.Ka-26. During cross-examination, PW-8 stated that he recorded statement of the informant who stated that he saw the accused while they were escaping from the spot. PW-8 stated that the informant had not disclosed about the presence of Daya Shankar at the spot though had stated about his involvement in conspiracy. PW-8 stated that at the time of inspection, he noted in the site plan that the window of the room was near the tap/tube-well and it opened towards north. Except that window there was no other window in that room. Though there was a sky light towards west and a door towards east. He stated that blood had fallen on the floor in the northern portion of that room just below the window. Blood was also noticed in between the wooden cot and box kept in that room. He stated that he has taken instructions from informant's wife and daughter Pramila while preparing the site plan. He stated that no cartridge, either empty or live, was found at the spot. He stated that though he prepared the custody memo of torches, lantern etc. but these torches and lantern are not currently present before him in the court. The witness was also cross-examined in respect of recovery of country made pistol but since the appellant has been acquitted of that charge, we do not propose to notice his statement in that regard.

19 . P**W-9 - Constable 52 Onkar Yadav**. This witness is in respect of recovery of country made pistol. But since the accused-appellant has been acquitted of that charge, we do not propose to notice his testimony in detail.

20. **PW-10 - Smt. Kishori.** She is the mother of the deceased. She stated that the incident is of about 7.30 pm. At that time she was in the verandah of the house. There was a lantern lit there. A lantern was lit outside and another lantern was lit in the room where the deceased was present. In her house in all there are four rooms. At that time, she was alone inside the house. Her younger daughter Pramila (PW-2) was outside, six paces away, near the tap/tube-well, filling water; whereas, her elder daughter Nirmla (deceased) was inside the room. Her husband Ram Shabad (informant) was outside at the Baithak. Her elder son was away on a visit to a relative whereas her younger son had gone to attend a dinner at some Pandit's place. The accused, namely, Ram Gati, his brother Vijay Kumar and his two brother-in-laws, namely, Krishna Chandra and Daya Shankar, arrived at the door of her house. Ram Gati was having a country made pistol whereas rest were having Lathi/Danda. All of them enquired from Pramila (PW-2) as to where her father and brothers were. When Pramila did not divulge any information to them, all four entered the house and, passing through verandah, entered the room of the deceased. When her elder daughter Nirmla (deceased) scolded them and warned them not to enter her room, Daya Shankar, Krishna Chandra and Vijay Kumar exhorted Ram Gati. On this, Ram Gati fired a shot at the deceased by a country made pistol. The deceased got injured, fell on the spot and died instantaneously.

Several questions were put to her to ascertain whether she had witnessed the incident or not. She answered all the questions accurately and stated specifically that only one gunshot was fired. She also specifically stated that when the gunshot

was fired the deceased was standing near the window of the room. In fact, PW-10 gave a graphic description of that incident. When questioned as to whether her husband also witnessed the incident from the same spot from where she witnessed the incident, PW-10 stated that she was alone at that spot whereas her husband, probably, was at the Baithak but she was not certain about that. Later, however, she was told by her husband that he had also witnessed the incident. PW-10 clarified that the accused were looking for her husband and sons. She stated that only Ram Gati had fired the shot at the deceased whereas the rest were only standing by his side. She stated that the accused had not opened the box or the almirah though they had hit the box and the almirah with their Danda. She stated that she did not run away. Rather, she remained standing there as she was completely shocked. She stated that the accused must have remained in the room for five minutes. In response to a question as to whether she went near the body of her daughter, she said no. She clarified that when others arrived at the spot, her husband also arrived. The police, however, arrived much later. When she was asked whether she had touched the body of her daughter, she stated that she touched her body when the body was taken outside the room. She stated that blood had spilled on the floor near the window of that room where the deceased was shot. She denied the suggestions that she did not witness the incident; and that she is giving false statement on account of past enmity.

21. **PW-11 - Subhash**. As the statement of this witness has been recorded in respect of recovery of the country made pistol, we do not propose to notice his testimony in detail as the appellant has already been acquitted of the charge under Section 25/27 Arms Act.

STATEMENT OF THE APPELLANT U/S 313 CrPC

22. After recording the prosecution evidence, the incriminating circumstances appearing in the prosecution evidence were put to the accused-appellant. The accused-appellant denied the incriminating circumstances and claimed that he has been falsely implicated on account of past enmity arising out of land dispute.

DEFENCE EVIDENCE

23. The accused-appellant examined three defence witnesses. The testimony of all the three defence witnesses is being noticed, in brief, here-in-below :

24. **DW-1 - Ram Gati** - the accused-appellant. The accused-appellant examined himself as a defence witness. He stated that the alleged recovery of country made pistol from him is absolutely false. In his cross-examination, DW-1 admitted that for the last 20 years, since prior to the incident, there had been animosity between him and the informant and that 2-4 months before the incident he was released on bail. He also admitted that 3-4 days before the incident he was released on bail in another case. He denied killing Nirmla. He denied that other accused were conspirators with him. He denied giving any disclosure statement in connection with the recovery of country made pistol.

25. **DW-2 - Ratnesh Kumar Srivastava.** He gave his testimony to discredit recovery of country made pistol from accused Ram Gati. Since Ram Gati

has already been acquitted of the charge of offence punishable under Section 25/27 Arms Act, we do not propose to notice his testimony in detail.

26. **DW-3 - CP Vijay Pratap Singh.** This witness had produced the original GD entry of police station Kotwali Khalilabad, district Sant Kabir Nagar of 24.01.2007 and 25.01.2007. He stated that on 24.01.2007, vide report no.52, at 20.35 hrs, Case Crime No.178 of 2007 was registered of which special report was sent vide report no.2 dated 25.01.2007 at 0.10 hrs. He stated that after 7.15 hrs on 24.01.2007, except the present case, no other case or NCR was recorded at the concerned police station. During cross-examination, he stated that Special report is not kept for a period exceeding one year as the same is destroyed.

TRIAL COURT FINDING

27. After evaluating the entire evidence led by the prosecution and considering the defence evidence, the trial court found that on the date of the incident the accused were on the lookout for the informant and his sons. Gunshot injury to the deceased was ascribed to the present appellant whereas the other accused caused no injury to any one and that the allegation of conspiracy was not proved therefore, the other accused were entitled to the benefit of doubt. Similarly, by expressing doubt in respect of recovery of country made pistol, the court extended the benefit of doubt to the appellant in respect of the charge relating to offence punishable under Section 25 Arms Act. However, the trial court found that the prosecution was successful in proving beyond doubt that the appellant entered the house of the deceased with country made pistol and with an intention to kill the deceased fired a shot at the deceased from a close range, resulting in her instantaneous death. Accordingly, the trial court convicted and sentenced the appellant under Section 452 and 302 I.P.C.

28. We have heard Sri V.K. Shahu for the appellant; Sri J.K. Upadhyaya, learned AGA, for the State; Sri Tripathi B.G. Bhai for the informant; and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANT

29. Learned counsel for the appellant submitted that from the testimony of PW-2 it appears that the police had arrived at the spot at 8.30 pm and had taken the body of the deceased from the room to the Baithak. Similarly, it has come in the testimony of PW-3 that information about the incident was given to the police on phone. Under the circumstances, the statement of PW-1 that he had taken out the body to place it at the Baithak and, thereafter, he went to the police station to lodge the report and thereafter, the police arrived at the spot, appears untrustworthy and this leaves a doubt as to whether the report was spontaneous and promptly lodged or was lodged after deliberation on the basis of past enmity. Likewise, from the testimony of PW-10, the presence of PW-1 at the spot appears doubtful. Otherwise also, PW-1's statement that he witnessed the incident from Baithak does not appear probable because if the site plan is taken into consideration, the accused had arrived at the house of the informant by taking a route which was very close to the Baithak therefore, if their intention was to kill the informant (PW-1) and his sons, had the informant been present at the Baithak, they would have killed the informant rather than

the deceased. Thus, it appears to be a case where the informant was not present at the spot. Rather, when he returned home from Gorakhpur, the FIR was lodged after deliberation and the accused were named on the basis of past enmity.

30. Learned counsel for the appellant also submitted that the autopsy surgeon could not confirm whether shot was from a rifle or a gun. The injury noticed appeared from a rifle because no pellet was found whereas the prosecution witness set up a case that the shot was fired from a country made pistol. Therefore, it appears to be a case where dacoits committed dacoity. In that dacoity the deceased was shot. Otherwise, why would the appellant kill the deceased when they had arrived, according to the prosecution, to kill her father and brothers. He submitted that the entire prosecution story appears doubtful and the trial court failed to take into consideration that there was no motive to kill the deceased.

31. Learned counsel for the appellant also submitted that, admittedly, it was a winter night and the night was dark. No source of light has been proved, inasmuch as, neither any lantern nor torch, in the light of which the incident is stated to have been witnessed, were made material exhibits. He submitted that if PW-10 and PW-2 had been present at the spot and were witnesses of the incident, they would not have been spared therefore, for that reason also, the entire prosecution story appears improbable. It has been submitted that since the prosecution witnesses including the informant are highly inimical and animosity between the parties had been there since long, all these witnesses were interested and related witnesses therefore, a strict scrutiny of their testimony was required, which the court below failed to undertake. He, accordingly, prayed that the judgment and order of the trial court be set aside and the appellant be acquitted of the charge for which he has been tried.

SUBMISSIONS ON BEHALF OF THE STATE

32. Sri J.K. Upadhyaya, learned AGA, submitted that this is a case where the deceased was shot inside a room of her house where the presence of PW-2 and PW-10 was natural. There is no suggestion to the prosecution witnesses that the place of incident was not inside the room of the house of the informant. There is no suggestion to PW-2 and PW-10 that at the time of incident they were present at another place, other than the place of occurrence. He submitted that the I.O. while preparing the site plan had lifted plain/blood stained earth from inside the room which was just below the window towards north of the room and just few paces away from that window there was tap/tube-well from where PW-2 witnessed the accused-appellant firing the shot at the deceased. He stated that both PW-2 and PW-10 are consistent throughout inasmuch as they could not be contradicted by any previous statement made by them and as their presence is natural and their ocular account finds support from the medical evidence, there is no reason to doubt their ocular account. Learned A.G.A. also submitted that no suggestion has been put to the eye witnesses with regard to the nature of the firearm used. Even country made pistol may cause a firearm injury of the nature found and the bullet may make an exit wound, therefore, on a stray statement of the autopsy surgeon that he cannot tell whether it was a rifle shot or gun shot, the ocular account, which is consistent, cannot be doubted.

33. Learned AGA further submitted that even if the presence of PW-1 at the Baithak is doubtful, as he may have escaped to save his life, the fact remains that PW-1 had proved that he had returned from his duties and there is no suggestion to him that he did not lodge the FIR at the time it is purported to have been lodged. Thus, since the FIR is extremely prompt and specific role is attributed to the appellant of firing gunshot at the deceased, there is no good reason to disbelieve the prosecution case as against the accused-appellant in respect of the charge for which he has been convicted. Learned AGA also submitted that the statement of PW-1 that two shots were fired instead of one, as claimed by PW-2 and PW-10, is not a ground to discredit the testimony of PW-2 and PW-10. He, accordingly, prayed that the appeal be dismissed and the judgment and order of the trial court be confirmed.

34. The learned counsel for the informant adopted the submissions made by the learned A.G.A.

ANALYSIS

35. Having noticed the rival submissions and the entire evidence on record, before proceeding further, it would be useful to first address the argument of the learned counsel for the appellant that all the eye-witnesses being related to each other and interested in the conviction of the appellant, due to past enmity, their testimony should be carefully scrutinised and the slightest discrepancy in their statement must enure to the benefit of the accused.

36. In this regard we may observe that "*it is well settled that interested witness testimony 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 witness 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 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"* **(vide para 13 of the decision of the Supreme Court in Hari Obula Reddy and Others Vs. State of Andhra Pradesh (1981) 3 SCC 675).**

37. Bearing the above legal principle in mind we shall evaluate the testimony of the eye-witnesses PW-1, PW-2 and PW-10. Though PW-2 and PW-10 may fall in the

category of interested witnesses but their presence at the spot, which is a room of their house, is natural. No doubt, an effort has been made on behalf of learned counsel for the appellant to demonstrate that the body was shifted from the spot and therefore whether the deceased was shot outside or inside could not be confirmed. But this effort fails because from the prosecution evidence it is clearly established that the I.O. had lifted plain/blood stained earth from inside the room of the house. Notably, blood was found near the northern window of that room. From the site plan (Ex. ka-15), which is prepared on the basis of spot inspection by the I.O., and the testimony of the prosecution witnesses, it is clear that window of that room in which the deceased was killed opens towards north and is close to the tap/tube-well where PW-2 was filling water at the time of occurrence and from where she had witnessed the incident. Importantly, there is no specific suggestion to the prosecution witnesses that the deceased was killed elsewhere and not inside the room of that house. In view of the above, the defence argument that it is uncertain whether the deceased was killed inside the room of that house or outside, is worthy of rejection. The argument of the defence that since the body was removed from the spot therefore, the spot becomes uncertain is also worthy of rejection because the prosecution witnesses have stated that the body was taken out of the room to check whether the deceased was surviving and could be taken to the hospital. This explanation is natural because even if a person is dead, close relatives make an attempt to revive the dead. Notably, deceased was a young girl. In such circumstances, it is quite natural for her father to take out the body to explore possibility of taking her to the hospital. Moreover, once blood was found inside the room, there exists no doubt with regard to the place of occurrence. We are therefore of the view that the prosecution has been successful in establishing that the deceased was killed inside the room of the house of the informant.

38. Once, the place of occurrence is proved, the presence of PW-2 and PW-10, who are younger sister and mother, respectively, of the deceased, becomes natural at the spot because they were in their own house where the incident occurred. No suggestion has been given to either PW-2 or PW-10 that they were at some other place at the time of the incident. In such circumstances, the defence has failed in its attempt to doubt the presence of PW-2 and PW-10 at the spot at the time of occurrence. Therefore, even though we may be of the view that the other prosecution witnesses arrived at the spot after hearing the noise of gunshot and might not have been in a position to witness the actual firing of the gunshot at the deceased but these witnesses have confirmed the place where the deceased was shot, the presence of PW-2 and PW-10 and the date and time when the deceased was shot. Accordingly, their testimony corroborates the testimony of PW-2 and PW-10.

39. In so far as the time of occurrence is concerned, according to the prosecution case, the occurrence is of 7.15 pm on 24.01.2007. The autopsy report and the testimony of the autopsy surgeon accepts the possibility of death of the deceased at or about 7.15 pm on 24.01.2007.

40. The submission of learned counsel for the appellant that from the prosecution evidence it appears that the police had

arrived at the spot even before the lodging of FIR and, therefore, it appears, the FIR was lodged later, after deliberation, does not appear sustainable, firstly, for the reason that mere giving of an information to the police on telephone is not a ground to reject the registration of the FIR on the date and at the time it is purported to be registered, particularly, when there is no suggestion to the informant or to any of the police witnesses that the FIR was ante-timed. Secondly, there is no cogent evidence, except the statement of PW-3, that the police was informed on telephone. The police witnesses have not accepted any such suggestion that they arrived at the spot even before registration of the FIR. Rather, evidence is specific that the informant had brought a written report. PW-2 specifically denied giving information to the police on telephone. No doubt, PW-2, at one stage, during cross-examination, stated that the police arrived at the spot at 8.30 pm, which time appears before registration of the FIR, but this stray statement during cross-examination is not sufficient to doubt the time at which the FIR was registered because there could always be confusion in respect of the exact time. In this regard it would be useful to notice observations of the Supreme Court made in paragraphs 27 (X) (XI) of its judgment in the case of **Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra** - Criminal Appeal No.739 of 2017, decided on July 14, 2022 - 2022 Live Law (SC) 596 wherein it was observed :

"(X) 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.

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

Bearing in mind the observations of the apex court noticed above, the statement of PW-2 that the police arrived at the spot at 8.30 pm and body was taken out by the police is to be understood in the contextual background of the case. PW-2 was a young girl whose sister was shot dead in front of her eyes. In such circumstances, she would have been in a state of shock. Expecting her to carefully notice and memorise the time and sequence of events would be unrealistic. Such minor discrepancy, in our view, does not shatter the foundation of the prosecution case so as to render the registration of the FIR on the date and time as it purports to be doubtful, particularly, when its registration on the date and time concerned is duly established by PW-1 as well as the documentary evidence.

41. More over, the defence itself examined DW-3 who proved registration of the FIR at 20.35 hrs on 24.01.2007. DW-3 also proved that a special report of its institution was sent promptly at 0.10 hrs on 25.01.2007 as recorded in the General Diary. In these circumstances, when it has been proved that the FIR was lodged promptly at 20.35 hrs in respect of an incident which occurred at 7.15 hrs, there is very little scope for the defence to suggest that the informant had contrived the story after deliberation. In so far as the testimony

of PW-2 that the police arrived at around 8.30 pm is concerned, there may be some confusion in her mind as to the time when the police had arrived. But since the police record clearly disclose the time when the police left the police station for the purposes of investigation/ inquest and PW-1 (informant) also states that the police arrived at the spot after registration of the FIR, we do not find any merit in the submission of learned counsel for the appellant that the FIR was lodged after deliberation as the police had arrived at the spot before registration of the FIR.

42. In respect of the reliability of the testimony of PW-2 and PW-10, the defence argument is to the effect that there was no clear motive to kill the deceased therefore, it appears to be a case where some dacoits entered the house and in the process of dacoity killed the deceased. Though an effort was made to demonstrate through suggestions to the witnesses that the dacoits/accused had covered their face while entering the house and had looted articles but all such suggestions were refuted by the witnesses who clearly deposed that the accused had not covered their faces and no dacoity was committed rather, it was the accused appellant who fired the shot at the deceased from a close range. Further, nothing could come out from cross examination of the witnesses with regard to existence of signs of loot/dacoity. In our view, the prosecution testimony is straight forward, which is to the effect that the accused had come to finish off the informant (father of the deceased) and his sons. They did enquire about the informant from PW-2. PW-2 sensing danger did not divulge any information regarding the informant and her brothers. Upon which, they entered the house perhaps to explore whether the informant was hiding there. When the deceased resisted their entry in her room, they got annoyed and as a result whereof, the appellant fired a shot at the deceased from a close range. In such circumstances, absence of motive to kill the deceased is not fatal to the prosecution case because the intention to kill the deceased was formed at the spur of the moment as she was resisting the accused from entering her room.

43. In so far as PW-2 and PW-10 witnessing the incident is concerned, there is no serious challenge to their presence at the spot because they were residents of that house and their presence was natural. The source of light i.e. presence of lanterns has been disclosed by the eye-witnesses. Presence of lanterns was confirmed during investigation and custody memo in respect thereof was made. During cross-examination, no serious challenge was laid to their deposition in respect of:- (a) the presence of lit lanterns in the house; (b) that there was a tap/tube-well right in front of the window where the deceased was standing when she was shot at and near which PW-2 was filling water; (c) that there was a door in the room where the deceased was killed, which opened in the verandah; (d) that through that door the room, where the deceased was standing, was clearly visible; (e) that there were lanterns lit in the verandah, room as well as outside, making the spot clearly visible; and (f) that shot was fired from a close range. The contention that lanterns were not produced during trial, therefore their existence becomes doubtful is not acceptable because the I.O. had deposed about being shown the lanterns. He also proved preparation of custody memo (Exb. Ka-26) in respect thereof. It be noted that lanterns are daily use articles hence the I.O. may not have seized the same. Instead, after examining it,

gave its custody to its owner with condition that it shall be produced when required. It is quite possible that the witnesses, who were having custody of those daily use articles, were not instructed to produce them. In such circumstances, when PW-2 and PW-10 both deposed about existence of lantern light and there was no serious challenge to their deposition mere failure on the part of the prosecution to secure their production during trial is not sufficient to discard the oral testimony regarding the source of light. The ocular account of PW-2 and PW-10 gives a pictorial account of the incident and there appears no shadow of doubt that they had witnessed the incident. More so, when their ocular account is corroborated by medical evidence and by collection of plain/blood stained earth from inside the room, where the deceased was shot at, the spot was confirmed. The site plan discloses that the witnesses were in close proximity and could have witnessed the incident. No doubt, the testimony of PW-1 may not inspire our confidence with regard to his statement that two shots were fired and that he witnessed the shot being fired at the deceased through the window of that room, because PW-2 and PW-10 speak of solitary shot and the probability of him having escaped from the spot seeing the assailants is quite high. But that does not fail the prosecution case which finds support from the unshaken testimony of PW-2 and PW-10.

44. In view of the discussion above, we are in agreement with the view of the trial court that the prosecution has been successful in proving the guilt of the accused-appellant beyond the pale of doubt in respect of the offences punishable under Sections 452 and 302 I.P.C. There is, therefore, no merit in this appeal. The same is **dismissed.** The judgment and order of the trial court is affirmed. The accused-appellant is reported to be in jail. He shall serve out the sentence awarded by the trial court.

45. Let a copy of this order be sent to the trial court for information and compliance.

(2022) 8 ILRA 909
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 6079 of 2009

Sunil ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri P. C. Yadav, Sri Ajit Kumar Singh Solanki, Sri Manoj Yadav, Sri R.P.S, Chauhan, Sri Shailendra Pratap Singh

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Section 377 - Section 302 - The Code of criminal procedure, 1973 - Section 53-A, 173(8), 437-A - appeal against conviction - Murder - unnatural offence *fouler the crime stricter the proof* - howsoever strong suspicion might be it cannot par take the character of proof - absence of disclosure in the FIR about presence of a witness is not by itself a ground to reject his/her testimony if his/her presence is otherwise natural.(Para - 20, 23 ,)

Murder and unnatural offence upon child victim - confirmed by medical evidence - no forensic evidence to link appellant to the crime - ocular

account of PW-1 untrustworthy and unreliable .**(Para - 28,30)**

HELD:-Prosecution failed to prove charge against appellant beyond reasonable doubt. Trial court failed to evaluate and test prosecution evidence in correct perspective and took evidence as gospel truth. Judgment and order of trial court set aside. Accused-appellant acquitted of charge.**(Para -31)**

Criminal Appeal allowed. (E-7)

List of Cases cited:-

1. S.D. Soni Vs St. of Guj., 1992 Supp (1) SCC 567

2. Lakshmi Singh Vs St. of Bihar, (1976) 4 SCC 394

3. Shankarlal Gyarasilal Dixit Vs St. of Maha., (1981) 2 SCC 35

4. Shahaja @ Shahajan Ismail Mohd. Shaikh VS St. of Maha., 2022 SCC OnLine SC 883

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. This appeal is against the judgment and order dated 22.08.2009/24.08.2009 passed by the Additional Sessions Judge, Court No.1, Budaun in S.T. No.1151 of 2007, arising out of case crime no.155 of 2007, P.S. Kadar Chowk, district Budaun, whereby the appellant Sunil Singh has been convicted under Section 377 and 302 IPC and sentenced as follows: 10 years R.I. as well as fine of Rs.25,000/-, coupled with a default sentence of one year, under Section 377 IPC; and imprisonment for life as well as fine of Rs.25,000/-, coupled with a default sentence of one year, under Section 302 IPC. Both sentences to run concurrently.

INTRODUCTORY FACTS

2. On 28.05.2007 a written report (Ex. Ka-1) was submitted by Raj Kumar (PW-1) at P.S. Kadar Chowk, Budaun, at 11.00 hours, giving rise to Case Crime No.155 of 2007 in respect whereof GD entry, vide report No.19 (Ex. Ka-13), and chik FIR (Ex. Ka-12) was prepared by S.I. Jagdish Prasad Verma (PW-6) . In the written report it was alleged that in the morning, at about 7 am, on 28.05.2007, the appellant Sunil, who is brother of informant's brother's Sadhoo, came to informant's house in a drunken condition. At that time, informant's Bua and informant's son Kamal (the deceased), aged about two years, were present and fritters (Pakaudi) were being cooked. Sunil had fritters and, as usual, took Kamal to play with him. But when he did not return with Kamal, informant, his brothers Krishna Pal and Tussam (PW-2), along with other villagers went in search of Kamal and Sunil. While they were searching for Sunil and Kamal, in the sugarcane field of Viram Singh, Sunil was noticed lying over Kamal and committing unnatural offence. When informant and others raised alarm, Sunil left Kamal and escaped. When informant went near Kamal, he found him dead. Alleging that the body is lying in the sugarcane field, the written report was lodged with a prayer to take appropriate action.

3. After registration of the FIR, inquest was conducted by Sri Nivas Yadav (PW-4) and an inquest report (Ex. Ka-2) was prepared. The inquest report was witnessed by Krishna Pal Singh (i.e brother of the informant - not examined), Raj Kumar (the informant- PW-1), Tussam Singh (another brother of the informant - PW-2), Ram Singh (not examined) and Rajveer Singh (not examined). As per the inquest report, the inquest was conducted in

a sugarcane field and was completed by 13.30 hours on 28.05.2007.

4. The cadaver was sent for autopsy. Autopsy was conducted by Dr. D.V. Shakya (PW-5) on 28.05.2007 at 4.30 pm. The autopsy report (Ex. Ka-11) records:-

Age - about two years.

External Examination:-

Average built body. R.M. passed off from upper limbs present in lower limbs. Eyes closed. Mouth closed. Conjunctivitis both eyes congested.

Ante-mortem injuries.

(1) An abrasion of size 9 cm x 5 cm on left side face near cheek lateral to angle of mouth.

(2) An abraded contusion of size 11 cm x 3 cm present on front and both sides of neck at the level of thyroid cartilage underneath on dissection subcutaneous tissues and muscle found congested. Right side hyoid bone found fractured. Trachea found congested.

(3) An abraded contusion of size 7 cm x 5 cm on top of left shoulder.

(4) An abrasion of 1 cm x 1.5 cm on exterior aspect of left wrist joint.

(5) Multiple abrasions in an area of 15 cm x 10 cm on back of chest both sides.

(6) Lacerated wound of size 1 cm x 0.7 cm x muscle deep present on posterior margin of anus with clotted blood.

(7) Abrasion of size 4 cm x 2 cm on back of left thigh just below left buttock.

Internal examination:

Skull: NAD

Thorax:-

Larynx and Trachea (see above).

Lungs- congested.

Abdomen:- Stomach contains 50 gram of semi digested food matter; Small intestine- Chyme and gases; Large intestine- faecal matter and gases.

Cause of death:- asphyxia as a result of ante mortem injury over neck.

Duration after death: About one day.

Note:- Two glass slides smear prepared by anal swab for pathological examination of dead sperm and handed over to accompanying constable in a sealed condition. One sealed bundle of clothes containing Kachchha (under wear), half shirt, one *Kardhani*, one *Gale Ki Mala, one Gale Ka Dhaga* was handed over to constable.

5. During the course of investigation, on 28.05.2007, the investigating officer (PW-4) prepared a site plan (Ex. Ka-8) on the instructions of the informant and witnesses. The I.O. disclosed arrest of the appellant on 29.05.2007 and seized the underwear worn by him at the time of arrest of which a seizure memo (Ex. Ka-9) was prepared. The seizure memo indicated that there were semen stains on the underwear. After completing the

investigation, the I.O. submitted charge sheet (Ex. Ka-10) on 09.06.2007. Cognisance was taken on the charge sheet. The case was committed to the court of session. The court of session on 11.02.2008 charged the appellant for offences punishable under Sections 377 and 302 IPC. The appellant pleaded not guilty and claimed trial.

PROSECUTION EVIDENCE

6. During the course of trial, the prosecution examined six witnesses. Their testimony, in brief, is as follows:-

7. **PW-1- Raj Kumar- informant.** PW-1 stated that the accused Sunil, present in court, is younger brother of Sadhoo (wife's sister's husband) of informant's brother; Sunil resided in the same village and being a relative was a regular visitor of informant's house. In respect of the incident, PW-1 stated that on the date of the incident, at about 7 am, Sunil came to informant's house. At that time, informant's mother (Maya Devi - PW-3) and Bua (Bhagwati - not examined) were making fritters (Pakaudi); Kamal (the deceased - informant's son), aged about two years, was present and was being fed by informant's mother; Sunil was in a drunken state, he took the deceased in his lap and while playing with him, took him outside the house. When Sunil went out with informant's son, informant was sweeping the floor of his house, near its door. But, when Sunil did not return with informant's son, after about an hour, PW-1, his brothers Tussam (PW-2) and Krishna Pal as well as other members of the village went in search of Kamal and Sunil. During search operation, when they arrived near the southern boundary of Gulzari's field, they noticed from a distance of 20-25 paces that Sunil (the appellant) was lying over informant's son and committing unnatural offence. Seeing the informant and company, Sunil escaped towards west. PW-1 stated that informant and others tried to catch Sunil but he ran away. When informant came near Kamal, he was found dead. In respect of the incident written report was given at the police station. PW-1 proved the written report, which was marked Ex. Ka-1.

During cross examination, PW-1 stated that the report was scribed at about 10 am; when the report was scribed, the body of the deceased was in the sugarcane field and was not shifted; that the body was not carried to the police station; that they reached the police station at quarter to 11 and after lodging the report, they returned on a bus but the police arrived at the spot on motorcycle and jeep. The police arrived before they could; and that the police sealed the body at about 11.15 am. Whereafter, he did not visit the police station. PW-1 stated that the police had interrogated him in the village at about 11 am. Immediately thereafter, in paragraph 9, PW-1 stated that the body was found in sugarcane field at around 11 am, whereas the accused had taken the deceased at about 7 am. PW-1 stated that he has no enmity with the accused; that the accused used to visit PW-1's house on a daily basis and used to play with the child (the deceased); that the house of the accused was 4-5 houses away from the house of the informant; that the accused was already married; that the accused used to visit PW-1's house morning as well as evening; that the accused used to play with PW-1's son and sometimes used to take him away to play with him; sometimes the child used to stay with the accused for 2-4 hours; whereafter he used to return the child. PW-

1 stated that, at the time, when the accused took away the victim, PW-1's mother Maya, his aunt Bhagwati and wife Neetu were there in the house. Immediately thereafter, PW-1 clarified that his wife had gone to offer prayers at a temple in front of his house about 10 paces away.

At this stage, the witness was confronted with an omission in his written report that he was sweeping near the outer door of the house when victim was taken away by the accused. On being confronted with this omission in the written report, PW-1 stated that he had mentioned this fact to the I.O. but if the I.O. had not recorded this in the statement or in the written report, he cannot give a reason for it.

On further query, PW-1 stated that the accused had never earlier come in a drunken condition to his house; that was the first day when he had come drunk. PW-1 could notice that the appellant was drunk because of the smell coming from appellant's mouth. PW-1, however, clarified that the accused was not staggering and had fritters that were being cooked in his house.

In respect of the time he took to sweep the floor on that day, PW-1 stated that he swept for about 30-45 minutes. When he got free from sweeping the house, he went to his field.

In respect of dress worn by the accused at the time when he visited PW-1's house, PW-1 stated that the accused was wearing pant and shirt.

In respect of when the search started, PW-1 stated, in paragraph 16 of his deposition, that when PW-1's wife arrived from temple and could not find the victim, search for the victim was made by PW-1. At that time, it must be quarter to 8 (7.45 am). PW-1 stated that first search was made in the village. The field where victim's body was found is about half to ¾ km away from PW-1's house; the field was having sugarcane crop of the height of about one foot. However, the body of the victim was found on the boundary of the field. At that time, along with PW-1, his elder brother Tussam Singh (PW-2) and younger brother Krishna Pal (not examined) and other villagers were there. In paragraph 18 of his deposition, PW-1 stated as follows:-

"जब हम बच्चे को ढूंढ रहे थे तब कमल नाम से आवाजेंलगा रहे थे जब तक हम लोग खेत के पास पहुॅचे तब तक मुलजिम भाग गया था।"

8. **PW-2- Tussam- elder brother of the informant.** This witness in his statement in chief supported the prosecution case as narrated by PW-1 and added that though the appellant was married but he had no child; and that his wife was not happy with him (i.e. the appellant) because of his bad habits and, therefore, she (i.e. appellant's wife) was not residing with him.

During cross examination, PW-2, in paragraphs 8, 9 and 10 of his deposition, stated as follows:-

"8. मेरी ससुराल गोपालपुर मे है जिस दिन की घटना है उस दिन मेरी ससुराल मे भागवत थी उस दिन मै व मेरा साढू भागवत मे गये हुये थे जहॉ रात के ग्यारह बजे मुझे वहॉ इत्तला मिली तो मै और मेरे साढू वहॉ से चले रात मे रामगंगा नाव से पार की।

9. उसके बाद बल्लिया से अपने साले की ससुराल से मोटर साइकिल मांगी मेरा साला मुझे व अशोक जो मुलजिम का सगा भाई है और मेरा साढू है को देवचरा तक छोड़कर गया जब देवचरा छोड़ा उस समय रात के दो बजे थे वहॉ से हम लोग बस से आये। फिर हम लोग बदायूॅ से टेम्पो से गये। टेम्पो से हम

लोग सुबह साढ़े छह बजे पहुॅच गये। फिर हम घर पहुॅचे उस समय बच्चे की लाश ईख के खेत मे रखी थी। तमाम गांव वाले व घर वाले इकट्ठे थे।

10.फोन से हमे इत्तला मिली थी मेरी ससुराल से मेरा घर करीब 82 किलोमीटर दूर है।''

After stating as above, in paragraph 11 of his deposition, PW-2 denied the suggestion that he did not witness any incident. He also denied the suggestion that what he is saying is false.

9. **PW-3- Smt. Maya Devi- mother of the informant.** PW-3 stated that she is grand mother of the deceased; that on the date of the incident, at about 7 am, she was cooking fritters (Pakaudi) when Sunil arrived at her house. At that time, Tussam (PW-2), Tussam's wife and her Nanand (Bhagwati) were present and informant Raj Kumar was sweeping near the door of the house; that Sunil was drunk and his mouth was smelling; he asked for fritters (Pakaudi), ate them and took Kamal in his lap; and took him away. When Sunil did not return, within an hour, a search for Kamal and Sunil was made. Whereafter the body of Kamal was found in a sugarcane field. She stated that her sons Raj Kumar (PW-1), Tussam (PW-3) had seen Sunil committing unnatural offence with the deceased.

During cross examination, PW-3 stated that Sunil was a regular visitor of her house and often use to take Kamal to play with him. Sometimes, he used to play with him for an hour or so and then bring him back. PW-3 stated that when she gave fritters (Pakaudi) to Sunil, Sunil was holding the hand of the child (victim). Child (victim) was also eating fritters (Pakaudi). At that time, it was 7 am. In paragraph 7 of her deposition, PW-3 stated as follows:-

''7. सुनील के जाने के एक घंटे बाद बच्चे की तलाश की थी तलाश करने कमल के पिता व उसका तुस्सम गये थे बच्चे की लाश दोपहर के बारह बजे मिली थी बारह एक बजे लाश लाकर घर के दरवाजे पर रख ली थी।**

After stating as above, in paragraph 8, PW-3 stated as follows:-

''8. थाने इत्तला देने मै गई थी मेरे साथ मेरा लड़का राज कुमार भी थाने गया था। दो

''9. पकौड़ी मै घर मे खुले मे सैक रही थी। जहॉ मै पकौड़ी सेंक रही थी वह जगह घर के अन्दर मुख्य दरवाजे से किधर थी यह मुझे पता नही।

10. पकौड़ी सैकने वाली जगह घर के मुख्य दरवाजे से दो चार छह कदम होगी जहॉ चूल्हा जल रहा था वह जगह खुली थी मै पकौड़ी स्वयं बना रही थी मैने दरोगा जी को वह जगह बता और दिखा दी थी जहॉ मै पकौड़ी बना रही थी।**

After stating as above, PW-3 denied the suggestions that Sunil had not arrived at her house; that he had not taken her grand child Kamal; and that she was not in the village but was in her Maika and she came back after receiving information.

10. **PW-4 - Sri Nivas Yadav - Investigating Officer.** He stated that after registration of the case on 28.05.2007, he took over the investigation of the case, visited the spot, carried out inquest, prepared inquest report and documents for autopsy. He stated that he had sealed the body and handed it over to constable Rajesh Kumar and constable Veerpal Singh for autopsy; that he recorded the statement of witness Tussam Singh, inquest witnesses and thereafter prepared site plan at the behest of the informant and witnesses. He proved the site plan which was marked Ex.

Ka-8. He stated that he arrested the accused on 29.05.2007 and seized and sealed the underwear worn by him at the time of arrest in respect whereof seizure memo (Ex. Ka-9) was prepared. He stated that after completing the investigation, he submitted charge sheet (Ex. Ka-10).

During cross examination, he stated that he left the police station to go to the spot at 11 hours though the time is not mentioned in the case diary. He arrived at the spot at 12.30 hours. The spot was 10-11 kilometer away from the police station. He stated that he arrested the accused on 29.05.2007 from Yatri Shed near Kadar Chowk, Budaun. The arrest was made at about 5.30 am. He stated that he did not enter the time in the case diary when he returned after conducting the investigation on 28.05.2007. He stated that on 29.05.2007 he left the police station at 4.05 hours of which GD entry was made and returned at 6.55 hours. He stated that the underwear of the accused was sealed at the place where he was arrested. He stated that he had not mentioned in the case diary the clothes worn by the accused at the time of his arrest. The semen stains on the under wear were noticed after the accused was requested to remove his trouser. He stated that at the time when underwear was seized, there was no public witness available. He stated that when the appellant was arrested dawn was about to break. The arrest was made near the main road. He stated that he had not handed over copy of the seizure memo to the accused. He denied the suggestion that the accused was lifted from home. He stated that he had not prepared site plan of the place from where the accused was arrested and underwear recovered. In paragraph 13 of his deposition, PW-4 stated that at the spot he did not notice any blood. He also stated that he did not send the underwear for forensic examination till submission of charge sheet but sent it later though he does not remember the date as the case diary is not with him. He denied the suggestion that the investigation was not conducted in a fair manner.

11. **PW-5 - Dr. D.V. Shakya**. He proved the autopsy report and the injuries noticed therein, as already noticed by us above. He also specifically stated, in paragraphs 7 and 8 of his deposition, as follows:-

"7. मृतक की गुदा से दो स्लाईड तैयार कर साथ आये पुलिस कर्मी को सील्ड कर स्पर्म की जांच हेतु पेथोलोजी भेजी गयी।

8. श्शव विच्छेदन के उपरान्त साथ आये पुलिस कर्मी को 9 पुलिस पेपर मेरे द्वारा हस्ताक्षरित तथा एक सील्ड कपड़ो का बन्डल जिसमे एक कच्छा व एक हाफशर्ट, एक करधनी, एक गले की माला गले का धागा कुल 5 अदद सुपुर्द किये गये।**

In paragraph 10 of his deposition, PW-5 accepted the possibility of death of the victim at 7 am on 28.05.2007 as a result of ante mortem injuries noticed by him.

During cross examination, PW-5, in paragraph 12 of his deposition, stated as follows:-

"12. पोस्टमार्टम की फाईन्डिग के आधार पर मृतक की मौत दिनाक 27.5.07 की शाम को 4 बजे होना संभव है।**

12. **PW-6 - S.I. Jagdish Prasad Verm**a. He is the person who prepared the GD entry of the written report and the chik FIR thereof which was exhibited on the basis of his statement.

During cross examination, PW-6 stated that to lodge the report, along with the informant, his brother Krishna Pal had also come to the police station. He stated that the I.O. had left for the spot, as per the GD entry, at 11 hours. The S.H.O. had returned to the police station on that day at 1300 hours. On that day, the I.O. had not deposited any goods at the Maalkhana. He stated that on that day, the I.O. had returned at the Thana in the night at 8.35 hours (8.35 pm). He denied the suggestion that the report was ante-timed.

Statement of the appellant under Section 313 CrPC

13. The incriminating circumstances appearing in the prosecution evidence were denied by the appellant. He stated that he has been falsely implicated on account of enmity.

TRIAL COURT FINDING

14. The trial court held that from the prosecution evidence it was established that the deceased was taken from home in the morning; that the accused was noticed committing unnatural offence with the deceased; that the autopsy report of the deceased confirms commission of unnatural offence; that the ocular account finds support in the medical evidence and therefore the prosecution was successful in bringing home the charge against the appellant. Consequently, the trial court convicted the appellant and sentenced him, as above.

15. We have heard Sri Shailendra Pratap Singh for the appellant; Sri Pankaj Saxena, learned AGA, for the State; and have perused the record.

Submissions on behalf of the appellant

16. The learned counsel for the appellant submitted that the prosecution evidence does inspire confidence for the following reasons:- (i) PW-1, who states that the victim was taken from home at 7 am in his presence, has not made any such statement in the written report and had also not given any such statement to the investigating officer during the course of investigation. In the site plan also his presence at the house, when the deceased was allegedly taken by the appellant, is not disclosed. Therefore, his testimony is not reliable in respect of victim being taken from home by the appellant at 7 am; (ii) In so far as PW-1's testimony that he saw the appellant committing unnatural offence with the deceased in the sugarcane field is concerned, the same appears doubtful. Firstly, because that spot was far away from his house, and, secondly, it is unbelievable that a child two years of age could sustain an onslaught that long. Notably, the child was allegedly taken from home at 7 am and was discovered by about 11 am. Interestingly, the FIR is also lodged at 11 am. All of this would suggest that after discovery of body the story was developed on suspicion. Further, PW-1 states that he was with his brother Tussam (PW-2) and Krishna Pal when he noticed the accused lying over the child and committing unnatural offence. Tussam (PW-2) in his testimony, during cross-examination, stated that he was attending Bhagwat at his Sasural and on receipt of information about the incident, he came and saw the body of the deceased in the field. The testimony of PW-2 therefore runs contrary to that of PW-1. The other witness Krishna Pal has not been examined. Further, from the testimony of PW-1 it is clear that by the time he arrived at the spot, the accused had escaped more so because they were searching by loudly calling the

name of the victim. The mode of search would, for sure, alert the accused to effect his escape from the scene well in advance. Thus, the testimony of PW-1 is not wholly reliable and cannot on its own form the basis of conviction. (iii) The testimony of PW-2 demolishes the prosecution case as it not only contradicts the statement of PW-1 with regard to PW-2 accompanying PW-1 to the spot and witnessing the accused committing the crime but also probabilizes the occurrence of the incident on previous day evening i.e. evening of 27.05.2007, which is in sync with the autopsy report and the statement of the autopsy surgeon (PW-5) made during cross-examination; (iv) The testimony of PW-3 to the effect that deceased was taken by appellant from home does not inspire confidence because her presence at home is neither disclosed in the written report nor in the site plan. She also could not convincingly answer the question as to where she was cooking fritters when, allegedly, the victim was taken by the appellant while she was making fritters. In fact, she goes on to shatter the prosecution case by stating that after the body of the deceased was found, the same was brought to the house, between 12.00 to 13.00 hours, and kept at the door of the house when, otherwise, the prosecution case is that the inquest was conducted at the spot in the field and, as per the inquest report, the body was sealed at 13.30 hours. All of this would suggest that either PW-3 was not a witness or that the case was developed after discovery of the body. The testimony of PW-3 is therefore not at all reliable; (v) Prosecution has suppressed an important witness i.e. informant's Bua (Bhagwati), whose presence alone was shown in the house both in the written report (Ex-Ka-1) as well as the site plan (Ex. Ka-8) yet, she has not been examined. (vi) The ocular account appears in conflict with the medical evidence, inasmuch as, according to the prosecution case, the deceased was taken from home at 7 am on 28.05.2007, whereas, the autopsy report which was prepared on 28.05.2007 at 4.30 pm estimates occurrence of death a day before and the Autopsy Surgeon, during cross-examination, accepted the possibility of occurrence of death in the evening of 27.05.2007 at about 4.30 pm.

17. The learned counsel for the appellant submitted that this is a case where the appellant was a regular visitor of the house of the informant. He was admittedly pally with the child (i.e. the deceased) and used to play with him. The deceased went missing and therefore suspicion fell on the appellant. On the basis of this suspicion, the prosecution story was developed. If there had been any truth in the prosecution story, the anal swab slides, clothes of the deceased and the underwear of the appellant would have been sent for forensic examination in the true spirit of the provisions of Section 53-A of the Code of Criminal Procedure. Admittedly, the doctor had taken the anal swab slides and had handed it over to the police personnel for forensic examination. The clothes of the deceased were also sealed and handed over to the police but they were not sent for forensic examination. The prosecution is, therefore, guilty of suppressing the best evidence. Not only forensic evidence was absent but even the witnesses of fact, namely, Krishna Pal (alleged eye witness present with PW-1) and Bhagwati (whose presence alone was shown in the house, both in the written report and in the site plan), have not been produced. Under these circumstances, there is a ring of doubt encircling the prosecution case entitling the appellant to its benefit. Learned counsel for

the appellant therefore submits that the appeal be allowed and the judgment and order of the trial court be set aside.

Submissions on behalf of the State

18. Per contra, learned AGA, submits that the accused could not demonstrate that the informant side had any animosity with the accused. Further, the presence of the prosecution witnesses of fact is natural in their house. In these circumstances, there was no good reason for the prosecution witnesses to lie. The prosecution story is straightforward which is that the accused was a regular visitor of the house and used to play with the child. On the date of the incident, he was drunk, he took the child and when a search for the child was made, his body was found and the accused was found lying over the body of the child and seeing the informant and the witnesses, he escaped. The autopsy report clearly disclosed that the victim was subjected to anal intercourse. The medical evidence corroborates the ocular account to that extent. In so far as the estimate in respect of time of death disclosed in the autopsy report is concerned, it is well settled that that estimate cannot overrule a reliable ocular account. Moreover that estimate is on the basis of rigor mortis which in case of a child sets early and passes off early, therefore it cannot be taken as a ground to discard the ocular account. Learned AGA also submitted that the testimony of PW-2 cannot be utilised to discredit the testimony of PW-1, inasmuch as, PW-2 is related to the accused and therefore, his testimony may have deliberately come to rescue the accused. Similarly, the testimony of PW-3 that the body was brought to the door of her house cannot be utilised to demolish the testimony of PW-1, inasmuch as, PW-3 might have got confused. Learned AGA also submitted that assuming that there was no forensic examination/DNA profiling of the anal swab smear slides/clothes collected/recovered from the the body of the deceased and the underwear or other body fluid collected from the accused, but that, by itself, would not make the prosecution story doubtful or unacceptable, particularly, when the same finds support from other evidences on record.

19. Learned AGA also submitted that even if the name of PW-1 and PW-3 is not mentioned in the written report as person present in the house when the deceased was taken from home, their testimony cannot be disbelieved as their presence in their own home is natural and therefore, in ordinary course, they would have witnessed the deceased being taken from home by the accused. Learned AGA submits that this is a case where the prosecution has been successful in proving the guilt of the accused beyond reasonable doubt therefore the conviction and sentence recorded by the trial court deserves to be sustained and the appeal is liable to be dismissed.

ANALYSIS

20. Having noticed the rival submissions and the entire prosecution evidence, before we proceed to evaluate the evidence we must bear in mind the well settled legal principle that is to be applied while appreciating evidence concerning brutal/ heinous crimes. The principle is that *fouler the crime stricter the proof* **(vide S.D. Soni v. State of Gujarat, 1992 Supp (1) SCC 567; Lakshmi Singh v. State of Bihar, (1976) 4 SCC 394).** Further, *different motives operate on the minds of different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with*

brutal crimes, to spin stories out of strong suspicions **(vide Shankarlal Gyarasilal Dixit Vs. State of Maharashtra: (1981) 2 SCC 35, para 33).** On scanning the prosecution evidence of the instant case it is noticed that there is no serious challenge to the prosecution testimony that the appellant was a regular visitor of informant's house and was very pally with the child (i.e. the deceased). He used to play with the child for hours and sometimes used take the child with him and after playing with him for hours used to return him back. Notably, the appellant resided in the same village few houses away. In this backdrop any untoward incident of the kind noticed in this case would naturally trigger a suspicion on the appellant putting him under the scanner. But, howsoever strong suspicion might be it cannot partake the character of proof. Thus, it would not be appropriate on our part to give undue weightage to the circumstance, as canvassed by the learned AGA, that since there is no proven enmity between the appellant and the complainant party, why would they falsely implicate the appellant. Rather, it would be appropriate on our part to evaluate the prosecution evidence to determine whether it succeeds in proving the guilt of the appellant beyond reasonable doubt.

21. In a recent decision of the Supreme Court, dated July 14, 2022, in Criminal Appeal No.739 of 2017 of 2017 : **Shahaja @ Shahajan Ismail Mohd. Shaikh V. State of Maharashtra, 2022 SCC OnLine SC 883**, in paragraph 27 of the judgment, judicially evolved principles for appreciation of ocular evidence were summarised. As to what ought to be the approach of the Court while appreciating the evidence, in sub para (I) of para 27, it was observed:

"I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief."

After enumerating several principles, the key principle to be borne in mind while assessing the value of the evidence of an eyewitness was laid down, in paragraph 28 of the judgment (supra), as follows:

"28. To put it simply, in assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence.

22. In the instant case, apart from the medical evidence, the prosecution evidence

can be divided into two parts. The first is with regard to a circumstance, which is, that the appellant took away the child from home in the morning at 7.00 am on 28.05.2007 and the second is, the ocular account with regard to witnessing the appellant committing unnatural offence in the field. In respect of the circumstance i.e. child being taken from home, key witnesses are PW-1 and PW-3 whereas, in respect of ocular account of the crime the witnesses are PW-1 and PW-2. Before we proceed to deeply evaluate their testimony on the above two aspects, it would be worthwhile to notice the key features in the prosecution evidence. These are:-

(a) In the written report (Ex. Ka-1), PW-1 had disclosed the presence of his aunt (Bua) at the time when the deceased was taken from home by the accused. The written report does not disclose the presence of any other person in the house when the deceased was taken from home by the accused. Similarly, the site plan (Ex. Ka-8) prepared at the instance of PW-1 and the other witnesses discloses only the presence of PW-1's aunt in the house;

(b) The statement of PW-1, during the course of trial, that he was sweeping at the door of his house when the appellant took away the deceased from home is made for the first time in court. The written report as well as the statement of the informant during the course of investigation omits to mention that fact. PW-1 was confronted with this omission;

(c) According to PW-1, in paragraph 16 of his deposition, search for the child started, upon his wife's return from temple within 45 minutes to one hour of the appellant walking away with the child;

(d) The eye witness account with regard to the accused-appellant being noticed committing unnatural offence in the sugarcane field is rendered by PW-1 only, because PW-2, who is stated to have accompanied PW-1 to the spot, backs out during cross-examination and claims that he arrived from his sasural on getting information about the incident. PW-2 has not been declared hostile by the prosecution to enable a cross-examination by the prosecution;

(e) The presence of PW-3 at the place from where the deceased was taken away by the appellant is neither disclosed in the written report (Ex. Ka-1) nor in the site plan (Ex. Ka-8). Rather, a suggestion is made to her that she was at her Maika. Though, PW-3 denied the suggestion but when closely cross-examined as to the place where she was making fritters (Pakaudi), PW-3 falters. Not only that, PW-3 makes a statement which runs contrary to the prosecution case, which is, that the body of the deceased after being found in the field was brought at the door of her house between 12.00 and 13.00 hours when, according to the prosecution, the body was left at the spot and was sealed at 13.30 hours;

(f) The autopsy report as regards the duration of time since death estimates death a day before i.e. on 27.5.2007. Though it might not be conclusive but throws a possibility of death to have occurred much before the time when the deceased was taken from home. This possibility gets corroboration from the testimony of PW-2 which discloses that information about the incident was received in the evening of the preceding day and upon receipt of the information, PW-2 came back from his Sasural and on

reaching the village he noticed the body in a sugarcane field;

(g) There is no forensic report in respect of anal swab smear slides, the clothes recovered from the deceased and the underwear recovered from the appellant even though the incident is of a date post the insertion of section 53-A in the Criminal Procedure Code, 1973.

23. When we analyse the prosecution evidence in the backdrop of the key features noticed above, the witness whose presence in the house was mentioned in the FIR when the child was allegedly taken away by the appellant at 7 am has not been examined. In the written report, the presence of informant's aunt (Bua), whose name has later been disclosed as Bhagwati, is shown at the place from where the deceased was taken by the appellant. Unfortunately, Bhagwati has not been examined. Rather, Maya Devi, whose name is not disclosed in the written report as being present in the house when the deceased was taken from home, has been examined as PW-3. We are conscious of the law that absence of disclosure in the FIR about presence of a witness is not by itself a ground to reject his/her testimony if his/ her presence is otherwise natural. But here PW-3 has been given a suggestion that she was at her Maika on that day and that she returned after receiving information. PW-3 though states that she was cooking fritters (pakaudi) and had served fritters (pakaudi) not only to the deceased but also to the appellant and the deceased was in the lap of the appellant at that time but when she was closely cross-examined with regard to the place where she was making those fritters, PW-3 faltered. Otherwise also, having a child on one's lap by itself is not incriminating but walking away with the child out of the house is certainly incriminating. Therefore, whether PW-3 could notice the appellant walking away with the child is important and it would depend on where she was cooking fritters. Ordinarily, one cooks in the kitchen. At what place the kitchen was located has not come in the evidence. But to show her presence near the gate of the house, PW-3 states in paragraph 10 of her deposition that the place where she was cooking was an open place two / four / six paces away from the main gate, which she had shown to the investigating officer. Interestingly, in the site plan (Ex. Ka-8) prepared by the I.O. on the statement of witness the place where fritters were being cooked has not been disclosed rather spot B is the spot from where the aunt (Bua) of the informant spotted the appellant taking the child. Surprisingly, Bua (aunt) of the informant, namely, Bhagwati, has not been examined. The statement of PW-3 that she was cooking in the open appears a deliberate attempt on her part to show her presence near the outer gate of the house. This part of her statement appears highly unnatural and, therefore, bearing in mind that her presence is neither disclosed in the FIR nor in the site plan, her testimony that she saw the child being taken out of the house by the appellant does not inspire our confidence.

24. In so far as the testimony of PW-1 in respect of noticing the appellant walking away with the child is concerned, PW-1 though is the informant but neither in the written report nor in his statement under section 161 CrPC, he disclosed his presence in the house. He only disclosed the presence of his aunt (Bua) and the child in the written report. Interestingly, the site plan (Ex. Ka-8) prepared at the instance of PW-1 and the witnesses does not disclose

PW-1's presence from where he witnessed the appellant walking away with the child. In such circumstances, PW-1's testimony in respect of being a witness of the appellant walking away with the child does not inspire our confidence.

25. There is another reason to doubt the prosecution story in respect of the appellant being noticed walking away with the child, which is, that if the prosecution witnesses were aware that the child was with the appellant, there existed no apparent reason for them to launch a search for the child within a short span of time (i.e. 45 minutes) as disclosed by PW-1. Because, according to the prosecution evidence, the child used to be in the company of the appellant for hours and sometimes the appellant used to even take the child away and return him later. The reason disclosed by PW-1 for the hectic search in that short span of time is that when child's mother returned from temple, which was few paces away, the search for the child was launched. It therefore appears that child's mother must have queried about the child. Importantly, the mother of the child has not been examined. A child that young is ordinarily under constant supervision of mother or father or very close relative responsible enough to take care of the child. Mother of the child in the circumstances of the case was a critical witness whose non-production by the prosecution has an adverse impact on the credibility of the prosecution story. Otherwise also, if we accept PW-1's statement that hectic search was made when child's mother returned from temple, it would suggest that till then none was aware where the child was thereby rendering the prosecution story doubtful.

26. For all the reasons above as also that the key witnesses i.e. PW-1's aunt (Bua) and PW-1's wife (i.e. victim's mother) have not been examined, the prosecution evidence that the child was taken from home by the appellant on 28.05.2007 at 7.00 am fails to inspire our confidence. Hence, we discard the circumstance that the appellant was seen taking away the child from home.

27. Now, we shall evaluate the ocular account with regard to commission of the offence rendered by PW-1. At the outset we may notice that the spot of occurrence is a sugarcane field shown to be a kilometre away from the village in the site plan (Ex. Ka-8). The distance of the spot i.e. where the body was found being one kilometre away from PW-1's house is confirmed by I.O. (PW-4) in paragraph 7 of his deposition. Interestingly, in paragraph 13 of PW-4's deposition, it is specifically stated that he noticed no blood on the spot. Injury no.6 in the autopsy report (Ex. Ka-11) would indicate that there was a lacerated wound, muscle deep, on posterior margin of anus with clotted blood. If the victim was being subjected to anal intercourse at that spot, as the eye witness account is, possibility of blood trickling down to the earth at the spot cannot be ruled out. Assuming that blood did not trickle down to the earth, the fall out of blood not being found there is that the prosecution evidence does not rule out possibility of the offence being committed elsewhere and body being dumped at that spot. Keeping the above possibility in mind we now proceed to evaluate the testimony of PW-1. According to PW-1, when the deceased could not be found a search for him and Sunil (the appellant) was made by him along with his brothers Krishna Pal and Tussam Singh (PW-2). PW-1 stated that first they searched for them in the village. On failure to find them, they went to search for them in the fields. According to PW-1, search operation commenced within 45

minutes to an hour of the deceased having left the house with the appellant. It is stated by PW-1 that when they arrived at the southern boundary of the field of Gulzari, from a distance of 20-25 paces, they spotted Sunil (i.e. the appellant) lying over the child and committing unnatural offence. But, interestingly, the time when PW-1 and his brothers noticed that, is neither specified in the written report nor in the oral testimony. The written report at the bottom mentions the time as 11.00 hours. What is interesting is that 11.00 hours is the time when the first information report was lodged at the police station and is also the time of making a GD entry thereof by PW-6. The police station, as per the Chik report (Ex. Ka-12), is 14 km away from the spot. If the incident was witnessed at 11.00 hours and the report was lodged 14 km away at the same time, in absence of specific disclosure as to when PW-1 and his brothers witnessed commission of unnatural offence by the appellant, the whole prosecution story becomes doubtful. Assuming that PW-1's omission with regard to the time of witnessing the incident is due to inadvertence and may therefore not be fatal to the prosecution case but here PW-1 was not alone in the team that was searching for the child. Apart from other villagers there were his two brothers. One brother has not been examined and the other brother, namely, PW-2, states during cross-examination that he was in his Sasural when he received the information at about 11 pm in the night upon which he rushed back home from his Sausural, which is 82 km away from his home, and after returning in the night noticed the body of the child lying in a sugarcane field. In these circumstances failure to disclose the time as to when the incident was noticed casts a serious doubt on the whole prosecution case.

28. Further, there is something inherently improbable in the testimony of PW-1 in respect of him witnessing commission of unnatural offence, which is, that the victim is a two year old child. How long a child of that tender age sustain an onslaught of the nature deposed by PW-1. Notably, PW-1 does not speak of noticing the murder, or throwing of the body, of the child. He speaks about witnessing commission of unnatural offence by the accused and of accused running away leaving the child, who was found dead. Notably, the body of the child carried various ante-mortem injuries. If those injuries were not caused in the presence of PW-1 then those injuries were caused earlier. With the kind of ante-mortem injuries found on the body, scope of survival even for half a minute appears improbable. Notably, hyoid bone was found fractured and in the opinion of the doctor death was due to asphyxia as a result of ante-mortem injuries on the neck. In that kind of a scenario, if PW-1 did not witness the causing of injuries to the child the obvious question that would arise is whether the accused was committing unnatural offence on a dead body. At this stage, we may notice that the prosecution evidence clearly spell out that the child was very friendly with the accused and used to play with him for hours. Accused resided in the neighbourhood and was a regular visitor. What made the accused a devil is not disclosed in the prosecution evidence. All these circumstances makes the testimony of PW-1 highly unnatural and improbable. Once, we accept this position a deeper and careful scrutiny of PW-1's testimony was required which, in our view, the trial court failed to undertake. Interestingly, the defence questioned PW-1 whether during search the search team members were making loud calls for the

missing person. In response to this question, in paragraph 18 of his deposition, PW-1 admits that while they were searching for the child they were shouting his name and by the time they arrived near that field (i.e. the spot), the accused had escaped. If the informant and his brothers were shouting the name of the child, they would for sure have alerted the accused in advance as a result whereof the accused being present at the spot even after hearing the cries of the witnesses including father of the victim is highly improbable. For all the reasons above, we do not find the ocular account of PW-1 trustworthy and reliable. Rather, it appears to be a case where the body of the deceased was found and thereafter the story was developed.

29. The doubts expressed by us with regard to the truthfulness of the prosecution case could have been dispelled had key prosecution witnesses such as the aunt (Bua) of the informant, mother of the child victim and the brother of the informant, namely, Krishna Pal, been examined. Unfortunately, these key witnesses have not been examined. The other witness, namely, PW-2, who is claimed to be with the informant at the time of search, has demolished the prosecution story by stating that he was in his Sasural at the time when information about the incident was received in the night and that after receipt of information, he rushed to his village to discover the body in the field. The statement of PW-2 throws a serious possibility of the incident being of previous evening. This possibility derives strength from the autopsy report (Ex Ka-11), dated 28.05.2007, which at 4.30 pm estimates time since death as about one day. Further, the testimony of autopsy surgeon (PW-5) admits the possibility of death to have occurred in the evening of 27.05.2007. For all the reasons above, the ocular account rendered by PW-1 does not at all inspire our confidence as to form the basis of conviction.

30. In so far as medical evidence is concerned though it may have confirmed murder and unnatural offence upon the child victim but there is no forensic evidence to link the appellant to the crime. At this stage, we wish to record our displeasure with regard to the manner in which the investigation of the case was carried out. This is a case of the year 2007. Section 53-A was inserted in the Code of Criminal Procedure, 1973 by Criminal Procedure (Amendment) Act, 2005 (Act No.25 of 2005) with effect from 23.06.2005 yet, despite having obtained sealed bundles of clothes of the deceased, the anal swab smear slides of the deceased and the underwear of the appellant, no effort was made to connect the appellant with the crime through DNA profiling. What is surprising is that the I.O., in his deposition, states that he had not sent the underwear for forensic examination till submission of charge sheet. He claims that he sent it later. When questioned about the date when it was sent, he stated that he does not know because the case diary is not with him. He also stated that he had not sought permission of the court for further investigation under Section 173(8) CrPC. Such casual approach on the part of the investigating agency is deprecated. In the age of scientific advancement, particularly, after insertion of Section 53-A in the Code of Criminal Procedure, an effort should be there on the part of the investigating agency to ensure that the investigation is scientific so that an innocent is not punished and the guilty is not left unpunished. Unfortunately, there has been no effort of that kind.

31. In view of the discussion made above and for all the reasons recorded herein above, we have no hesitation in holding that the prosecution has failed in its endeavour to prove the charge against the appellant beyond reasonable doubt. The trial court failed to evaluate and test the prosecution evidence in the correct perspective and took the evidence as gospel truth. Consequently, the appeal is **allowed.** The judgment and order of the trial court convicting and sentencing the appellant is set aside. The accused-appellant is acquitted of the charge for which he has been tried and convicted. The appellant is reported to be in jail. Unless wanted in any other case, he shall be released forthwith subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court.

32. Let a copy of this order be forwarded to the court below along with the record for information and compliance.

(2022) 8 ILRA 925
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 6401 of 2011
(U/S 372 Cr.P.C.)

Gyan Prakash Singh ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Satish Kumar Singh

Counsel for the Opposite Parties:
Govt. Advocate

A. Criminal Law – Appeal against acquittal – Code of Criminal Procedure,1973 - Sections 372 & 378 - It is well settled principle of law that appellate courts hearing the appeal filed against the judgment and the order of the acquittal should not overrule or otherwise disturbing the judgment acquittal, if the appellate court does not find substantiate and compelling reasons for doing so. (Para 15)

Nonetheless if the trial courts conclusion w.r.t. the facts is palpably wrong if the trial court decision was based on erroneous view of law and the judgment is likely result in grave miscarriage of justice and the approach proceeded towards wrong direction or the trial court has ignored the evidence or misread the material evidence which should have determining the factor in the lis of the matter then obviously the appellate court is right in interfering with the order acquitting the accused. However, Hon'ble Apex Court has further held that in case two views are possible and the view so taken by the trial court while acquitting the accused is a plausible view then in the backdrop of the fact that there is double presumption of innocence available to the accused then obviously the appellate court should not interfere with the order of acquittal. (Para 16)

B. Effect of non-explanation of injuries – (a) No universal rule can be laid down while acquitting the accused in the matter of non-explanation offered by the prosecution w.r.t. the injuries suffered by the accused. It cannot be held as a matter of law or invariably a rule that whenever accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the person of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. **Non-**

explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear cogent and credit worthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case. (Para 28, 34, 35)

Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. Prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. (Para 31)

Grievous injuries suffered by the accused are required to be explained by the prosecution whereas, simple injuries need not necessarily be. Non explanation of simple injuries of the nature suffered by the accused would not be fatal. (Para 34)

(b) Where the accused received injuries during the same occurrence in which complainants were injured and when they have taken the plea that they acted in self-defence, that cannot be lightly ignored particularly in the absence of any explanation of their injuries by the prosecution. (Para 29)

In the present case the court finds that the prosecution story itself proceeds on weak evidence as the testimony of the witnesses do not lead to a conclusion that the accused herein had committed the crime. Bearing in mind the fact that the incident alleged to have been occurred is during day time in a place wherein more than 50-60 workers were already working in the agricultural field which was in close vicinity and further the fact that the accused are stated to be in possession of a country-made pistol then too beating is stated to be administered by cuddle, wooden stick and hockey. In normal circumstances, it would be safely said that the possession of country-made pistol does not imply that use of cuddle, wooden stick and hockey cannot be resorted to while inflicting injuries but in the present case the allegation is w.r.t. resorting of firing and disposing the injured. It is quite abnormal and inconceivable that in an open place wherein 50-60 people were already there, 3 accused persons will administer beating by hockey and cuddle. The court below has further analysed the medical reports as well as the other relevant facts including the fact that P.W.3, who was working and who had witnessed the said incident while being in the farm which is just close by to the place of occurrence reached the place after a long time after the presence of P.W.2, who came to rescue the victim from the accused who was 2-3 kms. away. Nonetheless, the FIR recites the fact that the complainant's leg was also fractured and is also borne out from the statement given by all the 3 prosecution witnesses, however, in the medical report it has come on record that there was no fracture in the leg. (Para 35)

In the aforesaid factual backdrop, the relevance of explanation of the injuries of the accused assumes importance and significance. Despite the medical report being available w.r.t. the injuries so sustained by the accused opposite party no.3-Rama Shankar and proving of the same by the medical practitioner herein, no explanation has been given by the prosecution which itself creates a cloud and suspicion that the entire story so built up by the prosecution stands no legal and factual foundation and proceeds on weak evidences. The court below has further held that the injuries so sustained by the accused (even if it is true) are not fatal. This Court further finds that the prosecution case proceeds on weak evidences and in any view of the matter, this is not a case wherein the appellant/complainant can insist the Court to

take a different view from the view taken by the Trial Court while acquitting the accused, while reversing the judgment in question. (Para 36)

Criminal appeal dismissed. (E-4)

Precedent followed:

1. Tota Singh & anr.Vs St. of Pun., (1987) 2 SCC 529 (Para 17)

2. Ramesh Babulal Doshi Vs St. of Guj., (1996) 9 SCC 225 (Para 17)

3. St. of Raj. Vs St. of Guj., (2003) 8 SCC 180 (Para 17)

4. St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755 (Para 17)

5.Chandrappa & ors. Vs St. of Karn., (2007) 4 SCC 415 (Para 17)

6. Ghurey Lal Vs St. of U.P., (2008) 10 SCC 450 (Para 17)

7. Siddharth Vashishtha @ Manu Sharma Vs State (NCT of Delhi), (2010) 6 SCC 1 (Para 17)

8. Babu Vs St.of Kerala, (2010) 9 SCC 189 (Para 17)

9. Ganpat Vs St. of Har., (2010) 12 SCC 59 (Para 17)

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Mah., (2010) 13 SCC 657 (Para 17)

11. St. of U.P. Vs Naresh, (2011) 4 SCC 324 (Para 17)

12. St. of M.P. Vs Ramesh, (2011) 4 SCC 786 (Para 17)

13. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219 (Para 17)

14. Jafarudheen & ors. Vs St. of Kerala, JT 2022 (4) SC 445 (Para 18)

15. Laxmi Singh & ors. Vs St. of Bihar, (1976) 4 SCC 394 (Para 24)

16. Bhaba Nanda Sarma & ors. Vs St. of Assam, (1977) 4 SCC 396 (Para 25)

17. Vijayee Singh & ors. Vs St.of U.P., (1990) 3 SCC 190 (Para 26)

18. Dev Raj & anr. Vs St. of H.P., 1994 Supp (2) SCC 552 (Para 27)

19. Takhaji Hiraji Vs Thakore Kubersing Chamansing & ors., (2001) 6 SCC 145 (Para 28)

20. Kashiram & ors. Vs St. of M.P., (2002) 1 SCC 71 (Para 29)

21. Sucha Singh & anr. Vs St. of Pun., (2003) 7 SCC 643 (Para 30)

22. Surendra Paswan Vs St. of Jharkhand, (2003) 12 SCC 360 (Para 31)

23. Bishna Alias Bhiswadeb Mahato & ors., (2005) 12 SCC 657 (Para 32)

24. Ram Pyare Mishra Vs Prem Shanker & ors., (2008) 14 SCC 614 (Para 33)

25. Ram Pat & ors. Vs St. of Har., (2009) 7 SCC 614 (Para 34)

Present appeal assails judgment and order dated 08.09.2011, passed by Additional Sessions Judge, Jaunpur.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is an appeal under Section 372 of Criminal Procedure Code, 1973 (in short 'Cr.P.C.') has been instituted by the appellant-complainant- Gyan Prakash Singh s/o Shekhraj Singh against the judgment and order dated 08.09.2011, passed by Additional Sessions Judge, Court No.3, Jaunpur in Sessions Trial No.361/2003 (State vs. Panna Lal and two Others), arising out of Case Crime No.13/2000, under Sections 325/34, 307/34 IPC, Police Station- Shahganj, District Jaunpur whereby the accused respondents no.2 to 4 have been acquitted.

2. This appeal was presented before this Court on 9th November, 2011 wherein on 14.11.2011 this Court proceeded to pass the following order:-

"Summon the record and list thereafter."

3. Thereafter on 04.04.2014 and 07.05.2022 this Court proceeded to pass the following order:-

4.4.2014

"Counsel for the appellant is not present.

The lower court record has been received.

List peremptorily on 24.4.2014"

7.5.2022

"Case is taken up.

None is present for the appellant.

Learned AGA is present.

Appeal is yet to be admitted.

List this case in the week commencing 11.7.2022 for hearing on admission.

It is made clear that if on the next date learned counsel for the appellant will not remain present, the Court will proceed to decide the case appointing Amicus Curiae or with the help of learned AGA."

4. Orders passed in the present appeal reveals that after passing of the initial order dated 14.11.2011 nobody was present to press this appeal and ultimately this Court on 07.05.2022 proceeded to fix the matter today making it clear that in case on the date so fixed therein (today) if the counsel for the appellant is not present, the Court will proceed to decide the case appointing Amicus Curiae or with the help of learned AGA.

5. Yet today itself nobody appears to press the present appeal, thus this Court has no option to decide the appeal with the assistance of learned AGA.

6. The factual matrix of the case as worded in the present appeal are that the appellant-complainant being Gyan Prakash Singh on 12.01.2000 at 12:30 noon was about to proceed while carrying sugarcane in a tractor from the village Chhatai Khurd then at that point of time the accused herein being Rama Shankar alias Jhuri Yadav, Panna Lal Yadav and Nand Lal Yadav dragged the complainant from the tractor in question and with the aid of cuddle, wooden stick and hockey administered beating. Pursuant thereto ruckus was created and on account of hue and cry, the villagers, who were doing their agricultural activities in the farm land so situated in the vicinity came in and Indra Pal Singh and Hari Nath Singh came to be rescued along with others and on account of their intervention the complainant could save his life. While running away the accused respondent no.3 fired with country-made pistol and the complainant saved himself. However, as per the prosecution version, the complainant sustained injuries in his shoulder and fracture was occasioned in his right leg. It has been further alleged that the accused herein hurled abuses and threatened to kill the complainant. It has also come on record that a written complaint was filed on the instructions of the complainant by one Shreekant Mishra,

Advocate and accordingly first information report was registered under Sections 323, 325, 504, 506, 307 IPC before Police Station -Shahganj, District Jaunpur.

7. As per the prosecution case the complainant after lodging of the first information report got himself medically examined and according to prosecution case complainant received 9 injuries. As per the medical report the injuries were on account of hard and blunt object and so far as the injury no.9 is concerned, it was referred for X-Ray. The other injuries were simple in nature but fresh ones. Prosecution has also come up with the stand that the complainant got himself subjected to X-Ray, which is Ka-7, according to which on the left shoulder fracture was found and so far as legs are concerned, there was no fracture. Consequently, Investigating Officer was nominated, who conducted the investigation and as per the prosecution site plan was prepared and statements of the prosecution witnesses were also taken and chargesheet under Sections 323, 325, 504, 506, 307 IPC was submitted. The case was committed for trial and the accused persons pleaded not guilty of the charges levelled against them.

8. In order to bring home the charges, the following prosecution witnesses were produced.

1	Gyan Prakash	P.W.1
2	Indra Pal Singh	P.W.2
3	Hari Ram Singh	P.W.3
4	S.I. Amar Singh	P.W.4
5	Dr. D.V. Singh	P.W.5
6	Dr. K.P. Mishra	P.W.6

9. As per the defence an alibi was also taken under Section 313 Cr.P.C. that on 12.01.2000 at 12.00 hours the accused respondent no.3-Rama Shankar alias Jhuri Yadav was proceeding to one brick kiln owned by one Rambali possessing Rs.9400/- and when he reached near the house of one Sanjay Singh then Ajay, Vijay, Gyan Prakash, Prakash alias Sadhu, Shailendra alias Pintu with the aid of cuddle, wooden stick etc. administered beating upon the accused respondent no.2 and took away the money which he possessed at that point of time and threatened the accused herein and he sustained 9 injuries.

10. The defence in order to substantiate their version got examined the following witnesses:-

1	Arvind Kumar Yadav	D.W.1
2	Sushil Kumar	D.W.2
3	Vijay Kumar Pharmacist	D.W.3
4	Dr. R.K. Rai	D.W.4
5	Mohd. Mushlim	D.W.5
6	Abdul Rahman	D.W.6
7	Laxmi Shankar Yadav	D.W.7
8	Hari Shankar	D.W.8

11. The defence also produced paper no.28Kha being an application under Section 156(3) of the Cr.P.C. for lodging of the proceedings against the complainant fraction. It was also pleaded that one Ajay, Vijay s/o Ramchet, Gyan Prakash s/o Puran Singh, Prakash alias Sadhu s/o Shekhraj, Shailendra alias Pintu s/o Indra Nath,

accused Rama Shankar belonging to the same village and there happens to be a Pradhan election rivalry between them and on the date of the commission of the crime so sought to be alleged by the prosecution the complainant- Gyan Prakash committed the crime with regard to the motive being with relation to election of the Pradhan and also land dispute. So far as the accused-opposite party no.3-Rama Shankar alias Jhuri Yadav is concerned, he also got himself medically examined, wherein 9 injuries are stated to be sustained by him whereas injury nos.2 and 9 was put to observation and referred for X-Ray and the said injuries were shown to be received by virtue of weapon which is blunt.

12. We have heard Sri Ratan Singh, learned AGA, who appears for the State of U.P. and with his assistance the present appeal is being decided.

13. Before delving upon the issue in question which is being sought to be raised at the behest of the informant/complainant while filing the present appeal purported to be under Section 372 Cr.P.C. against the order of acquittal so passed in favour of the accused herein.

14. This Court has to bear in mind the judicial verdict and the mandate so envisaged by the Hon'ble Apex Court wherein the courts of law have been cautioned while exercising jurisdiction under Section 372 Cr.P.C. as well as Section 378 of the Cr.P.C. when the courts of law have been occasioned to deal with the Government Appeal against the acquittal.

15. The Hon'ble Apex Court in the series of decisions have been consistently mandating that it is well settled principle of law that appellate courts hearing the appeal filed against the judgment and the order of the acquittal should not overrule or otherwise disturbing the judgment acquittal, if the appellate court does not find substantiate and compelling reasons for doing so.

16. Nonetheless if the trial courts conclusion with regard to the facts is palpably wrong if the trial court decision was based on erroneous view of law and the judgment is likely result in grave miscarriage of justice and the approach proceeded towards wrong direction or the trial court has ignored the evidence or misread the material evidence which should have determining the factor in the lis of the matter then obviously the appellate court is right in interfering with the order acquitting the accused. However, Hon'ble Apex Court has further held that in case two views are possible and the view so taken by the trial court while acquitting the accused is a plausible view then in the backdrop of the fact that there is double presumption of innocence available to the accused then obviously the appellate court should not interfere with the order of acquittal.

17. The above noted proposition of law is clearly spelt out in umpty number of decisions, some of them are as under namely:-***Tota Singh and another vs. State of Punjab, (1987) 2 SCC 529, Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225, State of Rajesthan vs. State of Gujarat, (2003) 8 SCC 180, State of Goa vs. Sanjay Thakran, (2007) 3 SCC 755, Chandrappa and others vs. State of Karnataka, (2007) 4 S.C.C. 415, Ghurey Lal vs. State of U.P., (2008) 10 SCC 450, Siddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi), (2010) 6 SCC 1, Babu vs. State of Kerala, (2010) 9***

SCC 189, Ganpat vs. State of Haryana, (2010) 12 SCC 59, Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra, (2010) 13 SCC 657, State of U.P. vs. Naresh, (2011) 4 SCC 324, State of M.P. vs. Ramesh, (2011) 4 SCC 786, and Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219.

18. The Apex Court recently in ***Jafarudheen & Ors. vs. State of Kerala, JT 2022(4) SC 445*** has observed as under:-

"DISCUSSION Scope of Appeal filed against the Acquittal:

25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. Precedents:

Mohan @Srinivas @Seena @Tailor Seena v. State of Karnataka, [2021 SCC OnLine SC 1233] as hereunder: -

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such

decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under : (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179])

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

14.3. In the recent decision of Vijay Mohan Singh [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586], this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of this Court right from 1952 onwards. In para 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai [Umedbhai

Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108]. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence.

*This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching a*spect in the peculiar circumstances of the case.'

31.1. In Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320], the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under:

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 : 1996 SCC (Cri) 972] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial

court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case.'

31.2. In K. Ramakrishnan Unnithan [K. Ramakrishnan Unnithan v. State of Kerala, (1999) 3 SCC 309: 1999 SCC (Cri) 410], after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653], in para 5, this Court observed and held as under:

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach

due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State [Surajpal Singh v. State, 1951 SCC 1207 : AIR 1952 SC 52]; Wilayat Khan v. State of U.P. [Wilayat Khan v. State of U.P., 1951 SCC 898 : AIR 1953 SC 122]) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.'

31.4. In K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305], this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."

N. Vijayakumar v. State of T.N., [(2021) 3 SCC 687] as hereunder: -

"20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325 has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432)

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. Further in the judgment in Murugesan [Murugesan v. State, (2012) 10 SCC 383: (2013) 1 SCC (Cri) 69] relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction.

xxx xxx xxx

23. Further, in Hakeem Khan v. State of M.P., (2017) 5 SCC 719 : (2017) 2 SCC (Cri) 653 this court has considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court. Para 9 of the judgment reads as under: (SCC pp. 722-23) "9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This reason, coupled with the fact that the only independent witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned counsel for the respondent may be right in stating that the trial court went overboard in stating that the complainant party was the

aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case. This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

24. By applying the abovesaid principles and the evidence on record in the case on hand, we are of the considered view that having regard to material contradictions which we have already noticed above and also as referred to in the trial court judgment, it can be said that acquittal is a "possible view". By applying the ratio as laid down by this Court in the judgments which are stated supra, even assuming another view is possible, same is no ground to interfere with the judgment of acquittal and to convict the appellant for the offence alleged. From the evidence, it is clear that when the Inspecting Officer and other witnesses who are examined on behalf of the prosecution, went to the office of the appellant-accused, the appellant was not there in the office and office was open and people were moving out and in from the office of the appellant. It is also clear from the evidence of PWs 3, 5 and 11 that the currency and cellphone were taken out from the drawer of the table by the appellant at their instance. There is also no reason, when the tainted notes and the cellphone were given to the appellant at 5.45 p.m. no recordings were made and the appellant was not tested by PW 11 till 7.00 p.m."

19. Bearing in mind the proposition of law so culled out by the Hon'ble Apex Court in the above noted decisions coupled with the limitations so envisaged while deciding the present appeal which emanates at the instance of an informant against the acquittal of the accused, now the present case in hand is to be analysed while giving the verdict as to whether the trial court was in error in acquitting accused or not.

20. To begin with the ocular testimony of the prosecution is to be first marshaled. Gyan Prakash Singh, who happens to be the informant and the injured appeared as P.W.1. According to him the accused herein attacked him and resorted to gun shot fire but he could save himself, however he received as many as 9 injuries and fracture was also found in his shoulder. According to P.W.1, Gyan Prakash, he in his cross examination has come up with the stand that sugarcane field is 2-3 kms from his house and thus the place of occurrence is 2-3 kms. from his house. He has further deposed that the complainant as well as the accused belongs to the same village Chhatai Khurd. It has been alleged that he received injuries from cuddle, wooden stick and hockey and after sustaining the injuries the other witnesses came up and they have saved him and even in fact firing was also resorted in the air but he could save himself. P.W.2-Indra Pal Singh, who claims to be an eye witness, who has seen the commission of the crime he in his cross examination has stated that the accused Rama Shankar had beaten the complainant-injured with the butt of the country-made pistol and when he came there then the accused fired which was a single shot. P.W.3-Hari Ram Singh, who happens to be another witness, who has seen the commission of the crime. According to him he had gone to do the agricultural work in the sugar farm while harvesting the sugarcane belonging to Gyan Prakash Singh and at that relevant point of time there were 50-60 people working there. P.W.3-Hari Ram Singh in his statement has

further made a deposition that the other co-accused being Nand Lal Yadav- opposite party no.4 was having hockey in his hand, however, nobody else has stated about the possession of hockey in the hand of Nand Lal Yadav as they had though seen the same but on account of party politics they are not coming forward to give their statements. P.W.2- Indra Pal Singh has further deposed in his cross examination that he has a post office in his house and he works as a post master and the same is 2-3 kms away. It has also come on record that the P.W.2 reached the place of occurrence earlier to P.W.3-Hari Ram Singh.

21. Analysing the testimony of prosecution witnesses it is clear that the incident took place on agricultural field whereat sugarcane was being grown and more than 40-50 people were doing the agricultural activities. The court below while analysing the entire story so set up by the prosecution have come to the conclusion that once the accused side wanted to eliminate the complainant then there was no occasion for them to have beaten the complainant-injured with the help of cuddle, wooden stick and hockey as according to the prosecution the accused is stated to be in possession with the country-made pistol and then if they had the intention to kill the complainant-accused then they could have resorted to gun shot fire and not resorted to use of pistol butt, cuddle, wooden stick or hockey. There is cloud over the prosecution theory regarding commission of crime particularly when the place whereat the incident is being shown to be occurred is the place whereat about 40-50 people as stated by the prosecution, were doing the agricultural activities. Another aspect which needs to be considered is the material contradictions with relation to the fact that P.W.3- Hari Ram Singh is shown to be working in the agricultural field while harvesting the sugarcane just adjacent to the place of the occurrence, however, in relation to the said fact P.W.2, who happens to be Indra Pal Singh is working as a post master 2-3 kms wherein a post office is established in his house and he came to the site in question prior to P.W.3 who was just adjacent to the place of occurrence. The aforesaid sequence and the chain of events itself shows that the entire prosecution story is engineered just to paint an occurrence which did not occur at all.

22. The court below has also analysed the issue with regard to the medico legal report while observing that in the first information report P.W.1-Gyan Prakash had come up with the stand that there was fracture in his left shoulder and his right leg was also fractured. However, in the X-Ray report being Ex.7, it was found that there was no fracture in the leg. Nonetheless all the three prosecution witnesses have come up with the stand that the injured sustained fracture in his leg. Even otherwise the X-Ray plate was also not produced before the learned trial court. So far as the other injuries are concerned, they were found to be simple in nature having scratch only. In order to prove the same P.W.6-Dr. K.P. Mishra was produced. However, the court below record a finding that the medical report being Ex.8 itself makes it clear that the reference of the wounds was made in the Accidental register, however, Trial Court casted suspicion upon the fact that when the issue was with regard to marpeet then why the said endorsement was made in the Accidental register. On being specifically asked about the said aspect, P.W.6- Dr. K.P. Mishra did not tender his reply.

23. Admittedly, before the trial court it was pleaded that the injuries were also

sustained by the defence- accused side. The injuries so stated to be received by Rama Shankar was 9 in number. Details whereof has been given in the body of the judgment under challenge. A plea was also taken by the defence that no explanation has been given by the prosecution with regard to the injuries so sustained by the accused side despite the fact that the same was available on record and in order to prove the same D.W.4- Dr. R.K. Rai came to the witness box and proved the same wherein the complainant fraction also sustained injuries. Much reliance has also been placed by the defence that in absence of any explanation so sought to be offered by the prosecution regarding explaining the injuries so sought to be sustained by the defence the accused are liable to be acquitted in this regard.

24. The Hon'ble Apex Court in the case of ***Laxmi Singh and Others vs. State of Bihar, (1976) 4 SCC 394*** in paragraph 12 has observed as under:-

"12. P.W. 8 Dr. S. P. Jaiswal who had examined Brahmdeo deceased and had conducted the postmortem of the deceased had also examined the accused Dasrath Singh, whom he identified in the Court, on April 22. 1966 and found the following injuries on his person:

1. Bruise 3" x 1/2" on the dorsal part of the right forearm about in the middle and there was compound fracture of the fibula bone about in the middle.

2. Incised wound 1" x 2 m. m. x skin subcutaneous deep on the late ral part of the left upper arm, near the shoulder joint.

3. Punctured wound 1/2" x 2 m. m., x 4 m. m. on the lateral side of the left thigh about 5 inches below the hip joint.

According to the Doctor injury No. 1 was grievous in nature as it resulted in compound fracture of the fibula bone. The other two injuries were also serious injuries which had been inflicted by a sharp-cutting weapon. Having regard to the circumstances of the case there can be no doubt that Dasrath Singh must have received these injuries in the course of the assault, because it has not been suggested or contended that the injuries could be self-inflicted nor it is believable. In these circumstances, therefore, it was the bounden duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they did not see any injuries on the person of the accused. Indeed if the eye-witnesses could have given such graphic details regarding the assault on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this is a most important circumstance to discredit the entire prosecution case. It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence. This matter was argued before the High Court and we are constrained to observe that the learned Judges without appreciating the ratio of this Court in Mohar Rai v. State of Bihar tried to brush

it aside on most untenable grounds. The question whether the Investigating Officer was informed about the injuries is wholly irrelevant to the issue, particularly when the very Doctor who examined one of the deceased and the prosecution witnesses is the person who examined the appellant Dasrath Singh also. In the case referred to above, this Court clearly observed as follows:

The trial Court as well as the High Court wholly ignored the significance of the injuries found on the appellants. Mohar Rai had sustained as many as 13 injuries and Bharath Rai 14. We get it from the evidence of P.W. 15 that he noticed injuries on the person of Mohar Rai when he was produced before him immediately after the occurrence. Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly pro-babilised. Under these circumstances the prosecution had a duty to explain those injuries.... In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants.

This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue: and (2) that the injuries probabilise the plea taken by the appellants. The High Court in the pre-sent case has not correctly applied the principles laid down by this Court in the decision referred to above. In some of the recent cases, the same principle was laid down. In Puran Singh v. The State of Punjab Criminal Appeal No. 266 of 1971 decided on April 25, 1975 : which was also a murder case, this Court, while following an earlier case, observed as follows:

In State of Gujarat v. Bai Fatima Criminal Appeal No 67 of 1971 decided on March 19, 1975 :) one of us (Untwalia, J., speaking for the Court, observed as follows:

In a situation like this when the prosecution fails to explain the in juries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all.

The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgment. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case. It seems to us that in a murder case, the non-

explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version:

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosedition one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the Court to rely on the evidence of PWs. 1 to 4 and 6 more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in State of Gujarat v. Bai Fatima Criminal Appeal No. 67 of 1971 decided on March 19, 1975 : Reported in there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises."

25. The Hon'ble Supreme Court in the case of ***Bhaba Nanda Sarma and Others vs. State of Assam, (1977) 4 SCC 396*** in paragraph 2 has observed as under:-

"2.The eye witnesses of the occurrence were P.W. 2 Gopi Nath Sarma; P.W. 3 Danesh Ali; P.W. 4 Nur Mohammad and P.W. 6 Kurpan Ali. The High Court in its judgment has catalogued the main five reasons which led the Sessions Judge to make an order of acquittal in favour of the appellants. In our opinion the High Court was right in reversing the judgment of the Trial Judge and interfering with the order of acquittal. It did so well within the limits of its power and the law as enunciated by this Court in several decisions. The four reasons given by the learned Sessions Judge were of a flimsy nature. It did not justify the entertaining of any doubt in regard to the prosecution story on the basis of these reasons. One of the five reasons was that the P.Ws did not state about the injuries of Bhaba Nanda and they were not explained by the prosecution. In our

opinion the High Court has rightly not attached much significanceto the alleged failure of the prosecution to explain the injuries on Bhaba Nanda. The injuries on his person were of a very minor nature, three of them being ecchymosis and one swelling of the root of right index finger. The evidence of the Doctor D.W. 1 was not sufficient to prove that the injury on the right index finger was grievious in nature. The ecchymosis inquiries however, were all very simple. Bhaba Nanda did not claim in his statement under section 342 of the Code of Criminal Procedure, 1898 as to with what weapon the injuries were caused on his person. He merely said that Gopinath and Shashi gave blows on his back. He did not attribute the right index finger injury as having been caused by either of the two. No defence witness was examined to give any counter version of the occurrence. Bhaba Nanda did not show his injuries to the Investigating Officer, as is apparent from his evidence, when he arrested him soon after the occurrence. No counter information 9-951 SCI/77 was lodged with the police nor any counter case filed. In a case of this nature before an adverse inference is drawn against the prosecution for its alleged suppression or failure to explain the injuries on the person of an accused, it must be reasonably shown that, in all probability, the injuries were caused to him in the same occurrence or as a part of the same transaction in which the victims on the side of the prosecution were injured. The prosecution is not obliged to explain the injuries oil the person of an accused in all cases and in all circumstances. This is not the law. It all depends upon the facts and circumstances of each case whether the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused. In the instant case the Sessions Judge was not justified in doubting the truth of the version given by the eye witnesses-three of whom were wholly independent witnesses. Gopi Nath was surely present on the scene of the occurrence as he himself had received the injuries in the same transaction. The High Court has rightly believed the testimony of the eye witnesses."

26. The Hon'ble Apex Court in the case of ***Vijayee Singh and Others vs. State of U.P. reported in (1990) 3 SCC 190*** in paragraphs 9 and 10 has observed as under:

"*9. Now the question is whether the prosecution has explained these injuries and if there is no such explanation what would be its effect? We are not prepared to agree with the learned counsel for the defence that in each and every case where prosecution fails to explain the injuries found on some of the accused, the prosecution case should automatically be rejected, without any further probe. He placed considerable reliance on some of the judgments of this Court. In Mohar Rai & Bharath' Rai v. The State of Bihar, [1968] 3 SCR 525, it is observed:*

"Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly probabi- lised. Under these circumstances the prosecution had a duty to explain those injuries. The evidence of Dr. Bishnu Prasad Sinha (P.W. 18) clearly shows that those injuries could not have been self-inflicted and further, according to him it was most unlikely that they would have been caused at the instance of the appellants themselves. Under these circum-stances we are unable to agree with the High Court that the prosecution had no duty to offer any explanation as regards those injuries. In our judgment, the failure

of the prosecu- tion to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the inci- dent is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

In another important case Lakshmi Singh and Ors. v. State of Bihar, [1976] 4 SCC 394, after referring to the ratio laid down in Mohar Rai's case, this Court observed:

"Where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is un- true; and (2) that the injuries probabilise the plea taken by the appellants."

10. It was further observed that:

"In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable. (3) that in case there is a defence version which explains the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

Relying on these two cases the learned counsel for the defence contended that in the instant case the prosecution has failed to explain the injuries on the two accused and the genesis and the origin of the occurrence have been suppressed and a true version has not been presented before the Court and consequently the truth from falsehood cannot be separated and consequently the entire prosecution case must be rejected. We are unable to agree. In Mohar Rai's case it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. Likewise in Lakshmi Singh's case also it is observed that any non-expla- nation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case. In the instant case, the trial court as well as the two learned Judges of the High Court accepted the prosecu- tion case as put forward by P.Ws 1 to 3 in their evidence. The presence of these three witnesses could not be doubted at all. P.Ws 1 and 2 are the injured witnesses and P.W.

1 gave a report giving all the details. However, he attributed specific overt acts to accused Nos. 1, 3, 4 and 6 and made an omnibus allegation against the remaining accused. It is for this reason that Justice Seth found it to be safe to convict only accused Nos. 1, 3, 4 and 6 who are the appellants before us. P.Ws 1, 2 and 3 are the eye witnesses. We have carefully considered their evidence and nothing material is elicited in the cross examination which renders their evidence wholly untrustwor- thy. No doubt they have not explained the injuries found on accused Nos. 13 and 14. From this alone it cannot be said that the prosecution has suppressed the genesis and the origin of the occurrence and has not presented a true ver- sion. Though they are interested, we find that their evi- dence is clear, cogent and convincing. The only reasonable inference that can be drawn is that the two accused persons received the injuries during the course of the occurrence which were inflicted on them by some members of the prosecution party."

27. The Hon'ble Apex Court in the case of ***Dev Raj And Another vs. State of H.P. reported in 1994 Supp (2) SCC 552*** in paragraphs 8 and 9 has observed as under:

"8. Learned Counsel for the appellants submits that the prosecution has failed to explain the injuries on the two accused persons and as a matter of fact, later a medical board was constituted, and the doctor found on the body of Des Raj accused that there was fracture on the postro lateral aspect of the left forearm with scab off 1" above the lower ulnar prominence transverse in direction 2.5 cm x 1 cm and 6" below the elbow joint 1 cm x 1/2cm - among other wounds. His further submission is the failure on the part of the prosecution to explain the injuries on the accused would go to show that they suppressed the genesis of the occurrence and the right of private defence to these two accused cannot be denied. It is also his further submission that the accused need not prove their defence like the prosecution and it is enough if by preponderance of probabilities and on the basis of the circumstances they can show that they had such a right, then, they should be given the benefit of doubt.

9. As already mentioned, we are concerned only with Dev Raj now. Dev Raj as well as Des Raj undoubtedly received injuries during the same occurrence and when they have taken the plea that they acted in self-defence, that cannot be lightly ignored particularly in the absence of any explanation of their injuries by the prosecution. It is not necessary to refer to various decisions where it has been held that the accused if acted on self-defence, need not prove beyond all reasonable doubt and if two views are possible, the accused should be given the benefit of doubt. Having regard to the nature of the injuries on the two accused persons, we find it difficult to hold that their pleas altogether are unfounded. Then the next question would be whether they had exceeded the right of self-defence. Admittedly, the occurrence is said to have taken place in a sudden manner. Even, according to the prosecution, they did not come there armed. A quarrel ensued there and they picked up iron pipes and wooden patties that were lying there and a clash took place. In such a situation, their plea of right of private defence has to be accepted, but having regard to the injuries inflicted by them on the two deceased persons as well as on PW-23, they have definitely

exceeded the right of private defence and the accused are entitled to the benefit of Exception 2 of Section 300 and the offence punishable is one under Section 304, Part 1, I.P.C. . Accordingly, conviction of Dev Raj under Section 302, I.P.C. and the sentence of imprisonment for life awarded thereunder are set aside and, instead, he is convicted under Section 304 Part I, I.P.C. and sentenced to R. I. for seven years. His conviction under Section 307, I.P.C. and the sentence of five years R.I., are, however, confirmed. The sentences are to run concurrently . His conviction under Section 451, I.P.C. and the sentence of six months' R.I. and fine on default clause, if any, are confirmed. Sentences to run concurrently. Dev Raj shall surrender and serve out the remaining sentence. In the result, the appeal abates so far as Des Raj is concerned and allowed partly so far as Dev Raj is concerned to the extent indicated above."

28. The Hon'ble Apex Court in the case of **Takhaji Hiraji vs. Thakore Kubersing Chamansing and Others reported in (2001) 6 SCC 145** in paragraph 17 has observed as under:

"17. The first question which arises for consideration is what is the effect of non-explanation of injuries sustained by the accused persons. In Rajendra Singh & Ors. Vs. State of Bihar, (2000) 4 SCC 298, Ram Sunder Yadav & Ors. Vs. State of Bihar, (1998) 7 SCC 365 and Vijayee Singh & Ors. Vs. State of U.P., (1990) 3 SCC 190, all 3-Judges Bench decisions, the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the person of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions : (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear cogent and credit worthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case."

29. The Hon'ble Apex Court in the case of **Kashiram and Others vs. State of M.P. reported in (2002) 1 SCC 71 in paragraphs 22, 23, 24 and 28** has observed as under:

"22. A few relevant factual and legal aspects overlooked by the High Court may not be noticed. The investigation suffers from a serious infirmity which has to some extent prejudiced the accused in their defence. The investigating officer having found one of the accused having sustained injuries in the course of the same incident in which those belonging to the prosecution party sustained injuries, the investigating officer should have at least made an effort at investigating the cause of, and the circumstances resulting in, injuries

on the person of accused Prabhu. Not only the investigating officer did not do so, he did not even make an attempt at recording the statement of accused Prabhu. If only this would have been done, the defence version of the incident would have been before the investigating officer and the investigation would not have been one-sided.

23. Section 105 of Evidence Act, 1872 provides that the burden of proving the existence of circumstances which would bring the act of the accused alleged to be an offence within the exercise of right of private defence is on him and the Court shall presume the absence of such circumstances. However, it must be borne in mind that the burden on the accused is not so heavy as it is on the prosecution. While the prosecution must prove the guilt of the accused to its hilt, that is, beyond any reasonable doubt, the accused has to satisfy the standard of a prudent man. If on the material available on record a preponder-ance of probabilities is raised which renders the plea taken by the accused plausible then the same should be accepted and in any case a benefit of doubt should deserve to be extended to the accused (See : Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR (1964) SC 1563; State of Punjab v. Gurbux Singh and Ors., [1995] Suppl. 3 SCC 734, Vijayee Singh v. State of U.P, AIR (1990) SC 1459). In Vijayee Singh's case this Court emphasised the difference between a flimsy or fantastic plea taken by the defence which is to be rejected altogether and a reasonable though incompletely proved plea which casts a genuine doubt on the prosecution version and would threfore indirectly succeed. "It is the doubt of a reasonable, astute and alert mind arrived at after due application of mind to every relevant circumstance of the case appearing from the evidence which is reasonable".

24.The High Court was also not right in criticising and discarding availabil- ity of plea of self defence to the accused persons on the ground that the plea was not specifically taken by the accused in their statements under Section 313 Cr.P.C. and because the accused Prabhu did not enter in the witness box. Though Section 105 of the Evidence Act enacts a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused persons recorded under Section 313 Cr.P.C. or by adducing defence evidence. And, even if the plea is not introduced in any one of these three modes still it can be raised during the course of submissions by relying on the probabilities and circumstances obtain-ing in the case as held by this Court in Vijayee Singh's case (supra). It is basic criminal jurisprudence that an accused cannot be compelled to be examined as a witness and no adverse inference can be drawn agsint the defence merely because an accused person has chosen to abstain from the witness box.

28. In Dev Raj and Anr. v. State of Himachal Pradesh, AIR (1994) SC 523 this Court has held that where the accused received injuries during the same occurrence in which complainants were injured and when they have taken the plea

that they acted in self-defence, that cannot be lightly ignored particularly in the absence of any explanation of their injuries by the prosecution."

30. The Hon'ble Apex Court in the case of **Sucha Singh and Another vs. State of Punjab reported in (2003) 7 SCC 643** in paragraphs 24, 25 and 26 has observed as under:

"24. One of the pleas is that the prosecution has not explained the injuries on the accused. Issue is if there is no such explanation what would be its effect? We are not prepared to agree with the learned counsel for the defence that in each and every case where prosecution fails to explain the injuries found on some of the accused, the prosecution case should automatically be rejected, without any further probe. In Mohar Rai and Bharath Rai v. The State of Bihar (1968 (3) SCR 525), it was observed:

"...In our judgment, the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

In another important case Lakshmi Singh and Ors. v. State of Bihar (1976 (4) SCC 394), after referring to the ratio laid down in Mohar Rai's case (supra), this Court observed:

"Where the prosecution fails to explain the injuries on the accused, two results follow:

(1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants."

It was further observed that:

"In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

25. In Mohar Rai's case (supra) it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. Likewise in Lakshmi Singh's case (supra) it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the

truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by this Court in Vijayee Singh and Ors. v. State of U.P. (AIR 1990 SC 1459).

26. Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. As observed by this Court in Ramlagan Singh v. State of Bihar (AIR 1972 SC 2593) prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In Hare krishna Singh and Ors. v. State of Bihar (AIR 1988 SC 863), it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, trifle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case, particularly, when the accused who claimed to have sustained injuries has been acquitted.

27. The fact that name of PW10 does not figure in the inquest report or that the DDR entry does not contain the name of Pritam Singh does not in any way corrode the credibility of the prosecution version, particularly when the reason as to why these were absent in the relevant documents has been plausibly explained by the witnesses, and after consideration accepted by the trial Court and the High Court."

31. The Hon'ble Apex Court in the case of **Surendra Paswan vs. State of Jharkhand reported in (2003) 12 SCC 360** in paragraph 8 has observed as under:

"8.Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. As observed by this Court in Ramlagan Singh v. State of Bihar (AIR 1972 SC 2593) prosecution is not called upon in all cases

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32. The Hon'ble Apex Court in the case of ***Bishna AliasBhiswadeb Mahato and others reported in (2005) 12 SCC 657*** in paragraph 50 has observed as under:

"50.The fact as regard failure to explain injuries on accused vary from case to case. Whereas non-explanation of injuries suffered by the accused probabilises the defence version that the prosecution side attacked first, in a given situation it may also be possible to hold that the explanation given by the accused about his injury is not satisfactory and the statements of the prosecution witnesses fully explain the same and, thus, it is possible to hold that the accused had committed a crime for which he was charged. Where injuries were sustained by both sides and when both the parties suppressed the genesis in the incident, or where coming out with the partial truth, the prosecution may fail. But, no law in general terms can be laid down to the effect that each and every case where prosecution fails to explain injuries on the person of the accused, the same should be rejected without any further probe."

33. The Hon'ble Apex Court in the case of ***Ram Pyare Mishra vs. Prem Shanker and Others reported in (2008) 14 SCC614*** in paragraph 18 has observed as under:

"18. So far as non-explanation of superficial injuries on the accused persons is concerned, in Anil Kumar v. State of U.P. *(2004 (13) SCC 257), it was held as follows:*

"11.Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. As observed by this Court in Ramlagan Singh v. State of Bihar (AIR 1972 SC 2593) prosecution is not called

upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In Hare krishna Singh and Ors. v. State of Bihar (AIR 1988 SC 863), it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, trifle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case. (See Surendra Paswan v. State of Jharkhand (2003) 8 Supreme 476)."

34. The Hon'ble Apex Court in the case of ***Ram Pat and Others vs. State of Haryana reported in (2009) 7 SCC 614*** in paragraphs 38 to 40 has observed as under:

"38. On the date of occurrence, PW 8 started cultivating. It has been amply proved that the scuffle lasted for only two minutes to two and half minutes. PW8 - Rajbir was not armed with any weapon, so was not Harda Ram (the deceased). It was Lal Singh alone who had in his hand a small twig (Kamari). According to him, the same is used to drive camels. Kamari was said to be used by Lal Singh in his sole defence as a result whereof Sheo Ram and Raja Ram were injured. We have noticed hereinbefore that the injuries on the person of the said two accused were simple in nature.

39. It is true that the fact that two of the accused persons had suffered injuries had not been disclosed in the FIR or in their statement before the Investigating Officer, but the same, in our opinion, was not necessary inasmuch as they got themselves medically examined by Dr. Goel almost at the same time when the other prosecution witnesses got themselves examined. By that time they had already been arrested. It was the police authorities who had submitted an application along with the injuries chart. They had been brought by Constable Satbir Singh. Thus, the fact that two of them had suffered injuries in the same incident was known to the Investigating Officer.

40. It has furthermore well settled that whereas grievous injuries suffered by the accused are required to be explained by the prosecution, simple injuries need not necessarily be. Non explanation of simple injuries of the nature suffered by the accused would not be fatal. In Hari vs. State of Maharashtra [2009 (4) SCALE 103], this Court held:

"30. On the other question, namely, non- explanation of injury on the accused persons, learned Counsel for the

appellant has cited a decision in Lakshmi Singh and Ors. v. State of Bihar (1976) 4 SCC 394. In the said case, this Court while laying down the principle that the prosecution has a duty to explain the injuries on the person of an accused held that non-explanation assumes considerable importance where the evidence consists of interested witnesses and the defence gives a version which competes in probability with that of the prosecution case.

31. But while laying down the aforesaid principle, learned Judges in paragraph 12 held that there are cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This would "apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries." Therefore, no general principles have been laid down that non-explanation of injury on accused person shall in all cases vitiate the prosecution case. It depends on the facts and the case in hand falls within the exception mentioned in paragraph 12 in Lakshmi Singh (supra)."

35. Applying the proposition of law so culled out by the Hon'ble Apex Court in the above noted decisions and irresistible conclusion stands drawn that no universal rule can be laid down while acquitting the accused in the matter of non-explanation offered by the prosecution with respect to the injuries suffered by the accused. However, each and every case is to be decided on its facts looking into the ocular testimony and the evidences so sought to be adduced in that regard. Here in the present case the court finds that the prosecution story itself proceeds on weak evidence as the testimony of the witnesses do not lead to a conclusion that the accused herein had committed the crime. Bearing in mind the fact that the incident alleged to have been occurred is during day time in a place wherein more than 50-60 workers were already working in the agricultural field which was in close vicinity and further the fact that the accused are stated to be in possession of a country-made pistol then too beating is stated to be administered by cuddle, wooden stick and hockey. In normal circumstances, it would be safely said that the possession of country-made pistol does not imply that use of cuddle, wooden stick and hockey cannot be resorted to while inflicting injuries but in the present case the allegation is with regard to resorting of firing and disposing the injured. It is quite abnormal and inconceivable that in an open place wherein 50-60 people were already there, 3 accused persons will administer beating by hockey and cuddle. The court below has further analysed the medical reports as well as the other relevant facts including the fact that P.W.3, who was working and who had witnessed the said incident while being in the farm which is just closeby to the place of occurrence reached the place after a long time after the presence of P.W.2, who came to rescue the victim from the accused who was 2-3 kms. away. Nonetheless, the first information report recites the fact that the complainant's leg was also fractured and is also borne out from the statement given by all the 3 prosecution witnesses, however, in the medical report it has come on record that there was no fracture in the leg.

36. In the aforesaid factual backdrop, the relevance of explanation of the injuries of the accused assumes importance and

significance. Despite the medical report being available with respect to the injuries so sustained by the accused opposite party no.3-Rama Shankar and proving of the same by the medical practitioner herein, no explanation has been given by the prosecution which itself creates a cloud and suspicion that the entire story so built up by the prosecution stands no legal and factual foundation and proceeds on weak evidences. The court below has further held that the injuries so sustained by the accused (even if it is true) are not fatal. This Court further finds that the prosecution case proceeds on weak evidences and in any view of the matter, this is not a case wherein the appellant/complainant can insist the Court to take a different view from the view taken by the Trial Court while acquitting the accused, while reversing the judgment in question.

37. Hence, in any view of the matter applying the principles of law so culled out by the Hon'ble Apex Court in the facts of the present case, we have no option but to concur with the view taken by the learned Sessions Judge.

38. The present criminal appeal stands **dismissed.**

39. Records of the present case be sent back to the concerned court below.

(2022) 8 ILRA 952
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.07.2022

BEFORE

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

Criminal Appeal No. 7052 of 2006

Vinay Kumar Sharma ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri U.K. Saxena, Sri Apul Mishra, Sri Rahul Misra, Sri Rajul Bhargava, Sri Sharad Kumar Srivastava, Sri Yogesh Kumar Srivastava, Sri Yogesh Srivastva

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Sections 201, 302 & 376 - The Code of Criminal Procedure, 1973 - Section 313 -appeal against conviction - Relationship is not a factor to affect credibility of a witness - Evidence of a related witness can be relied upon provided it is trustworthy - in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue - the correctness or legality of the said fact/issue could not be raised.(Para -86,101)

Circumstantial evidence - no eye witness - most important circumstance - recovery of dead body of victim-girl from the house of Appellant - missing report - victim aged about 12 years - gone along with bucket to fetch water - did not come back - murdered and raped deceased - bucket of deceased recovered from house of Appellant - Appellant not been able to explain circumstance with regard to the recovery of the dead body of the victim (in naked condition) from the house of Appellant - prosecution witnesses proved prosecution case beyond reasonable doubt .**(Para - 95,104)**

(B) Evidence Law - Indian Evidence Act, 1872 - Section 8 - Motive, preparation and previous or subsequent conduct - testimony of resgestae is allowable when it goes to the root of the matter concerning the commission of the crime - conduct of a person involved in a crime becomes relevant if his conduct is related to the incident that happened - Where a crime has been committed, the court has to take into account both the previous and subsequent conduct of the accused

pertaining to the commission of the crime.(Para - 47, 48)

(B) Evidence Law - Indian Evidence Act, 1872 - Section 27 - How much of information received from accused may be proved - factum of information - discovery of dead body and other articles - information within special knowledge of appellant – Held - doctrine of confirmation by subsequent events attracted - recovery or discovery is a relevant fact or material - can be relied upon. **(Para - 56)**

(C) Evidence Law - Indian Evidence Act, 1872 - Section 11 – When facts not otherwise relevant become relevant – Plea of alibi - collateral facts having no connection with the main fact except by way of disproving any material fact, proved or asserted can be admitted in evidence - plea of alibi must be proved with absolute certainty so as to completely exclude the presence of the person concerned at the time when and the place where the incident took place.(Para - 81)

(D) Evidence Law - Indian Evidence Act, 1872 - Section 145 - cross examination as to previous statements in writing - Contradictions are to be proved in accordance with the Evidence Act otherwise they would have no evidentiary value and would not be admissible - Appellant has not cross-examined P.W.2 nor the contradiction has been proved in compliance with section 145 of the Evidence Act. **(Para - 100)**

HELD:-Appellant failed to dislodge the prosecution case. No circumstance stated which would entitle finding of conviction and sentence recorded by trial court as per-se perverse. Conviction and sentence recorded by trial court in the impugned judgment upheld.**(Para -105)**

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. Anant Chintaman Lagu Vs St. of Bom., AIR 1960 SC 500

2. Pankaj Vs St. of Raj., (2016) 16 SCC 192

3. A.N. Venkatesh Vs St. of Karn., (2005) 7 SCC 714

4. Prakash Chand Vs St. (Delhi Admn.), (1979) 3 SCC 90

5. Ghanashyam Das Vs St. of Assam, (2005) 13 SCC 387

6. St. of Karn. Vs K. Yarappa Reddy, (1999) 8 SCC 715

7. St. of Raj. Vs Teja Ram, (1999) 3 SCC 507

8. Kartik Malhar Vs St. of Bihar, (1996) 1 SCC 614

9. St. of U.P. Vs Samman Dass, (1972) 3 SCC 201

10. Khurshid Ahmed Vs St. of J&K, (2018) 7 SCC 429

11. Mahavir Singh Vs St. of Har., (2014) 6 SCC 716

12. V.K. Mishra Vs St. of Uttarakhand, (2015) 9 SCC 588

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. The present appeal is preferred against the judgment and order dated 09.11.2006 passed by Session Judge, Gautam Budh Nagar in Session Trial No. 237 of 1995 - State Vs. Vinay Kumar Sharma and another wherein the Appellant has been convicted under section 302 Indian Penal Code for life imprisonment and fine of Rs.15,000/-; under section 376 Indian penal code convicting the Appellant for a sentence of 10 years rigorous imprisonment and fine of Rs.5000/- and further convicting the appellant under section 201 Indian Penal Code with a sentence of three years rigorous imprisonment and fine of Rs.3000/-.

2. Heard Sri Rahul Misra, learned counsel for the Appellant; learned A.G.A. for the State and perused the lower court record with the assistance of the counsel for the parties.

3. There is one Ram Avtar Sharma who is resident of Village-Nar Mohammadpur within Police Station-Jahangirpur, District- Gautam Budh Nagar. The accused person is the next-door neighbour.

4. On 9th August, 1994 at about 10 am, the victim (aged about 12 years), daughter of Sri Ram Avtar Sharma had gone to the house of accused person to fetch water from the hand pump with a bucket in her hand but she did not return from there. She was searched out in the village and when she could not be found then her uncle (Anand Swaroop, S/o Ganga Ram) on 9th August, 1994 lodged a missing report at 16.45 hours at P.S. Jahangirpur, District Gautam Budh Nagar being G.D. No.21 in respect of the missing of the Victim. In the aforesaid report it was mentioned that the victim girl had gone to bring water from house of Naresh.

5. On the said information, police came to the village and made search in the house of Naresh and other residents of the village but the girl/victim could not be traced.

6. On that very night, Badri Prasad (father of Appellant) came to the house of Suresh Chand Sharma (PW3) and asked for his help in disposing of the dead body of the girl in the canal after disclosing that she was killed by his son Vinay (Appellant), but Suresh Chand Sharma refused to oblige Badri Prasad.

7. On the next day, Suresh Chand Sharma (PW-3) disclose the aforesaid fact Ramavtar and other villagers.

8. On 10th August, 1994, Anand Swaroop gave another report at P.S. Jahangirpur that his niece (victim) has been murdered by Vinay Kumar Sharma, s/o Sri Badri Prasad Sharma and that her corpus is lying in the house of accused - Vinay Kumar Sharma. It was also stated that Vinay Kumar Sharma appears to have committed rape of the victim and, thereafter, has murdered her. It was also alleged that the father of Vinay Kumar Sharma, namely, Badri Prasad Sharma has aided in concealing the corpus of the deceased. The aforesaid report was entered in G.D. No.16 at 12.30 PM on 10th August, 1994. On the basis of the aforesaid, a case under section 302, 201 and 376 of the Indian Penal Code was registered against the accused persons.

9. The then Station House Officer of the police station concerned D.R.Nanoria (PW-6) took investigation of the case in his hand and came along with complainant - Anand Swaroop and other police personnel to the village. The house of the accused person was surrounded by villagers and both the accused person Vinay Kumar Sharma and Badri Prasad were present at the roof of the house.

10. On seeing the police party, both the accused person jumped into the courtyard of their house, where the bricks and bulleys were lying and they were apprehended and beaten by villagers.

11. The investigating officer arrested both the accused person and made enquiries from them. Appellant-accused person confessed to the crime and got recovered dead body of the victim which

was wrapped in a gunny bag in a naked condition. The corpus of the deceased was concealed in a almirah of the eastern wall of the room of the Appellant-accused.

12. The body of the deceased was taken out from the bag in naked condition and her clothes namely underwear, Baniyan, salwar, kurta and bangles were also got recovered on 10th August, 1994. The recovery memo of the articles recovered along with corpus of the deceased from the house of Vinay Kumar Sharma (Appellant) is marked as Ex.Ka-1. The witnesses to the aforesaid recovery memo are Ramvir Sharma (PW1) and Dharmendra, S/o Jabar Singh.

13. Badri Prasad (father of Appellant) also got the bucket recovered from the house of the Appellant-accused. The recovery memo of the bucket is Ex - Ka 2. It is the case of the prosecution that the bucket that was recovered was the same bucket which was taken by the victim to the house of the Appellant. The witnesses to the aforesaid recovery memo are Ramvir Sharma and Dharmendra, S/o Jabar Singh.

14. The investigating officer also prepared the inquest report/panchnama dated 10/08/1984 from 13:30 hours to 14:30 hrs. The panchnama was marked as Ex Ka - 5 before the trial court.

15. The body of the deceased was sent for post mortem examination by the investigating officer, through Constable-Chandra Pal and Constable - Yogendra Yadav. In this respect Form 13 was prepared on 10th August, 1994 and the same was marked as Ex Ka - 6. The police form depicting the mark of injury was marked as Ex - Ka 7. The other connected papers were marked as Ex - Ka 8 and Ex - Ka 9.

16. The post mortem of the deceased girl was held on 10th August, 1994 at 4.15 PM by Dr. S.K. Sharma (PW-5) and the post mortem report was marked as Ex. Ka-3.

17. The Investigating Officer also prepared the site plan of the place of occurrence and the place of recovery of the articles and the dead body and the same was marked as Ex. Ka-4.

18. After concluding the investigation, the Investigating Officer has filed a chargesheet (Ex. Ka-10) under Sections 302, 201 and 376 I.P.C. against Appellant and Badri Prasad.

19. The charge was framed by the trial court against accused Vinay Kumar Sharma under Sections 376, 302 and 201 I.P.C. and a charge under Section 201 I.P.C. only was framed against the accused Badri Prasad. Both the accused denied the charges and claimed to be tried.

20. The prosecution in support of the case has examined 8 prosecution witnesses before the Trial Court.

21. Ramvir Sharma (PW1) is the witness of recovery of the dead body of the deceased girl and her clothes and bangles and gunny bag in which the dead body was kept. The aforesaid witness has supported the prosecution case and according to him when the police had arrived in the village, both the accused persons had jumped from the roof of their house and they were apprehended and beaten by the villagers with lathi and danda and as bricks and balli were lying where they had jumped, they have got themselves injured. After their arrest, on interrogation the accused Vinay Kumar Sharma had informed that the dead body of the victim/girl is lying concealed in the almirah of his room and he got the dead

body recovered in his presence as well as the police and several villagers. Badri Prasad had brought the bucket of the deceased girl and gave it to the police. The aforesaid witness has proved the recovery memo being Ex. Ka-1 of the blood stained clothes, plastic bangles and bag (including body). The aforesaid witness has also proved the recovery memo being Ex. Ka-2 in respect of the recovery of the bucket. The witness has also proved the recovery of underwear, banyan, salwar and kurta, plastic bangles and the bag and the same are Material Ex. 1 to 6 respectively.

22. Anand Swaroop (P.W. 2) is uncle of the deceased. He has lodged the "Gumshudgi' Report of the victim at Police Station - Jahangirpur on 9th August 1994 and again on 10th August, 1994 he has given the report to the police in which he has mentioned that he has come to know that accused Vinay Kumar (Appellant) has concealed the dead body of the victim in his house after committing rape and murder of the Victim. The witness has supported the prosecution case and has stated that the victim had gone to fetch water from the house of Naresh but the hand pump of Naresh was not functioning, therefore she had gone to the house of accused Vinay Kumar and thereafter she did not return and could not be found whereupon the missing report dated 9th August, 1994 was lodged by Anand Swaroop. On the next date, when the witness came to know from the villagers that accused Vinay (Appellant) has committed rape and murder of the victim and thereafter has concealed the corpus of the victim in his house, the witness had lodged another report dated 10th August, 1994 with the police station. He is also the witness of recovery of the dead body and the clothes of the deceased from the house of the accused person.

23. Suresh Chand (P.W. - 3) is the resident of the village. According to the aforesaid witness, Badri Prasad had come to him in the night on the date of incident and has asked for his help in getting the dead body of the victim girl disposed off by throwing the same in the canal. The witness has further stated that Badri Prasad had stated to him that the girl has been murdered by his son but the witness refused to oblige him.

24. Ghanendra Singh (PW-4) is the witness of the recovery of the dead body and clothes etc. of deceased and her bucket on 10th August, 1994 and their recovery memos Ex. Ka-1 and Ex. Ka-2. He has supported the prosecution case and has stated that the dead body of deceased was recovered from the house of accused Badri Prasad, who also brought a bucket from his house and gave it to the police. He has proved his signature on recovery memo Ex. Ka-2 and has also proved the bucket Material Ex.7 and its wrapper Material Ex.8.

25. Dr. S.K. Sharma (PW-5) had performed the autopsy of the dead body of deceased on 10th August, 1994 at 4.15 PM. He has supported the above facts on oath and has proved the post mortem report as Ex. Ka-3. According to him, at the time of the post mortem examination, the girl was dead by about 1-1/4 days and there were seven ante-mortem injuries on her body and the posterior fourchette of her vagina was lacerated, posterior vaginal wall was lacerated and her hymen was found freshly ruptured and two slides of her vaginal smear were prepared and were sent for pathological examination and the girl had died due to asphyxia, as a result of strangulation.

26. S.I. D.R. Nanoria (PW-6) is the Investigating Officer of the case. He has

proved the site plan Ex. Ka-4 of the place of occurrence as well as of the place of recovery of the dead body of deceased and other articles and has also proved the 'Panchnama' of the dead body of the deceased as Ex.Ka-5 and its related documents, namely, police form no.13 Ex. Ka-6, sketch of the dead body Ex. Ka-7, letter to R.I. Ex.Ka-8, and letter sent to C.M.O. Ex. Ka-9. He has further proved the chargesheet Ex. Ka-10. He has also stated that the original 'Gumshudgi' report is not on file, but it was copied out in the G.D. and the original 'Gumshudgi' report was annexed with the G.D. which had already been weeded out, as per report (paper no.518) of the record keeper of the police department of Bulandshahar. He has also stated that on the basis of the report given at the Police Station on 10th August, 1994, at 12.30 PM no chik FIR was drawn and the case was registered by making entries in General Diary No.16, in which contents of the report were copied out. He has also stated that the G.D. of PS Jahangirpur, dated 10th August, 1994 has also been weeded out but the carbon copy of the General Diary No. Ex. Ka-11, is on file as paper no.10-A, which has been proved by him. He has also said that the accused persons were arrested by him and accused Vinay Kumar got the dead body and clothes of the deceased recovered.

27. Smt. Kusum (PW-7) is the mother of the deceased and is also a witness of seeing her daughter going to the house of accused-persons for taking water. She has supported the prosecution case on oath.

28. Constable Udham Singh (PW-8) is the 'Pairokar' of Police Station Jahangirpur and has stated that the original General Diary of Police Station Jahangirpur, dated 9th August, 1994 and 10th August, 1994 were summoned from the office of SSP Bulandshahar but according to report dated 16th September, 2000 Ex. Ka-12, of the SSP Office, the GDs were weeded out. He has also proved the true copies of GD No.21, dated 9th August, 1994 and GD No.16 dated 10th August, 1994 of PS Jahangirpur, as Ex.Ka-13 and Ka-14 respectively by stating that copies are in the hand writing of the then Head Moharrir Sh. Yogendra Prakash of the Police Station who had been posted with him.

29. The prosecution exhibited the following documents in support of prosecution case:-

Documents	**Exibit No.**	**Prosecution Witness**
Recovery Memo	Ex. Ka-1	P.W.-1
Recovery Memo	Ex. Ka-2	P.W.-4
Postmortem Report	Ex. Ka-3	P.W.-5
Site Plan	Ex. Ka-4	P.W.-6
Panchnama	Ex. Ka-5	P.W.-6
Form No.13	Ex. Ka-6	P.W.-6
Photo Naash	Ex. Ka-7	P.W.-6
Report to Police Station	Ex. Ka-8	P.W.-6
Report to CMO	Ex. Ka-9	P.W.-6
Chargesheet	Ex. Ka-10	P.W.-6
Nakal Rapat No.16	Ex. Ka-11	P.W.-6
Weeding out report 16.9.2002	Ex. Ka-12	P.W.-8
Chik FIR	Ex. Ka-13	P.W.-8

Nakal Rapat No.16	Ex. Ka-14	P.W.-8

30. The Defence produced the following witness before the Trial Court:-

31. Lakhpat Singh (DW-1) was an Assistant Teacher at Primary School, Jahangirpur where at the time of the occurrence, Badri Prasad was working as the Head Master. He has brought the attendance register of the school pertaining to the year 1994 and on the basis of that register, he has stated that on 9th August, 1994, Badri Prasad had signed at 6.30 AM as a token of his arrival in the school and had again signed at 12.10 PM when he had left the school. He has proved the signature of Badri Prasad and has also filed the photocopy of the attendance register Ex. Kha-1. He has further stated that on 10th August, 1994, S.I. D.R. Nanoria of PS Jahangirpur, had visited the school and had inspected the attendance register and correspondence register of the school in his presence as well as in the presence of other teachers and had also made entry of inspection on those registers. He has also proved the photocopy of correspondence register as Ex. Kha-2. He has also stated that Sri Nanoria had prepared a memo regarding the inspection of the registers whereon, his signature and carbon copy of other were obtained and had given a carbon copy thereof to the school. He has filed the said carbon copy Ex. Kha-3 before the Court.

32. Aasin Ansari (DW-2) was working as Security Guard at Teletube Electronics Ltd., Kavi Nagar Industrial Area, Ghaziabad and has stated that whenever a new visitor used to visit the company to meet any employee, then, he is required to make entry on the visitor's register and, thereafter, he is allowed to go inside and the time of his entry and exit are mentioned and the Security Guard on duty also puts his signature thereof. He has brought the visitor register pertaining to the year 1994 and has stated that on 9th August, 1994 an entry in the name of Vinay Kumar Sharma is made in this register, whereon, his colleague Bhai Pal, Security Guard had also put his signature and there is another entry in the name of Vinay Kumar Sharma on that date, whereon, the security guard Surjeet Singh had put his signature. He has filed the photocopy of the entries of the said register pertaining to 9th August, 1994.

33. Raj Kumar Sharma (DW-3) is the brother of accused Vinay Kumar son of Badri Prasad and according to him, he was working as Assistant Manager (Accounts) in Teletube Electronics Ltd. on 9th August, 1994. He has also stated that he used to write letters to his father at the address of his school. He has proved the original letters dated 26th June, 1994 and 30th July, 1994 as Ex. Kha-6 and Kha-7 respectively. According to him, Appellant-Vinay Kumar is also known as Guddu and through letter dated 30th July, 1994, he had called accused Vinay Kumar to his company in respect of his service and on 9th August, 1994, accused Vinay Kumar had come to meet him at 11.30 AM and remained with him upto 1.15 PM and, thereafter, both of them had come on a scooter to his house and took lunch together. He has also stated that Vinay (Appellant) had gone to meet him at the factory at about 5.30 or 5.45 PM and on 10th August, 1994, he had seen off accused Vinay Kumar at the railway station at 9 AM for Khurja Junction.

34. As per the prosecution case on 9th August, 1994 at about 10 am, the victim (aged about 12 years), daughter of Ram Avtar Sharma had gone to the house of

accused person to fetch water from the hand pump with a bucket in her hand but she did not return. She was searched out in the village and when she could not be found then her uncle (Anand Swaroop, S/o Ganga Ram) on 9th August, 1994 lodged a missing report at 16.45 hours at P.S. Jahangirpur, District Gautam Budh Nagar being G.D. No.21 in respect of the missing of the Victim. The fact with regard to lodging the missing report dated 09.08.1994 of the deceased girl has been testified by Anand Swaroop (PW-2) before the trial court. The said witness has read the contents of the copy of the report dated 9.8.1994 and has admitted the contents are the same as has been given by him at the police station. Further P.W. 6 - Sub Inspector D.R. Nanoria has stated before the trial court that on 09.08.1994 he was posted as station house officer at Police Station - Jahagirpur, Where the missing report of the victim was lodged. He has further testified that the aforesaid missing report dated 09.08.1994 was entered in G.D. No 21 at 16:45 pm on the same day. Con. 473 Shri Udham Singh (PW-8) has stated before the trial court that the copy of GD no 21 has been written by H.M. Yogendra Prakash and has identified the writing of Yogendra Prakash. The fact regarding missing report dated 09.08.1994 has been proved by the prosecution.

35. On the same night, Badri Prasad (Father of Appellant) came to the house of Suresh Chand Sharma (PW-3) and asked for his help in disposing of the dead body of the victim in the canal after disclosing that she was killed by his son Vinay (Appellant), but Suresh Chand Sharma refused to oblige Badri Prasad. Suresh Chand Sharma (P.W. 3) has testified before the trial court that on 09.08.1994 he was sleeping at his house when Badri Prasad came to his house and informed that my son Vinay Kumar (Appellant) has killed Ram Avtar daughter/deceased and he should help him in disposing the dead body of the deceased in the river; Suresh Chand Sharma refused to help Badri Prasad in his design to dispose the body of deceased.

36. On the next day, Suresh Chand Sharma (PW-3) disclosed the said fact to Ramavtar. The said fact was testified by Suresh Chand Sharma (P.W.-3) before the trial court. Further, Anand Swaroop received information from villagers about the fact that the Appellant has murdered deceased and the body of the deceased is concealed in the house of Appellant.

37. On 10th August, 1994, Anand Swaroop gave another report at P.S. Jahangirpur that his niece (victim) has been murdered by Vinay Kumar Sharma, S/o Badri Prasad Sharma and that his corpus is lying in the house of Appellant-Vinay Kumar Sharma. It was also alleged that Vinay Kumar Sharma (Appellant) appears to have committed rape of the victim and, thereafter, has murdered the victim. It was also alleged that the father of Vinay Kumar Sharma, namely, Badri Prasad Sharma has aided in concealing the corpus of the deceased. The aforesaid report was entered into G.D. No.16 at 12.30 PM on 10th August, 1994. On the basis of the aforesaid, a case under section 302, 201 and 376 of the Indian Penal Code was registered against Appellant and Badri Prasad. The Report dated 10.8.1994 is marked as Ex. Ka.-14 before the Trial Court. The fact with regard to lodging report dated 10.08.1994 has been testified by P.W.-2-Anand Swaroop before the trial court. Further, P.W. 6-Sub Inspector D.R.Nanoria has stated before the trial court that on 10.08.1994 he was posted as station house

officer at Police Station-Jahagirpur, where a report was lodged that Anand Swaroop has suspicion that victim has been raped and murdered by Vinay Kumar and body has been concealed by Vinay kumar and Badri Prasad. He has further testified that the aforesaid report dated 09.08.1994 was lodged as Case Crime No.101 of 1994, under Sections 302, 201, 376 Indian Penal Code. Con. 473 Shri Udham Singh (P.W.8) has stated before the trial court that the copy of Report No.16 dated 10.8.1994 has been written by H.M. Yogendra Prakash and has identified the writing of the Yogendra Prakash. Report No. 16 dated 10.8.1994 is marked as Exhibit K-14 before the Trial Court. The fact regarding lodging of report dated 10.8.1994 is proved by the prosecution.

38. The then Station House Officer of the police station, PW-6 D.R.Nanoria took investigation of the case in his hand and came along with complainant-Anand Swaroop and other police personnel to the village. The house of the accused person was surrounded by villagers and both the accused person Vinay Kumar Sharma and Badri Prasad were present at the roof of the house. On seeing the police party, both the accused person jumped into the courtyard of their house, where the bricks and bulleys were lying and they were apprehended and beaten by villagers. The said fact has been testified by PW-6 D.R.Nanoria, before the trial court.

" मुल्जिमान के मकान को भीड़ को घेर रखा था तथा दोनो मुल्जिम अपने घर की छत पर थे। जो मुल्जिमान छत पर थे उनमें से एक मुल्जिम विनय हाजिर अदालत था। दूसरा मुल्जिम आज नहीं आया है। दोनों मुल्जिमान हम पुलिस वालों को देखकर अपने मकान के आंगन में कूद गये, उसके बाद छत से कूदने के कारण चोटें आई और गांव वालों ने इनकी पिटाई कर दी। बा मुश्किल गांव वालों से मुल्जिमान को बचाते हुए अपने कब्जे में लिया।"

39. P.W.-1: Ramveer Sharma has also testified the said fact in his statement before the Trial Court

"सूचना मिलते ही पुलिस थाना ज० पुर को सूचना दी तो तुरन्त ही करीब 1 बजे पुलिस गांव में आई। जब पुलिस गांव मे आई तो हाजिर अदालत मुल्जिमान विनय कुमार व बद्री प्रसाद अपने मकान के उपर वाले अढ़त में छिप गये। पुलिस को देखते ही भागने के इरादे से छत से नीचे कूद गये तो गांव की बहुत पब्लिक इकट्ठी हो गई थी। गांव वालों ने लाठी डंडों से भी मुल्जिमान को मारपीट किया। जहॉ पर मुल्जिमान छत से नीचे आंगन मे कूदे थे वहां पर ईट पत्थर व बहुत सारी बल्लियां पड़ी थी जिससे मुल्जिमान को हाथ पैरो मे चोट आ गई थी तभी पुलिस ने दोनों को आकर गिरफ्तार कर लिया और पूछताछ किया।"

40. P.W.-3 : Suresh Chand Sharma has testified the fact before the trial court.

"रामौतार ने पुलिस को खबर कर दी। गांव में जब पुलिस आई तो बद्री प्रसाद व विनय कुमार अपने घर की छत पर चढ़ गये। पुलिस के आने पर ये छत से कूदे और भागने लगे तो गांव वालो ने इनको पकड लिया।"

41. The investigating officer arrested both the accused person and made enquiries from them. The Appellant confessed to the crime and got recovered dead body of the victim which was wrapped in a gunny bag in naked condition. The corpus of the deceased was concealed in a almirah of the eastern wall of the room of the accused. The said fact has been

testified by D.R. Nanoria (PW6) before the trial court.

"4. मुल्जिम विनय कुमार व बद्री प्रसाद को कब्जे में लेने के बाद उनका ब्यान केस डायरी में दर्ज किया गया। दोनो मुल्जिमान विनय अपने जुर्म का इकबाल करते हुए बताया कि कु० सुषमा उसके घर आंगन में हैण्डपम्प से बाल्टी लेकर पानी भरने आई थी उस समय मेरे घर पर कोई नही था मै अकेला था। जब वह पानी भरने लगे तो मैने अकेली देखकर, मेरी नियत खराब हो गई और मैने उसे हैण्ड पम्प के पास से ही उसे घसीटते हुए कमरे की तरफ ले गया। मैने अन्दर से किवाड बन्द कर उसे जमीन पर गिरा लिया और उसकी जबरदस्ती सलवार, चढढी उतारते हुए, उसके साथ बलात्कार करने की कोशिश की, उसके मुंह में उसकी सलवार व कुर्ती खीचकर उतारकर मुंह में ठुंस दी और बलात्कार करने की कोशिश की, लेकिन वह बलात्कार नही करने दे रही थी और लात घूंसों मार रही थी तब मैने उसके मुंह में अपने हाथों से मुक्के मारे। उसने गुस्से में आकर अपने मुँह से मेरे उँगली व अंगूठे पर दांतों से काट लिया और मैने गुस्से में आकर उसके सलवार व कुर्ते से उसका गला दबा दिया, जिससे वह मर गई। फिर मै घबरा गया। बलात्कार की इच्छा हुई, फिर मुझे ग्लानी हुई तो मेरा मन बदल गया। मैने फिर लाश को घर में रखी बोरी में अपने हाथ से डालकर उसी कमरे की पूर्वी दीवार में बनी अलमारी में छिपा दिया और किवाड़ बन्द कर मै बाहर चला गया। अगर मै गांव से भाग जाता तो लोग मुझपर शक करते इसलिए मै भागा नही, शाम को मेरे पिताजी बद्री प्रसाद जब स्कूल से आये तो मैने सारी बात उनको बताई। तब पिताजी की मदद से रात में घर से लाश निकालकर बाहर निकालने की योजना बनाई तभी गांव में पता लग गया।

5. मैने मुल्जिम विनय की निशानदेही पर मैने सुषमा की लाश बरामद की जिसका मौके पर ही नक्शा बनाया जो पत्रावली पर कागज सं० 6ए है मेरे लेख व हस्ताक्षर में है। इस पर प्रदर्श क-4 डाला गया। "

42. P.W.-1: Ramveer Sharma has also testified the said fact in his statement before the Trial Court

"तभी पुलिस ने दोनों को आकर गिरफ्तार कर लिया और पूछताछ किया। पुलिस के पूछने पर विनय कुमार ने बताया कि सुषमा की लाश मेरे कमरे की आलमारी मे छिपा रखी है। पुलिस ने गांव वालो के सामने व मेरे सामने विनय कुमार के मकान से सुषमा की लाश को निकाला।"

43. P.W. 2 : Anand Swaroop has also testified the said fact in his statement before the Trial Court

"मैंने इस बात की सूचना भी दिनांक 10.8.94 को लिखकर थाना जहागीरपुर पर दे दी थी। जिस सूचना पर पुलिस तभी गांव मे आई थी और मुल्जिमान विनय व बद्री प्रसाद के घर से अलमारी मे से जो कमरे मे थी के अन्दर से बोरे मे बन्द मेरी भतीजी सुषमा की लाश निकाली थी।"

44. P.W. 3 : Suresh Chand Sharma has also testified the said fact in his statement before the trial court.

"गांव में जब पुलिस आई तो बद्री प्रसाद व विनय कुमार अपने घर की छत पर चढ़ गये। पुलिस के आने पर ये छत से कूदे और भागने लगे तो गांव वालो ने इनको पकड लिया। तब पुलिस वालो को विनय ने बताया कि लड़की मेरे घर पानी भरने आई थी। उसने यह भी बताया कि लड़की के साथ उसने बुरा काम किया था। और लड़की के मुंह में कपड़ा डाल

कर उसे मार दिया है। फिर विनय ने अपने घर में कमरे की आलमारी से कटटे में रखी हुई लाश निकाल कर दी। जब पुलिस ने बोरी खोली तो उसमें लड़की नग्न अवस्था में थी।"

45. The body of the deceased was taken out from the bag and her clothes namely underwear, Baniyan, salwar, kurta and bangles were also got recovered on 10th August, 1994. The recovery memo of the articles recovered along with corpus of the deceased from the house of Vinay Kumar Sharma is marked as Ex.Ka-1 before the trial court.

46. Badri Prasad (father of Appellant) also got the bucket recovered from the house of the accused. The recovery memo of the bucket is Ex. Ka 2. It is the case of the prosecution that the bucket that was recovered was the same bucket which was taken by the deceased to the house of the Appellant.

47. It is to be noted that under Section 8 of the Indian Evidence Act, 1872 the conduct of the accused is relevant if such conduct is influenced by any fact in issue or relevant fact and whether it was previous or subsequent thereto. Section 8 of the Evidence Act is reproduced hereinbelow :-

"8. Motive, preparation and previous or subsequent conduct.- Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

48. This section embodies the rule that the testimony of resgestae is allowable when it goes to the root of the matter concerning the commission of the crime. The conduct of a person involved in a crime becomes relevant if his conduct is related to the incident that happened. Where a crime has been committed, the court has to take into account both the previous and subsequent conduct of the accused pertaining to the commission of the crime. In certain cases, the previous conduct of the accused throws light on whether the accused is innocent or guilty whereas in some cases it is the subsequent conduct that becomes very important in determining the innocence or guilt of the accused. The Apex Court in the case of ***Anant Chintaman Lagu Vs. State of Bombay, AIR 1960 SC 500*** observes thus :-

"(15)... A criminal trial, of course, is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material...".

49. The apex court in ***Pankaj v. State of Rajasthan, (2016) 16 SCC 192*** has observed as under :-

"23. An objection was raised by the learned Senior Counsel for the appellant-accused that recovery of firearm

at the instance of the appellant-accused was planted by the police and it could not have been relied upon. This Court, in a number of cases, has held that the evidence of circumstance simpliciter that an accused led a police officer and pointed out the place where weapon was found hidden, would be admissible as conduct under Section 8 of the Evidence Act, irrespective of whether any statement made by him contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act."

50. Further, Hon'ble Supreme Court in ***A.N. Venkatesh v. State of Karnataka, (2005) 7 SCC 714*** in paragraph 9 has held:-

"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 and on their pointing out the body was exhumed, 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 or not as held by this Court in Prakash Chand v. State (Delhi Admn.) [(1979) 3 SCC 90 : 1979 SCC (Cri) 656 : AIR 1979 SC 400] . Even if we hold that the disclosure statement made by the accused-appellants (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act.

51. It is submitted by the counsel for the Appellant that no disclosure statement of the accused was prepared by the police and as such the alleged recovery on the pointing out of the Appellant is highly doubtful. He is further submitted that no arrest memo was prepared by the police at the time of alleged recovery which creates doubt with regard to the prosecution case of recovery of the dead body from the house of the Appellant. Counsel for the Appellant further submits that the alleged recovery cannot be stated to be under section 27 of the evidence act.

52. The corpus of the deceased was recovered from the house of the Appellant on the basis of the information given by the Appellant to the investigating officer during investigation. The dead body of the deceased was recovered in naked condition from a bag along with the clothes which were kept in an almirah of the house. The investigating officer (P.W. 6) in his testimony has proved the factum of the recovery of the dead body of the deceased from the house of the Appellant on the information provided by the Appellant during the investigation. The investigating officer in his statement has further stated that the accused-appellant opened the room and the body of the deceased was recovered from the almirah in the house of the appellant. The witnesses have further proved the recovery memo dated 10.08.1994 being Ex. Ka-1. The clothes of the deceased were also recovered on the

basis of the information provided by the Appellant-accused. The conduct of the Appellant-accused in providing information to the investigating officer with regard to the fact that the dead body of the deceased and clothes were hidden in the house of the Appellant-accused and subsequently thereafter Appellant had opened the room and aided in recovery of the body of the deceased and clothes, is an important circumstance/conduct admissible under section 8 of the Evidence Act.

53. Section 8 of the Evidence Act is independent of section 27 of the Evidence Act. Even in a case where the evidence under section 27 of the Evidence Act is not forthcoming, the evidence that the accused led to the spot where the dead body of the victim and the clothes were hidden and the said fact was confirmed by the subsequent recovery of the corpus of the victim and the clothes, can be looked into under section 8 of the evidence act.

54. The Apex Court i***n Prakash Chand v. State (Delhi Admn.), (1979) 3 SCC 90*** has in respect of Section 8 of the Evidence Act observed as under :-

"8. It was contended by the learned Counsel for the appellant that the evidence relating to the conduct of the accused when challenged by the Inspector was inadmissible as it was hit by Section 162, Criminal Procedure Code. He relied on a decision of the Andhra Pradesh High Court in D.V. Narasimham v. State [AIR 1969 AP 271 : 1969 Cri LJ 1016 : 1969 MLJ (Cri) 687] . We do not agree with the submission of Shri Anthony. There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a Police Officer in the course of an investigation which is hit by Section 162 of the Criminal Procedure Code. What is excluded by Section 162, Criminal Procedure Code is the statement made to a Police Officer in the course of investigation and not the evidence, relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act (vide Himachal Pradesh Administration v. Om Prakash [(1972) 1 SCC 249 : 1972 SCC (Cri) 88 : AIR 1972 SC 975])."

55. The Hon'ble Supreme Court in ***Ghanashyam Das v. State of Assam, (2005) 13 SCC 387*** has observed in para 5 :-

"5. Another incriminating circumstance which corroborates the case of the prosecution is that the appellant led the IO PW 12 to Kharbhanga riverside and pointed out the place where he had thrown away the khukri. According to the evidence of PW 12 the IO and PW 6, the khukri was recovered from the river with the help of a diver. Though both the courts have eschewed this circumstance from consideration on the ground that no information was recorded by PW 12 the IO so as to attract Section 27 of the Evidence

Act, we are of the view that the evidence of PW 12 and PW 6 to the effect that the accused led them to the spot and pointed out the place where the khukri was thrown, which fact stands confirmed by its recovery, can be looked into to throw light on the conduct of the accused under Section 8 of the Evidence Act vide H.P. Admn. v. Om Prakash [(1972) 1 SCC 249 : 1972 SCC (Cri) 88] ."

56. In the case at hand, the factum of information related to the discovery of the dead body and other articles and the said information was within the special knowledge of the present appellant. Hence, the doctrine of confirmation by subsequent events is attracted and, therefore, we have no hesitation in holding that the recovery or discovery in the case at hand is a relevant fact or material which can be relied upon and has been correctly relied upon by trial court.

57. Learned counsel for the Appellant submitted that no reliance can be placed on the alleged recovery of the dead body of the deceased and related articles at the instance of the Appellant as according to P.W.3-Suresh Chand Sharma, he had come to know from Badri Prasad on the night of 09.08.1994 as to where the body of the victim was concealed and therefore it is unlikely that the police would wait till 1:15 PM on 10.08.1994 to recover the dead body at the instance of the Appellant. As per the prosecution case Anand Swaroop lodged report dated 10.08.1994 at the police station at 12:30 PM and thereafter the investigating officer has visited the village and at the instance of the Appellant recovered the dead body of the deceased from the house of the Appellant. It is to be noted that as per the testimony of Anand Swaroop he had received information that the deceased was raped and murdered by the appellant from the villagers in the morning of 10.08.1994 and on the aforesaid basis the report dated 10.08.1994 was lodged. It is further to be noted that as per the statement of P.W.3-Suresh Chand Sharma he had informed Ram Avtar about the information received from Badri Prasad on 10.08.1994. The report dated 10.08.1994 was lodged by Anand Swaroop and P.W.3 Suresh Chand Sharma has not stated that he had informed on Anand Swaroop about the information received from Badri Prasad. Under the facts narrated herein above, the police authorities have promptly taken action on the report dated 10.08.1994 and as such there is no unnatural circumstances which belies the story of the prosecution.

58. Learned counsel for the Appellant further submitted that the dead body of the deceased was recovered in the morning of 10.08.1994 much prior to the prosecution case that it was discovered at the instance of the Appellant on 10.08.1994 at 1:15 PM. In order to strengthen his argument the Counsel for appellant has drawn attention to Form No.13 according to which the dead body of the deceased was send to the headquarter at 3:30 PM on 10.08.1994 which was 42 km away from the police station. He submits that the according to the inquest report, the inquest was completed on 10.08.1994 at 2:30 PM and as such it took one hour for covering 42 km by vehicle on which the dead body was carried. It is submitted that it is highly improbable that in one hour distance of 42 km would be covered with the dead body specifically when the witness of recovery and inquest clearly stated that the investigating officer went to the police station with the dead body and from the police station they went to post-mortem house for post-mortem. The inquest report

was prepared on 10.08.1994. As per the inquest report the inquest was completed at 14:30 pm at the village and thereafter the body of the deceased was sealed. Once the body of the deceased was sealed and taken into custody by the investigating officer, the body is required to be transported to the post-mortem in the custody of the police and as such the transportation of the body of the deceased would have been arranged at the behest of investigating officer. P.W.1 has stated that the investigating officer had gone to the police station along with corpus of deceased. It is to be noted that as per the form 13 (Ex. Ka. 16) the distance of police station from the place of occurrence was 4 km and the headquarter was at a distance of 42 km. It has not come in evidence as to nature of transport used for transportation of the body of the deceased after the inquest was completed. Once the body of the deceased sent to the post-mortem in the custody of the police then it would be presumed that the same was transported in the police vehicle at the earliest unless there is evidence to the contrary. The appellant before the trial court has not cross-examined the prosecution witness on this aspect. The coverage of distance of 42 km is a possibility and it cannot be accepted that the same was improbable.

59. Learned counsel for the Appellant submits that the Extrajudicial Confession of Badri Prasad to P.W.3 - Suresh Chand Sharma in the night of 09.08.1994 cannot be relied upon on the following count :-

a) Badri Prasad was acquitted by the trial court.

b) Badri Prasad has no reason to confess the guilt to P.W.3-Suresh Chand Sharma as he was not friendly with Badri Prasad.

c) If the appellant's wanted to dispose of the body of the deceased they could have thrown the same in the open space towards north - West of the house of the appellant

d) If Badri Prasad had informed about the concealment of the body of the victim in the house of Appellant then the aforesaid fact would have found mentioned in the second report lodged by Anand Swaroop.

e) Witness Suresh Chand Sharma is a close relative of informant and as such it is unlikely that Badri Prasad would seek help from P.W.3 - Suresh Chand Sharma.

f) If P.W.3 - Suresh Chand Sharma had very close relation with the deceased family then the said witness would have in natural course of conduct informed the family of the deceased in the night of 09.08.1994 and would have not waited till the next date.

60. As per the prosecution case, on 09.08.1994 Badri Prasad came to the house of P.W.3 - Suresh Chand Sharma on the very night and asked P.W.3 for help in disposing off the dead body of the deceased in the canal after disclosing that she has been killed by his son Vinay-Appellant. Suresh Chand Sharma (P.W.3) has deposed before the trial court that in the night of 09.08.1994 when he was sleeping at his house then Badri Prasad came to his house and asked for help in disposing of the body of the deceased who has been killed by his son Vinay-Appellant. The aforesaid witness has further deposed that on the next day at 6:30 AM the said witness met Ram Avtar. The said witness has further deposed that he had no visiting terms with Ram Avtar and in fact there was a dispute between him

and Ram Avtar. It is further to be noted that Anand Swaroop in his testimony before the trial court has stated that on 10.08.1994 in the morning he came to know from the villagers that the Appellant had committed rape and murder of the deceased and the corpus has been concealed in the house of the Appellant.

61. It is further to be noted that Badri Prasad was charged under section 201 of the Indian penal code for disappearance of evidence, screening of the offender. The learned trial court while passing the impugned judgement has held that the circumstance that Badri Prasad had gone to seek help of P.W.3 or disposal of the dead body of the deceased is not sufficient to prove that Badri Prasad was involved in commission of the offence charged. Further, at the instance of Badri Prasad the bucket has been recovered which was taken by the deceased for fetching water from the house of the Appellant. The submission of the Counsel for the Appellant that Badri Prasad has been acquitted by the trial court and as such no reliance on the statement of P.W. 3 Suresh Chand Sharma can be made, is not tenable under law. It is also to be noted that the trial court in the impugned judgement has not rejected the testimony of P.W.3-Suresh Chand Sharma and further the conviction of the appellant cannot be set aside solely on account that Badri Prasad has been acquitted by the trial court.

62. The counsel for the Appellant further submitted that Badri Prasad had no reason to confess his guilt to Suresh Chand Sharma (P.W.3) as neither he had any influence over the police nor he was friendly with the Badri Prasad. It has not come in evidence that there was any enmity between Badri Prasad and Suresh Chand Sharma (P.W.3). The aforesaid witness was subjected to cross examination however no evidence has come with regard to any enmity between Badri Prasad and Suresh Chand Sharma. It is natural human conduct that in the course of distress the person seek help even of a stranger if he has confidence that he may receive some help to overcome his distress. Badri Prasad and Suresh Chand Sharma are resident of same village and must have been known to each other. Village is a small community and is a closely knitted society and as such seeking help from resident of Village is a natural phenomenon. It is to be noted that the Appellant was confronted under section 313 of the criminal procedure code with the evidence of P.W.3-Suresh Chand Sharma however the appellant has not set up any defence that Badri Prasad had never visited the house of Suresh Chand Sharma or there was any enmity between Badri Prasad and Suresh Chand. It is further to be noted that Badri Prasad was also confronted with the evidence of P.W.3-Suresh Chand Sharma however no defence was set up that there was any enmity with Suresh Chand Sharma or they were not on talking terms. Section 313 Cr.P.C prescribes a procedural safeguard for an accused facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him in the prosecution's evidence. That opportunity is a valuable one and cannot be ignored. The statement of the accused under Section 313 CrPC is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. Further in the cross examination of Suresh Chand Sharma no question with regard to the relationship of Badri Prasad and Suresh Chand Sharma has been put by the defence. There is no evidence to the effect that there was any enmity between Suresh Chand Sharma and Badri Prasad or they were not

on talking terms. The level of relationship between Suresh Chand Sharma and Badri Prasad has not been put to challenge in cross examination. The submission of Leanard counsel for the appellant that Badri Prasad had no reason to confess the guilt to Suresh Chand Sharma is unfounded specifically when Suresh Chand Sharma has entered into the witness box and has testified that Badri Prasad disclosed the information to him and the aforesaid testimony of Suresh Chand Sharma could not have been shaken in the cross examination.

63. Learned counsel for the Appellant submitted that according to Suresh Chand Sharma (PW-3) when Badri Prasad disclosed about the dead body of the deceased concealed by them and thereafter Suresh Chand Sharma had informed the family of the deceased about the same then in the second report dated 10.08.1994 lodged by the informant -Anand Swaroop the name of PW-3 should have been mentioned in the aforesaid report. The report dated 10.08.1994 lodged by Anand Swaroop was to the effect that on 09.08.1994 missing report of the victim was lodged by Anand Swaroop however it has come to the knowledge that the corpus of the victim is concealed in the house of the Appellant and the appellant has committed rape and murder of the victim. Anand Swaroop (P.W.-2) in his statement before the trial court has stated that on 10.08.1994 he came to know from the villagers that the Appellant has committed rape and murder of the victim and the body of the victim was concealed in the house of the Appellant. It is further to be noted that Suresh Chand Sharma (P.W.3) in his testimony before the Trial Court has stated that he had informed Ram Avtar about the fact that Badri Prasad had disclosed to him that his son Vinay has raped and murdered the victim and that he wanted his help to dispose off the dead body of the victim. It is to be seen that Anand Swaroop received information about the commission of the offence by the Appellant from the Villagers and thereafter he is submitted report dated 10.08.1994 at the police station. It is further to be noted that the first information report is not an encyclopaedia and mere omission on part of Anand Swaroop to disclose the details of the source of information in the report dated 10.08.1994 would not demolish the prosecution case specifically when there are other incriminating evidence pointing towards the guilt of the Appellant.

64. It is urged by the counsel for the Appellant that Suresh Chand Sharma is a close relative of the first informant so it is unlikely that the accused would choose him to seek help in disposing of the body of the victim. The testimony of Suresh Chand Sharma (P.W.3) has been recorded before the Trial Court wherein it has been stated that Suresh Chand Sharma had no visiting terms with Ram Avtar and in fact there was a dispute between Suresh Chand Sharma and Ram Avtar (father of the victim). The aforesaid statement in the testimony of P.W.3 has not been shaken in the cross examination nor any material has been brought on record which could substantiate that the aforesaid statement of the P.W.3 was not true. Once there was a dispute/enmity between Suresh Chand Sharma and Ram Avtar then it could be inferred that Badri Prasad could have gone to Suresh Chand Sharma seeking help in disposing the body of the victim.

65. It is further submitted by the counsel for the Appellant that if Suresh Chand Sharma was having close relation

with Ram Avtar and the said witness had knowledge in the night of 09.08.1994 with regard to rape and murder of the victim by the Appellant then there was no occasion for waiting till the morning hours for informing to the family members of the deceased. It is to be seen that as per the prosecution case Anand Swaroop had lodged the report dated 10/08/1994 on the basis of the information received in the morning of 10/08/1994 from the villagers. The testimony of Anand Swaroop indicates that he had received information about the murder of victim in the morning hour of 10.08.1994 and on the aforesaid basis the report dated 10.08.1994 was lodged. Testimony of Suresh Chand Sharma further specifies that Suresh Chand Sharma was having dispute with Ram avtar (father of the deceased). It has also come in evidence that Badri Prasad came to the house of Suresh Chand Sharma in the night when he was sleeping and informed about the misdeeds of the appellant. When Suresh Chand Sharma himself got the information late in the night hours on 09.08.1994 and thereafter had informed the father of the deceased the next date in the morning, there is nothing objectionable in this respect specifically when Suresh Chand Sharma had no visiting terms with Ramavtar and Anand Swaroop in his testimony has stated that he received information from the villagers in the morning of 10/08/1994. The information may have crossed from one ear to another as grapevine and as such was received by Anand Swaroop in the morning of 10.08.1994 and as such no issue can be raised with regard timing of disclosure of information by Suresh Chand Sharma.

66. Learned counsel for the Appellant has submitted that the Suresh Chand (P.W.3) in his testimony has stated that the police arrived in the village at 8.30 pm and went away at 1.00 pm. Learned counsel for the appellant has further drawn attention to the statement of PW4 Gyanendra Singh, who has stated that the police has arrived at 10 -11 pm and remained in the village for about 1 and ½ hours and accordingly, left at 12.30 pm. It is to be noted that the witnesses were examined before the Court after 8-9 years of the incident and after such a long period certain contradiction and discrepancies in the statement on the point of time on arrival of the police are natural as the memory of a person fades with the passage of time. The discrepancy pointed out by the learned counsel for the appellant is not of a nature which could demolish the prosecution case.

67. It is also to be noted that the Investigating Officer has proceeded from the police station in pursuance to the G.D. Entry No.16 along with other police personnel and when he arrived in the village crowd was present on the spot before whom the present appellant got recovered a bag from an almirah, which contained the dead body of the victim and her clothes. The body of the victim was found naked and her mouth, throat, hands and legs seamer with blood. The recovery memo being Ex.Ka.1 of the clothes of the deceased and bangles, bag has been prepared by the Investigating Officer. The testimony of P.W.1 Ramveer Sharma, P.W.3 Suresh Chand and P.W.4 Gyanendra Singh evidences the factum of recovery of the dead body of the victim and her clothes at the instance of the Appellant. The said witnesses has withstood the test of cross-examination and as such the testimony of the aforesaid witnesses cannot be discarded.

68. It is further submitted by the learned counsel for the appellant that in Column No.3 of the inquest report, the name of Anand Swaroop is mentioned as

the person who has first informed the police station about the recovery of the dead body and this column does not contain the name of the accused Vinay Kumar and the aforesaid fact would demonstrate that the dead body was not recovered at the instance of accused-appellant Vinay Kumar from his house but the same was recovered from some other place. The aforesaid submission of the learned counsel for the appellant is not tenable on account of the fact that Anand Swaroop on 10th August, 1994 had lodged a report at the police station and on the aforesaid basis case under Section 376, 302 and 201 of the Indian Penal Code was registered. Anand Swaroop (P.W.-2) has mentioned that he had come to know that the dead body of the victim was lying in the house of Appellant. According to the prosecution case, the news of the dead body of the victim lying in the house of the Appellant came to the knowledge of Anand Swaroop through villagers and as such the aforesaid fact has been recorded in the report dated 10th August, 1994 and on the aforesaid basis the Investigating Officer has rightly mentioned the name of Anand Swaroop in Column No.3 in the inquest report as the person who has informed the police station about the whereabout of the body of the deceased at the first instance.It is to be noted that the Appellant was not the person who has informed at the police station about the recovery of the dead body but he is accused person at whose instance recovery of the dead body has been recovered by the police after the lodging of the report dated 10th August, 1994 by Anand Swaroop.

69. The learned counsel for the appellant has further submitted that the Investigating Officer has not taken the lock and key of the house of the accused in his possession nor any memo of lock and key was prepared by the investigating officer. It is settled law that omission on the part of the Investigating Officer cannot be the basis for refusing to accept the testimony of the witnesses. The evidence collected by the Investigating Officer are in the nature of corroborative or contradictory to the evidence given on oath before the court and as such the facts and circumstances brought before the court by way of testimony cannot be disregarded on the sole ground that there is omission on the part of the Investigating Officer in conducting the investigation specifically when such a omission does not goes to the root of the prosecution case. In any event, any omission on the part of the investigating officer cannot go against the prosecution. Interest of justice demands that such acts or omission of the investigating officer should not be taken in favour of the accused or otherwise it would amount to placing a premium upon such omissions.

70. Hon'ble Supreme Court in ***State of Karnataka v. K. Yarappa Reddy, (1999) 8 SCC 715*** has held in para 19:-

19..... It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. "

71. Learned counsel for the appellant has further submitted that in the Police Form No.13 being Ex.Ka.6 there is

overwriting on the date and timing when the information was given to the police station. The original missing report was lodged on 09.08.1994 and the Investigating Officer in Form No.13 has recorded 09.08.1994 as the date when the information was received at the police station. It is to be noted that the initial report dated 09.08.1994 was subsequently converted into report under section 302, 201 and 376 Indian penal code by report dated 10.08.1994. The Investigating Officer being P.W.6 in a statement has testified the aforesaid fact and further the said fact is recorded in Exhibit Ka-14 . The alleged overwriting in Form No.13 only record the correct fact and the said overwriting will not in any manner dislodge the prosecution case.

73. It is further submitted by the counsel for the Appellant that when the police arrived at the house of the Appellant on the information that the dead body of the deceased was concealed in the house of the Appellant then 40 to 50 villagers were present inside the house of the Appellant and the aforesaid fact is indicative that the discovery of the dead body was not in terms of section 27 of the evidence act but was in fact a rediscovery. It is to be noted that recovery of the body of the deceased from is a important circumstance under section 8 of the Evidence Act. It is further to be noted that the P.W.8 in his testimony has stated that villagers have encircled the house of the appellant. There is no evidence to the effect that the villagers have entered into the house of the appellant. It is further to be noted that the Appellant was at the first floor of his house and thereafter jumped into the courtyard when the police came and thereafter the appellant has opened the room where the dead body of the deceased was concealed. It is not the case of the prosecution that the house of the Appellant was locked from outside and as such the prosecution case is tenable under law.

74. It is submitted by the counsel for the appellant that there is no signature of the accused on the recovery memo and as such the recovery memo is not tenable under law. The Investigating Officer is not required to obtain the signature of an accused in any statement attributed to him while preparing seizure-memo for the recovery of any article. There is no provision under law which mandates that the recovery memo is to be mandatorily signed by the accused person on whose instance the incriminating article has been recovered. While dealing with the same question, the Supreme Court in the matter of ***State of Rajasthan v. Teja Ram, (1999) 3 SCC 507*** has held that the Investigating Officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing seizure memo for the recovery of any article covered by Section 27 of the Evidence Act. But, if any signature has been obtained by an investigating officer, there is nothing wrong or illegal about it. The Supreme Court has observed in para 30 of its judgment as follows:--

"The resultant position is that the Investigating Officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing seizure memo for the recovery of any article covered by Section 27 of the Evidence Act. But, if any signature has been obtained by an investigating officer, there is nothing wrong or illegal about it. Hence, we cannot find any force in the contention of the learned counsel for the accused that the signatures of the accused

in Exs. P-3 and P-4 seizure memo would vitiate the evidence regarding recovery of the axes."

75. Learned counsel for the Appellant further submits that the original missing report dated 09.08.1994 and the subsequent report dated 10.08.1994 has not been submitted before the trial court. It is to be noted that as per the prosecution case the original report dated 09.08.1994 and 10/08/1994 has been weeded out. The prosecution has filed copies of GD No 21 dated 09.08.1994 being Ex Ka-13 and GD No 16 dated 10.8.1994 being Ex Ka-14 which contains the true account of the original report filed by P.W.2 - Anand Swaroop. In this respect the investigating officer, P.W.6 D.R.Nanoria in his testimony has stated that on receiving the missing report the extract of the same are copy in the General diary of the police station. It is submitted that on enquiry made by the trial court to the police, Bulandshahar, the Senior Superintendent of Police, Bulandshahar by paper number 51 has informed that the report has been weeded out. On account of weeding out of the original reports the copies of the same has been produced. The P.W.2-Anand Swaroop has proved the contents of his reports as mentioned in the copies of the General diary. In this reference the statement of P.W.2 - Anand Swaroop is quoted herein below :-

"गवाह को नकल रपट सं० 21 दिनांकित 9.8.94 समय16.45 बजे थाना जहॉगीर पुर बावत गुमशुदगी सुषमा पढ़कर सुनाई गई जिसे सुनकर गवाह ने कहा कि यह वही मजबून है जो मैने दिनांक 9.8.94 को थाना जहागीर पुर पर अपनी भतीजी सुषमा के गायब हो जाने के सम्बन्ध में दिया था। गवाह को नकल रपट नं० 16 समय 12.30 दिनांकित 10.8.94 थाना जहांगीर पुर का मजबून बाबत उसकी भतीजी सुषमा की लाश उसके पड़ौसी विनय कुमार के घर में छिपे होने व उसके साथ विनय द्वारा बलात्कार किये जाने व उसकी हत्या किये जाने तथा विनय व उसके पिता बद्री प्रसाद द्वारा लाश को (सुषमा) छिपाने की बावत पढ़कर सुनाया गया जिसे सुनकर गवाह ने कहा कि यह वही मजबून है जो मैनें अपनी तहरीरी रिपोर्ट दिनांकित 10.8.94 बावत अपनी भतीजी सुषमा के साथ मुल्जिम विनय कुमार के द्वारा बलात्कार किये जाने व उसकी हत्या किये जाने व मुल्जिमान विनय व बद्री प्रसाद के द्वारा उसकी लाश को घर में छिपाये रखने की बावत थाना जहांगीर पुर में दी थी।"

76. The contents of copy of the Gen diary being GD No 16 dated 10.8.1994 and GD No 21 dated 9.8.1994 has been duly proved by the P.W.2- Anand Swaroop. The prosecution has further brought on record the report dated 16.9.2002 of the office of Senior Superintendent of police, Bulandshahar that the report dated 09.08.1994 and 10.8.1994 is weeded out. The P.W.6 has further stated in his testimony that no chik FIR was brought on the basis of report dated 10/08/1994 and after the general diary entries have been made, the case was registered against the accused persons. The submission of the counsel for the Appellant that the prosecution has deliberately withheld the original report before the trial court as the aforesaid report reveals the name of other persons is without any substance.

77. Counsel for the Appellant has further argued that the charge of rape against Vinay Kumar (Appellant) is completely ruled out from the post-mortem report as well as the pathological report. In this respect it is to be noted that the post-mortem report as well as the testimony of

P.W.5-Dr S.K.Sharma reveals that the posterior fourchette and the posterior vaginal wall of the deceased were lacerated and the hymen was freshly ruptured. The said witness has further stated that the above facts would demonstrate that something forcefully entered into the vagina of the deceased. The aforesaid witness has further testified that abrasion were found on the thigh of deceased which would have come from forcibly widening her legs. The doctor has opined that some hard object was inserted into vagina of deceased which caused rupture of the hymen and also lacerated the posterior wall of the vagina. Section 375 of the Indian penal code in the first explanation states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. The injuries on the post-mortem report and the testimony of P.W.5 brings home irresistible conclusion that the vagina of the victim was penetrated. The circumstances in which the body of the victim was found is an indicator of fact that the victim was subjected to sexual abuse.

78. The counsel for the Appellant has further submitted that the P.W.5 in his testimony has stated that the two sides of vaginal seamer were sent for pathological examination. It is submitted that no pathological report was brought on record and as such it can be presumed that no spermatozoa was found in the vaginal seamer. In the present case Appellant has also been charged for an offence of rape. As per section 375 of the Indian penal code merely penetration is sufficient for constituting the offence of rape. The sperms can be found only when the person committing the offence has discharge the semen. The rape in the eyes of law can be committed if the vagina of the victim was penetrated.

79. Learned counsel for the Appellant has further submitted that on the date of alleged incident on 09.08.1994, the appellant was not present in the Village and had gone to meet his brother Raj Kumar Sharma at his factory in Ghaziabad. In this reference the defence has examined DW-2 Aasim Ansari and DW-3 Raj Kumar Sharma.

80. Literal meaning of alibi is "elsewhere". In law this term is used to express that defence in a criminal prosecution, where the party-accused, in order to prove that he could not have committed the crime charged against him, offers evidence that he was in a different place at that time. The plea taken should be capable of meaning that having regard to the time and place when and where he is alleged to have committed the offence, he could not have been present. The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea of alibi is not one of the General Exceptions contained in Chapter IV IPC. It is a rule of evidence recognised under Section 11 of the Evidence Act.

81. When a plea of alibi is raised by an accused, it is for the accused to establish the said plea by positive evidence. Under Section 11 of the Evidence Act, 1872 collateral facts having no connection with the main fact except by way of disproving any material fact, proved or asserted can be admitted in evidence. In other words, the facts proved as such which make the existence of the fact so highly improbable as to justify the inference that it never existed, but such fact has to be established by the person who takes the plea. It is trite that a plea of alibi must be proved with

absolute certainty so as to completely exclude the presence of the person concerned at the time when and the place where the incident took place.

82. It is submitted by the counsel for the Appellant that on the date of alleged incident, the Appellant was present at Ghaziabad. In this respect the defence has testified D.W.-2: Asin Ansari who is said to be working as Security guard in Delhi Teletube Company, Ghazaibad. The aforesaid witness was not on duty when the Appellant is alleged to have entered the aforesaid company premises. It is to be noted that as per the case of the Appellant, he is said to have entered the company premises at Ghaziabad on 09.08.1994 at 11:20 AM. In this respect the defence has submitted the visitor register of the above-mentioned company of the relevant date. The witness D.W.- 2 : Asin Ansari has stated that when the relevant entry in the visitor register was made he was not on duty and at that time one Bhaypal and Surjit were present at the duty. He has further testified that a person who is entering the premises of the aforesaid company, his identity is not verified at the gate of the company. The said witness has only identified the signatures of Bhaipal and Surjit Singh who were Security guard posted in the aforesaid company on the relevant date. It is further to be noted that the witness D.W.- 2 : Asin Ansari has not seen the Appellant entering the company premises at Ghaziabad on 09.08.1994 nor he has witnessed the exit of the Appellant from the company premises. As such on the basis of the testimony of D.W.- 2 : Asin Ansari it cannot be said that the Appellant had actually visited the factory on 09.08.1994.

83. The counsel for the Appellant has also relied upon the testimony of DW-3 : Raj Kumar Sharma who happens to be the real further of the accused - Appellant. The said witness has stated that the Appellant on 09.08.1994 at 11:30 AM had visited the factory at Ghaziabad to meet the aforesaid witness and remained there up to 1:15 PM and thereafter both of them had gone to take lunch at his residence and thereafter again came to meet at 5:30 PM. Learned AGA has submitted that the witness in question was an officer of the factory and therefore the possibility that he might have got the visitor register managed cannot be ruled out. It is to be noted that the visitor register is said to be having signature of the accused - appellant however the signature of the accused appellant in the order sheet of the trial court does not match with the signature in the aforesaid register with naked eye. There is no evidence to the effect that the signature on the register are that of the accused- Appellant. The witness DW-3 : Raj Kumar Sharma who is the real Brother of the Appellant and, therefore, the possibility that the aforesaid witness would depose in favour of the accused appellant to get him released from criminal prosecution cannot be placed out and safe reliance therefore cannot be made on the testimony of the aforesaid witness. The aforesaid testimony does not create any reasonable doubt with regard to the presence of the Appellant on 09.08.1994 at his village.

84. We also find no merit in the plea of alibi as it is just an excuse which has been put forward by the accused persons to escape the liability in law.

85. Learned counsel for the Appellant has further argued that all the witnesses namely PW-1 Ramvir Sharma, PW-2 Anand Swaroop, PW-3 Suresh Chand and PW-4 Ghanendra Singh belong to one family and therefore their testimony cannot be accepted. 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 relative would be the last to screen the real culprit and falsely implicate an innocent person. It is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. 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 Apex Court in ***Kartik Malhar Vs. State of Bihar, (1996) 1 SCC 614*** 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.

86. Merely because the witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. There is no bar in law on examining family members as witness. Evidence of a related witness can be relied upon provided it is trustworthy.

87. The Supreme Court in ***State of Uttar Pradesh Vs. Samman Dass, (1972) 3 SCC 201*** observed as under:-

"23...It is well known that the close relatives of a murdered person are most reluctant to spare the real assailant and falsely involve another person in place of the assailant..."

88. In ***Khurshid Ahmed Vs. State of Jammu and Kashmir (2018) 7 SCC 429,*** Supreme Court on the issue of evidence of a related witness observed as under :-

"31. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

89. Learned counsel for the Appellant has further argued that the wall in between the house of Ram Avtar and Appellant is 3 to 4 feet in height and as such it is impossible that a girl of 12 years age was forcefully raped in the house of the Appellant and no person would have heard protest and nobody would have seen anything specially when the occurrence took place in the daytime on 09.08.1994 in the village. It is to be noted that the deceased was child who was taken away by the Appellant and thereafter raped and murdered. As per the statement under section 313 Cr.P.C. the age of the accused was 38 years on 02.05.2006. The incident took place on 09.08.1994 that is 12 years from the date when the statement under section 313 Cr.P.C. was recorded. On the date of occurrence the Appellant was aged about 26 years. The appellant was at his prime young age and could have easily overpowered a child leaving her the chance to make any distress call. The house of the Appellant was having open land on the southern side and the place where the body

of the deceased was found was on the northern side as such there was no chance for any person to have seen the occurrence once the victim had entered into the premises of the appellant. Even otherwise the recovery of the dead body of the deceased at the instance of the Appellant is indicative of the fact that the victim had gone to the premises of the Appellant on the fateful day.

90. It is submitted by counsel for the Appellant that in the present case co-accused Badri Prasad is acquitted by the trial court and no government appeal is preferred against the acquittal of Badri Prasad which shows that the learned trial court was not very confident about the prosecution story. Badri Prasad was charged under section 201 of the Indian penal Court for disappearing of evidence with the intention of screening the offender from legal punishment. Badri Prasad was not charged under section 302 of the Indian penal Code. The trial court has found no evidence against the aforesaid accused person and as such acquitted the aforesaid accused person and the same would not ipso facto be indicative that the prosecution story was false specifically when the dead body of the deceased was recovered at the instance of Appellant from his house.

91. It is argued by counsel for the Appellant that the offence of rape and murder is not substantiated as there is no blood stain on the clothes of the accused nor any blood is found in the almirah from where the dead body of the deceased was recovered in a gunny bag nor blood stained earth has been found from the place of occurrence. It is to be noted that the post-mortem of the deceased was held on 10.08.1994 and according to the post-mortem report the death occurred due to Asphyxia as a result of strangulation. The post-mortem report observes contusion and abrasions on the body of the deceased. Injury no 1 is a lacerated wound being muscle deep. The injuries on the deceased are not of such nature which would have spilled blood on the Earth or clothes of accused. The failure of the prosecution to recover the blood strained clothes of the accused by itself may not be a ground to disbelieve the prosecution case. It is to be seen that the gunny bag in which the dead body was found was blood stained. The nature of the injuries found on the body of the deceased would have stained the gunny bag but the same would not have the effect where the blood would have spilled on the earth. The failure of the investigation officer in recovering the blood stain from almirah where the body of the deceased was found may not disbelieve the prosecution story when there is other cogent evidence and circumstances to support the prosecution case. The argument of the Learned counsel for the Appellant sans merits and as such is liable to be rejected.

92. The counsel for the Appellant submits that as per the prosecution case on 09.08.1994 at about 10 AM the victim girl had gone to the house of accused Vinay Kumar Sharma to fetch water. In this regard the prosecution has examined P.W.-7-Smt. Kusum (mother of the deceased girl). The testimony of the aforesaid witness does not inspire confidence and appears to be an afterthought and the prosecution has failed to prove that the deceased girl had gone to the house of the Appellant to fetch water and as such the prosecution story cannot be relied upon

93. The Learned Counsel for the Appellant has further stated that the testimony of P.W. 7 has several discrepancy as under :-

a) The witness P.W.-7 - Smt Kusum in cross examination has stated that she went to the house of the Accused - Appellant to enquire about deceased girl and the Appellant informed her that she has gone to school. It is submitted that the conduct of the aforesaid witness is unnatural as she has not asked the accused Vinay about her bucket.

b) The witness P.W.-7-Smt Kusum in cross examination has stated that she had informed her husband-Ram Avtar Sharma and Devar-Anand Swaroop on the same day that the deceased girl had gone to the house of Appellant-Vinay to fetch water and thereafter she has not come back to her house. It is submitted by the counsel for the Appellant that the report dated 09.08.1994 lodged by Anand Swaroop at the Police Station-Jahangirpur with regard to missing of the deceased girl has specifically stated that the deceased girl went to house of Naresh to fetch water. In case P.W.-7-Smt Kusum had informed husband-Ram Avtar Sharma and Devar - Anand Swaroop then there was no occasion for Anand Swaroop to report on 09.08.1994 that the deceased girl went to house of Naresh. Similarly in the report dated 10/08/1994 to the police station there is no reference to the fact that the victim girl went to the house of Appellant - Vinay to fetch water.

94. It is to be noted that the trial court has rejected the testimony of P.W.-7 - Smt Kusum with regard to the fact that she had seen her daughter entering into the house of accused - appellant to fetch water.

95. The present case of the prosecution rests on the circumstantial evidence and there is no eye witness with regard to the occurrence. In the case of circumstantial evidence all the incriminating circumstances which points towards the guilt are required to be taken into consideration while coming to the conclusion with regard to the complicity of the accused. Merely on the ground that P.W.-7 - Smt. Kusum does not appear to be a reliable witness it cannot be stated that the fact that the deceased girl had gone to the house of the Appellant - Vinay Kumar Sharma is disproved, in case where there are other incriminating circumstances pointing towards the guilt of the accused person. The most important circumstance is the recovery of the dead body of the victim-girl from the house of the Appellant-Vinay Kumar. In case the aforesaid circumstance is proved by the prosecution beyond reasonable doubt then it can be accepted that the victim had gone to the house of the Appellant- Vinay Kumar.

96. It is also urged that on the basis of the report dated 09.08.1994, police had visited the village and made search of the victim - girl in the house of Naresh, Jai Prakash, Chandra Pal but the house of Accused-Vinay Kumar Sharma was not searched on 9.8.1994 by the police. On the aforesaid basis it is submitted that the case of the prosecution that the victim had gone to the house of the Appellant-Vinay Kumar is not reliable. It is to be seen that the police had made a search on 09.08.1994 on the basis of the report dated 09.08.1994 lodged by Anand Swaroop. The circumstance that the police had not searched the house of the accused Vinay Kumar on 09.08.1994 will not in any manner shake the prosecution case specifically when the dead body of the victim is recovered from the house of the Appellant -Vinay Kumar.

97. Anand Swaroop - PW 2 although in his statement before the trial court has stated that the victim girl was called by Vinay Kumar under the pretext of fetching water from his house however the aforesaid

witness has not been examined by the defence counsel in this regard and no question has been put to him as to whether he had informed the investigating officer about the fact that the victim had gone to the house of accused Vinay Kumar. It is also to be noted that no questions were advanced to the Investigating Officer-PW-6 by the defence counsel in this respect.

98. The Investigating Officer-D.R.Nanoria (P.W. 6) has stated that when he reached the house of the accused, the accused person jumped from the terrace of their house and they were taken into custody by him. The arrest of the accused has been duly testified by the investigating officer. It is to be noted that mere omission on the part of the police will not negate the testimony of the examined witness. It is further to be seen that at the instance of the accused person the dead body, clothes of the victim and bag from the house of the accused person has been recovered and the recovery memo has been prepared. P.W.1-Ramveer Sharma has further testified that on 10.08.1994 when the police came to the village they had arrested the accused person and interrogated them.

99. It is also submitted by counsel for the Appellant that Ramvir Sharma (PW-1) in his statement before the trial court has stated that they had dispute with Badri Prasad and as such it is improbable that the victim - girl will go to the house of the Accused Vinay Kumar. Ramavtar is Ramveer Shamra brothers son. The house of Ramavtar is 50 yards away from house of Ramvir Sharma. Both persons are related however are living separately. Ramvir Sharma has stated in his testimony that he had dispute with Badri Prasad and the same would not mean that Ramavtar was also not on talking terms with Badri Prasad.

100. It is also urged on behalf of the Appellant that the report dated 09.08.1994 at 4:45 PM lodged by Anand Swaroop (PW-2) with the allegation that the victim was missing since 10 AM however there is no reference in the said report that the victim was seen entering the house of the Appellant- Vinay Kumar. The report dated 09.08.1994 alleges that the victim aged about 12 years went to the house of Naresh to fetch water however when she did not come back for a long time and was missing and as such the report was lodged. Anand Swaroop is uncle of Ram Avtar - Father of the Deceased. He is living in separate house. Naresh is son of Anand Swaroop and lives along with Anand Swaroop. The witness Anand Swaroop in his statement before the trial court has stated that the victim went to the house of Naresh to fetch water however the tap was not working and Appellant - Vinay Kumar called the victim on the pretext of taking water from his house. The accused has not cross-examined the witness Anand Swaroop as such there is no ground to disbelieve the testimony of Anand Swaroop. A contradiction or an omission which amounts to a contradiction if proved in accordance with the provisions of the Evidence Act, 1872 can impeach the credibility of the witness and can help in rejecting the evidence of the prosecution in criminal trials. Contradictions are to be proved in accordance with the Evidence Act otherwise they would have no evidentiary value and would not be admissible.

101. Hon'ble Supreme Court in ***Mahavir Singh v. State of Haryana, (2014) 6 SCC 716*** has observed as under:-

" 16. It is a settled legal proposition that in case the question is not put to the witness in cross-examination who could

furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be raised."

102. The Apex Court in ***V.K. Mishra v. State of Uttarakhand, (2015) 9 SCC 588*** has observed as under :-

"19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction."

103. In the present case the Appellant has not cross-examined P.W.2 nor the contradiction has been proved in compliance with section 145 of the Evidence Act and as such the submission of the counsel for the Appellant is not sustainable.

104. The following incriminating circumstances are drawn by the prosecution against the Appellant which points towards the guilt of the Appellant :-

a) On 09.08.1994 a missing report of the deceased was lodged by Anand Swaroop (P.W.-2) with the allegation that at about 10.00 am on 09.08.1994, victim aged about 12 years had gone along with bucket to fetch water however did not come back.

b) On 10.08.1994 report was lodged by Anand Swaroop that the Appellant has murdered and raped the deceased and the body has been concealed in the house of the Appellant. The aforesaid information was lodged by Anand Swaroop on the information received from the villagers.

c) On the basis of the above-mentioned report dated 10.08.1994, the earlier missing report dated 09.08.1994 was converted into Case crime no 101 of 1994

under section 302, 201 and 376 of the Indian penal Code by the police.

d) On 10.08.1994 police visited the village and at the instance of the Appellant the body of the deceased, clothes, bangles were recovered from almirah in the house of the Appellant. The recovery memo was prepared by the investigating officer and the same was marked as Ex Ka-1 before the trial court.

e) On 10.08.1994 at the instance of Badri Prasad (father of Appellant) the bucket of the deceased was recovered from the house of the Appellant. The Recovery Memo was Prepared by the Investigating Officer and the same was marked as Exhibit Ka-2.

f) The panchayatnama of the deceased was conducted on 10.08.1994 in the presence of P.W.3- D.R. NaNoria. As per the panchayatnama the deceased died on account of injuries on the body of the deceased. The panchayatnama was marked as Ex. Ka-5 before the trial court.

g) The post-mortem of the deceased was held on 10.08.1994 by Dr. SK Sharma (P.W.5). As per the Post-Mortem Report lacerated wound, Contusion, abrasion were found on the body of the deceased. Posterior Fourchette lacerated, post vaginal wall also lacerated, freshly ruptured hymen. As per the post-mortem report the deceased died due to Asphyxia as a result of strangulation. The said witness has proved the post-mortem report.

h) The prosecution witnesses have proved the prosecution case beyond reasonable doubt and the Appellant has not been able to dislodge the prosecution case in cross examination.

i) The statement of the Appellant under section 313 of the criminal procedure code was recorded before the trial court. Appellant has not been able to explain the circumstance with regard to the recovery of the dead body of the victim (in naked condition) from the house of the Appellant.

105. The Appellant has failed to dislodge the prosecution case and no circumstance has been stated which would entitle the finding of conviction and sentence recorded by the trial court as per-se perverse. We are in agreement with the conviction and sentence recorded by the trial court in the impugned judgment.

106. In view of the aforesaid, the present appeal lacks merit and is, accordingly, **dismissed.**

107. Office is directed to return the record of the lower court forthwith along with a copy of this order.

(2022) 8 ILRA 980
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1270 of 2020
And
First Appeal From Order No. 1377 of 2020

Umesh Pal & Anr. ...Appellants
Versus
Uttam Ghosh & Ors. ...Respondents

Counsel for the Appellants:
Sri Nigamendra Shukla

Counsel for the Respondents:
Sri S.K. Mehrotra

(A) Civil Law – Motor Vehicles Act, 1988 - Section -166 - Appeal - compensation - Contributory negligence – burden of proof for contributory negligence has to be discharged by opponents - it is duty of driver to explain the accident - it is admitted position that neither driver nor the owner of truck have stepped into the witness box - while going through the testimony of witnesses, it is clear that motorcyclist was not negligent - Truck came behind and dashed with motorcycle of deceased causing grievous injuries and death – truck being bigger vehicle, the driver of truck has to be more cautious – Principle of *Res ipsa loquitur* - issue of negligence is decided against the insurance company - hence, insurance company cannot avoid its liability.
(Para 18, 22, 24, 26)

(B) Civil Law – Motor Vehicles Act, 1988 - Section 166 - U.P. Motor Vehicles Rules, 1998 - Rules 220 - Compensation - Quantum - in view of law laid down in Sarla Verm's case Multiplier of 18 is correctly applied because the age of deceased was 23 years, - and 40% of income ought to be added towards future loss of income is appropriate since he was not a permanent employee of the company - Compensation computed and awarded accordingly - appeal partly allowed and further directions as per the settled law laid down by the Hon'ble Apex Court towards mode of disbursement, payment of interest, deduction of income tax etc. issued accordingly.(Para 31, 32, 35, 37, 38, 39, 41)

Appeals are partly allowed. (E-11)

List of Cases cited: -

1. UPSRTC Vs Km. Mamta & ors., AIR 2016 SC 948,

2. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 vol. 0 Supreme (SC) 1050,

3. Oriental Insurance Co. Ltd. Vs Poonam Kesarwani & ors., 2008 Law Suit (All) 1557,

4. Mukund Dewangan Vs Oriental Insurance Co. Ltd., (2017) 14 SCC 663,

5. Sarla Verma & ors. Vs Delhi Transport Corporation & anr. (2009 (6) SCC 121),

6. National Insurance Co. Ltd. Vs Mannat Johal & ors. (2019 (2) T.A.C. 705 (SC),

7. A. V. Padma Vs Venugopal (2012 (3) SCC 378),

8. General Manager, KSRTC, Trivandrum Vs Susamma Thomas & ors. (AIR, 1994 SC 1631),

9. The Oriental Insurance Co. Ltd. Vs Chief Commissioner of Income Tax (TDS), (R/Special Civil Application No.4800 of 2021, Decided on 05.04.2022

10. Bajaj Allianz General Insurance Co. Ltd. Vs U.O.I. & ors. (Decided on Dt. 27.01.2022).

(Delivered by Hon'ble Ajai Tyagi, J.)

1. Heard learned counsel for the appellants and learned counsel for the respondents. Perused the record.

2. First Appeal From Order No.1270 of 2022 has been preferred by appellants/claimants against the judgment and award dated 18.01.2020 passed by Motor Accident Claims Tribunal, Muzaffarnagar (hereinafter referred to as, 'Tribunal') in Motor Accident Claim Petition No.459 of 2016 (Umesh Pal and another v. Uttam Ghosh and others) whereby the claimants were awarded compensation Rs.1,37,12,904/- with 7% p

3. Claimants have preferred the aforesaid appeal for enhancement of

amount of compensation. The National Insurance Company insurer of truck (vehicle) involved in the accident has also preferred Appeal No.1377 of 2020 against the aforesaid award challenging the same and for setting aside the award in question/modification qua compensation, negligence and liability of Insurance Company are concerned.

4. The brief facts as culled out from the record are that a claim petition was filed by claimants, who are legal representatives of deceased. The averments in the petition are that on 3.8.2016 the deceased Gaurav Kumar was driving Motorcycle No.WB 20 N 1364. When the deceased was going to his room with his friend Virendra Kumar at about 4.30 p.m. and when the deceased reached the gate of M.I.M.T. Colony on Taratola Road, a tanker No.WB 19 E 8494 came from behind which was being driven rashly and negligently by its driver and hit the motorcycle of deceased from behind. In this accident, deceased sustained grievous injuries due to which he died on the spot. Deceased Gaurav Kumar was serving in Merchant Navy as a Cadet.

5. On summons being issued, Respondent No.3, Insurance Company Ltd filed its written statement, but no written statement was filed by driver or owner of the aforesaid Tank involved in the accident.

6. 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.

7. The accident having occurred is now not in dispute, involvement of truck though initially disputed by Insurance Company, qua involvement but finding of tribunal about involvement is not in dispute in challenge by either side while going through the grounds of challenge of the insurance Company, the insurance company has contended that non consideration of contributory negligence of the deceased in light of the facts and circumstances and holding the driver of the truck to be solely liable is bad in eye of law.

8. The issue of negligence decided by the Tribunal is in dispute. The Insurance Company has challenged the liability imposed on them. It is submitted by counsel for Insurance company, the finding that the driving licence of the driver of tanker was valid and effective is bad and on this ground the impugned award is erroneous and liable to be set aside qua the Insurance Company.

9. It is further submitted by learned counsel for Insurance company that the driving licence of the deceased was not valid and effective on the date of accident i.e. on 03.08.2016 as it was valid to drive transport vehicle w.e.f. 26.08.2019 to 25.08.2024 and that there was no endorsement for hazardous goods whereas Tanker in question was heavy goods vehicle capable of carrying of hazardous goods but the Tribunal illegally held that the driving licence of Tanker driver was valid and effective hence on this ground also impugned award is erroneous and liable to be set aside.

10. It is an admitted position of fact that deceased was a bachelor and the claimants are the legal representatives of the deceased, namely, the parents of the deceased, the multiplier would be as per the

judgment of ***National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050***, which would have to be granted as per the age of the deceased and not as per the age of the parents as submitted by learned counsel for the Insurance company.

11. With these background, the submissions of counsels are to be discussed.

Arguments qua Compensation in both Appeals:

12. Learned counsel for claimants submitted that at the time of accident, deceased was serving in Merchant Navy, with a private Marine Company in Ireland. It is also submitted that learned tribunal has assessed monthly income of the deceased at Rs.90,000/- p.m. which is on lower-side because the company had deposited Rs.12,00,000/- in six months in the bank account of deceased. The monthly income of the deceased was Rs.2,00,000/- when converted to Indian currency. It is next submitted that in the service of Merchant Navy, income tax has not to be deducted from the salary of the employee. Learned counsel submitted that in the present case, deceased used to reside in Ireland for nine months and tax was deducted from his income by the Government of Ireland, it is submitted that learned Tribunal has erred in deducting income tax from the income of deceased. Learned counsel also submitted that deceased was receiving salary from the company in Euro Currency and at the time of his death, the exchange rate of Euro was Rs.71.20 per Euro. Learned counsel for claimants also submitted that for the future loss of income, 50% of the income should have been added by the learned tribunal, but tribunal has committed error by adding 40% of the income only, it is further submitted that the amount under non pecuniary damages is on lower side. It is further submitted that rate of interest on lower side than repo rate.

13. Learned counsel for Insurance company vehemently objected to the submissions advanced by counsel for claimants as far as compensation is concerned and submitted that deceased was not the employee of the company, but he was working with the company on contractual basis and there was employment contract between company and deceased in which it was clearly stated that salary would be 800 US Dollars per month. Learned counsel submitted that the tribunal could not go beyond the aforesaid contract and further submitted that at the time of death of the deceased, the exchange rate of US Dollar was Rs.70 per dollar. Hence, the salary of the deceased comes at Rs.56,000/- per month and the calculation of salary at Rs.90,000/- per month is on higher side.

14. Learned counsel for claimants submitted that it is on record that from 19th August, 2015 till 20th December, 2015, the deceased earned 18670.67 Euro, certificate of which is on record. It is also submitted by learned counsel that statement of bank account of the deceased is also on record which could prove the income of the deceased which has been overlooked by the tribunal.

15. Learned counsel for insurance company submitted that deceased was not a permanent employee of the Marine Company. Hence, the learned Tribunal was justified by adding only 40% of the income towards future loss of income to the salary of deceased.

Findings on all issues:

Negligence:

16. As the issue of negligence is raised by Insurance company the same would have to be decided as to who was negligent, whether the deceased had contributed in the accident having taken place what we have to be evaluated to the fact and circumstances of the case. The issue of negligence will have to be decided in light of the facts and circumstances of this case.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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).

23. 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.

24. While going through the facts, it is an admitted position of fact that neither the driver nor the owner of the truck have stepped into the witness box. The driver of the vehicle (truck) is the best witness to contradict and prove the negligence. While going through the testimony of the witnesses, it is clear that motorcyclist was not negligent. The fact that the motorcyclist was going ahead of the truck, the truck which is a bigger vehicle which was following the motorcycle the driver of the truck should have taken proper care, if care was taken, the injuries would not have been suffered by the deceased. The deceased died on the spot and there was injuries on temporal region also. This shows that driver of the truck drove the truck rashly and negligently and dashed motorcyclist on the rear-side. Therefore, the submission of counsel for the insurance company that the deceased had also contributed to the accident having taken place cannot be accepted. Hence, the issue of negligence is decided against the insurance company and we concur with the learned Tribunal as far as issue No.2 is concerned.

25. This takes us to the issue of avoidance and breach of terms of insurance as far as the licence of the truck driver is concerned, the judgment of the Apex Court in Mukund Dewangan (infra) would enure for the benefit of the claimants, the permit was also there, the driver had driving licence which cannot be said to be not of the vehicle which he was driving. It has not

been proved whether the truck was carrying hazardous chemicals or not. All the documents were valid, the finding of fact which has not be proved to be perverse or bad in eye of law. The tribunal which has to take a holistic view of the matter in coming to the conclusion that the driver was having proper effective driving licence has done so.

26. We are fortified in our view in the light of the judgment of this Court in **Oriental Insurance Company Limited v. Poonam Kesarwani and others, 2008 LawSuit (All) 1557**, when it was not proved by the Insurance Company that there was breach of policy condition, there being no breach of policy of insurance, the judgment of Apex Court in **Mukund Dewangan Vs. Oriental Insurance Company Limited (2017) 14 SCC 663,** though referred to the larger Bench will apply to the facts and circumstances of the case. Hence, this ground so to avoid its liability by insurance company cannot be accepted. Insurance company cannot avoid its liability. We concur with the tribunal as far as breach of policy conditions are concerned, there is no breach of policy condition.

Compensation :

27. The learned tribunal has assessed monthly income of the deceased at about Rs.90,000/- per month on the following basis. While learned counsel for Insurance Company has referred the employment contract between the company and the deceased which shows that salary of the employee would be 800 US Dollars per month. It is submitted by learned counsel for claimants that the deceased was paid amount in Euro currency.

28. Controversy about the salary/pay package of the deceased, this Court have re-evaluated. The reports of copies of bank account statement of the deceased just prior to the accident.

29. It is admitted fact that death of the deceased took place in the month of August 2016 on account of the accident, hence the income of the deceased preceding one year of the death would be relevant.

30. While going through the bank account statements of the deceased, for the one year preceding to the death of the deceased, total Rs.8,45,225/- were credited into the bank account of the deceased by the company, hence, average monthly income of the deceased comes out Rs.70,435/-. It is pertinent to mention that this amount of Rs.8,45,225/- was credited in bank account between the month of September 2015 and December, 2015 and no amount was credited by the company from the month of January, 2016 till the death of the deceased. Hence, the average income of the deceased is assessed Rs.70,435/- per month. In this way, the total computable annual income of the deceased has to be taken at Rs.8,45,225/- (concerted).

31. We are in agreement with the learned tribunal for adding 40% of the income towards future loss of income because the deceased was not a permanent employee of the company, but he was working with the Company on contractual basis, 1/2 is deducted by the tribunal for personal expenses of the deceased as he was bachelor and for some period of year would not be with parents which is in consonance with the judgment of Apex Court titled S**arla Verma Vs. Delhi Transport Corporation, (2009) 6**

SCC 121 multiplier of 18 is also correctly applied in view of the aforesaid judgment of Sarla Verma (supra) because the age of the deceased was 23 years, non pecuniary damages also need not to be interfered by us as there is no dispute with regard to the non pecuniary damages.

32. On the basis of the above discussions, the quantum of compensation is re-computed herein below:

i. Annual Income Rs.8,45,225/- p.m.

ii. Percentage towards future prospects : 40% namely Rs.3,38,090/-

iii. Total income : Rs. 8,45,225 + Rs. 3,38,090= Rs.11,83,315/-

iv. Income after deduction of 1/2: Rs.5,91,657/-

v. Multiplier applicable : 18

vi. Loss of dependency: Rs. 5,91,657 x 18 = Rs.1,06,49,826/-

vii Loss of estate : Rs.15000/-

viii Funeral expenses : Rs.15,000/-

ix. Filial Consortium (Rs.40,000 each): Rs.80,000/- (as per decision of the Apex Court)

x. **Expenses for bringing the dead body : 20,000/-**

xi. Total compensation (vi+vii+viii+ix+x): **Rs.1,07,79,826/-**

33. We maintain transportation charges awarded by the tribunal, the reason being, dead body of the deceased transported from distant place.

34. 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 7 Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.) w**herein 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."

35. We deem it fit to rely on the judgment of the Apex Court in the case of ***A.V. Padma and others Vs. R. Venugopal, 2012 (3) SCC 378*** wherein the Apex Court has considered the judgment rendered in ***General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas and others, AIR 1994 SC 1631*** for disbursement.

36. 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 (supra), the order of investment is

not passed because claimants are neither illiterate nor rustic villagers.

37. Recently the Gujarat High Court in case titled the ***Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS), R/Special Civil Application No.4800 of 2021*** decided on 05.04.2022, it is held that interest awarded by the tribunal or appellate court under Section 171 of Motor Vehicles Act is not taxable under the Income Tax Act, 1961

38. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunal 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.

39. 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 respondent-Insurance Company shall deposit the amount of s.1,07,79,826/- 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.

40. Record be transmitted to tribunal.

41. 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 8 years have elapsed since occurrence of accident, the amount be deposited in the Saving Account of claimants in Nationalized Bank. The amount shall be credited in the said account with without investment as the case may be.

42. The First Appeal From Order No.1377 of 2020 of National Insurance Company Ltd. is partly allowed and the First Appeal From Order No.1270 of 2020 of claimants is decided, accordingly.

43. We are thankful to learned counsel for the parties for ably assisting this court in getting this old appeal disposed of.

(2022) 8 ILRA 988
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2022

BEFORE

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

First Appeal From Order No. 1699 of 2013
connected with
Cross Objection No. 48 of 2021

United India Insurance Co. Ltd.
...Appellant
Versus
Smt. Mamta Rani & Ors. ...Respondents

Counsel for the Appellant:
Sri Anubhav Sinha, Sri V.C. Dixit

Counsel for the Respondents:
Sri Yogendra Pal Singh, Sri Dharmendra Kr. Gupta

(A) Civil Law – Motor Vehicles Act, 1988 - Sections 166 - U.P. Motor Vehicles Rules, 1998 - Rules 220, 220-A(3), 220-A(3) (iii) & 220-A(6): - Insurers' Appeal – against award - Cross objection - seeking enhancement of compensation by Claimant's - denial of accident

- deceased's motorcycle was struck and knocked down on the dusty pavement - *Appreciation of evidence* - non-mention of the witness's name in FIR does not discredit the factum of his presence - court cannot shut its eyes to the harsh reality of legal proceedings that follow by police - held - negligence of the driver of the offending vehicle is responsible for accident - thus, finding of tribunal is unexceptionable & insurer's plea that PW-2 as a planted witness, who had not seen anything, is not acceptable.

(Para - 19, 20, 28)

(B) Civil Law – Motor Vehicles Act, 1988 - Section 166 - U.P. Motor Vehicles Rules, 1998 - Rules 220, 220-A(3), 220-A(3) (iii) & 220-A(6): - Insurers' Appeal against award - Cross objection for seeking enhancement - *Quantum of compensation* - deceased was a govt. servant - survived by five dependants - aged about 50 years - there is no objection about the deceased's monthly emoluments vis-a-vis- deduction made therefrom on account of income tax - court, accordingly proceed to determine the compensation - as per prospects has been laid down in cases of Pranay Sethi's, Urmila Shukla's, Smt. Shanti's and in the light of judgement in case of Jiuti Devi's case and as per Rules 220-A(3) - claimants are entitled to get enhanced compensation - compensation computed from Rs. 36,80,22/- to Rs. 47,13,900/- with 7% rate of simple interest per annum - hence, Insurer's appeal dismissed, but, Cross objection for seeking enhancement is allowed accordingly.

(Para - 36, 37, 43, 45, 46, 53, 54)

(C) Civil Law – Motor Vehicles Act, 1988 - Section 166 - U.P. Motor Vehicles Rules, 1998 - Rules 220, 220-A(3), 220-A(3) (iii) & 220-A(6): - Insurers' Appeal against award - Cross objection for seeking enhancement - *Quantum of compensation* - in the light principle acknowledged by the Supreme Court in case of Kajal Vs Jagdish Chand & ors. - court can award compensation more than that claimed - Appeal fails and dismissed with cost - cross objection preferred by the claimants is allowed.

(Para - 55, 56)

Appeal dismissed with cost but, Cross objection is allowed. (E-11)

List of Cases cited: -

1. Dr. Anoop Kumar Bhattacharya & anr. Vs National Insurance Co. Ltd., (2022) 1 All. L.J. 603

2. Anita Sharma Vs The New India Assurance Co. Ltd., (2021) 1 SCC 171

3. Sunita & ors. Vs Rajasthan St. Road Transport Corporation & ors., (2020) 13 SCC 486

4. National Insurance Co. Ltd. Vs Pranay Sethi, (2017) 16 SCC 680,

5. National Insurance Co. Ltd. Vs Rekhaben & ors., (2017) 13 SCC 547

6. Sarla Verma Vs Delhi Transprot Corporation & anr., (2009) 6 SCC 121

7. Vimal Kanwar Vs Kishore Dan, (2013) 7 SCC 476

8. Ranjita Seal & ors. Vs Lal Chandra Sharma & ors., (2022) SCC Online Gau 250

9. Karnataka St. Road Transport Corporation Bengaluru Vs Pankaja H.S. AIR Online 2020 Kar. 1190

10. New India Assurance Co. Ltd. Vs Urmila Shukla, 2021 SCC Online SC 822

11. Smt. Shanti & ors. Vs Anil Awasthi @ Anil Kumar Awasthi & anr., FAFO No. 866 of 2021 connected with Appeals, decided on dated 30.5.2022,

12. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd. & ors., FAFO No. 2581 of 2021, dated 26.04.2017

13. Jiuti Devi & ors. Vs Manoj Kumar & ors., 2022 SCC Online All. 46

14. Kajal Vs Jagdish Chand & ors., (2020) 4 SCC 413

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

This First Appeal From Order by the Insurance Company is directed against a

judgment and award of the Motor Accidents Claims Tribunal/Special Judge (S.C./S.T. Act), Bulandshahr dated 21.03.2013, ordering the appellant-Insurance Company to pay compensation to the claimant-respondents in the sum of ₹36,80,222/- together with interest.

2. A cross-objection, being Cross Objection No. 48 of 2021, has been preferred by the claimants, seeking enhancement of the compensation. The cross-objection was presented beyond time by five years and fifty-one days. It was accompanied by a delay condonation application. The delay was condoned vide order dated 20.01.2022 and the cross-objection admitted to hearing.

3. The facts giving rise to this appeal are that on the 23rd of February, 2011, Shyamveer was proceeding on his motorcycle bearing Registration No. UP-14L-2487 from Sikandrabad to Town Gulawathi, both situate in the district of Bulandshahr. As he reached a certain Dholi Pyau near village Sanauta at about 02:00 p.m., a Bolero SUV bearing Registration No. HR-66/1186, proceeding from the opposite direction, that is to say, from Gulawathi to Sikandrabad, driven at a high speed and negligently in a wayward fashion, hit Shyamveer's motorcycle head on. Shyamveer was moving on the left hand side of the road, more on to its pavement. The impact caused Shyamveer to sustain a number of grievous injuries, in consequence whereof, he died on the spot, without opportunity for the extension of medical aid.

4. The deceased is survived by five dependents, who are the claimant-respondents to this appeal. They are Smt. Mamta Rani, widow of the deceased Shyamveer. She was aged 47 years at the time of the accident. Atul Kumar and Km. Nisha Rani are the deceased's son and the daughter. They were aged 24 and 23 years, respectively at the time of the accident. Smt. Mahaviri Devi and Naipal Singh are the mother and the father of the deceased. The mother was aged 70 years and the father 72 years at the time the cause of action arose.

5. The deceased was employed as an Assistant Development Officer in Harijan Samaj Kalyan Department of the State Government and posted as the Block Development Officer, Sikandrabad, District Bulandshahr. He was drawing a monthly salary of ₹38,400/-. The claimant-respondents prayed that they may be awarded compensation in the sum of ₹40,45,000/-.

6. Respondent nos. 1 and 2 to the claim petition, who are respondent nos. 6 and 7 to this appeal, are the driver and the owner of the offending vehicle. The driver is Rahul, son of Rajat Singh, whereas the owner is Randhir Singh, son of Indraveer Singh. They shall hereinafter be referred to as 'the driver' and 'the owner' respectively.

7. The driver and the owner filed a written statement, denying the involvement of the offending vehicle. It has been pleaded in Paragraph No. 15 of their written statement that the driver was working as such (of the offending vehicle) and had a valid and effective driving licence issued in his favour by the competent Authority at Bulandshahr.

8. It was further stated that at the time of the accident, the offending vehicle was insured with respondent no. 3 to the claim petition, who are an Insurance Company.

The particulars of the Insurance Policy with its number was pleaded and a copy of the cover note was enclosed with the written statement. It is the case of the owner and the driver that if at all liable, it is the Insurance Company, who are obliged to satisfy the award.

9. A separate written statement was put in on behalf of the third respondent to the claim petition, who are the United India Insurance Company Limited, Branch Office near Meerut Private Bus Stand, State Bank of India Lane, Bulandshahr, represented by its Branch Manager. The Insurance Company aforesaid shall hereinafter be referred to as 'the insurers'. The insurers are the appellant here. They in their written statement said that the driver of the offending vehicle did not hold a valid and effective driving license. The claim petition is bad for non-joinder of necessary parties. The insurers have also denied the fact that the deceased was an Assistant Development Officer with the Harijan Samaj Kalyan Department, and that he was posted as a Block Development Officer at the time of the accident. It was, however, admitted in Paragraph No. 8 of the insurers' written statement that the offending vehicle was insured with them vide Policy No. 22200231090100011601 from the midnight hour of 25.02.2010 to the midnight hour of 24.02.2011, the policy being issued in the name of the owner.

10. On the pleadings of parties, the following issues were framed (translated into English from Hindi) :

(1) Whether on 23.02.2011, the accident happened when the deceased, Shyamveer Singh, proceeding from Town Sikandrabad to Gulawathi, riding his motorcycle bearing Registration No. UP-14L-2487 at 02:00 p.m., had reached Dholi Pyau, where a Bolero bearing Registration No. HR-66-1186, proceeding in the opposite direction, driven at a high speed and negligently, hit the motorcycle, leading to fatal injuries and consequent death?

(2) Whether on the date of accident, the Bolero in question was insured validly with the Insurance Company?

(3) Whether on the date of accident, the driver of the vehicle (offending) had a valid and effective driving licence?

(4) The amount of compensation, that the claimants are entitled to receive?"

11. The claimant-respondents, who shall hereinafter be referred to as 'the claimants', examined three witnesses in support of their case. PW-1, Mamta Rani is the widow of the deceased Shyamveer, Narendra Singh, who is an eye-witness of the accident, was examined as PW-2 and Ashok Kumar Gupta, who is an Accountant in the Office of the Additional District Development Officer (Samaj Kalyan), Bulandshahr, was examined as PW-3, to prove the deceased's salary. The driver, Rahul examined himself as DW-1 whereas on behalf of the insurers, their Investigator, Laxmi Narain was examined as DW-2.

12. The claimants in their documentary evidence filed, through a list of documents dated 05.12.2011, a certified copy of the First Information Report1 relating to the crime arising out of the accident, a copy of the charge-sheet filed by the Police, a copy of the site-plan (part of the police papers), a copy of the postmortem report relating to the deceased

and the deceased's pay certificate in original for the month of January, 2011. In addition, through a list of documents dated 19.01.2012, a photostat copy of the first page of the service-book relating to the deceased was filed on behalf of the claimants.

13. On behalf of the owner and the driver, three documents were filed through a list, Paper No. 17 C1. These are a photostat copy of the Registration Certificate of the Bolero SUV bearing Registration No. HR-66-1186, a photostat copy of Rahul's driving licence and a photostat copy of the cover note issued by the insurers for the Bolero bearing Registration No. HR-66-1186. Again on behalf of the owner and the driver, a certified copy of the certificate of insurance was filed through list of documents, Paper No. 25C-1. The insurers, through a list of documents, Paper No. 56C-1, filed their Investigator's investigation report (in original) dated 07.05.2012.

14. Heard Mr. Anubhav Sinha, learned Counsel on behalf of the insurers in support of the appeal and Mr. Yogendra Pal Singh, learned Counsel appearing for the claimants in opposition. Mr. Yogendra Pal Singh has been heard on behalf of the claimants in support of cross-objection and Mr. Anubhav Sinha in answer on behalf of the insurers.

15. Mr. Anubhav Sinha, learned Counsel for the insurers has assailed the findings of the Tribunal on Issue No.1 vociferously and says that the Tribunal has ignored from consideration telltale features in the claimants' evidence, that go to show that the offending vehicle was never involved in the accident. He submits that the FIR was lodged against an unknown vehicle, with no particulars thereof mentioned. Later on, the Bolero SUV bearing Registration No. HR-66-1186 has been framed as the offending vehicle in connivance with the Police and the planted eye-witness, Narendra Singh, PW-2. It is argued that PW-2 had seen nothing about the accident. The witness is not mentioned in the FIR. It is argued that if Narendra Singh was present at the time of accident, there is no reason why his name did not figure in the FIR and further that the fact that Narendra Singh did not report the matter to the Police or did anything to help the deceased, then a victim of the accident, falsifies his presence.

16. The learned Counsel for the insurers has drawn attention of the Court to the fact that PW-1 has said in answer to a suggestion in his cross-examination that it is incorrect to say that the deceased's face was crushed beyond recognition, whereas the deceased's wife, Smt. Mamta Rani, PW-1 in her cross-examination, has said that the deceased's face was so badly crushed that it was difficult to recognize. He submits, therefore, that the testimony of PW-2 about the identification of the deceased on the basis of an information shared by the witness's brother-in-law about the time and place of the accident is hard to believe. Learned Counsel for the insurers particularly criticizes that part of the testimony of PW-2, where he says that on reaching the deceased's home and seeing his photograph, he immediately recognized the deceased. Learned Counsel submits that this testimony is not worthy of acceptance, because the deceased's wife, in her cross-examination, has acknowledged the fact that the deceased's face was crushed beyond recognition. It is, particularly, emphasized by the learned Counsel for the insurers that PW-2 is a got up witness, who

has seen nothing, but later on came up with the registration number of the offending vehicle that he shared with the Police and also feigned identifying the deceased and witnessing the accident.

17. Mr. Yogendra Pal Singh, learned Counsel for the claimants has supported the findings of the Tribunal on the foot of the reasoning that the Tribunal has accepted the testimony of PW-2 together with other circumstances, taking a plausible view of the evidence holistically. He submits that there is ample evidence to accept the factum of the accident being caused by the offending vehicle and the accident being witnessed by PW-2, who remembered the registration number of the offending vehicle, but did not take any step to report the matter to the Police for the obvious reason that he did not know the deceased. Later on, when he learnt about the deceased's identity and particularly the fact that he was a friend of his brother-in-law, he connected the event, the identity of the victim and the offending vehicle, which he volunteered to share with the Police.

18. This Court has considered the submissions of the learned Counsel for parties on the first issue and perused the record.

19. It is true that the FIR lodged by the deceased's son, Atul Kumar, does not mention the name of PW-2 as a witness of the accident, but in our opinion, the non-mention of the witness's name does not discredit the factum of his presence in the circumstances obtaining. The witness was a passer-by, who saw the accident, stopped over for a few minutes and went away, because he had a sick aunt to take care of. The first informant is the son of the deceased, who was not present at the site of the accident. Admittedly, the first informant is not an eyewitness. In the circumstances, the fact that PW-2 was not mentioned by the informant in his written information to the Police is a logical and natural part of the unfolding of events, the way they did. There is also nothing unnatural about the conduct of Narendra Singh, PW-2 in not, reporting the accident to the Police after witnessing it as a passer-by.

20. We cannot shut our eyes to the harsh reality that reporting even an accident to the Police is not a pleasant experience for a man not endowed with some extraordinary resource or authority. The legal proceedings that follow after a man turns a first informant are equally unpleasant and taxing. The natural conduct of a witness, who sees an accident, is to eschew and avoid reporting it. It is circumstances compelling or very motivating, such as affinity or acquaintance with the victim, that may impel a witness to come forward and say what he has seen, even about an accident. The premise, therefore, on which Mr. Sinha wants us to disbelieve the presence of PW-2 are too mechanical and bookish to accept. The fact that this witness came forward a little later, in our opinion, is not the result of design to produce a planted witness by the claimants. Rather, it was apparently an accident of a different kind, where the witness's brother-in-law happened to be a friend of the deceased and narrated to him the ill-fate of the deceased. It was the location and the time of the accident that very logically reminded the witness of seeing it all. Since this episode happened on the fourth day after the accident, the witness's memory was still fresh. He chose to volunteer. Therefore, to castigate Narendra Singh as a planted witness, who had not seen anything of the accident, as the insurers seek to do, is not acceptable.

21. A Division Bench of this Court, when confronted with an almost identical stance of the Insurance Company about the presence of the eyewitness in ***Dr. Anoop Kumar Bhattacharya and another v. National Insurance Company Limited2*** held :

37. Let us first deal with the absence of the name of PW-2 from the hospital records and the FIR. Does it render the testimony of PW-2 suspected and liable to be disbelieved?

38. In Anita Sharma (supra), the Rajasthan High Court set aside the judgment of the Tribunal awarding compensation to the claimant, inter alia, on the ground that the eyewitness, the testimony of whom the Tribunal had relied on, could not have been believed because he had failed to report the accident to the police and because even though he asserted that he had brought the injured to the hospital the same was not borne out from the hospital records. The hospital records instead indicated that the injured was brought in by the police. The judgment of the High Court was assailed before the Supreme Court. Contradicting the reasoning of the High Court, the Supreme Court observed thus:--

"12. It is commonplace for most people to be hesitant about being involved in legal proceedings and they therefore do not volunteer to become witnesses. Hence, it is highly likely that the name of Ritesh Pandey or other persons who accompanied the injured to the hospital did not find mention in the medical record. There is nothing on record to suggest that the police reached the site of the accident or carried the injured to the hospital. The statement of AW3, therefore, acquires significance as, according to him, he brought the injured in his car to the hospital. Ritesh Pandey (AW3) acted as a good samaritan and a responsible citizen, and the High Court ought not to have disbelieved his testimony based merely on a conjecture. It is necessary to reiterate the independence and benevolence of AW3. Without any personal interest or motive, he assisted both the deceased by taking him to the hospital and later his family by expending time and effort to depose before the Tribunal.

13. It is quite natural that such a person who had accompanied the injured to the hospital for immediate medical aid, could not have simultaneously gone to the police station to lodge the FIR. The High Court ought not to have drawn any adverse inference against the witness for his failure to report the matter to Police. Further, as the police had themselves reached the hospital upon having received information about the accident, there was perhaps no occasion for AW3 to lodge a report once again to the police at a later stage either.

14. Unfortunately, the approach of the High Court was not sensitive enough to appreciate the turn of events at the spot, or the appellant claimants' hardship in tracing witnesses and collecting information for an accident which took place many hundreds of kilometers away in an altogether different State. Close to the facts of the case in hand, this Court in Parmeshwari v. Amir Chand1, viewed that:

"12. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh, PW 1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to

the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitised enough to appreciate the plight of the victim.

x x x

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied."

39. It is clear that the Supreme Court did not concur with the approach adopted by the Rajasthan High Court in discarding the testimony of an eyewitness on the ground that he did not report the incident to the police and that his name did not appear in the hospital records even though he claimed to have brought the injured to the hospital.

40. In a telling and insightful commentary on the general tendencies of everyday actors, the Supreme Court observed that it is very common-place that people are hesitant to give their details to the hospitals in cases of accidents for the fear of getting embroiled in tedious and cumbersome legal proceedings. The testimony of a witness, who claims to have brought the victim of an accident to the hospital, therefore, does not automatically become doubtful and suspicious simply on account of the fact that the concerned individual's name was missing from the hospital records. In fact, such a circumstance is highly likely. The Hon'ble Supreme Court also opined that it is unrealistic to expect that a person who decides to stop and help the injured by taking the injured to the hospital should also simultaneously go to the police station and lodge the FIR. Placing reliance on its judgment in the case of Parmeshwari v. Amir Chand, reported in (2011) 11 SCC 635, the Supreme Court opined that an eye-witness, who helps the victim of an accident get to the hospital, acts as a good Samaritan and cannot be disbelieved simply because he did not file a complaint with the police. The decision to discard the testimony of such a witness cannot be based solely on conjecture. A holistic view of the matter must be taken without losing sight of the distress caused to the victim. It must be borne in mind that strict proof of accident is not required and the case of the victim has to be tested only according to the standard of preponderance of probabilities.

22. This Court, in believing that Narendra Singh PW-2 was present at the site and the time of the accident, which he witnessed, is fortified about the approach to be adopted in such matters by the remarks of their Lordships of the Division Bench in **Dr. Anoop Kumar Bhattacharya** *(supra)*, which, in turn, has drawn on the guidance of the Supreme Court in **Anita Sharma v. The New India Assurance Company Limited3.**

23. The Police, on the other hand, after a full-fledged investigation in Case Crime No. 88 of 2011, have filed a charge-

sheet, citing Narendra Singh as the first witness of fact. In the cross-examination of Narendra Singh by the insurers, there is nothing that figures to discredit the witness's presence. PW-2 has stuck to his stand why he moved away after seeing the accident, but later on came forward upon coming to know that the deceased was a friend of his brother-in-law. To a suggestion by the insurers that he was testifying at the instance of the claimants, or that he wanted to secure undue benefit to them, the witness has resolutely denied the fact and maintained his position that he had seen the accident. He has also dispelled the suggestion that he had never seen it happen. Presence of the witness could be impeached by the insurers through cross-examination, which they extensively undertook. The insurers' endeavour to discredit the presence of PW-2 at the site of the accident, when the witness took stand in the dock, has been utterly unsuccessful. Therefore, this Court has no hesitation to hold that the presence of PW-2 cannot be doubted.

24. The other limb of the submission, that the insurers have canvassed before this Court, is about the inherent unworthiness of the testimony of Narendra Singh. The basis of the submission seems to be the fact that Narendra Singh could identify the deceased by a look at his photograph put up at the mourning site, which is not believable. This submission is founded on the testimony of the deceased's wife Smt. Mamta Rani, PW-1, who has stated in her cross-examination that the deceased's face was so badly crushed that it was difficult to recognise. No doubt the deceased's wife has said words to the effect that Mr. Sinha has emphasized, but, the identification of an individual, who has met with a fatal accident, by a witness, is based on broader things, and not confined only to the facial features. The date and time of the accident, the identity of the victim otherwise well established by his or her gait, broadly seen by the witness, can and do ensemble to facilitate the witness accurately identify. Narendra Singh's presence at the site of the accident is not in doubt. He had seen the accident and the victim while he stayed there for a few minutes, before proceeding to attend to his ailing aunt. The witness was cognizant of the broad features of the victim, but did not know him. Later on, through his brother-in-law, when he came to know about the victim's identity with reference to the date, time and place of the accident, he could and did correctly identify. There is nothing so startling or absurd about the testimony of Narendra Singh, PW-2 that may impel the Court to disbelieve the witness in a matter as inquisitorial in nature as a motor accident claim and test it by the gruelling standard that a criminal prosecution must meet. There is no warrant for the Court to assess the testimony of the witness even by standards of an ordinary adversarial civil cause. The purpose of trial in a motor accident claim is to ascertain whether an accident has happened, and where it is a fatal accident, to ensure that the dependents of the victim are compensated by the offending vehicle or its insurers. This is to be done in a broadly inquisitorial exercise, where the identity of the offending vehicle is established with reasonable assurance. The approach in a mot

25. In this connection, reference may be made with profit to the guidance of the Supreme Court in **Sunita and others v. Rajasthan State Road Transport Corporation and others4**, where, their Lordships were concerned about the approach that the Court has to adopt in

evaluating evidence, while determining the liability for the accident. In the context of facts, where the High Court had set aside the Tribunal's award granting compensation by holding the witnesses to be unreliable and insisting on adherence to the best evidence rule, it was observed :

20. The thrust of the reasoning given by the High Court rests on the unreliability of the witnesses presented by the appellants: first, that the evidence given by Bhagchand (AD 2) was unreliable because he was not shown as a witness in the list of witnesses mentioned in the charge-sheet filed by the police and that the said witness could not identify the age of the pillion rider, Rajulal Khateek. Second, the said pillion rider himself, Rajulal Khateek, who was the "best" witness in the matter, was not presented for examination by the appellants. The High Court also relies on the site map (Ext. 3) to record the finding on the factum of negligence of the deceased Sitaram in causing the accident which resulted in his death.

21. We have no hesitation in observing that such a hypertechnical and trivial approach of the High Court cannot be sustained in a case for compensation under the Act, in connection with a motor vehicle accident resulting in the death of a family member. Recently, in Mangla Ram v. Oriental Insurance Co. Ltd. [Mangla Ram v. Oriental Insurance Co. Ltd., (2018) 5 SCC 656 : (2018) 3 SCC (Civ) 335 : (2018) 2 SCC (Cri) 819] (to which one of us, Khanwilkar, J. was a party), this Court has restated the position as to the approach to be adopted in accident claim cases. In that case, the Court was dealing with a case of an accident between a motorcycle and a jeep, where the Tribunal had relied upon the FIR and charge-sheet, as well as the accompanying statements of the complainant and witnesses, to opine that the police records confirmed the occurrence of an accident and also the identity of the offending jeep but the High Court had overturned [Pratap Singh v. Mangla Ram, 2017 SCC OnLine Raj 3765] that finding inter alia on the ground that the oral evidence supporting such a finding had been discarded by the Tribunal itself and that reliance solely on the document forming part of the police record was insufficient to arrive at such a finding. Disapproving that approach, this Court, after adverting to multitude of cases under the Act, noted as follows: (Mangla Ram case [Mangla Ram v. Oriental Insurance Co. Ltd., (2018) 5 SCC 656 : (2018) 3 SCC (Civ) 335 : (2018) 2 SCC (Cri) 819] , SCC pp. 667-71, paras 22-25)

"22. The question is: Whether this approach of the High Court can be sustained in law? While dealing with a similar situation, this Court in Bimla Devi [Bimla Devi v. Himachal RTC, (2009) 13 SCC 530 : (2009) 5 SCC (Civ) 189 : (2010) 1 SCC (Cri) 1101] noted the defence of the driver and conductor of the bus which inter alia was to cast a doubt on the police record indicating that the person standing at the rear side of the bus, suffered head injury when the bus was being reversed without blowing any horn. This Court observed that while dealing with the claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, the Tribunal stricto sensu is not bound by the pleadings of the parties, its function is to determine the amount of fair compensation. In paras 11-15, the Court observed thus: (SCC pp. 533-34)

"11. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto

sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimant's predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post-mortem report vis-à-vis the averments made in a claim petition.

12. The deceased was a constable. Death took place near a police station. The post-mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of the constable had taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus-stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.

13. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate Respondents 2 and 3. The claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the first information report had been lodged in relation to an accident could not have been ignored.

14. Some discrepancies in the evidence of the claimant's witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying the burden of proof in terms of the provisions of Section 106 of the Evidence Act, 1872 as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by Respondents 2 and 3.

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties.'

(emphasis supplied)

The Court restated the legal position that the claimants were merely to establish their case on the touchstone of preponderance of probability and standard of proof beyond reasonable doubt cannot be applied by the Tribunal while dealing with the motor accident cases. Even in that case, the view taken by the High Court to reverse similar findings, recorded by the Tribunal was set aside.

23. Following the enunciation in Bimla Devi case [Bimla Devi v. Himachal RTC, (2009) 13 SCC 530 : (2009) 5 SCC (Civ) 189 : (2010) 1 SCC (Cri) 1101] , this Court in Parmeshwari v. Amir Chand [Parmeshwari v. Amir Chand, (2011) 11 SCC 635 : (2011) 4 SCC (Civ) 828 : (2011) 3 SCC (Cri) 605] noted that when filing of the complaint was not disputed, the decision of the Tribunal ought not to have been reversed by the High Court [Amir Chand v. Parmeshwari, 2009 SCC OnLine P&H 9302] on the ground that nobody came from the office of the SSP to prove the complaint. The Court appreciated the testimony of the eyewitnesses in paras 12 & 13 and observed thus: (Parmeshwari case [Parmeshwari v. Amir Chand, (2011) 11 SCC 635 : (2011) 4 SCC (Civ) 828 : (2011) 3 SCC (Cri) 605] , SCC p. 638)

"12. The other ground on which the High Court dismissed [Amir Chand v. Parmeshwari, 2009 SCC OnLine P&H 9302] the case was by way of disbelieving the testimony of Umed Singh, PW 1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitised enough to appreciate the plight of the victim.

13. The other so-called reason in the High Court's order was that as the claim petition was filed after four months of the accident, the same is "a device to grab money from the insurance company'. This finding in the absence of any material is certainly perverse. The High Court appears to be not cognizant of the principle that in a road accident claim, the strict principles of proof in a criminal case are not attracted. ...'

24. It will be useful to advert to the dictum in N.K.V. Bros. (P) Ltd. v. M. Karumai Ammal[N.K.V. Bros. (P) Ltd. v. M. Karumai Ammal, (1980) 3 SCC 457 : 1980 SCC (Cri) 774] , wherein it was contended by the vehicle owner that the criminal case in relation to the accident had ended in acquittal and for which reason the claim under the Motor Vehicles Act ought to be rejected. This Court negatived the said argument by observing that the nature of proof required to establish culpable rashness, punishable under IPC, is more stringent than negligence sufficient under the law of tort to create liability. The observation made in para 3 of the judgment would throw some light as to what should be the approach of the Tribunal in motor accident cases. The same reads thus: (SCC pp. 458-59)

"3. Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are

often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their neighbour. Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parsimony practised by tribunals. We must remember that judicial tribunals are State organs and Article 41 of the Constitution lays the jurisprudential foundation for State relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Courts should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard.'

25. In Dulcina Fernandes [Dulcina Fernandes v. Joaquim Xavier Cruz, (2013) 10 SCC 646 : (2014) 1 SCC (Civ) 73 : (2014) 1 SCC (Cri) 13] , this Court examined similar situation where the evidence of claimant's eyewitness was discarded by the Tribunal and that the respondent in that case was acquitted in the criminal case concerning the accident. This Court, however, opined that it cannot be overlooked that upon investigation of the case registered against the respondent, prima facie, materials showing negligence were found to put him on trial. The Court restated the settled principle that the evidence of the claimants ought to be examined by the Tribunal on the touchstone of preponderance of probability and certainly the standard of proof beyond reasonable doubt could not have been applied as noted in Bimla Devi [Bimla Devi v. Himachal RTC, (2009) 13 SCC 530 : (2009) 5 SCC (Civ) 189 : (2010) 1 SCC (Cri) 1101] . In paras 8 & 9 of the reported decision, the dictum in United India Insurance Co. Ltd. v. Shila Datta [United India Insurance Co. Ltd. v. Shila Datta, (2011) 10 SCC 509 : (2012) 3 SCC (Civ) 798 : (2012) 1 SCC (Cri) 328] , has been adverted to as under: (Dulcina Fernandes case [Dulcina Fernandes v. Joaquim Xavier Cruz, (2013) 10 SCC 646 : (2014) 1 SCC (Civ) 73 : (2014) 1 SCC (Cri) 13] , SCC p. 650)

"8. In United India Insurance Co. Ltd. v. Shila Datta [United India Insurance Co. Ltd. v. Shila Datta, (2011) 10 SCC 509 : (2012) 3 SCC (Civ) 798 : (2012) 1 SCC (Cri) 328] while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-Judge Bench of this Court has culled out certain propositions of which Propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow: (SCC p. 518, para 10)

"10. ... (ii) The rules of pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.

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(v) Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation. ...

(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to assist it in holding the enquiry."

9. The following further observation available in para 10 of the Report would require specific note: (Shila Datta case [United India Insurance Co. Ltd. v. Shila Datta, (2011) 10 SCC 509 : (2012) 3 SCC (Civ) 798 : (2012) 1 SCC (Cri) 328] , SCC p. 519)

"10. ... We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute.'"

In para 10 of Dulcina Fernandes [Dulcina Fernandes v. Joaquim Xavier Cruz, (2013) 10 SCC 646 : (2014) 1 SCC (Civ) 73 : (2014) 1 SCC (Cri) 13] , the Court opined that non-examination of witness per se cannot be treated as fatal to the claim set up before the Tribunal. In other words, the approach of the Tribunal should be holistic analysis of the entire pleadings and evidence by applying the principles of preponderance of probability."

22. It is thus well settled that in motor accident claim cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place by reason of negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of preponderance of probability and not the strict standard of proof beyond all reasonable doubt which is followed in criminal cases.

26. Given the approach that the Tribunal must adopt in the case of a motor accident claim, this Court has no hesitation in holding that the Tribunal was absolutely right in accepting the testimony of PW-2, including his identification of the deceased and connecting the deceased to the accident, that the witness had seen. The Tribunal has relied on the conclusions of investigation by the Police in identifying the offending vehicle. The criticism of this part of the reasoning by the learned Counsel for the insurers on ground that the Police investigation is absolutely irrelevant, is not one which accords with the law. The Police investigation cannot be conclusive about the complicity of the offending vehicle or the negligence of the driver, but is certainly a relevant piece of evidence and weighty, that must be taken into consideration. The Tribunal has only done that and considered the conclusions of the Police investigation in togetherness with all other relevant evidence.

27. In the opinion of this Court, the Tribunal has rightly not paid much heed to the testimony of the driver DW-1 Rahul, who has spoken to disown his liability, notwithstanding the involvement of the offending vehicle. This witness has been charge-sheeted by the Police and there is every reason why he would testify the way he has done. He has said that he had left the owner's employ and was not the driver of the offending vehicle on the date of the accident.

His testimony has not inspired much confidence with the Tribunal and there is no reason for this Court to take a different view. Likewise, the testimony of DW-2, Lakshmi Narayan Tyagi, has been disbelieved by the Tribunal, because this witness is an investigator hired by the insurers, whose commitment to his employer makes his testimony inherently unreliable. In any case, DW-2 is not an eyewitness. There is a remark by the Tribunal to the effect that the testimony of PW-2 Narendra Singh, who is cited as a witness in the charge-sheet submitted by the Police, also gives a very natural account of the accident. This Court cannot but unhesitatingly agree with the Tribunal's opinion on this score. To the credit of this remark by the Tribunal, it must be said that a holistic view of the testimony of Narendra Singh, PW-2 together with the other evidence, such as the Police charge-sheet, the circumstances of disclosing the deceased's identity by Narendra Singh's brother-in-law to him impromptu, leading PW-2 to testify, all put together, preponderantly establish the involvement of the offending vehicle in the accident. The negligence of the driver of the offending is more than obvious.

28. It has figured in the evidence of PW-2 and also in the site-plan drawn by the Police during investigation that the deceased's motorcycle was struck and knocked down on the dusty pavement. There is no question of any contributory negligence of the deceased being involved. Apparently, it is the negligence of the driver of the offending vehicle, that was responsible for the accident. The finding returned by the Tribunal on Issue No. 1, in the opinion of this Court, is unexceptionable.

29. The other issue, on which the learned Counsel for the parties have elaborately addressed the Court, is Issue No. 4. It is about the quantum of compensation. There is a cross objection on behalf of the claimants, seeking enhancement of the compensation awarded. So far as the insurers are concerned, the sole objection about the quantum of compensation is that out of the five claimants, the adult son of the deceased, Atul Kumar, who has been favoured with a compassionate appointment, cannot count amongst the deceased's dependents. The submission of Mr. Anubhav Sinha is that in working out the dependency of the claimants, Atul Kumar is not to be counted, as he has been appointed on compassionate grounds. The compensation, therefore, is to be proportionately reduced.

30. Mr. Yogendra Pal Singh, learned Counsel for the claimants in support of the cross objections, has argued that the Tribunal has wrongly applied the multiplier of "11' going by the age of the deceased. According to him, the appropriate multiplier is "12'. It is argued that the Tribunal has not awarded any sum of compensation towards loss of love and affection, that the deceased's parents and children have suffered. He moots that under this head, a compensation in the sum of ₹ 2,00,000/- ought to have been awarded. It is also urged that the claimants are entitled to add to the deceased's income, 20% by way of future prospects under the Uttar Pradesh Motor Vehicles Rules, 19985. It is particularly argued that under the non-pecuniary heads, that is to say, compensation for loss of estate, loss of consortium and funeral expenses, appropriate compensation has not been awarded in the terms laid down by the Supreme Court in the Constitution Bench decision in **National Insurance Company v. Pranay Sethi and others6.**

31. The submission of learned Counsel for the insurers that the adult son of the deceased, who has been given compassionate appointment, must not be counted amongst his dependents, is not worthy of acceptance. This submission has been urged in the past to claim deduction from the dependency put forth by the claimants. This was the issue before the Supreme Court, put in a different manner on behalf of the insurers, in **National Insurance Company Limited v. Rekhaben and others7**. There the issue was raised in terms that can best be understood by reference to the words of their Lordships in the report. These read :

11. The main contention of the appellant in these appeals is that the amount of salary received by the claimants being appointed by the employers of the deceased on compassionate grounds must be reduced from the award of compensation made in favour of the claimants. Thus, the only issue before us in these appeals is whether the income of the claimants from compassionate employment is liable to be deducted from the compensation amount awarded by the Tribunal under the statute.

32. The issue was differently posed in ***Rekhaben*** *(supra*), but ultimately at the bottom of it, it is identical to the contention that Mr. Sinha raises before this Court. The contention, perhaps, has been differently put on behalf of the insurers in order to escape the principle that is laid down in **Rekhaben** and a number of other decisions of various High Courts that have not favoured any deductions from the compensation on account of compassionate appointment, granted to one of the dependents of the deceased.

33. Mr. Sinha has sought to argue that the deceased's adult son was no longer a dependent of the deceased, being favoured with compassionate appointment in consequence of his demise. The issue, in substance, is answered against the insurers in Rekhaben by the Supreme Court, but, to dispose of a novel rendition of the same contention urged on behalf of the insurers by Mr. Sinha, it must be remarked that until time that the deceased passed away in consequence of the accident, the adult son was one of the deceased's dependents. Right to compensation stood crystallized on the date of the victim's death. The day the deceased passed away, the claimants sustained the loss, which was the dependency. The deceased's adult son was 24 years old. If the deceased had survived, the adult son might have improved his educational qualifications or looked for better prospects. There is no logic or principle by which on the grant of compassionate appointment, the adult son of the deceased is to be counted out of the dependents.

34. To revert to the issue that their Lordships of the Supreme Court considered in **Rekhaben,** it was most elaborately dealt with thus :

13. In these cases, compensation is claimed against the tortfeasor who may be the driver or owner of the vehicle or the insurer. In respect of an accident in which the tortfeasor is found to be liable, the owner or the driver of the vehicle or the insurer, as the case may be, may alone be held responsible for the payment of such compensation since the accident has resulted in the injury or death which gives rise to the claim of the claimants. No other party is involved in it. And certainly not the employer who may offer compassionate

appointment to the dependants of the injured/deceased.

14. While awarding compensation, amongst other things, the Tribunal takes into account the income of the deceased and calculates the loss of such income after making permissible deductions to compensate the injured claimant for the loss of earning capacity in case of an injury, and to compensate the claimants dependent on him in case of death. Thus, the income of the deceased or the injured, which the claimants have lost due to the inability of the deceased or the injured to earn or to provide for them is a relevant factor which is always taken into consideration. The salary or the income of the claimant in case of death is generally not a relevant factor in determining compensation primarily because the law takes no cognizance of the claimant's situation. Though in case of an injury, the income of the claimant who is injured is relevant. In other words, compensation is awarded on the basis of the entire loss of income of the deceased or in a case of injury, for the loss of income due to the injury. What needs to be considered is whether compassionate appointment offered to the dependants of the deceased or the injured, by the employer of the deceased/injured, who is not the tortfeasor, can be deducted from the compensation receivable by him on account of the accident from the tortfeasor. Certainly, it cannot be that the one liable to compensate the claimants for the loss of income due to the accident, can have his liability reduced by the amount which the claimants earn as a result of compassionate appointment offered by another viz. the employer.

15. The submission on behalf of the appellant in these cases is that the salary of the claimants receivable on account of compassionate appointment must be deducted from the compensation awarded to them. Reliance is placed in this regard on the judgment of this Court in Bhakra Beas Management Board v. Kanta Aggarwal [Bhakra Beas Management Board v. Kanta Aggarwal, (2008) 11 SCC 366 : (2009) 1 SCC (Cri) 154] in which compensation was claimed against the employer of the deceased who was also the owner of the offending vehicle i.e. the tortfeasor. The tortfeasor offered employment on compassionate grounds to the widow of the deceased i.e. the claimant. In the facts and circumstances of the case, this Court took the view that the salary which flowed from the compassionate appointment offered by the tortfeasor, was liable to be deducted from the compensation which was payable by the same employer in his capacity as the owner of the offending vehicle. We find this decision as being of no assistance to the appellant in the cases before us. In the present cases, the owner of the offending vehicle is not the employer who offered the compassionate appointment. As observed earlier, it is difficult to see how the owner can contend that the compensation which he is liable to pay for causing the death or disability should be reduced because of compassionate employment offered by another. In any case, it is difficult to determine how much the person offered compassionate appointment would earn over the period of employment which is not certain, and deduct that amount from the compensation.

16. At this juncture, it would be apposite to refer to some of the decisions rendered by this Court. In Helen C. Rebello v. Maharashtra SRTC [Helen C. Rebello v. Maharashtra SRTC, (1999) 1 SCC 90 :

1999 SCC (Cri) 197] , the insurance company had claimed that the amount which was received by the claimant on account of life insurance was liable to be deducted from the compensation which is payable to the claimants. This contention was rejected by this Court in the following words : (SCC pp. 112-13, paras 36-37)

"36. As we have observed, the whole scheme of the Act, in relation to the payment of compensation to the claimant, is a beneficial legislation. The intention of the legislature is made more clear by the change of language from what was in the Fatal Accidents Act, 1855 and what is brought under Section 110-B of the 1939 Act. This is also visible through the provision of Section 168(1) under the Motor Vehicles Act, 1988 and Section 92-A of the 1939 Act which fixes the liability on the owner of the vehicle even on no fault. It provides that where the death or permanent disablement of any person has resulted from an accident in spite of no fault of the owner of the vehicle, an amount of compensation fixed therein is payable to the claimant by such owner of the vehicle. Section 92-B ensures that the claim for compensation under Section 92-A is in addition to any other right to claim compensation in respect whereof (sic thereof) under any other provision of this Act or of any other law for the time being in force. This clearly indicates the intention of the legislature which is conferring larger benefit on the claimant. Interpretation of such beneficial legislation is also well settled. Whenever there be two possible interpretations in such statute, then the one which subserves the object of legislation viz. benefit to the subject should be accepted. In the present case, two interpretations have been given of this statute, evidenced by two distinct sets of decisions of the various High Courts. We have no hesitation to conclude that the set of decisions, which applied the principle of no deduction of the life insurance amount, should be accepted and the other set, which interpreted to deduct, is to be rejected. For all these considerations, we have no hesitation to hold that such High Courts were wrong in deducting the amount paid or payable under the life insurance by giving a restricted meaning to the provisions of the Motor Vehicles Act basing mostly on the language of English statutes and not taking into consideration the changed language and intents of the legislature under various provisions of the Motor Vehicles Act, 1939.

37. Accordingly, we set aside the impugned judgment dated 9-9-1985 and restore the judgment of the Tribunal dated 29-9-1980 and hold that the amount received by the claimant on the life insurance of the deceased is not deductible from the compensation computed under the Motor Vehicles Act. The respondent concerned shall make the payment accordingly, if not already paid in terms thereof."

17. Similarly, in United India Insurance Co. Ltd. v. Patricia Jean Mahajan [United India Insurance Co. Ltd. v. Patricia Jean Mahajan, (2002) 6 SCC 281 : 2002 SCC (Cri) 1294] , this Court held that the amount received by the claimants on account of social security from an employer must have a nexus or relation with the accidental injury or death, in order to be deductible from the amount of compensation. Hence, this Court refused to deduct the said amou

18. The facts of the case in Vimal Kanwar v. Kishore Dan [Vimal Kanwar v.

Kishore Dan, (2013) 7 SCC 476 : (2013) 3 SCC (Civ) 564 : (2013) 3 SCC (Cri) 583 : (2013) 2 SCC (L&S) 759] are similar to the facts of the cases in hand. The contention in the said case was that the amount of salary receivable by the claimant appointed on compassionate ground was deductible from the amount of compensation which the claimant was entitled to receive under Section 168 of the Motor Vehicles Act, 1988. This Court rejected the said contention and observed as follows : (SCC p. 485, para 21)

"21."Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in harness i.e. while in service leaving behind the dependants, one of the dependants may request for compassionate appointment to maintain the family of the deceased employee who dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and has no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependants may be entitled for compassionate appointment but that cannot be termed as "pecuniary advantage" that comes under the periphery of the Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act."

19. In Reliance General Insurance Co. Ltd. v. Shashi Sharma [Reliance General Insurance Co. Ltd. v. Shashi Sharma, (2016) 9 SCC 627 : (2016) 3 SCC (Cri) 713 : (2017) 1 SCC (L&S) 90] , this Court permitted the deduction of the amount receivable by the claimant under the scheme of the 2006 Rules framed by the State of Haryana which provided a grant of compassionate assistance by way of ex gratia financial assistance on compassionate grounds to the members of the family of a deceased government employee who died while in service/missing government employee.

20. The financial assistance was a sum equal to the pay and other allowances that were last drawn by the deceased employee in the normal course without raising a specific claim for periods up to 15 years from the date of the death of the employee if the employee had not attained the age of 35 years, and lesser periods of 12 years and 7 years depending on the age of the employee at the time of death. The family was eligible to receive family pension only after the period of financial assistance was completed. The Court held that ex gratia financial assistance was liable to be deducted on the ground that the claimant was eligible to it on account of the same event in which the compensation was claimed under the Motor Vehicles Act, 1988 i.e. the death of the employee.

21. This case seems to superficially support the case of the appellant Insurance Company before us. However, on a deeper consideration, it does not. In Reliance General Insurance[Reliance General Insurance Co. Ltd. v. Shashi Sharma, (2016) 9 SCC 627 : (2016) 3 SCC (Cri) 713 : (2017) 1 SCC (L&S) 90] , the family of the deceased

employee became entitled to financial assistance of a sum equal to the pay and other allowances that were last drawn by the deceased for a certain period after his death, even without raising a specific claim. In other words the family became entitled to the pay and allowances that the deceased would have received if he would have not died, for a certain period of time. This financial scheme resulted in paying the family the same pay and allowances for a certain period and thus in effect clearly offsetting the loss of income on account of the death of the deceased. Thus, the amount of financial assistance had to be excluded from the loss of income, as to that extent there was no loss of income, and the compensation receivable by the family had to be reduced from the amount receivable under the Motor Vehicles Act.

22. In the present cases, the claimants were offered compassionate employment. The claimants were not offered any sum of money equal to the income of the deceased. In fact, they were not offered any sum of money at all. They were offered employment and the money they receive in the form of their salary, would be earned from such employment. The loss of income in such cases cannot be said to be set off because the claimants would be earning their living. Therefore, we are of the view that the amount earned by the claimants from compassionate appointments cannot be deducted from the quantum of compensation receivable by them under the Act.

23. In the cases before us, compensation is claimed from the owner of the offending vehicle who is different from the employer who has offered employment on compassionate grounds to the dependants of the deceased/injured. The source from which compensation on account of the accident is claimed and the source from which the compassionate employment is offered, are completely separate and there is no co-relation between these two sources. Since the tortfeasor has not offered the compassionate appointment, we are of the view that an amount which a claimant earns by his labour or by offering his services, whether by reason of compassionate appointment or otherwise is not liable to be deducted from the compensation which the claimant is entitled to receive from a tortfeasor under the Act. In such a situation, we are of the view that the financial benefit of the compassionate employment is not liable to be deducted at all from the compensation amount which is liable to be paid either by the owner/the driver of the offending vehicle or the insurer.

35. As remarked earlier, the insurers have put forward the same contention that stands answered against them in **Rekhaben** in a very different way. If the adult son of the deceased is to be counted out of his dependents while determining the dependency on the basis of which compensation is worked out, merely because the adult son has been given compassionate appointment, it is nothing more or nothing less than a deduction made from the compensation payable to the claimants on account of compassionate appointment given to one of the dependents. The contention under reference urged on behalf of the insurers cannot be accepted.

36. Now, considering the quantum of compensation payable, it is well settled that a just award has to be made, based on broadly settled principles. The fundamental edifice on which compensation is to be

calculated is the monthly income of the deceased, which then has to be worked out in terms of the annual income. The annual income is to be multiplied by adopting a suitable multiplier. The figure so arrived at has to be subjected to a deduction on the account of personal expenses of the deceased, about which too, there are settled principles. Here, the income of the deceased is not in the slightest doubt. He was a government servant. The income was properly and punctiliously established by producing the deceased's salary certificate, which was proved by an officer from the department of the State, where the deceased was employed. The monthly income is a figure of ₹38,417/- based on the salary certificate for the month of January, 2011. The Tribunal has proceeded to determine the compensation payable on the monthly income of the deceased, evident from his salary certificate.

37. The dependency of the claimants has been worked out by the Tribunal in the following manner : the salary of the deceased, which is his monthly income, has been multiplied by "12' to arrive at the deceased's annual income. This has been worked out as ₹38,417 x 12 = ₹ 4,61,000/- (rounded-off). Out of the aforesaid sum of money, a sum of ₹ 16,068/- has been deducted towards income tax for a year. The deceased has five dependents and therefore, relying upon the decision of the Supreme Court in **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another8** deduction towards personal expenses of the deceased has been worked out in the bracket of 4-6 dependents, to wit, one-fourth the deduction, therefore, towards personal expenses was worked out to a figure of ₹ 1,11,234/- per annum. In consequence, the annual dependency of the claimants has been determined as ₹4,44,936 - 1,11,234 = ₹3,33,702/-. It is on the foot of this dependency that compensation payable has been finally determined. To the understanding of this Court, the deduction towards personal expenses of the deceased and the multiplier of "11' have been rightly determined by the Tribunal, as it accords with the principles in regard to both these parameters of computation approved in Sarla Verma (supra).

38. However, the Tribunal's decision to deduct ₹16,068/- per annum from the annual emoluments of the deceased towards income tax cannot be endorsed by this Court. The principle about the dependency of a deceased government servant is that the monthly emoluments shown in the deceased's salary certificate or the last-pay certificate should proceed on the presumption that the employer has deducted the tax at source. If the insurer or the owner dispute the fact that the salary certificate does not show tax deduction at source, it is for such objector to come forward and produce evidence. The principle in this regard was laid down by the Supreme Court in Vimal Kanwar and others v. Kishore Dan9 where it was held :

23. In Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] this Court held: (SCC p. 133, para 20)

"20. Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation."

This Court further observed that: (SCC p. 134, para 24)

"24. ... Where the annual income is in taxable range, the words "actual salary' should be read as "actual salary less tax'."

Therefore, it is clear that if the annual income comes within the taxable range, income tax is required to be deducted for determination of the actual salary. But while deducting income tax from the salary, it is necessary to notice the nature of the income of the victim. If the victim is receiving income chargeable under the head "salaries" one should keep in mind that under Section 192(1) of the Income Tax Act, 1961 any person responsible for paying any income chargeable under the head "salaries" shall at the time of payment, deduct income tax on estimated income of the employee from "salaries" for that financial year. Such deduction is commonly known as tax deducted at source ("TDS", for short). When the employer fails in default to deduct the TDS from the employee's salary, as it is his duty to deduct the TDS, then the penalty for non-deduction of TDS is prescribed under Section 201(1-A) of the Income Tax Act, 1961. Therefore, in case the income of the victim is only from "salary", the presumption would be that the employer under Section 192(1) of the Income Tax Act, 1961 has deducted the tax at source from the employee's salary. In case if an objection is raised by any party, the objector is required to prove by producing evidence such as LPC to suggest that the employer failed to deduct the TDS from the salary of the employee. However, there can be cases where the victim is not a salaried person i.e. his income is from sources other than salary, and the annual income falls within taxable range, in such cases, if any objection as to deduction of tax is made by a party then the claimant is required to prove that the victim has already paid income tax and no further tax has to be deducted from the income.

39. The aforesaid principle was also applied by the Guwahati High Court in **Ranjita Seal and others v. Lal Chandra Sharma and others10**. In **Ranjita Seal** *(supra)* after a reference to the decision of their Lordships of the Supreme Court in **Vimal Kanwar** *(supra)*, it was observed by the Division Bench :

19. Reverting back to the present case, it appears that none of the respondents brought to the notice of the Court that the income-tax payable by the deceased was not deducted at source by the employer-State Government. No such statement was made by PW-3 Ganeswam Dev Sarma, Principal in-charge of Birjhora H.S. School, Bongaigaon, who exhibited the last pay certificate vide exhibit-17 and salary certificate vide exhibit-9 respectively. The Tribunal failed to notice that the Income tax on the estimated income of the employee was not deducted from the salary of the employee during the said month or financial year.

20. Learned Tribunal ought to have asked the person who exhibited the last pay certificate to bring Form-16, which is definitely available in the office of the employer of any Government employee but no such initiative was taken by the Tribunal for production of such documents to prove the actual salary of the deceased. In absence of such evidence, it is presumed that the salary paid to the deceased as per Last Pay Certificate was paid in accordance with law i.e. by deducting the income tax on the estimated income of the deceased for that month or the financial year.

40. The application of the principle is eloquently reflected in the decision of the Division Bench of the **Karnataka High Court in Karnataka State Road Transport Corporation Bengaluru v.**

Pankaja H.S.11, where, their Lordships, after a reference to the principle in **Vimal Kanwar**, held :

18. In so far as the award of compensation by the Tribunal without deducting income tax from the salary of the deceased is concerned, it is pertinent to refer to the Judgment of the Hon'ble Supreme Court answering an identical question, in the case of VIMAL KANWAR cited supra, wherein it is held as follows:

xxxxxxxxxx(QUOTED PORTION OMITTED)xxxxxxxxxx

In terms of the afore-extracted declaration of law by the Hon'ble Supreme Court, it is clear that if the employer has not deducted the tax at source as prescribed under Section 192(1) of the Income Tax Act, 1961. The presumption of such deduction will be in favour of the employee. In those circumstances, the entire salary will have to be taken into consideration as income for the purpose of determination of compensation. Thus, the contention of the learned counsel for the Corporation that the income tax ought to have been deducted from the salary of the deceased as he was a government servant cannot be accepted and the salary considered as per the salary certificate - Ex.P.11 by the Tribunal is in accordance with law.

41. In the present case, this Court finds that the claimants have proved the deceased's income by producing his salary certificate for the month of January, 2011. The said certificate is a document dated November 19, 2011 bearing Paper No. 36A1. It is signed by the District Development Officer (Social Wefare), Bulandshahr. No doubt, amongst the column of deductions, it does not indicate any deduction towards income tax, but PW-3, Ashok Kumar Gupta, Accountant in the Office of the District Development Officer (Social Welfare), Bulandshahr has stated in his cross-examination at the instance of the owner and driver as follows :

श्री श्यामवीर सिंह का वेतन माह जनवरी 2011 को Rs. 38,417/- था, जिसमें से Rs. 4000/- GPF में व Rs. 200/- G.I.S. में कट रहे थे । शुद्ध भुगतान धनराशि Rs. 34,217/- उनके खाते में वेतन के रूप में जा रहे थे।

42. This witness was extensively cross-examined at the instance of the insurers also. A perusal of his cross-examination by the insurers shows that the questions regarding the structure of the deceased's salary under various heads, including the sum of his basic pay and the dearness allowance payable were asked, to which the witness responded. The witness also disclosed the deceased's grade pay. Across the length and breadth of the cross-examination of PW-3, who could offer the best evidence about the fact of deduction or non-deduction of income tax from the deceased's salary indicated in the certificate, no question was put about the issue. There is no objection at any stage raised on behalf of the insurers about the fact that the salary of ₹38,417/- evidenced by the deceased's salary certificate produced by the claimants did not show the income tax deducted.

43. Apparently, considering the fact that there is no objection about the deceased's monthly emoluments vis-à-vis deduction made therefrom on account of income tax, the presumption that the salary certificate issued by an Authority of the State would include deduction of due

income tax under the law is not at all rebutted.

44. It must also be remarked that the Tribunal, in directing deduction of a sum of ₹16,068/- from the deceased's annual income, has acted impromptu and without any objection either by the owner or the driver or the insurer in this regard. The deduction of the sum of ₹16,068/- from annual income of the deceased is apparently without any reason or basis. The Tribunal ought not to have made any deduction towards income tax, the deceased being an employee of the State, where the employer is presumed to have deducted the due income tax from the emoluments while issuing and certifying his monthly salary. Of course, it was open to the insurers as well as the owner and the driver to produce evidence to the contrary and show that the emoluments of the deceased did not include deductions to be made towards income tax, but that evidence is not at all forthcoming. This Court, therefore, finds that the deceased's annual emoluments have to be determined without the deduction of ₹16,068/- directed by the Tribunal.

45. This Court, accordingly, proceeds to determine the compensation payable to the deceased. The monthly emoluments of the deceased were admittedly a sum ₹38,417. The annual income would, therefore, be ₹38,417 x 12 = ₹4,61,000/- (rounded-off). The Tribunal has not added anything to the deceased's income towards future prospects. Learned Counsel for the claimants, during his submission, had canvassed the point that the Tribunal went utterly wrong in not adding anything to the deceased's income on account of future prospects. The law regarding future prospects has been laid down by the Supreme Court in **Pranay Sethi** (supra). The relevant part of the holding in **Pranay Sethi** reads :

16. Considering the submissions advanced by the learned counsel for the parties, there are three points on which the awarded compensation requires scrutiny and a just award made. It is to be seen whether the Tribunal was right in denying any compensation towards future prospects and that if the Tribunal was right in directing a deduction of 1/3rd of the deceased's income, given the number of his family members. It is also to be seen whether the award of compensation under the conventional heads is in accordance with law. The law regarding future prospects was summarized by the Supreme Court in Pranay Sethi (supra), where it is held:

"56. The seminal issue is the fixation of future prospects in cases of deceased who are self-employed or on a fixed salary. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

57. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardisation, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of

determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardisation on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

58. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] thinks it appropriate not to add any amount and the same has been approved inReshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] . Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one

reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, 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. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts."

46. The question whether future prospects are to be worked out in accordance with the principle laid down in **Pranay Sethi** or Rule 220-A(3) of the Rules of 1998 came up for consideration before the Supreme Court in **New India Assurance Company Limited v. Urmila Shukla12.** The said appeal arose out of a decision of this Court and, therefore, it is squarely applicable to the determination of future prospects in the State of Uttar Pradesh. In **Urmila Shukla** *(supra)* the question that was considered by their Lordships is set forth in Paragraph No. 4 of the report. It reads :

4. The basic ground of challenge by the appellant is that sub-rule 3(iii) of Rule 220A is contrary to the conclusions arrived at by the Constitution Bench of this Court in National Insurance Company Ltd v. Pranay Sethi reported in (2017) 16 SCC 680.

47. The issue was answered in **Urmila Shukla** thus :

9. It is to be noted that the validity of the Rules was not, in any way, questioned in the instant matter and thus the only question that we are called upon to consider is whether in its application, sub-Rule 3(iii) of Rule 220A of the Rules must be given restricted scope or it must be allowed to operate fully.

10. The discussion on the point in Pranay Sethiwas 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.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs."

48. There is, therefore, little doubt that so long as Rule 220-A(3) is on the statute, future prospects have to be worked out according to the Rules of 1998 and not by the figures for determination thereof as laid down in **Pranay Sethi.**

49. The question is whether Rule 220-A(3) would apply to the present case because the accident happened here on 23.02.2011, whereas Rule 220-A(3) was introduced vide Notification No. 777/XXX-4-2011-4(3)-2010 dated September 26, 2011 (Eleventh Amendment Rules, 2011). The said rules have been held by me to apply retrospectively in Smt. Shanti and others v. Anil Awasthi alias Anil Kumar Awasthi and another13, following the decision of a Division Bench of this Court in Sushil Kumar and others v. M/s. Sampark Lojastic Private Limited and others14. There is, therefore, no doubt that Rule 220-A(3) of the Rules of 1998 would govern future prospects payable to the claimants here. Rule 220-A(3) of the Rules of 1998 reads :

220-A. Determination of Compensation-

(1) X X X

(2) X X X

(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased as under-

(i)	Below 40 years of age	:	50% of the salary
(ii)	Between 40-50 years of age	:	30% of the salary
(iii)	More than 50 years	:	20% of the salary
(iv)	When wages not sufficiently proved	:	50% towards inflation and price index

50. In view of the provisions of Rule 220-A(3)(iii), it is evident that the deceased being a salaried man above the age of 50 years would entitle the claimants to add 20% to his income by way of future prospects.

51. So far as the entitlement of compensation under the conventional heads is concerned, I had occasion to dwell upon it in **Smt. Shanti** *(supra)* where it was held :

28. Again, so far as the conventional heads are concerned, this Court is of opinion that far less than what is to be awarded for the loss of estate, loss of consortium and funeral expenses has been directed by the Tribunal. Moreover, loss of consortium is not confined to the widow alone, but the parents too are entitled to be compensated for the loss of filial consortium. The two minor children are entitled to compensation on account of loss of parental consortium. In this regard, the holding of the Constitution Bench in **Pranay Sethi** is again of much relevance, where it is observed:

"48. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra [UP SRTC v. Trilok Chandra, (1996) 4 SCC 362] . Recently, in Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy, (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574] it has been reiterated by stating : (SCC p. 80, para 54)

"54. ... we hold that the Second Schedule as was enacted in 1994 has now

become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

"3. General damages (in case of death):

The following general damages shall be payable in addition to compensat

(i)	Funeral expenses	Rs 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs 5000
(iii)	Loss of estate	Rs 2500
(iv)	Medical expenses - actual expenses incurred before death supported by bills/vouchers but not exceeding	Rs 15,000

50. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra [UP SRTC v.Trilok Chandra, (1996) 4 SCC 362] and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium inRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find fromRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh[Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. ThoughRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] refers to Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed.

The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."

(emphasis supplied)

29. The principles governing award of compensation under conventional heads, particularly with regard to award for loss of consortium, have been laid down by the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others, (2018) 18 SCC 130. In Magma General Insurance Company Ltd. (supra),** it has been held:

"21. A Constitution Bench of this Court in Pranay Sethi[National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse : [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation". [Black's Law Dictionary(5th Edn., 1979).]

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training".

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognised that the value of a child's consortium far

exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

23. The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium. Parental consortium is awarded to children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count [Rajasthan High Court in Jagmala Ram v. Sohi Ram, 2017 SCC OnLine Raj 3848 : (2017) 4 RLW 3368; Uttarakhand High Court in Rita Rana v. Pradeep Kumar, 2013 SCC OnLine Utt 2435 : (2014) 3 UC 1687; Karnataka High Court in Lakshman v. Susheela Chand Choudhary, 1996 SCC OnLine Kar 74 : (1996) 3 Kant LJ 570] . However, there was no clarity with respect to the principles on which compensation could be awarded on loss of filial consortium.

24. The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under "loss of consortium" as laid down inPranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] . In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs 40,000 each for loss of filial consortium."

(emphasis supplied)

30. It must be noted that under Rule 220-A(4) of the Rules of 1998, compensation or damages under the non pecuniary heads or the conventional heads have been stipulated. But, these are disadvantageous to the claimants and do not confer better or greater benefit upon them in comparison to liquidated figures laid down in **Pranay Sethi**. The figures under the conventional heads have been arrived at, bearing in mind the price index, falling bank interest, escalation of rates in different cases. There is a provision for 10% upward revision to be done in a span of three years. By contrast, the Rules of 1998, that have been amended to bring in Rule 220-A more than ten years ago, in the year 2011, cannot serve as a realistic index to award compensation under the conventional heads. The determination of compensation in **Pranay Sethi** would, therefore, be applicable. The revised and dynamic determination of compensation payable under the conventional heads stipulated in **Pranay Sethi** would prevail over that under the Rules of 1998. It is held, accordingly.

52. In this case, the deceased left behind five dependents, that is to say, the widow, two adult children and two aged parents. The adult children were aged 24 years and 23 years respectively at the time the cause of action arose. Going by the principles in **Shanti Devi,** the widow and the two aged parents would be entitled to compensation in accordance with the law in **Pranay Sethi**, but the two children, who are adults, would not be entitled to parental consortium, in view of what was held by

me in **Jiuti Devi and others v. Manoj Kumar and others15. In Jiuti Devi (supra)**, it was observed :

39. Loss of consortium, that includes parental consortium, unlike dependency, is not some tangible economic loss. It is an emotional loss to the next of kin of the deceased-victim of a motor accident. In case of parental loss, it causes a particular deprivation to minors and young children, about whom it is said by the Supreme Court in United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur, to borrow the words of their Lordships, "Parental Consortium is awarded to the children who lose the care and protection of their parents in motor vehicle accidents".

40. To the understanding of this Court, the impact of loss of parental consortium upon the deceased's children, in the very nature of that loss, is dependent upon the children's age. The loss of parent is a disheartening and emotional event for the child at any age of his maturity, but by the nature of the principle governing award of compensation under the head of parental consortium, the deprivation, that is suffered by a child or a minor, appears to be the determinative and entitling fact. A child, who has advanced into matured adulthood, is married or otherwise in the mainstream of life, would not be entitled to compensation under that head.

53. In view of the principles applicable for determining compensation payable to the claimants, this Court proceeds to determine the same as follows :

(i)	Monthly Income of the deceased	=	**₹38,417/-**
(ii)	Monthly Income + Future Prospects (monthly income x 20%) = ₹38,417 + 7,683 (rounded-off)	=	**₹46,100/- (rounded-off)**
(iii)	Annual Income of the deceased = ₹46,100 x 12	=	**₹5,53,200/-**
(iv)	Annual Dependency = Annual Income - one-fourth deduction towards personal expenses of the deceased = ₹5,53,200 - 1,38,300	=	**₹4,14,900/-**
(v)	Total dependency = Annual Dependency x Applied Multiplier = ₹4,14,900 x 11	=	**₹45,63,900/-**
(vi)	Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + Dependents' consortium = ₹15,000 + 15,000 + 40,000 x 3	=	**₹1,50,000/-**
(vii)	Total Compensation = ₹45,63,900 + 1,50,000	=	**₹47,13,900 /-**

Total Compensation (in words) = Rupees Forty Seven Lac, Thirteen Thousand

54. The compensation as determined hereinabove would carry simple interest at the rate of 7% per annum in accordance

with Rule 220-A(6) of the Rules of 1998 from the date of institution of the claim petition until realization. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim orders of this Court) shall be adjusted.

55. It must be remarked here that this Court has awarded compensation that is more than that claimed. In a motor-vehicle claim, it is well settled that the Court must award just compensation, which may be more than the claim. This is a well-acknowledged principle, which has been recently endorsed by the Supreme Court in **Kajal v. Jagdish Chand and others16.**

56. In the result, this appeal **fails** and is **dismissed with costs**. The cross-objection preferred by the claimants is **allowed** in terms of the orders aforesaid.

(2022) 8 ILRA 1019
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.07.2022

BEFORE

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

Criminal Revision No. 747 of 2022

Ram Saran ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Rajesh Kumar Awasthi

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure,1973 - Section 156 (3) & 156 (3) -treated as Complaint-impugned-Always open to the Magistrate to do the needful-in view of provision u/s 202 Cr.P.C.-impugned order is not illegal.

Application dismissed. (E-9)

List of Cases cited:

1. Lalita Kumari Vs Gov. of U.P. & anr., 2014 (2) SCC1

2. Sukhwasi Vs St. of U.P. , 2008 CriLJ 452

3. Ramdev Food Products (P) Ltd. Vs St. of Guj., (2015) 6 SCC 439

4. M/s. Cucusan Foils Pvt. Ltd. Vs St. (Delhi Admn.), 1991 Cr. LJ 683

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

1. Heard learned counsel for the revisionist, learned A.G.A for the State and perused the record.

2. The instant criminal revision has been filed by the revisionist for setting aside order dated 25.04.2022 passed by learned Chief Judicial Magistrate, Bahraich, in Misc. Criminal Case No.4050/12/2021, Ram Saran vs. Ayushman and another, Application u/s 156(3) Cr.P.C., Police Station Kaisarganj, District Bahraich.

3. Brief facts are that the applicant moved an application under Section 156 (3) Cr.P.C. for registration and investigation of the case which was heard and learned Magistrate vide order dated 25.04.2022 treated the same as complaint case and fixed the date 26.05.2022 for recording the statement u/s 200 Cr.P.C.

4. Foremost submission of learned counsel for the applicant is that the impugned order is not sustainable in the

law, insofar as the same is against the law laid down by the Hon'ble Apex Court in the case of **Lalita Kumari vs. Government of Uttar Pradesh and another, reported in 2014 (2) SCC 1**. He, thus, submitted that the only option available to the learned Magistrate was to allow the application filed under Section 156 (3) Cr.P.C. with a direction to the Station House Officer concerned for registration of F.I.R. regarding the matter. The learned Magistrate was not competent to direct that the application filed under Section 156 (3) Cr.P.C. be treated as complaint. The impugned order is thus, patently illegal which would cause miscarriage of justice, therefore, the same is liable to be quashed. He has also submitted that learned trial Court while passing the impugned order has lost sight of the fact that the question of recovery of alleged tractor in question was also involved which is otherwise not possible in a case instituted upon private complaint and the same would cause miscarriage of justice to the revisionist/complainant. He has also submitted that it was the duty of learned Magistrate concerned to issue a direction to the police station concerned to get the FIR lodged on the basis of application moved by the revisionist under Section 156(3) Cr.P.C. He, thus, prays that the impugned order is illegal which could not be sustained and deserves to be set aside.

5. Per contra, learned A.G.A. has supported the impugned order and has pointed out that the grievance of the applicant has not gone unattended by the court below. The court below after taking into consideration the entire gamut of the facts and circumstances of the case has rightly decided to treat the application filed by the applicant under Section 156 (3) Cr.P.C. as a complaint. The applicant shall still have an opportunity to prove his case before the court below. His further submission is that in **Lalita Kumari (supra)** Hon'ble the Apex Court has not referred, discussed and overruled the law laid down by the Division Bench of this Court in **Sukhwasi vs. State of Uttar Pradesh; 2008 Cri LJ 452.** Therefore, the impugned order cannot be termed to be illegal and no miscarriage of justice would be caused by the impugned order.

6. The scope and ambit of law laid down by the Hon'ble Supreme Court in **Lalita Kumari (supra)** can be ascertained from para no.6 of the judgment, which is quoted hereinbelow :

"6) Therefore, the only question before this Constitution Bench relates to the interpretation of Section 154 of the Code and incidentally to consider Sections 156 and 157 also."

(Emphasis supplied)

7. In case of **Lalita Kumari (supra)** the controversy revolved around the registration of F.I.R in cognizable cases by the Police Officer. However, it did not dwelve upon scope and ambit of power vested in Magistrate by virtue of provision of Section 156 (3) Cr.P.C. which is, for ready reference, quoted hereinbelow :

"156. Police officer' s power to investigate cognizable case.

(1) .....

(2) .....

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

8. In **Sukhwasi (supra)** the Division Bench of this Court in paragraph nos.6, 7, 8 & 9 has held as under:

"6. It will also be noticed that the law was, and has always been, that if a cognizable offence is made out, the Police are bound to register the First Information Report. In case, the Police do not register the First Information Report, there is provision under Section 154(3) Cr.P.C. to send an application to Superintendent of Police, who shall direct the registration of a First Information Report, if a cognizable offence is disclosed. There was as such, no need for an authority in this regard being given to the Magistrate. That, this has been done and such authority as given to the Magistrate indicates, that this has been done, because the Magistrate will bring to bear upon the matter a judicial and judicious approach, which will be necessarily implication be selective. That gives a clear inkling to the intention of the legislature, that the Magistrate may consider the feasibility and propriety, of passing an order of registration of the First Information Report.

7. The matter may be looked into from another angle, and that is, in Section 154(3) Cr.P.C. where the Superintendent of Police has been given the authority for registration of First Information Report, the word used is 'shall' Section 143(3) Cr.P.C. is as hereunder

"154. Information of cognizable cases --

(1)

(2)

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing, and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence shall either investigate the case himself or direct an investigation to be made, by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer incharge of the police station in relation to that offence."

8. In Section 156(3) Cr.P.C. the word used is 'May' Section 156(3) Cr.P.C. is as follows;

156. Police Officer's power to investigate cognizable case--

(1)

(2)

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.

9. The use of the word 'shall' in Section 154(3) Cr. P.C: and the use of word 'May' in Section 156(3) Cr.P.C. should make the intention of the legislation clear. If the legislature intended to close options for the Magistrate, they could have used the word 'shall' as has been done in Section 154(3) Cr.P.C. Instead, use of the word 'May' is, therefore, very significant, and gives a very clear indication, that the Magistrate has the discretion in the matter, and can, in appropriate cases, refuse to order registration."

(emphasis supplied)

9. The Hon'ble Supreme Court in the case of **Ramdev Food Products (P) Ltd. v. State of Gujarat, (2015) 6 SCC 439** in paragraph no.32 has held as under:-

"32. We now come to the last question whether in the present case the Magistrate ought to have proceeded under Section 156(3) instead of Section 202. Our answer is in the negative. The Magistrate has given reasons, which have been upheld by the High Court. The case has been held to be primarily of civil nature. The accused is alleged to have forged partnership.

Whether such forgery actually took place, whether it caused any loss to the complainant and whether there is the requisite mens rea are the questions which are yet to be determined. The Magistrate has not found clear material to proceed against the accused. Even a case for summoning has not yet been found. While a transaction giving rise to cause of action for a civil action may also involve a crime in which case resort to criminal proceedings may be justified, there is judicially acknowledged tendency in the commercial world to give colour of a criminal case to a purely commercial transaction. This Court has cautioned against such abuse."

10. It is, thus, abundantly clear that in view of law laid down by the Division Bench of this Court in **Sukhwasi (supra)** and **Ramdev Food Products (P) Ltd. (supra)**, it cannot be said that a Magistrate, while entertaining an application filed under Section 156 (3) Cr.P.C. cannot reject or treat the same to be a complaint.

11. So far as the question of recovery of alleged tractor is concerned, it is pertinent to mention that keeping in view the provisions contained in Section 202 Cr.P.C. in its entirety it is held in ***M/s. Cucusan Foils Pvt. Ltd. vs. State (Delhi Admn.), 1991 Cr.LJ 683*** in paragraph No.16, as under :-

"16. Even this judgment says that once the Magistrate proceeds on the basis of the original complaint, then he must first proceed to examine on oath the complainant and his witnesses under Section 200 and thereafter either hold an enquiry himself or direct the enquiry to be held by police officer under Section 202 of the Code, as he thinks fit and then either dismiss the complaint or issue the process, as the case may be."

(emphasis supplied)

12. Therefore, it is also open to the learned Magistrate, at the appropriate stage, to do the needful in this regard, keeping in view the provisions of Section 202 Cr.P.C. and law laid down by Delhi High Court in **M/s. Cucusan Foils (Supra).**

13. In view of what has been discussed above, the impugned order passed by learned Magistrate, whereby he has treated the application filed under Section 156 (3) Cr.P.C. as a complaint, cannot be said to be illegal. The impugned order cannot be said to be an abuse of process of the Court either. Therefore, the present application lacks merit and is liable to be dismissed.

14. In view of the aforesaid discussion, the present application is **dismissed.**

(2022) 8 ILRA 1022
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Trade Tax Revision No. 269 of 2008

M/S Aligarh Cement Factory Private Ltd. ...Revisionist
Versus
The Commissioner Trade Tax U.P. Lucknow ...Opposite Party

Counsel for the Revisionist:
Sri N.R. Kumar, Sri Vishwajeet

Counsel for the Opposite Party:

C.S.C.

A. Tax Law – U.P. Trade Tax Act, 1948 - Sections 4-A & 4-AA - 'Employees Act' - Sections 1(1), 1(2), 1(3) & 16(1)(d) - In the present case, it is found - though the 'Explanation' appended to the Restrictive Notification would apply to the reading of Clause 2 of the Exemption Notification, at the same time, it would remain a directory provision of law. Where the figure of employment to be computed under the Restrictive Notification remained indeterminate, the same would be read as 'total employment' granted otherwise. (Para 34)

The language of proviso (ii) Clause 2 of the Exemption Notification leaves no doubt that the legislature adopted the mode-legislation by incorporation which is a well-recognized mode of legislation. It bodily lifted and incorporated the 'Conditions & Restrictions' contained in the Restrictive Notification, to the Exemption Notification, as a further condition to be fulfilled, to avail exemption. (Para 14, 15)

By virtue of proviso (ii) of Clause 2 of the Exemption Notification, the legislature chose to provide three conditions to be fulfilled to exclude the applicability of Clause 2 of the Exemption Notification. First, it excluded applicability of the restrictive Clause to 'new units' established in specified districts. Second, it excluded that restrictive Clause to 'new units' providing employment to members of specified categories, in prescribed percentages. Such 'new units' would avail full/unrestricted exemption. Third, it was provided, the restrictive Clause 2 would not apply if "Conditions and Restrictions" specified in the Restrictive Notification, were fulfilled. (Para 16)

It is not in dispute between the parties that the first condition prescribed under the Restrictive Notification is of filing of Certificate of the District Magistrate & Assistant Labour Commissioner certifying engagement of persons belonging to specified categories, in specified percentages up to a specified date, has been met by the assessee. (Para 18)

There is no case set up by the revenue that the condition of maintaining employment of members of the specified categories, at the prescribed percentages had been violated by the assessee in any year. Therefore, the second condition has also been fulfilled. (Para 19)

B. The Restrictive Notification is not an addendum or corrigendum to the Exemption Notification. It is an independent notification issued under Section 4-AA of the Act. By its very nature, such notifications were issued by the State Government, at the relevant time, to grant exemption to a unit, based on employment granted - to persons belonging to specified categories. **The assessee had not claimed that exemption.** (Para 20)

C. The 'Explanation' is neither a third condition/restriction contained in the Restrictive Notification nor, it otherwise provides such effect. It is only in the nature of a definition of the phrase "total employment". The revenue has read the 'Explanation' to imply - a new restrictive condition on the claim of full exemption made by the assessee-being payment of Employees Provident Fund contribution, by employees of the 'new unit'. Plainly, there is nothing in the language of the Restrictive Notification read with the Exemption Notification to infer existence of such a condition. (Para 23)

D. Provision granting incentive for promoting economic growth and development in taxing statutes should be liberally construed and restriction placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the objective of the provision. (Para 29)

For the Exemption Notification, the legislature - in its wisdom, restricted the computation of 'total employment' to such employees/workmen only, who may be making contributions to the provident fund. Seen in that light, the

'Explanation' is likely to work in favour of the 'new unit' claiming exemption, u/s 4-A of the Act. The larger body of workmen (who may have been engaged on casual basis and w.r.t. whom the requirement to make contributions to provident fund would not apply) including those who may not be making such contribution would stand excluded in that computation. Based on that determination, the percentage of employment (to be reserved for members of scheduled castes, scheduled tribes, other backward classes, and minorities), as a condition for grant of full exemption, would have to be determined. Computed on that basis, there is no dispute that the 'Explanation' to the Restrictive Notification was satisfied. (Para 25, 26, 30)

At the relevant time, there were about 10 employees at the 'new unit' established by the assessee. Therefore, the applicability of the 'Employees Act' to the assessee, is very doubtful. (Para 27, 28)

On the facts found by the Tribunal, it must be accepted-no contribution of provident fund was being made by a single employee at the new unit established by the assessee. In view of that, the only conclusion that the revenue authorities may have reached was - the number of 'total employment' was an indeterminate figure, or '0'. If strictly applied to the Exemption Notification, it would lead to an absurd result - no percentage result of employment granted to persons of specified category would be possible to deduce. That is not the purpose of the Exemption Notification. It must be read to retain its functionality and purpose. (Para 29)

There is no dispute to the fact, considering that figure, the percentage of employment granted by the assessee to the members of Scheduled Castes, Scheduled Tribes and Other Backward Classes and minorities was met, satisfactorily. Thus, **substantial compliance of the directory provision had been made by the assessee.** (Para 35)

E. In absence of any consequence prescribed by law, in the event of its non-compliance, inference may not be made, of that provision being mandatory. (Para 31)

Here, no consequence has been provided either under the Exemption Notification or under the Restrictive Notification or any other law relied by the revenue as may directly suggest - availability of the exemption would be denied if provident fund contributions were not made by the employees of the new unit. Keeping that in mind, **the 'Explanation' appended to the Restrictive Notification must be read as directory.** (Para 31)

Therefore, the proviso (ii) to Clause 2 of the Exemption Notification wholly applied to the assessee's case. Consequently, the restrictive Clause 2 of the Exemption Notification did not apply to it. Still, consequentially, the assessee was entitled to full exemption under the Exemption Notification, as provided under Annexure No. I thereto. (Para 36)

Revision allowed. (E-4)

<u>Precedent followed</u>:

1. Ram Sarup Vs Munshi & ors., AIR 1963 SC 553 (Para 15)

2. Commissioner of Sales Tax Vs Industrial Coal Enterprises, (1999) 2 SCC 607 (Para 28)

3. Topline Shoes Ltd. Vs Corporation Bank, (2002) 6 SCC 33 (Para 31)

4. Sahu Stone Crushing Industries Vs Divisional Level Committee & anr., 1994 UPTC 1 (Para 32)

5. M/s Atul Gases Vs Commissioner of Commercial Tax, U.P. Lucknow & anr., 2018 UPTC 198 (Para 33)

Present revision assails order dated 02.01.2008, passed by Trade Tax Tribunal, Aligarh Bench, Aligarh.

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Vishwjit, learned counsel for the assessee and Sri A.C. Tripathi, learned Standing Counsel for the revenue.

2. Present revision has been filed by the assessee, against the order of the Trade Tax Tribunal, Aligarh Bench, Aligarh, dated 02.01.2008, in Second Appeal No. 445 of 2002 for A.Y. 1997-98 (U.P.), whereby the Tribunal has dismissed the appeal filed by the assessee and thereby upheld the order passed by the first appeal authority, restricting the available limit of exemption under section 4-A of the U.P. Trade Tax Act, 1948 (hereinafter referred to as the 'Act'), to 5% of the sale price.

3. The revision has been pressed on the following question of law:

"Whether the 'Explanation' to Notification No. TT-2-779/XI-9 (226)/94 dated 31.03.1995 (Restrictive Notification) was mandatory to be fulfilled, while applying that Notification to proviso (ii) of Clause 2 of Notification No. TT-2-780/XI-9 (226)/94, dated 31.03.1995 (Exemption Notification) ?"

4. In brief, the assessee set up a "new unit', as defined under Section 4-A of the Act. Undisputedly, the assessee was granted Eligibility Certificate, creating exemption from tax (under the Act), for a period of 8 years, beginning from the date of the starting production - 04.04.1997 to 03.04.2005. Thus, A.Y. 1997-98 was the first year of business of the assessee.

5. For A.Y. 1997-98, the assessee disclosed sales turnover Rs. 23,01,369.50/-. It claimed full exemption on the same, under the Eligibility Certificate issued to it, read with Notification No. TT-2-780/XI-9 (226)/94 dated 31.03.1995 (hereinafter referred to as the 'Exemption Notification').

6. In the first place, under the Exemption Notification, exemption from tax was granted to the assessee, by virtue of it having established a "new unit' at Aligarh. That exemption from tax was available to the extent described under column 4, for the year described in column 3, under Clause 3 of Annexure No. - I to the Exemption Notification. It read as below:

1	*2*		*3*	*4*		*5*
			A	*B*	*C*	
"3.		*Eight years*	*1st Year*	*100 per cent*	*100 per cent*	*175 percent of the fixed capital investment or, as the case may be, additional fixed capital investment in case of small scale units and 150 percent of*
	The district of Agra (excluding Taj Trapezium area), Aligarh (excluding Taj Trapezium Area), Allahabad (excluding the area in south of rivers Jamuna and confluent Ganga but including the		*2nd Year*	*100 per cent*	*100 per cent*	
			3rd Year	*100 per cent*	*75 per cent*	
			4th Year	*100 per cent*	*75 per cent*	
			5th Year	*100 per cent*	*50 per cent*	
			6th Year	*100 per cent*	*50 per cent*	
			7th Y	*100 per cen*	*25 per cen*	

	area included under Municipal Corporation Allahabad), Bareilly, Bhadohi, Bijnor, Firozabad, (excluding Taj Trapezium Area), Ghaziabad (excluding the Greater Noida Industrial Development Area), Gorakhpur, Haridwar, Kanpur (Nagar), Lakhimpur Kheri, Lucknow, Mahara		*ear*	*t*	*t*	*the fixed capital investment or additional fixed capital investment in case of other units.”*
			8th Year	*100 per cent*	*25 per cent*	

	jganj, Mirzapur, Meerut, Muzaffarnagar, Saharanpur, Sonbhadra and Varanasi.					

7. At the same time, by virtue of Clause 2 of the Exemption Notification, the extent of exemption from tax, was limited to a maximum of 5% of the sale price. For ready reference, Clause 2 of the Exemption Notification read as below:

"2. The facility of exemption from or reduction in the rate of tax, including additional tax specified in column 4 of Annexure I to any unit on any transaction of sale shall not exceed 5 percent of the sale price. The tax, including additional tax, in excess of 5 percent shall be payable by such unit according to law:

Provided that the provisions of the paragraph shall not apply to any unit.

(i) established in the districts of Almora, Chamoli, Dehradun, Nainital, Pauri Garhwal, Pithoragarh, Tehri Garhwal and Uttar Kashi;

(ii) which provides employment to the persons belonging to the Scheduled Castes, Scheduled Tribes, other backward classes of citizens and minorities in not less than the following proportions to the total employment being provided such industrial units and subject to the conditions and restrictions specified in the Government Notification No. TT-2-779/XI-9 (226)/94-

U.P. Act-15-48-Order-95, dated March 31, 1995.

Scheduled Castes/Scheduled Tribe 23 percent

Other backward classes of citizen 27 percent

Minorities 10 percent"

8. Thus, first, exemption available under the Exemption Notification was limited to 5% of the sale price. Second, by way of exception to that restriction, that limit was waived to "new units' established in specified districts - Almora, Chamoli, Dehradun, Nainital, Pauri Garhwal, Pithoragarh, Tehri Garhwal and Uttar Kashi (then part of Uttar Pradesh). Also, by way of another exception, it was stipulated, such restrictive condition would not apply to new units that provided employment to persons belonging to Scheduled Castes, Scheduled Tribes, Other Backward Caste and, minorities (hereinafter referred to as 'specified categories'), in the proportions prescribed thereunder.

9. Then, by way of a further stipulation, the said proviso also made applicable 'Conditions and Restrictions' specified under Notification No. TT-2-779/XI-9 (226)/94 dated 31.03.1995 (hereinafter referred to as the 'Restrictive Notification').

10. For ready reference, the contents of the Restrictive Notification read as below:

"Vitta (Vyapar Kar) Anubhag-2, Notification No. TT-2-779/XI-9 (226)/94-U.P. Act-15-48-Order-95, dated March 31, 1995.

In exercise of the powers under Section 4-AA of the Uttar Pradesh Trade Tax Act, 1948 (U.P. Act. No. XV of 1948), the Governor is pleased to grant, with effect from April, 1, 1995, a concession of twenty-five percent in the rate of tax to such industrial units in the private sector as are registered under the Factories Act, 1948 and provide employment to the persons belonging to Scheduled Castes and Scheduled Tribes, other Backward Classes of Citizens and Minorities at the rate respectively of not less than 23 percent., 27 percent and ten percent of the total employment being provided by such industrial unit subject to the following conditions and restrictions:

Conditions and restrictions. -- (1) An industrial unit may be granted concession in the rate of tax only if it files before the concerned assessing authority upto 31st December of the succeeding assessment year a certificate:

(a) of the District Magistrate to the effect that the person who has been provided employment belongs to the category of Scheduled Castes or Scheduled Tribes or Other Backward Classes of Citizens or Minorities, as the case may be.

(b) of an officer not below the rank of an Assistant Labour Commissioner to the effect that such industrial unit has provided employment to the persons belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes of Citizens and Minorities in the required proportion to the total employment during whole or part or parts of the assessment year concerned.

(2) The industrial unit shall be entitled to the concession in the rate of tax only during the period in which employment in the required proportion to the total employment has been provided to persons belonging to the Scheduled Castes, Scheduled Tribes, Other Backward Classes of Citizens and Minorities.

Explanation : For the purposes of this notification, the term "total employment" shall include only the persons

who contribute to the Fund established under Employees, Provident Fund and Miscellaneous Provisions Act, 1952."

11. The Tribunal has applied the Restrictive Notification and reached a conclusion - by virtue of Clause 2 of Exemption Notification, the assessee was disabled from claiming exemption more than 5% of the sale value.

12. Having heard learned counsel for the parties and having perused the record, there is no dispute to the fact - the assessee had set up a "new unit', to manufacture cement. It was eligible to exemption granted under Section 4-A of the Act read with the Exemption Notification. Further, it is also not in dispute, the "new unit' established by the assessee had engaged members of specified categories, in the percentage strengths - prescribed under proviso (ii) to Clause 2 of the Exemption Notification. It was granted the Eligibility Certificate.

13. Only this much is in dispute - whether the Restrictive Notification was applicable to the case of the assessee and whether the 'Explanation' appended to the Restrictive Notification, ousted the claim of the assessee to exemption - to the full extent, under the Exemption Notification or whether it was restricted to 5% of the sale price, under Clause 2 of the Exemption Notification.

14. Here, in the first place, the language of proviso (ii) Clause 2 of the Exemption Notification leaves no doubt, the legislature adopted the mode - legislation by incorporation. It bodily lifted and incorporated the 'Conditions & Restrictions' contained in the Restrictive Notification, to the Exemption Notification, as a further condition to be fulfilled, to avail exemption.

15. Legislation by incorporation is clearly a well-recognized mode of legislation. In that, the legislature only avoids repetition of words, phrases, and even whole provisions. The principle is - the provisions of a former/first enactment are incorporated in a later/second enactment such that they become an absolute part of the later/second enactment, as if they had been bodily transposed into it, to the point - still later/third enactment of repeal of the former/first enactment would not severe its incorporation into the later/second enactment, to the extent of its original incorporation. It would require a repeal of/in the later/second enactment, to cause that legal effect. That principle was recognized and applied in **Ram Sarup Vs. Munshi & Ors., AIR 1963 SC 553.**

16. Here, by virtue of proviso (ii) of Clause 2 of the Exemption Notification, the legislature chose to provide three conditions to be fulfilled to exclude the applicability of Clause 2 of the Exemption Notification. First, it excluded applicability of the restrictive Clause to "new units' established in specified districts. Second, it excluded that restrictive Clause to "new units' providing employment to members of specified categories, in prescribed percentages. Such "new units' would avail full/unrestricted exemption. Third, it was provided, the restrictive Clause 2 would not apply if "Conditions and Restrictions" specified in the Restrictive Notification, were fulfilled.

17. Plainly, if the assessee had fulfilled the requirement of engagement of certain members of the society in the prescribed percentage but did not fulfill

'Conditions & Restrictions' contained in the Restrictive Notification, it could not claim full exemption under the Exemption Notification. To that extent, that condition is like an exception to the second condition to proviso (ii) to Clause 2 of the Exemption Notification. Therefore, the effect of 'Conditions and Restrictions' prescribed under the Restrictive Notification become a justiciable issue.

18. Then, the first condition prescribed under the Restrictive Notification is of filing of Certificate of the District Magistrate & Assistant Labour Commissioner certifying engagement of persons belonging to specified categories (noted above), in specified percentages. Those certificates were to be filed before the assessing authority, up to a specified date. It is not in dispute between the parties, such condition also been met by the assessee.

19. By way of a second condition, it was stipulated, the "new unit' would be entitled to concession for the period during which it maintained the employment of members of the specified categories (noted above), at the prescribed percentages. Thus, if the condition of such employment was found fulfilled in one year but violated in the succeeding year, that assessee would expose itself to limited exemption in terms of Clause 2 of the Exemption Notification, in the succeeding year. Again, there is no case set up by the revenue that the condition of employment had been violated by the assessee in any year.

20. Then, the Restrictive Notification is not an addendum or corrigendum to the Exemption Notification. It is an independent notification issued under Section 4-AA of the Act. By its very nature, such notifications were issued by the State Government, at the relevant time, to grant exemption to a unit, based on employment granted - to persons belonging to specified categories. The assessee had not claimed that exemption.

21. What survives for consideration is, whether the 'Explanation' to the Restrictive Notification also constitutes part of the 'Conditions and Restrictions' contained therein. In essence, the 'Explanation' defines the term, 'total employment'. It has been used in Clause 1(b) and Clause 2 of the 'Conditions and Restrictions' under the Restrictive Notification. It provides - for the purposes of considering the 'total employment' generated by a "new unit', only such of its employees would be counted, who may have contributed to the fund established under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the ' Employees Act'). Once that number (of total employment) would be determined, the percentage test - of employment granted to members of specified categories, could be easily applied, to that number determined.

22. It is not the case of the revenue that the number of employees engaged by the assessee who were making contribution to Employees Provident Fund was such that the 'total employment' generated by the assessee was much higher or such as would deplete the percentage of members of specified categories, employed by it, below the prescribed percentages. In fact, the revenue alleges in the converse, i.e. the employees of the assessee were not making contribution to the Employees Provident Fund. Yet, it did not allege that the numbers of members of specified categories, engaged by the assessee were

below the percentages prescribed, either under the Exemption Notification or the Restrictive Notification.

23. Thus, the revenue has read the 'Explanation' to imply - a new restrictive condition on the claim of full exemption made by the assessee - being payment of Employees Provident Fund contribution, by employees of the "new unit'. Plainly, there is nothing in the language of the Restrictive Notification read with the Exemption Notification to infer existence of such a condition. The "Explanation' is neither a third condition/restriction contained in the Restrictive Notification nor, it otherwise provides such effect. It is only in the nature of a definition of the phrase "total employment".

24. It is not difficult to visualise the purpose of restricting 'total employment' at a "new unit', to such number of employees who may be making contributions to the Employees Provident Fund. It is not uncommon, in running of industries, engagement is offered for different types/nature of work, to different types of workmen, enjoying different status and terms, whether as a daily wage employees or temporary employees or contract employees etc., along with permanent employees. While provident fund liability exists against certain category of employees, specified by the Employees Act, deduction of provident fund contribution is not mandatory or uniform across the board, as may apply to every category of the workmen, irrespective of his status.

25. For the Exemption Notification, the legislature - in its wisdom, restricted the computation of 'total employment' to such employees/workmen only, who may be making contributions to the provident fund. Seen in that light, the 'Explanation' is likely to work in favour of the "new unit' claiming exemption, under Section 4-A of the Act. A "new unit' where provident fund contribution may be made by some employees, only such number of employees would be included in the list of 'total employment', who may be making that contribution. The larger body of workmen including those who may not be making such contribution would stand excluded in that computation.

26. Thus, for example, at a "new unit' engaging 200 workmen, if provident fund contribution were being made by only 100 of its workmen, the 'total employment' of that "new unit', for the purpose of satisfaction of the 'Conditions and Restrictions', under the Restrictive Notification, would remain confined to 100 i.e., the lesser number and not the larger. Based on that determination, the percentage of employment (to be reserved for members of scheduled castes, scheduled tribes, other backward classes, and minorities), as a condition for grant of full exemption, would have to be determined.

27. Next, it may be noted, the Tribunal has wrongly taken note of Section 16(1)(d) of the "Employees Act'. It was omitted by the Parliament by Act no.10 of 1998, with retrospective effect from 22.9.1997. However, it cannot be ignored, the said provision remained operative for part period of A.Y. 1997-98. At the same time, Section 1(1), 1(2) and 1(3) of the Act reads as below:

"(1) This Act may be called the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

*(2) It extends to the whole of India 5***.*

[(3) Subject to the provisions contained in section 16, it applies—

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which 7 [twenty] or more persons are employed, and (b) to any other establishment employing 6 [twenty] or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf: Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than 6 [twenty] as may be specified in the notification.]"

28. It is also undisputed, at the relevant time, there were about 10 employees at the "new unit' established by the assessee. Therefore, the applicability of the "Employees Act' to the assessee, is very doubtful. Yet there is no credible material to reach a firm finding on that issue.

29. In any case, on the facts found by the Tribunal, it must be accepted - no contribution of provident fund was being made by a single employee at the new unit established by the assessee. In view of that, the only conclusion that the revenue authorities may have reached was - the number of 'total employment' was an indeterminate figure, or '0'. If strictly applied to the Exemption Notification, it would lead to an absurd result - no percentage result of employment granted to persons of specified category would be possible to deduce. That is not the purpose of the Exemption Notification. It must be read to retain its functionality and purpose. In **Commissioner of Sales Tax Vs. Industrial Coal Enterprises, (1999) 2 SCC 607,** in the context of interpretation of Exemption Notification, it was observed as under:

*"**11.** In CIT v. Straw Board Mfg. Co. Ltd. [1989 Supp (2) SCC 523 : 1990 SCC (Tax) 158] this Court held that in taxing statutes, provision for concessional rate of tax should be liberally construed. So also in Bajaj Tempo Ltd. v. CIT [(1992) 3 SCC 78] it was held that provision granting incentive for promoting economic growth and development in taxing statutes should be liberally construed and restriction placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the objective of the provision.*

***12.** We find that the object of granting exemption from payment of sales tax has always been for encouraging capital investment and establishment of industrial units for the purpose of increasing production of goods and promoting the development of industry in the State. If the test laid down in Bajaj Tempo Ltd. case [(1992) 3 SCC 78] is applied, there is no doubt whatever that the exemption granted to the respondent from 9-8-1985 when it fulfilled all the prescribed conditions will not cease to operate just because the capital investment exceeded the limit of Rs 3 lakhs on account of the respondent becoming the owner of land and building to which the unit was shifted. If the construction sought to be placed by the appellant is accepted, the very purpose and object of the grant of exemption will be defeated. After all, the respondent had only shifted the unit to its own premises which made it much more convenient and easier for the respondent to carry on the*

production of the goods undisturbed by the vagaries of the lessor and without any necessity to spend a part of its income on rent. It is not the case of the appellant that there were any mala fides on the part of the respondent in obtaining exemption in the first instance as a unit with a capital investment below Rs 3 lakhs and increasing the capital investment subsequently to an amount exceeding Rs 3 lakhs with a view to defeat the provisions of any of the relevant statutes. The bona fides of the respondent have never been questioned by the appellant."

30. Also, as discussed above, it is seen, the computation of 'total employment' provided under the Restrictive Notification appears to run to the benefit of the assessee, to exclude therefrom such workmen who may have been engaged on casual basis and with respect to whom the requirement to make contributions to provident fund would not apply. Computed on that basis, there is no dispute that the "Explanation' to the Restrictive Notification was satisfied.

31. Here, it must be noted, no consequence has been provided either under the Exemption Notification or under the Restrictive Notification or any other law relied by the revenue as may directly suggest - availability of the exemption would be denied if provident fund contributions were not made by the employees of the new unit. Keeping that in mind, the 'Explanation' appended to the Restrictive Notification must be read as directory. In **Topline Shoes Ltd. Vs Corporation Bank, (2002) 6 SCC 33,** the Supreme Court interpreted section 13 of the Consumer Protection Act, 1986, that prescribed 30 days' time limit, to file an objection/written statement to the complaint, was directory. It reasoned - in absence of any consequence prescribed by law, in the event of its non-compliance, inference may not be made, of that provision being mandatory.

32. In the context of another exemption notification, a similar conclusion was earlier reached by a division bench of this Court, in **Sahu Stone Crushing Industries Vs. Divisional Level Committee &Anr., 1994 UPTC 1**, in the context of requirement of registration under the Factories Act. It was found, registration under the Factories Act, could not be granted to that "new unit', yet would be entitled to claim exemption. To that extent the requirement of registration under the Factories Act, was directory. It was held:

***"23.** In Kuchchal Industries case 1990 UPTC 481, it was held by a Division Bench of this Court that the requirement of registration under the Factories Act cannot always be complied with because a new unit which has less than 10 employees does not come within the definition of "factory" in section 2(m) of the Factories Act and hence to insist upon such registration would deprive such small-units of the benefit of exemption under section 4-A. The special leave petition against the said decision was dismissed by the Supreme Court. The ratio of the said decision is obviously that the requirement of registration under the Factories Act is only directory and not mandatory. The purpose of requirement of registration is only to ensure that there is a genuine new unit and hence this condition need not be insisted upon when by other materials it can be demonstrated that a genuine new unit has been set up. The requirement of registration under the Factories Act has, hence, to be treated as directory and not mandatory."*

33. Again, in the context of the exemption granted under Section 4-A, in **M/S Atul Gases Vs. Commissioner of Commercial Taxes, U.P. Lucknow & Anr., 2018 UPTC 198,** with respect to requirement of ownership of land, it was found, acquisition of land was not a condition that may be inferred so long as its ownership derived from open market was not doubted. Accordingly, a co-ordinate bench of this Court observed as under:

"20. The construction sought to be culled out finds support from the exemption notification also. The last notification dated 22.12.2000 eliminates the mode of acquisition for the purposes of grant of exemption entirely. This clearly reflects that mode of acquisition was not of relevance, rather, it was possessing of land which alone had relevance for the context.

21. Any other construction, as is suggested by the learned Standing Counsel, may be open to challenge as being arbitrary. If it is allowed, a person who establishes new unit upon land owned by him or upon land purchased from the open market would not be disentitled to exemption, even if all other conditions are met. Such a classification would be impermissible in law. Mode of acquisition of land is not shown to have any relevance for the object sought to be achieved by promulgating Section 4-A of the Act or the exemption notification. Any distinction drawn based upon mode of acquisition of land would have no nexus with the object sought to be achieved, and thus would be violative of Article 14 of the Constitution of India."

34. In the present case, it is found - though the 'Explanation' appended to the Restrictive Notification would apply to the reading of Clause 2 of the Exemption Notification, at the same time, it would remain a directory provision of law. Where the figure of employment to be computed under the Restrictive Notification remained indeterminate, the same would be read as 'total employment' granted otherwise.

35. As noted above, there is no dispute to the fact, considering that figure, the percentage of employment granted by the assessee to the members of Scheduled Castes, Scheduled Tribes and Other Backward Classes and minorities was met, satisfactorily. Thus, substantial compliance of the directory provision had been made by the assessee.

36. Therefore, the proviso (ii) to Clause 2 of the Exemption Notification wholly applied to the assessee's case. Consequently, the restrictive Clause 2 of the Exemption Notification did not apply to it. Still, consequentially, the assessee was entitled to full exemption under the Exemption Notification, as provided under Annexure No. I thereto.

37. In view of the above, the question of law is answered in the negative i.e., in favour of the assessee and against the revenue.

38. The revision is **allowed.** No order as to costs. Any amount of tax deposited by the petitioner, may be refunded in accordance with law, subject to exclusion of the rule of unjust enrichment.

(2022) 8 ILRA 1033
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.08.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Contempt Application (Criminal) No. 5 of 2022

In Re ...Applicant

Versus

Shri Chandan Kumar, Investigating Officer ...Opposite Party

Counsel for the Applicant:

Sri Sudhir Mehrotra

Counsel for the Opposite Party:
Sri R.V. Pandey, Sri Abhishek Mishra, Sri Ashutosh Kumar Pandey, Sri R.V. Pandey

Criminal Contempt- The Contempt Of Courts Act, 1971 – Section 2(a), (c) - Cognizance of criminal contempt, on a reference made to High court , by the subordinate court - Section 15 (2) - I.O. mechanically arrested the accused on the ground that: (i) the accused refused/declined to comply the terms and conditions of the notice under Section-41(A) (ii) the matter involves two rival communities, may adversely affect the communal harmony - however, the reason for arrest failed to inspire confidence with the Magistrate - Magistrate made contempt reference before High court against Investigating Officer, as I.O. did not follow the direction of Supreme Court rendered in Arnesh Kumar Vs State of Bihar, . 2014(6) S.C.J. 219 – On notice being issued contemnor tendered unconditional apology - Held - taking advantage that the accused belongs to a different community, comtemnor mechanically, without reasons to believe, made an entry in the G.D. that accused failed to comply the conditions of the notice, to justify the arrest - conduct of the contemnor being willful and deliberate to defy the authority of law by assigning non existing reason - contemnor being a member of the disciplined force is bound to comply the mandate of law, breach thereof would entail civil and criminal consequence - apology tendered is qualified and guarded to escape the proceedings - contemnor is held guilty of the charge. (17, 19)

Allowed. (E-5)

List of Cases cited:

1. Arnesh Kumar Vs St. of Bihar 2014(6) S.C.J. 219

(Delivered by Hon'ble Suneet Kumar, J.

&

Hon'ble Syed Waiz Mian, J.)

1. Heard learned counsel for the parties.

2. Pursuant to order dated 04.08.2022, contemnor is present in the Court.

3. Contemnor vide order dated 04.08.2022, was held guilty for committing contempt for breach of the mandate pronounced by the Supreme Court in ***Arnesh Kumar Vs. State of Bihar*** reported in 2014 (6) SCJ 219.

4. In the affidavit, the contemnor pleads for taking a sympathetic view on the quantum of punishment, for the reason, that he is a young officer and his wife is expecting. Further, it is pleaded that he is the sole bread earner of his family, including, four brothers and one sister; he further pleads that punishment would adversely affect his career. The contemnor, therefore, tenders an unconditional apology.

5. We have considered the averments made in the affidavit and submissions of the learned counsel for the contemnor.

6. This Court would not lose sight of the fact that the contemnor, being a member of disciplined Force, in exercise of his powers of arrest, has willfully and deliberately bypassed the mandate of the Supreme Court in **Arnesh Kumar** (supra), which is binding on all the authorities, including, the Magistrate, in view of Article 141 of the Constitution of India.

7. 'Apology' means regretful acknowledgement or an excuse for failure.

It is an explanation offered to a person affected by one's action that no offence was intended. Further, held 'apology' should be unquestionable in sincerity and tempered with sense of genuine remorse and repentance, and not a calculated strategy to avoid punishment. The apology tendered by the contemnor is a matter of last resort, therefore, it cannot be accepted.

8. It has been noted by the Court in the order dated 04.08.2022, that the contemnor, though, has served a notice under Section 41-A Cr.P.C. on the accused, but, to bypass the mandate of the Supreme Court, he willfully and deliberately recorded in the GD that accused declined to accept the terms and condition of the notice. Further, communal colour was attempted to be given by the contemnor taking advantage that the accused belongs to a muslim community, by stating that there was an apprehension of communal riots. It is noted in the order that no such apprehension did exist as admittedly, the FIR was not lodged at the police station until intervention by the higher authorities. There is no entry in the GD that there was any such apprehension of communal flare up in the event of the accused not being arrested. The misleading entry in the GD was made willfully and deliberately with sole purpose to bypass the mandate in **Arnesh Kumar** (supra), in order to arrest the accused. The contemnor, in the circumstances, has circumvent the mandate which was binding upon him.

9. In the event of the Court taking a sympathetic view, it would not sub-serve public interest and the administration of justice. In order to secure public respect and confidence in the judicial process, the Court is constrained in awarding punishment to the contemnor, Investigating Officer, Shri Chandan Kumar, Incharge of Police Station, Kanth, District Shahjahanpur, for committing contempt.

10. In the circumstances, Shri Chandan Kumar, Incharge of Police Station, Kanth, District Shahjahanpur, is sentenced to undergo simple imprisonment for 14 days and fine is imposed at Rs. 1000/-. On default, the contemnor shall undergo one week further simple imprisonment.

11. The sentence shall be kept in abeyance for 60 days from today as the learned counsel for the contemnor pleads that the contemnor would like to prefer an appeal under Section 19 of Contempt of Court Act, 1971.

12. In view thereof, the contempt petition and pending application, if any, stands disposed of.

(2022) 8 ILRA 1035
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 289 of 2015

Vikram Prasad ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Pradeep Kumar VI, Sri Bhaju Ram Prasad Sharma, Sri Dinesh Kumar Pandey, Sri Manu Sharma, Sri Rajrshi Gupta

Counsel for the Opposite Party:

Govt. Advocate

Criminal Law- Indian Evidence Act, 1872- Sections 154 & 32- The testimony of hostile witnesses cannot be thrown away just on the basis of the fact that they have not supported the prosecution case and were cross-examined by the prosecutor. The testimony of hostile witnesses can be relied upon to the extent it supports the prosecution case - The hostility of witnesses of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version of the event that occurred and the circumstances leading to her death.

Settled law that not only the relevant parts of evidence of a hostile witness which are admissible in law can be used by prosecution or the defence but also

Criminal Law - Indian Evidence Act, 1872- Section 32- Dying Declaration- In case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required-A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim- In order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination.

The court can record conviction of the accused solely upon the dying declaration and without seeking corroboration where the same has been recorded in a legal and proper manner, specially by a magistrate who cannot have any animus with the accused, although the dying declaration has to be treated with scrutiny and caution as the defence cannot avail the opportunity of cross examining the maker of the dying declaration.

Criminal Law - Indian Penal Code, 1860 - Section 302 of I.P.C. or Section 304 Part-I or Part-II- Fire was put out by the appellant himself and deceased was admitted to the hospital in injured condition by the appellant and his family members, it is transpired that appellant's had no intention to do away with the deceased. Deceased died after four days of the occurrence and during this period, she constantly remained admitted in Medical College and was under treatment. Doctor conducted the post-mortem, has also mentioned the cause of death as "Shock"- The offence would be punishable under Section 304 (Part-I) IPC because the burn injuries were caused to the deceased by appellant with the intention to cause such bodily injuries as were likely to cause death and, therefore, the instant case falls under the Exceptions 4 of Section 300 IPC.

Where death is caused without premeditation and intention but the bodily injuries were likely to cause death then the offence would be punishable under section 304 (Part – I) of the IPC. Para (15, 21, 22, 23, 25, 27, 32, 33, 34, 35)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case Law relied upon:-

1. Koli Lakhmanbhai Chandabhai Vs St. of Guj. 1999 (8) SCC 624

2. Ramesh Harijan Vs St. of U.P. 2012 (5) SCC 777

3. St. of U.P. Vs Ramesh Prasad Misra & anr. 1996 AIR (SC) 2766

4. Lakhan Vs St. of M.P ,(2010) 8 SCC 514

5. Krishan Vs St. of Har. (2013) 3 SCC 280

6. Ramilaben Hasmukhbhai Khristi Vs St. of Guj. ,(2002) 7 SCC 56

7. Tukaram & ors. Vs St. of Maha., (2011) 4 SCC 250

8. B.N. Kavatakar & anr. Vs St. of Kar., 1994 SUPP (1) SCC 304

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the judgment and order dated 17.12.2014, passed by learned Additional Sessions Judge, Court No.4, District Maharajganj, in Session Trail No. 90 of 2006 (State of UP vs. Vikram Prasad and Others), arising out of Case Crime No.336 of 2006, under Section 302 of Indian Penal Code (in short "IPC"), Police Station-Shyamdeorva, District Maharajganj whereby the appellant is convicted and sentenced for the offence under Section 302 IPC for life imprisonment with a fine of Rs.20,000/- and in default of payment of fine, further imprisonment for one year.

2. The brief facts of the case are that a written report was filed by informant Jhinak at Police Station Shyamdeorva, Maharajganj, District Maharajganj with the averments that complainant's daughter Shanti Devi was married to Vikram R/o Village Belrai, Police Station Shyamdeorva, District Maharajganj before one and half year. For want of Rs.10,000/-, in the night of 20.03.2006 the accused Vikram and his mother-Simirata Devi set his daughter ablaze and after getting her admitted into the Medical College, Gorakhpur they (the accused) absconded from there. On getting the information from the villagers on phone, the complainant and others reached Medical College, Gorakhpur where on 24.03.2006 at about 6:00 PM Shanti Devi passed away during the course of treatment.

3. On the basis of the aforesaid written report, a case crime no.336 of 2006 was registered against the aforesaid accused persons under Sections 498-A and 304-B I.P.C. During the course of investigation, I.O. has visited the spot and prepared the site plan. I.O. has also collected the piece of cot, piece of burn bedding, container of kerosene oil along with matchstick etc. from the spot and prepared the recovery memo. On the next day of occurrence, a dying declaration of the deceased was recorded by Naib Tehsildar Sunil kumar patel. The injured Shanti Devi died after four days of the occurrence i.e. 24.03.2006 during treatment. Post-mortem was conducted, in which cause of death was mentioned as shock. Before post-mortem inquest report was also prepared. I.O. recorded the statement of the witnesses. After completion of investigation, a charge sheet under Section 498-A, 304-B I.P.C. and Section 3/4 of Dowry Prohibition Act, 1961 was submitted against the accused persons namely Vikram and Semirata Devi.

4. Learned Magistrate committed the case to the sessions court as the case was triable by sessions court.

5. Learned trial judge framed the charges against both the accused persons under Sections 498-A, 304-B I.P.C. and Section 3/4 of Dowry Prohibition Act, 1961.

6. To bring home the charges, the prosecution examined following witnesses:

1.	Jhinak	P.W.-1
2.	Smt. Devi	P.W.-2
3.	Manoj Kumar	P.W.-3
4.	Smt. Chandrawati Devi	P.W.-4
5.	Ram Naresh Prasad	P.W.-5
6.	Ram Sawar	P.W.-6
7.	Anil Kumar	P.W.-7
8.	Devi Lal	P.W.-8
9.	Leelawati	P.W.-9
10.	Shiv Lal Prasad	P.W.-10
11.	Prakash	P.W.-11
12.	Ram Rekha Yadav	P.W.-12
13.	Rekha Devi	P.W.-13
14.	Smt. Anarkali Devi	P.W.-14
15.	Dr. Santosh Kumar	P.W.-15
16.	Nagendra Bahadur Singh	P.W.-16
17.	Sanjay Kumar	P.W.-17
18.	Satish Kumar Srivastava	P.W.-18
19.	Sunil Kumar Patel	P.W.-19
20.	Dr. A.K. Srivastava	P.W.-20

7. In support of oral evidence, prosecution submitted following documentary evidence, which was proved by leading oral evidence:

1.	FIR	Ex.ka-3
2.	Written report	Ex.ka-1
3.	Dying-declaration	Ex.ka-14
4.	Recovery memo	Ex.ka-7
5.	Post mortem report	Ex.ka-2
6.	Panchayatnama	Ex.ka-9
7.	Charge sheet	Ex.ka-6
8.	Site plan with index	Ex.ka-5

8. It is borne out from the record and dying declaration that deceased was hospitalised after the occurrence by accused persons themselves. The deceased died after 4 days of the occurrence and during the course of treatment.

9. Heard Mr. Rajrshi Gupta, learned counsel for the appellant and learned AGA appearing on behalf of the State. Perused the record and paper book.

10. Learned counsel for the appellant has submitted that accused persons have been falsely implicated in this case. It is further submitted by learned counsel that all the witnesses have turned hostile. PW-1, Jhinak is complainant and father of the deceased. He has not supported the prosecution case and was declared hostile by prosecution. PW-2, Smt. Devi is mother of the deceased. She has also denied the demand of any amount or any sort of torturing to her daughter by the accused persons. Apart from P.W.-1 and P.W.-2, prosecution has examined 12 other witness of fact i.e. P.W.-3 to P.W.-14, who are relative of the deceased. All these witnesses have not supported the prosecution version and on the basis of analysis of their evidence, no guilt against the accused appellant is established and proved.

11. Learned counsel for the appellant next submitted that dying-declaration of the deceased was recorded when she was surviving, but this dying-declaration has no corroboration from any prosecution evidence. All the witnesses of fact have turned hostile and nobody has supported the version, which is mentioned in dying-declaration. It is submitted that learned trial court committed grave error in convicting the accused on the sole basis of dying-declaration only when it was not corroborated at all.

12. Learned counsel for the appellant has submitted that it is the husband-accused who got the deceased admitted to Medical College, (Hospital) Gorakhpur. The deceased got burn injuries accidently because a small lamp fell on her while she was sleeping. Learned counsel for the appellant has also submitted that in dying declaration itself it is stated by the deceased that accused put out the fire, if the offence was committed by the accused-appellant, there was no reason for him to put out the fire.

13. No other point or argument was raised by the learned counsel for the appellants and has confined his arguments to above points only.

14. Learned AGA, *per contra*, vehemently opposed the arguments placed by counsel for the appellants and submitted that conviction of accused can be based only on the basis of dying-declaration, if it is wholly reliable. It is also submitted that the deceased has specifically stated in her dying declaration that accused set her ablazed. It requires no corroboration. Moreover, testimony of hostile witnesses can also be relied on to the extent it supports the prosecution case. Learned trial court has rightly convicted the appellants under Section 302 IPC and sentenced accordingly. There is no force in this appeal and the same may be dismissed.

15. First of all learned counsel for the appellants has raised the issue relating to the non support of the witness to prosecution story, that 14 witnesses of the fact were examined before learned trial court. All these witnesses have turned hostile/namely not supported the prosecution story, but the testimony of hostile witnesses cannot be thrown away just on the basis of the fact that they have not supported the prosecution case and were cross-examined by the prosecutor. The testimony of hostile witnesses can be relied upon to the extent it supports the prosecution case. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

16. Hon'ble *Apex Court* in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat*** *[1999 (8) SCC 624]*, as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

17. In ***Ramesh Harijan vs. State of U.P.*** *[2012 (5) SCC 777]*, the Hon'ble *Apex Court* has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

18. In ***State of U.P. vs. Ramesh Prasad Misra and another*** *[1996 AIR (Supreme Court) 2766]*, the Hon'ble *Apex Court* held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to

close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defense.

19. Perusal of impugned judgment shows that learned trail court has scrutinised the evidence on record very carefully.

20. As far as the dying-declaration is concerned, it was recorded by Sunil Kumar Patel, Nayab Tehsildar, who was examined as PW-19. Dying-declaration was recorded by PW-19 after obtaining the certificate of mental-fitness from doctor in the hospital. After completion of dying-declaration also the said doctor has given certificate that during the course of statement, the victim remained conscious.

21. Learned counsel for the appellants has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble *Apex Court* has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh*** *[(2010) 8 Supreme Court Cases 514],* in this case, Hon'ble *Apex Court* held that the doctrine of dying declaration is enshrined in the legal *maxim nemo moriturus praesumitur mentire,* which means, *"a man will not meet his Maker with a lie in his mouth"*. The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

22. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble *Apex Court* in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

23. Deceased survived for 4 days after the incident took place. Her dying declaration was recorded by Sunil Kumar Patel, Nayab Tehsildar after obtaining the certificate of medical fitness from the concerned doctor. This dying declaration was proved by PW-19, Sunil Kumar Patel, Nayab Tehshildar. These witnesses have absolutely independent witnesses. In the wake of aforesaid judgments of Lakhan (supra), dying declaration cannot be disbelieved, if it inspires confidence. On

reliability of dying declaration and acting on it without corroboration, Hon'ble *Apex Court* held in ***Krishan vs. State of Haryana*** *[(2013) 3 Supreme Court Cases 280]* that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

24. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat,*** *[(2002) 7 SCC 56],* the Hon'ble *Apex Court* held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

25. From the above precedents, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

26. In dying deceleration of the deceased, it is also relevant to note that deceased died after three days of recording it. It means that she remains alive for three days after making dying declaration, therefore, truthfulness of dying declaration can further be evaluated from the fact that she survived for three days. After making it from which it can reasonably be that inferred she was in a fit mental condition to make the statement at the relevant time.

27. In such a situation, the hostility of witnesses of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version of the event that occurred and the circumstances leading to her death.

28. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The

dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction. Hence, learned trial court has committed no error on acting on the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration Ex.Ka-14 and convicting the accused-appellants on the basis of it.

29. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant.

30. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

31. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.C. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

32. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the *Apex Court* in the Case of ***Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250 and in the case of B.N. Kavatakar and Another Vs. State of Karnataka, reported in 1994 SUPP (1) SCC 304,*** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

33. In the case in hand, after perusal of dying declaration of the deceased it is

not revealed as to why the appellant had poured the kerosene oil on the deceased and set her ablazed. Moreover, it is stated by the deceased in dying declaration that fire was also put out by the appellant himself, hence, there is no dispute to the fact that fire was put out by the appellant and as per the dying declaration, it is also not in dispute that appellant and his family members had taken the deceased to the Medical College, Gorakhpur for treatment and she was admitted by them.

34. Keeping in view of the aforesaid fact that fire was put out by the appellant himself and deceased was admitted to the hospital in injured condition by the appellant and his family members, it is transpired that appellant's had no intention to do away with the deceased. Deceased died after four days of the occurrence and during this period, she constantly remained admitted in Medical College and was under treatment. Doctor conducted the post-mortem, has also mentioned the cause of death as "Shock".

35. On overall scrutiny of the facts and circumstances of the case coupled with the opinion of the medical officer and considering the principle laid down by the Hon'ble *Apex Court* in the case of ***Tuka Ram and others vs. State of Maharashtra [(2011) 4 SCC 250]*** and in the case of ***BN Kavadakar and another vs. State of Karnataka [1994 Supp (1) 304],*** we are of the considered opinion that the offence would be punishable under Section 304 (Part-I) IPC because the burn injuries were caused to the deceased by appellant with the intention to cause such bodily injuries as were likely to cause death and, therefore, the instant case falls under the Exceptions 4 of Section 300 IPC.

36. In view of the aforesaid discussion, we are of the view that appeal has to be partly allowed. The conviction of the appellant under Section 302 IPC is converted into conviction under Section 304 (Part-I) IPC and the appellant is sentenced to undergo ten years of incarceration with remissions and fine of Rs. 10,000/-. In case of default of payment of fine, the appellant shall further undergo simple imprisonment for one year. This default sentence would commence on completion of ten years of incarceration for the main sentence of ten years with remission.

37. Accordingly, the appeal is **partly allowed**, as modified above.

38. Record be sent to trial court immediately.

(2022) 8 ILRA 1043
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.08.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application U/s 482 No. 5776 of 2017

Ajeet Shukla & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Nadeem Murtaza

Counsel for the Opposite Parties:
Govt. Advocate, Ajit Shukla, Amrendra Nath Tripathi

Criminal Law - Code of Criminal Procedure,1973 -Section 197 - Impugned revisional order-summoning order-mandatory

provision of sanction u/s 197 Cr.P.C. not complied-Applicant Police personnel-criminal proceedings would be non-est and void in the absence of sanction u/s 197 Cr.P.C.-impugned order quashed.

Application allowed. (E-9)

List of Cases cited:

1. Matajog Dobey Vs H.C. Bhari, AIR 1956 SC 44
2. Pukhraj Vs St. of Raj. & anr., 1973 (2) SCC 701
3. D. Devraja Vs Owais Sabeer Hussain, (2020) 7 SCC 695
4. Bakhshish Singh Brar Vs Gurmej Kaur & anr., (1987) 4 SCC 663

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

1. By way of this application under Section 482 CrPC, the applicants have prayed for quashing of the order dated 19.08.2017 passed by the learned Sessions Judge, Court No. 5, Pratapgarh in Criminal Revision No.192 of 2016 (Visharjan Singh Yadav and others Vs. State of U.P. and others).

By means of the impugned order the learned Sessions Judge has dismissed the revision filed by the applicants against the order dated 12.01.2015 passed by the learned Chief Judicial Magistrate, Pratapgarh in Case No.732 of 2014 (Vidhyabhan Singh Vs. Visharjan Singh Yadav and others) and Case No.761 of 2014 (Indirakar Misra Vs. Visharjan Singh Yadav and others) whereby the applicants were summoned to face trial under Sections 323, 325, 379, 427, 452 and 506 IPC.

Further prayer has been made for quashing of the entire proceedings of Case No.732 of 2014 (Vidhyabhan Singh Vs. Visharjan Singh Yadav and others) and Case No.761 of 2014 (Indirakar Misra Vs. Visharjan Singh Yadav and others), pending in the Court of Additional Chief Judicial Magistrate, Pratapgarh.

2. On the date of incident i.e. 21.05.2014 all the applicants were posted in the District Police Pratapgarh. Applicant no. 1 was posted as Sub-Inspector at Police Station Kotwali Nagar, District Pratapgarh, applicant no. 2 was posted as Chowki In-charge at Police Station Kotwali City, applicant no. 3 was posted as Additional Superintendent of Police, District Pratapgarh, while applicant no. 4 was posted as Circle Officer, City, District Pratapgarh.

3. District Court, Pratapgarh comes within the jurisdiction of Police Station Kotwali Nagar, District Pratapgarh.

4. On 21.05.2014, the police received an information through Dial-100 of Police Service that a conflict between advocates of the District Court, Pratapgarh and Pradeshik Armed Constabulary (for short 'PAC') personnel, deployed in the premises of Civil Courts, Pratapgarh, was taking place. Information was also given that a PAC personnel had fired upon one lawyer, who had sustained firearm injuries. Soon after receiving the information, to maintain peace and to prevent any further untoward incident, the applicants and many other police personnel rushed towards the Civil Courts compound Pratapgarh to control the situation and maintain peace. The advocates, present in the Courts compound, were highly agitated and, it appears that in the skirmishes, between the police personnel and the advocates, the applicants suffered injuries. The police also used mild force to control the situation and, it took almost entire day for the District Administration to control the situation and

bring normalcy in the District Courts compound and city of Pratapgarh.

5. The respondent nos. 2 and 3 filed two complaints before the Chief Judicial Magistrate, Pratapgarh on 24.05.2014 against the applicants and 8-10 other police personnel, alleging therein that on 21.05.2014 the police personnel, named in the complaints, assaulted and abused the advocates. The advocates suffered injuries. The police personnel also damaged property of the advocates and snatched their mobile-phones etc.

6. After recording statement of the complainants under Section 200 CrPC and witness under Section 202 CrPC, the learned Chief Judicial Magistrate, Pratapgarh vide order dated 15.07.2014 directed merging of both the complaints.

7. After merging of the two complaints, statement of Mr. Ramchandra Yadav was recorded under Section 202 CrPC on 04.08.2015 and statement of Mr. Anil Yadav was recorded under Section 202 CrPC on 30.08.2014. Learned Magistrate thereafter passed order, summoning the applicants vide order dated 12.01.2015 under Sections 323, 325, 379, 427, 452, 504 and 506 IPC.

8. Heard Nadeem Murtaza, learned counsel for the applicants, Mr. Amrendra Nath Tripathi, learned counsel for respondent nos. 2 and 3, as well as learned Additional Government Advocate, representing respondent no. 1-State.

9. On behalf of the applicants, it has been submitted that the applicants were discharging official/public duty when the alleged incident took place for which two complaints came to be filed and the applicants had been summoned as accused; mandatory provision of sanction by the competent authority under Section 197 Criminal Procedure Code, 1973 (for short 'CrPC') could not have been ignored by the learned Chief Judicial Magistrate before taking cognizance and summoning the applicants as accused; the information received on Dial-100 through Mr. Anvar Khan, Advocate was recorded in the G.D. dated 21.05.2014. In the G.D. dated 22.05.2014 the extract of incident was also recorded. The police personnel, after receiving information, which got recorded in the G.D., reached to the District Court to control the situation in discharge of their official/public duty.

10. On behalf of the applicants, it has also been submitted that if the police personnel, including the applicants, would not have reached at the Court's compound to control the situation, there would have been much more damage to lives and properties, which might have included public property as well; the impugned proceedings, in absence of sanction by the competent authority for prosecution of the applicants, are non-est and, are liable to be quashed as the same are without jurisdiction.

11. On behalf of the applicants, it has also been submitted that the learned Magistrate has exceeded its jurisdiction to take cognizance and summon the applicants as there was no proper sanction by the competent authority.

12. On behalf of the respondents, it has been submitted that assaulting the lawyers, destroying their properties and taking away their cell-phones etc. cannot be said to be a part of official duty of the applicants. The offence committed by the

applicants cannot be said to be a part of the official duty and, therefore, no sanction was required for prosecuting them for the offences committed by them and the same did not come within the performance of the public/official duty; the police personnel, including the applicants, reached to the Court's compound without prior permission from the District Judge and, therefore, their action was wholly illegal and not in performance of public/official duty. Their acts/crimes are not protected by the provision of Section 197 CrPC. It has been further submitted that the present application has no merit and is liable to be dismissed.

13. I have considered the submissions advanced by the learned counsel for the parties and gone through the record.

14. Section 197 in The Code of Criminal Procedure, 1973 is extracted herein below for convenience:-

"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."

Notification No. 1841 (3)/VI-538-71 dated 30th January, 1975 reads as under:

"Grih Vibhag (Police), Anubhag-9, Notification No. 1841 (3)/VI-538-71, dated January 30, 1975:-

In exercise of the powers conferred by sub-section (3) of Section 197 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974), the Governor is pleased to direct that the provisions of sub-section (2) of the aforesaid section shall apply to all members of the following forces of the State, charged with the maintenance of public order wherever they may be serving, namely :

(i) U.P. Police Force

(ii) U.P. Pradeshik Armed Constabulary"

15. The object of sanction for prosecution under Section 197 CrPC is to protect the public servants discharging official/public functions from harassment by initiation of mala-fide/frivolous/retaliatory criminal proceedings. A Constitution Bench of the Supreme Court in the case of ***Matajog Dobey Vs. H.C. Bhari, AIR 1956 SC 44,*** delineating importance of sanction for prosecution of public servants held as under:-

"15.The minor contentions may be disposed of at the outset. Even if there was anything sound and substantial in the constitutional point about the vires of Section 5(1) of the Act, we declined to go into it as it was not raised before the High Court or in the grounds of the petition for special leave to appeal. Article 14 does not

render Section 197 of the Criminal Procedure Code ultra vires as the discrimination is based upon a rational classification. Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. It was argued that Section 197 of the Criminal Procedure Code vested an absolutely arbitrary power in the Government to grant or withhold sanction at their sweet-will and pleasure, and the legislature did not lay down or even indicate any guiding principles to control the exercise of the discretion. There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for an act done or purporting to be done by the public servant in the discharge of his official duties. No one can take such proceedings without such sanction. If the Government gives sanction against one public servant but declines to do so against another, then the government servant against whom sanction is given may possibly complain of discrimination. But the petitioners who are complainants cannot be heard to say so, for there is no discrimination as against any complainant. It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the government and not in a minor official. Further, we are not now concerned with any such question. We have merely to see whether the court could take cognisance of the case without previous sanction and for this purpose the court has to find out if the act complained against was committed by the accused while acting or purporting to act in the discharge of official duty. Once this is settled, the case proceeds or is thrown out. Whether sanction is to be accorded or not is a matter for the government to consider. The absolute power to accord or withhold sanction conferred on the government is irrelevant and foreign to the duty cast on the court, which is the ascertainment of the true nature of the act."

16. The intention behind protection under Section 197 CrPC is to protect the public servant from being unnecessarily harassed by launching a criminal proceeding against him for an offence allegedly committed while performing official/public duty. If the offence is in respect of an act done or purported to be done in discharge of official/public duty, the public servant has protection under Section 197 CrPC. This protection under Section 197 CrPC has salutary object to prevent harassment of public servants and protect them for mala fide and motivated criminal prosecution. However, if the competent authority finds that the act of commission/omission done by public servant was not in performance of his public duty, he would sanction prosecution of the public servant.

17. In ***1973 (2) SCC 701 (Pukhraj Vs. State of Rajasthan and another)*** the Supreme Court has held that the requirement of sanction cannot be confined to only such an act done or purporting to be done directly in discharge of his public office. This protection would be available in cases where the act complained of is in excess of the duty or under a mistaken belief as to the existence of such duty. Paragraph-2 of P*ukhraj Vs. State of Rajasthan and another case* (supra) is extracted hereinunder:-

"2. The law regarding the circumstances under which sanction under

Section 197 of the Code of Criminal Procedure is necessary is by now well settled as a result of the decisions from Hori Ram Singh's case [AIR 1939 FC 43 : 1939 FCR 159 : 40 Cri LJ 468] to the latest decision of this Court in Bhagwan Prasad Srivastava v. N.P. Misra [(1970) 2 SCC 56 : (1971) 1 SCR 317] . While the law is well settled the difficulty really arises in applying the law to the facts of any particular case. The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in execution of duty. The test appears to be not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the "capacity in which the act is performed", "cloak of office" and "professed exercise of the office" may not always be appropriate to describe or delimit the scope of section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty. In Hori Ram Singh case Sulaiman, J. observed:

"The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction."

In the same case Varadachariar, J. observed: "there must be something in the nature of the act complained of that attaches it to the official character of the person doing it". In affirming this view, the Judicial Committee ofthe Privy Council observed in Gill [AIR 1948 PC 128 : 1948 LR 75 IA 41 : 49 Cri LJ 503] case:

"A public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty.... The test may well be whether the public servant, if challenged, can reasonably claim that, what he does in virtue of his office."

In Matajog Dobey v. H.C. Bhari [AIR 1955 SC 44 : (1955) 2 SCR 925 : 1956 Cri LJ 140] the Court was of the view that the test laid down that it must be established that the act complained of was an official act unduly narrowed down the scope of the protection afforded by Section 197. After referring to the earlier cases the Court summed up the results as follows:

"There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

Applying this test it is difficult to say that the acts complained of i.e. of kicking the complainant and of abusing him, could be said to have been done in the course of performance of the 2nd respondent's duty. At this stage all that we are concerned with is whether on the facts alleged in the complaint it could be said that what the 2nd respondent is alleged to have done could be said to be in purported exercise of his duty. Very clearly it is not. We must make it clear, however, that we express no opinion as to the truth or falsity of the allegations."

18. In ***(2020) 7 SCC 695 (D. Devraja Vs. Owais Sabeer Hussain)*** the Supreme Court, after making survey of the case law on the question of sanction in paragraphs-66, 67, 68, 69, 70 and 71 has held as under:-

66. Sanction of the Government, to prosecute a police officer, for any act related to the discharge of an official duty, is imperative to protect the police officer from facing harassive, retaliatory, revengeful and frivolous proceedings. The requirement of sanction from the Government, to prosecute would give an upright police officer the confidence to discharge his official duties efficiently, without fear of vindictive retaliation by initiation of criminal action, from which he would be protected under Section 197 of the Code of Criminal Procedure, read with Section 170 of the Karnataka Police Act. At the same time, if the policeman has committed a wrong, which constitutes a criminal offence and renders him liable for prosecution, he can be prosecuted with sanction from the appropriate Government.

67. Every offence committed by a police officer does not attract Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act. The protection given under Section 197 of the Criminal Procedure Code read with Section 170 of the Karnataka Police Act has its limitations. The protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and official duty is not merely a cloak for the objectionable act. An offence committed entirely outside the scope of the duty of the police officer, would certainly not require sanction. To cite an example, a policeman assaulting a domestic help or indulging in domestic violence would certainly not be entitled to protection. However, if an act is connected to the discharge of official duty of investigation of a recorded criminal case, the act is certainly under colour of duty, no matter how illegal the act may be.

68. If in doing an official duty a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policeman of the protection of the government sanction for initiation of criminal action against him.

69. The language and tenor of Section 197 of the Code of Criminal Procedure and Section 170 of the Karnataka Police Act makes it absolutely clear that sanction is required not only for acts done in discharge of official duty, it is

also required for an act purported to be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority.

70. To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. In the case of an act of a policeman or any other public servant unconnected with the official duty there can be no question of sanction. However, if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if the policeman has exceeded the scope of his powers and/or acted beyond the four corners of law.

71. If the act alleged in a complaint purported to be filed against the policeman is reasonably connected to discharge of some official duty, cognizance thereof cannot be taken unless requisite sanction of the appropriate Government is obtained under Section 197 of the Code of Criminal Procedure and/or Section 170 of the Karnataka Police Act."

19. It is also well settled that an application under Section 482 CrPC is maintainable to quash the proceedings for want of sanction or if same are frivolous or in abuse of process of the Court. If there is no reasonable relationship with the official/public duty the protection under Section 197 CrPC will not be available to such a public servant. However, for the alleged offence committed by the police personnel, which may be in excess of his official/public duty, without sanction the Court is barred to take cognizance of the offence. The judgment reported in ***(1987) 4 SCC 663 (Bakhshish Singh Brar Vs. Gurmej Kaur and another)*** relied on by Mr. Amrendra Nath Tripathi, learned counsel for the respondent nos. 2 and 3 is not applicable in the facts of the present case inasmuch as in the said case the police officer was accused of causing grievous injuries and death in conducting raid and search and, therefore, the Court held that where the police officer, while acting in purported discharge of official duty exceeded limits **(underline supplied)** of his official capacity, would be a question which can be decided after taking cognizance of offence and, therefore, held that the trial need not be stayed for want of sanction in the said case.

20. In the present case, it is not in dispute that there was unrest and the atmosphere was highly changed. The applicants, along with other police personnel, went to control the situation and maintain peace and order. The police officials also had suffered injuries to control the situation. To control the situation, if they had used force, and as a result thereof, some lawyers had suffered injuries, it cannot be said that the police officers were not acting in discharge of their official duty. The question that the police personnel went there without permission of the District Court has no relevance inasmuch as the duty of the police is to maintain peace, law & order. It appears that there was an emergent situation to deal with by the police and, they could not have waited for the order to be passed by the District Judge to enter the Court premises. On this ground that there was no order passed by the District Judge for the police to enter the Court compound, the action taken by the police officials cannot be said to be not one towards discharge of the official/public duty. Even if the police official had exceeded to some extent their authority in discharge of their official/public duty, then also sanction

would be required for their prosecution. In absence of sanction, the criminal proceedings against the applicants would be non-est and void and the same are liable to be quashed.

21. In view thereof, the application is hereby **allowed.** Consequently, the impugned proceedings are quashed.

(2022) 8 ILRA 1051
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.08.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application U/s 482 No. 6257 of 2019

Arvind Mishra ...Applicant
Versus
C.B.I., Lucknow ...Opposite Party

Counsel for the Applicant:
Pranshu Agrawal, Raghvendra Pandey

Counsel for the Opposite Party:
A.S.G., Anurag Kumar Singh

Civil Law - Indian Evidence Act,1872 - Section 33-impugned order allowed for reading the evidence recorded in a previous proceedings of criminal case-treating it to be relevant-in previous proceeding-evidences got recorded and statement of accused recorded-final order was-prosecution sanction was invalid-Earlier court had jurisdiction-only sanction was invalid-section 33 fully applicable-Accused-Applicant is not prejudiced by impugned order-evidence recorded earlier cannot become non-est merely on the ground that the proceedings were dropped because of improper/invalid sanction under section 19 of the PC Act.

Application dismissed. (E-9)

List of Cases cited:

1. Baij Nath Prasad Tripathi Vs St. of Bhopal & anr., AIR 1957 SC 494

2. Nanjappa Vs St.of Karn., (2015) 14 SCC 186

3. Sudhindra Nath Vs The State, AIR 1953 Cal. 339

4. Lallan Prasad Vs St. of U.P. & Noorul Haq), (2008) 3 ADJ 413

5. Subramanian Swamy Vs Director, Central Bureau of Investigation & anr., (2014) 8 SCC 682

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

1. Heard Mr. Pranshu Agrawal, learned counsel for the accused-applicant, as well as Mr. Anurag Kumar Singh, learned counsel for respondent-Central Bureau of Investigation, and gone through the record.

2. By way of this application under 482 CrPC, the applicant has prayed for quashing of the order dated 15.07.2019 passed by the learned Special Judge, Anti-Corruption, CBI (West), Lucknow by means of which application filed by the CBI under Section 33 of The Indian Evidence Act,1872 (hereinafter referred to as 'Evidence Act') in Criminal Case No.502 of 2016 (State through CBI V. Arvind Mishra) for reading the evidence, recorded in the proceedings of Criminal Case No.04 of 2001, RC No 30(A) of 1999 and, treating it to be relevant for Criminal Case No.502 of 2016, has been allowed.

3. Facts of the case are that the applicant is an accused in Criminal Case No.502 of 2016, under Sections 120-B, 409, 420, 468 and 471 IPC read with Section 7 and Sections 13(2) read with Sections 13(1)(d) of the Prevention of

Corruption Act, 1988 (for short 'Act of 1988'), arising out of RC No.30(A) of 1999, Police Station CBI/ACB, Lucknow.

4. The trial of the said case is pending before the learned Special Judge, Anti-Corruption, CBI, West, Lucknow. The earlier trial, arising out of the RC No.30(A) of 1999, was conducted vide Criminal Case No.04 of 2001. The evidence of all the witnesses got recorded and the statement of the accused-applicant was also recorded under Section 313 CrPC. However, after final argument on behalf of the CBI and the accused-applicant, the learned trial Court, vide judgment and order dated 30.11.2015 held that the prosecution sanction was invalid. Thus, the accused-applicant was discharged. The learned trial Court had, however, observed that the competent authority could grant fresh sanction for prosecution, in accordance with law. The CBI obtained fresh order dated 16.05.2016 for prosecution of the accused-applicant and filed same charge-sheet on 12.08.2016 before the trial Court with fresh sanction order. After charge got framed, the CBI preferred an application under Section 33 of the Evidence Act dated 27.03.2019 for admitting the evidence of the proceedings of Criminal Case No.04 of 2001, arising out of the same RC No.30(A) of 1999, in Criminal Case No.502 of 1916 in the present trial.

5. The learned trial Court has allowed the said application vide the impugned order dated 15.07.2019.

6. Mr. Pranshu Agrawal, learned counsel for the applicant, submits that the invalid sanction for prosecution of a public servant makes the entire trial proceedings null & void; once the trial proceedings of Criminal Case No.04 of 2001 were void ab initio, the evidence of the said trial, which was rendered as null & void, cannot be read in subsequent trial, which takes place after the valid sanction has been accorded for prosecution of the accused-applicant. The learned counsel has placed reliance upon judgment reported in AIR 1957 SC 494 ***(Baij Nath Prasad Tripathi V. State of Bhopal and another)*** to submit that in absence of valid sanction, no Court can take cognizance of the offence in question. In absence of the valid sanction, no Court can be said to be the Court of competent jurisdiction to try those offenes and the trial, in absence of such sanction, is null & void. Learned counsel submits that in ***(2015) 14 SCC 186 (Nanjappa V. State of Karnataka)*** it has been observed that in absence of previous valid sanction, as per requirement under Section 19 of the Prevention of Corruption Act, 1988 (for short 'PC Act'), the trial Court was not competent to take cognizance of the offence. The absence of valid sanction under Section 19 (1) of the PC Act goes to the very root of the prosecution case inasmuch as the said provision prohibits any Court from taking cognizance of any offence punishable under Sections 7, 10, 13 and 15 of the PC Act against the public servant, except with the previous sanction granted by the competent authority. If the trial proceeds, despite the invalidity attached to the sanction order, proceedings would be deemed to be non-est in the eyes of law. However, the second trial for the same offence would not be forbidden upon grant of valid sanction for such prosecution.

7. The learned counsel has also placed reliance upon the judgment reported in ***AIR 1953 Cal. 339 (Sudhindra Nath V. The State)*** to submit that evidence in judicial proceedings, which had taken place without

jurisdiction, cannot be permitted in evidence under Section 33 of the Evidence Act in subsequent trial. The leaned counsel has also placed reliance upon judgment of this Court in ***(2008) 3 ADJ 413 (Lallan Prasad V. State of U.P. and Noorul Haq)*** to submit that in absence of a proper and valid sanction earlier the trial Court was incompetent to take cognizance and record any evidence. It was a defect, which could not be cured by the Court itself, as it was a fundamental legal defect inasmuch as, in absence of proper and legal sanction, the Court was incompetent to take cognizance and record the evidence. The Court could not have taken cognizance for want of proper and legal sanction and, it would not have proceeded further and, after proper sanction, denovo trial has to take place. It has also been submitted that if it is a denovo trial, the evidence that was led in the previous trial, cannot be received in the subsequent denovo trial. The learned counsel, therefore, submits that the impugned order passed by the learned trial Court is unsustainable in the eyes of law. The earlier trial was coram non judice, therefore, he submits that this application may be allowed.

8. On the other hand, Mr. Anurag Kumar Singh, learned counsel for the respondent-CBI, submits that the object and purpose of the PC Act is to consolidate and amend the law relating to prevention of corruption and to make the corruption laws more effective by widening their coverage and strengthening the provisions. The New Act seeks to provide for speedy trial of offences punishable under the PC Act in public interest as the legislature had become aware of the corruption amongst the public servants as held in ***(2014) 8 SCC 682 (Subramanian Swamy V. Director, Central Bureau of Investigation and another).***

9. Learned counsel for the respondent-CBI submits that FIR as RC No. No.30(A) of 1999 was registered against the accused-applicant and since then 23 years have already passed. In the earlier trial, in Case No.04 of 2001, arising out of the same RC, as many as 9 witnesses were examined and the accused-applicant had cross-examined them. However, the trial Court vide its order dated 30.11.2015 had held that the sanction for prosecution was invalid and granted liberty to take a fresh sanction. Even, thereafter more than 7 years have passed, and considering these facts, the learned trial Court has allowed the application under Section 33 of the Evidence Act vide the impugned order. It is further submitted that the accused-applicant is not prejudiced in any manner inasmuch as he had already cross-examined 9 witnesses, produced by the CBI, in detail. It has also been submitted that some of the witnesses had died during the course of trial in Case No. 04 of 2001 and production of the ramaining witnesses would not be possible in the present case. The learned counsel has submitted that the provisions of Section 33 of the Evidence Act are applicable in the present case as the evidence given by the witnesses, during the course of trial of Case No.04 of 2001, are undoubtedly relevant for the purpose of proving the prosecution case in the present case. When the presence of the witnesses cannot be secured without an amount of further delay and expense, the provisions of Section 33 of the Evidence Act can be invoked. Recalling the witnesses, who were cross-examined in Case No. 04 of 2001, particularly, when some of them had died, would not be feasible inasmuch as 23 long

years have gone-by since lodging of the FIR as RC No.30(A) of 1999.

10. The learned counsel for the CBI has submitted that the judgment in *Nanjappa V. State of Karnataka* (supra), relied upon by the learned counsel for the accused-applicant, is not relevant in respect of issue involved in the present case. In the case of *Nanjappa V. State of Karnataka* (supra), it was only held that in absence of valid sanction order, the judicial proceedings would be non-est in the eyes of law. The question of applicability of privisions of Section 33 of the Evidence Act was not an issue in the said case. It has been further submitted that the subsequent trial, after valid sanction is granted, does not amount to double jeopardy under Article 20 of the Constitution of India. The learned counsel for the prosecution-CBI has further submitted that even if it is re-trial, after obtaining valid and proper sanction, the evidence, earlier recorded by the trial Court in Case No.04 of 2001, would not get frustrated. The accused-applicant has failed to prove that how he is prejudiced if the evidence which was recorded earlier is read in the present trial in Case No.502 of 2016.

11. I have considered the submissions advanced on behalf of both the parties.

12. Section-33 of the Evidence Act, on which the fate of the case hinges, reads as under:-

"33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.--Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable: Provided-- that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.--A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

13. The trials of Case Nos.04 of 2001 and 502 of 2016, arise out of one and the same RC No.30(A) of 1999, between the same parties. The accused-applicant had full opportunity to cross-examine the witnesses produced in Case No.04 of 2001 and, in fact, he cross-examined all the witnesses produced by the prosecution. The parties are the same in the first trial, in Case No.04 of 2001, and second trial, in Case No. 502 of 2016. The accused-applicant has himself admitted that some of the witnesses had died and 23 years have passed since lodging of the FIR as RC No.30(A) of 1999. It is not in dispute that the production of the prosecution witnesses would be extremely difficult, rather the same is impossible. Even if some of the witnesses are alive, their presence would be obtained with an amount of further delay and, therefore, in these circumstances, the

learned trial Court has allowed the application of the prosecution under Section 33 of the Evidence Act.

14. Short question, which false for consideration by this Court, is whether the evidence led in the trial of Case No.04 of 2001, which case got dismissed on the finding recorded by the learned trial Court that the sanction order for prosecution of the accused-applicant under Section 19 of the PC Act was improper and invalid, can be taken/read in the subsequent trial in Case No.502 of 2016. The Supreme Court in the case of *Nanjappa V. State of Karnataka* (supra) was dealing with the issue that whether the trial, after proper sanction, would amount to double jeopardy or not. The question regarding applicability of Section 33 of the Evidence Act was not involved in the said case. It cannot be said that the evidence, recorded in trial of Case No.04 of 2001, was not in judicial proceedings. The proceedings of earlier trial and subsequent trial both are judicial proceedings.

15. According to Section 33 of the Evidence Act, the relevancy of certain evidence for proving, in subsequent proceeding, the evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding. So far as the proceedings of the present case are concerned, requirement of Section 33 of the Evidence Act are fully satisfied. It is not case of the accused-applicant that the requirement of the Section 33 of the Evidence Act are not satisfied in the present case. It is not the case of the accused-applicant that the earlier Court, before which the trial of Case No.04 of 2001 was conducted, did not have jurisdiction over the offence, but the accused-applicant was acquitted only on the ground that there was no proper and valid sanction under Section 19 of the PC Act for his prosecution. There is a distinction between complete lack/want of jurisdiction and existence of jurisdiction and its irregular and improper exercise.

16. Considering the aforesaid discussions, I am of the opinion that ingredients of Section 33 of the Evidence Act are fully applicable in the facts of the present case. The accused-applicant is not prejudiced in any manner by the impugned order. The evidence, recorded earlier, was in judicial proceedings, and the evidence cannot become non-est merely on the ground that the proceedings were dropped because of improper/invalid sanction under Section 19 of the PC Act. Therefore, I do not find any error committed by the learned trial Court in allowing the application of the CBI and, thus, the present application fails, which is hereby **dismissed.**

(2022) 8 ILRA 1055
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ A No. 13567 of 2009

Rohitash Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.P.S. Chauhan

Counsel for the Respondents:
C.S.C., Sri Anuj Kumar, Mohit Singh

Civil Law - Appointment - Gram Rojgar Sewak – G.O. dated 23.11.2007 (Parag) - Bar on engagement of relatives as Gram Rozgar Sewak - Any person who is relative of concern Gram Panchayat Pradhan, Up-Pradhan, member or secretary cannot be appointed as a Gram Rozgar Sewak, Relatives means father, mother, grandfather, father-in-law (paternal or maternal relation), son, grandson, son-in-law, sister, daughter-in-law, wife and daughter - *Held* - even though the word 'brother' is not included in the list of relatives but considering that word 'sister' is included, in the list of relatives 'brother' is deemed to be included - In para (छ) of G.O. word used is *tatparya*/ "तात्पर्य", which means 'purport', which is not a synonym of words 'means' or 'include' - Therefore, the list of relatives mentioned in Government Order dated 23.11.2007 cannot be considered to be exhaustive rather it is only enumerative. (Para 7)

Candidature of petitioner for appointment to the post of Gram Rojgar Sewak, was rejected on the ground that his brother was a Member of concerned Gram Panchayat - Held - No Illegality.

Dismissed. (E-5)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. This writ petition is filed seeking following reliefs:

"i. Issue a writ, order or direction in the nature of certiorari to quash the appointment of respondent no. 6 Ajay Kumar on the post of Gram Rojgar Sewak in Gram Panchayat Nagaliya Balloo, Block Pawasa, District Moradabad, made by the respondent no. 5 Gram Panchayat Moradabad on 04.04.2008 approved by the District Administrative Committee respondent no. 2 to 4 (Annexure no. 1 and 4 to the writ petition).

ii. Issue a writ, order or direction in the nature of Mandamus, commanding the respondent no. 1 to 5 to appoint the petitioner on the post of Gram Rojgar Sewak in Gram Panchayat Nagaliya, Block- Pawasa, District Moradabad and permit him for discharging his duty, accordingly."

2. Sri R.P.S. Chauhan, learned counsel for petitioner submits that ground to reject candidature of petitioner for appointment to the post of Gram Rojgar Sewak, was that his brother was a Member of concerned Gram Panchayat at relevant time, who though resigned but his resignation was accepted after the resolution was passed by Gram Panchayat rejecting candidature of petitioner. Learned counsel for petitioner heavily relied on para (छ) of Government Order dated 23.11.2007, which is reproduced as under:

"**छ- सम्बन्धियों के ग्राम रोजगार सेवक के रुप में रखने पर रोक**- कोई भी व्यक्ति, जो संबंधित ग्राम पंचायत के प्रधान, उप प्रधान, सदस्य अथवा सचिव, पंचायत का संबंधी है ग्राम रोजगार सेवक के रुप में नहीं रखा जा सकेगा। **सम्बन्धियों का तात्पर्य पिता, माता, दादा, श्वसुर (पितृ अथवा मातृ संबंधी) पुत्र, पौत्र, दामाद, पुत्र-वधू, बहन, पति, पत्नी तथा पुत्री से है।**"

3. Learned counsel for petitioner further contended that relation of "brother' was not included within the purport of relatives of a candidate in above referred provision, therefore, the basis of resolution of rejecting candidature of petitioner on the ground that his brother was elected member of Gram Panchayat, though his resignation was accepted later on, was erroneous and contrary to above referred provision.

Learned counsel further submits that the selected candidate has not joined the post and no further recruitment process was undertaken thereafter and post is still lying vacant. The respondents have accepted the averments made in para 8 of writ petition in their counter affidavit.

4. Per contra, Sri P.K. Srivastava, learned Additional Chief Standing Counsel appearing for State-Respondents, submits that "brother' is deemed to be included in above referred provision as well as it is a contractual appointment, initially for one year and could be extended from time to time. The averment made in para 8 of the writ petition is specifically denied and not accepted in counter affidavit.

5. Heard learned counsel for parties and perused the material available on record.

6. Learned counsel for petitioner has heavily relied on the relations mentioned in para (छ) of Government order which does not include "brother'. It is not in dispute that brother of petitioner was a Member of Gram Panchayat at the relevant point of time, as his resignation from said elected post was accepted subsequently.

7. In the above referred para (छ) word used is "तात्पर्य", which means "purport', as mentioned in "Vidhi Shabdavali", Universal's Law Dictionary (Reprint 2011), at page no. 746, which is not a synonym of words "means' or "include'. Therefore, the list of relatives mentioned in Government Order dated 23.11.2007 cannot be considered to be exhaustive rather it is only enumerative. In the list of relation "sister' is included. Therefore, an interpretation that "brother' could not be included being not mentioned, would frustrate the very object of such bar, whereby the relatives of elected Pradhan, Up-pradhan, Member etc. of Gram Panchayat were barred to be appointed on the post of Gram Rojgar Sewak. Such interpretation would lead to absurd consequences, that a candidate, who is sister of elected Pradhan, Up-pradhan, Member etc. of Gram Panchayat, could not be selected on the post of Gram Rojgar Sewak but if the brother of same candidate is on similar position, he would be selected. This interpretation cannot be allowed. Therefore, even though the word "brother' is not included in the list of relatives but considering that word "sister' is included, in my view, in the list of relatives "brother' is deemed to be included.

8. The object of para (छ) of Government Order dated 23.11.2007 is, not to appoint relatives of elected Pradhan, Up-pradhan, Member etc. of Gram Panchayat on the post of Gram Rojgar Sewak, therefore, even the brother of a candidate, who is in the said position is also deemed to be included in the aforesaid list of relatives. The list of relatives includes all the blood relations but not the "brother', who is also a blood relation, therefore, it appears to be a bona fide mistake. The word "तात्पर्य' (purport) means to include relations which may likely to influence the procedure of selection for the post of Gram Rojgar Sewak. Therefore, even if the "brother' is not mentioned in the said list of relatives, this Court is of the view that "brother' is deemed to be included, as he is also likely to influence the

selection procedure as a "sister' could influence.

9. Even otherwise, the recruitment in question was started in the year 2008 and this writ petition was filed in the year 2009, which is pending for a long time and meanwhile much water has flown, therefore, now at this stage, no relief, as prayed by petitioner, could be granted.

10. In view of above discussion, I do not find any merit in the argument of learned counsel for petitioner. Therefore, the prayers of the writ petition are rejected.

11. However, considering the submission of petitioner that presently the post of Gram Rojgar Sewak in concerned Gram Panchayat is vacant, as the selected candidate has joined some other service, in such event the respondents are directed to initiate fresh procedure for recruitment in accordance with procedure prescribed and petitioner is at liberty to participate and his candidature shall also be considered on merit.

12. With the aforesaid observations, this writ petition is finally disposed of.

(2022) 8 ILRA 1058
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.08.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ A No. 17257 of 2020

Eklavya Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Anwar Asfaq, Rina Pandey

Counsel for the Respondents:
C.S.C.

Civil Service Regulations, 1956 - Section 351- A - U.P. Government Servant (Discipline and Appeal) Rules, 1999 - Regulation 351- A empowers the State to recover from the pension, but, it has to be categorically recorded / established that the act of the delinquent employee has caused pecuniary loss to the State (Para 11)

Petitioner was awarded punishment of deduction of 5% from his pension for period of three years - impugned order assailed on the ground that such punishment does not find mention in the U.P. Government Servant (Discipline and Appeal) Rules, 1999 or under Section 351- A of the Civil Service Regulations - Held - In the present case, there was no charge against the petitioner to have caused pecuniary loss to the State - It was also noticed that no date, time and place was fixed by the inquiry officer - deduction made from the pension of the petitioner is liable to be refunded, alongwith interest at the rate of 6% from the date of deduction till the amount is refunded to the petitioner.(Para 12, 16)

Allowed. (E-5)

List of Cases cited:

1. Radhey Kant Khare Vs U.P. Co-operative Sugar Mill, 2003 (1) AWC 704

2. Yog Narain Dubey Vs Managing Director & ors.; Writ Petition No. 1756 (S/B) of 2006 dt 14.07.2011

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

1. Heard Sri Anwar Ashfaq, learned counsel for the petitioner as well as learned Standing Counsel for the respondents.

2. By means of present writ petition the petitioner has assailed the order of

punishment dated 05.06.2020, passed by the Secretary (PWD), Government of U.P., Lucknow, holding the petitioner guilty and awarded punishment of deduction of 5% from petitioner's pension for period of three years.

3. It has been submitted by learned counsel for the petitioner that the petitioner was appointed on the post of Assistant Engineer in the year 1992 and was promoted to the post of Executive Engineer on 20.11.2005 and since then he worked on the said post till his superannuation on 30.09.2018. It is submitted that disciplinary proceedings were initiated against the petitioner by means of office memorandum dated 26.03.2018 and Chief Engineer, PWD was appointed as inquiry officer. The charge sheet was given to the petitioner on 26.05.2018, wherein the charge against the petitioner was that when he was posed at General Manager, U.P.R.N.N. he gave charge of work agent to daily wager Sri Ram Shanker as per requirement of the work, on the recommendation of the Assistant Engineer. The second charge was with regard to appointment of Daily Wagers Sri Rajesh Kumar and Brijesh Pal Singh (Mate), who were also given charge of work agent. According to charge sheet, said promotions were illegal and de-hors the rules, consequently the petitioner was asked to submit response to the said charges.

4. It is next submitted by learned counsel for the petitioner prior to aforesaid promotions, the petitioner had sought certain documents from the respondents by means of letter dated 05.05.2018. It is submitted that none of the documents were supplied to him and hence in absence of aforesaid material/documents, the petitioner submitted his reply to the charge sheet on 17.10.2018. The petitioner in his reply had denied all the charges and stated that he had infact not promoted the daily wagers to the post of work agent but only said work of the post of "work agent" was assigned to them. He further stated that such an action was neither illegal nor contrary to rules inasmuch as, no rules for promotion had been framed and consequently orders passed by the petitioner did not amount to promotion orders and had further stated that in any view of the matter in case the orders passed by the petitioner were illegal, they could very well have been set aside by the higher authorities.

5. It is further submitted that subsequent to submission of reply by the petitioner inquiry was concluded and report was submitted to the disciplinary authority. Show cause notice was given to the petitioner on 12.07.2019, to submit his reply to the inquiry report. The petitioner submitted his reply on 13.08.2019, again denying the charges. He replied that he had not passed any order for promotion with regard to said daily wagers. He had further stated that said employees are Class IV employees which is minimum requirement for being eligible to hold post of work agent.

6. Considering the response/reply filed by the petitioner, the impugned order of punishment has been passed, considering the fact that the petitioner superannuated from service on 30.09.2018, and the order of punishment was passed after three years of his superannuation.

7. Learned counsel for the petitioner has assailed the impugned order on the ground that punishment passed by the respondents, could not have been passed as

the same does not even find mention in the U.P. Government Servant (Discipline and Appeal) Rules, 1999 or under Section 351-A of the Civil Service Regulations, which is applicable to the employees of the State Government. He further submits that no date, time and place was fixed for the said inquiry which has disabled the petitioner from defending himself and said inquiry proceedings in absence of fixing any date, time and place, the petitioner could not submit any evidence and even the inquiry proceedings would stand vitiated inasmuch as evidence on the basis of which the punishment has been awarded was not submitted to the inquiry officer by any of the presenting officer on behalf of the department.

8. Learned Standing Counsel on the other hand has opposed the writ petition. He submits that inquiry proceedings were proceeded in accordance with the rules and the petitioner was afforded adequate opportunity of hearing in the said inquiry proceedings. He submits that charge sheet was given to the petitioner to which he has submitted his reply and even after conclusion of inquiry proceedings a show cause notice was given and a copy of the inquiry report was provided to him and hence the impugned order has been passed.

9. Heard learned counsel for the parties and perused the record.

10. It has been submitted by learned counsel for the petitioner that punishment under Rule 351- A which empowers the respondents to pass order to recover from the pension of the petitioner can be passed only in cases where it is established that some financial loss has been caused to the State. Provision of Regulation 351 - A of the Regulations is quoted herein below :

*"**351-A** - The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave mis-conduct, or to have caused pecuniary loss to the Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement;*

Provided that -

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment -

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings, and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a), and

(c) the Public Service Commission, U.P. shall be consulted before final orders are passed.

Explanation - For the purposes of this article -

(a) departmental proceedings shall be deemed to have been instituted

when the charges framed against the pensioner are issued to him, or, if the officer has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted;

(i) in the case of criminal proceedings, on the date on which a complaint is made, or a charge-sheet is submitted, to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court."

11. From bare perusal of Regulation 351-A, it is clear that though the State has been empowered to recover from the pension, but, it has to be categorically recorded that the act of the delinquent employee has caused pecuniary loss to the State. It is mandatory that such finding is recorded, pursuant to which the respondent could have validly pass the order of recovery from the pension of the petitioner.

12. In the present case, neither there is any charge levelled against the petitioner to have caused pecuniary loss to the State nor there is any evidence on record of promoting employees to the post of work agent, hence order of recovery from the pension of the petitioner, could not have been passed.

13. In the light of above, this Court is of view that punishment order is clearly vitiated and impugned order is illegal and arbitrary and the petitioner already stands retired on 30.09.2018, which is clearly two years prior to the passing of impugned order. It is further noticed that no date, time and place was fixed by the inquiry officer which evident from the inquiry report. In this regard Hon'ble Supreme Court in catena of judgments has held that the inquiry proceedings is not a casual exercise but have to be conducted in accordance with law and appropriate opportunity of hearing has to be given to the delinquent employee to place all the material in his defence. Date, time and place is fixed for affording opportunity to the delinquent employee to place material in his defence before the inquiry officer. By not fixing date, time and place, the inquiry officer has committing gross illegality which vitiates the entire disciplinary proceedings.

14. This Court in the case of **Radhey Kant Khare Vs. U.P. Co-operative Sugar Mill, 2003 (1) AWC 704,** in para 7, has observed as under :

"7. In a Division Bench of this Court in Subhash Chandra Sharma V. U.P. Co-operative Spinning Mills, 1999 (4) AWC 3227, in which one of us (Hon'ble M. Katju, J.) was a member, this law has been laid down. The law is as follows :

"After a charge-sheet is given to the employee, an oral enquiry is a must, whether the employee requests for it or not. Hence, a notice should be issued to him indicating him the date, time and place of the enqiury. On that date the oral and documentary evidence against the employee should first be led in his presence. ....."

15. Division Bench of this Court in **Writ Petition No. 1756 (S/B) of 2006 - Yog Narain Dubey Vs. Managing Director and Others (decided on 14.07.2011)**, has held as under :-

"Statutory procedure is prescribed for holding the enquiry in departmental matters. Principle of natural justice have to be followed even if there are

no rules prescribing any such procedure. The enquiry starts after issuance of charge sheet in which charges are mentioned which should be clear and unambiguous. If the petitioner requires the copies of any document and makes an application in that behalf, the Enquiry Officer shall consider the application of the petitioner for supply of documents and after being satisfied about the relevancy of such documents, he shall supply the copies of such documents to the petitioner and in case it is not practically possible for any valid reason to supply the copy of any such document, he may allow inspection of such document to the petitioner by fixing date, time and place for such inspection. The enquiry officer shall ensure free access to the petitioner to such documents which are to be inspected by the petitioner. After gathering such information, reply is submitted to the charge sheet . On receipt of reply of the charge sheet the Enquiry Officer has to fix date, time and place for holding enquiry, for which formally the Department is to give one opportunity first, to lead evidence wherein the delinquent is also permitted to remain present, who is given opportunity to cross-examine the witnesses, if any examined and also to rebut the documentary evidence. Thereafter a date is to be fixed by the Enquiry Officer to allow adducing of evidence by the delinquent, if he so desires, which may be oral as well as documentary. It is thereafter that the Enquiry Officer after hearing the parties records his finding on the basis of the evidence which is collected during the enquiry and enquiry report is submitted by the Enquiry Officer to the Disciplinary Authority. Disciplinary Authority has to see whether procedure in holding enquiry has been followed or not and if not then the matter need be remitted to the Enquiry Officer to rectify the mistake but during the enquiry if he finds that all required procedure has been followed and enquiry has been held following the principles of natural justice, then he would see whether charge stands proved on the basis of material collected or brought before the enquiry officer . If the disciplinary authority is satisfied with the report of the enquiry officer, he will pass final orders after affording opportunity to the delinquent."

16. In the light of above, this Court is of the opinion that impugned order dated 26.05.2018, is illegal and arbitrary and is accordingly quashed. The amount of deduction made from the pension of the petitioner is liable to be refunded within six weeks from the date of production of certified copy of this order before the competent authority, alongwith interest at the rate of 6% from the date of deduction till the amount is refunded to the petitioner.

17. The writ petition is **allowed.**

(2022) 8 ILRA 1062
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.07.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ A No. 29828 of 2021

Shri Prakash Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amrendra Nath Tripathi, Ashutosh Shahi

Counsel for the Respondents:
C.S.C., A.S.G., Alok Kumar Tripathi

Civil Law - Disciplinary Proceedings - Issue - whether a person while in exercise of his discharge of official functions can be subjected to disciplinary proceedings with regard to any decision taken by him - Misconduct - mere error of judgment, carelessness or negligence in performance of the duty not amounts to misconduct - merely because a wrong order has been passed does not warrant initiation of disciplinary proceedings - any order passed by judicial or quasi judicial authority may be incorrect or otherwise, but merely on the basis of passing of incorrect order, disciplinary proceedings cannot be initiated. (Para 18, 21)

Petitioner, a Deputy Collector, allowed an application u/s 33/39 of the Land Revenue Act - In revision Commissioner, set aside the order & held that petitioner did not had any jurisdiction to exercise power u/s 33/39 for converting non ZA land to ZA land & directed for conducting inquiry - minor punishment of 'censure' was imposed upon the petitioner - *Held* - inquiry proceedings could not be initiated against the petitioner considering the fact that he passed order u/s 33/39 of the Land Revenue Act in exercise of his quasi judicial functions - land was non ZA land and its conversion to ZA land may not be permissible under the jurisdiction held by the petitioner, but this fact in itself cannot be the sole basis for initiation of disciplinary proceedings against the petitioner - No material to show that there was any extraneous consideration in passing the order (Para 22)

Allowed. (E-5)

List of Cases cited :

1. Abhay Jain Vs High Court of Judicature of Rajasthan & anr., 2022 SCC OnLine Supreme Court 319

2. Zunjarrao Bhikaji Nagarkar Vs U.O.I. & ors., (1999) 7 SCC 409

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

1. Heard Sri S.K. Kalia, learned Senior Advocate assisted by Sri Ashutosh Sahai, learned counsel for the petitioner as well as learned Standing Counsel for the respondent no. 1 and 2 and Sri Alok Kumar Tripathi, learned counsel for the respondent no. 4.

2. Learned counsel for the petitioner at the very outset has submitted that he does not want to press prayer no. 1 and accordingly, this Court proceeds to consider prayer no. 2 of the writ petition.

3. The sole question for consideration of this Court is as to whether a person while in exercise of his discharge of official functions can be subjected to disciplinary proceedings with regard to any decision taken by him, if so under what circumstances?

4. It has been submitted by learned counsel for the petitioner that the petitioner was initially appointed on the post of Deputy Collector by the Union Public Service Commission in the year 1999 and was posted at District - Mau, Tehsil Sadar. When an application was moved before him under Section 33/39 of the Land Revenue Act, seeking conversion of land from the nature of non ZA to ZA land.

5. The petitioner in exercise of his jurisdiction as Deputy Collector heard the said matter, invited objections as well as report from the Tehsildar and after considering entire material available on record, by means of order dated 17.11.2009, allowed the said application converting the said land into ZA land.

6. It has been submitted by learned counsel for the petitioner that while deciding the said application, it was mentioned that certain fraudulent entires have been made and corrected. The said

land which was infact ZA land was recorded non ZA land and only to rectify and correct the revenue records, the petitioner was called upon to exercise power under Section 33/39 of Land Revenue Act.

7. Order dated 17.11.2009, passed by the petitioner was subjected to revision before the Commissioner, who allowed the said revision and set aside the order passed by the petitioner. While allowing the said revision the Commissioner held that petitioner did not had any jurisdiction to exercise power under Section 33/39 of the Land Revenue Act for converting non ZA land to ZA land. While setting aside the order passed by the petitioner, the Commissioner also recorded that copy of his judgment be placed before the Chief Secretary, Appointments for conducting an inquiry in the said matter. It is on the basis of direction issued by the Additional Commissioner that disciplinary proceedings were initiated against the petitioner and charge sheet was issued to him on 05.02.2018. The charge sheet was issued by the Commissioner, Azamgarh Division, Azamgarh who was appointed inquiry officer.

8. The inquiry proceedings concluded and inquiry report was submitted on 19.06.2018, exonerating the petitioner of all the charges. Finding was returned in the inquiry report that there was no malafide intention neither it can be alleged nor can be proved for which the petitioner in exercise of his judicial functions could be charged.

9. On the inquiry report dated 19.06.2018, opinion was sought from Board of Revenue, in pursuance to which Board of Revenue also gave its opinion on 22.03.2019, for dropping the proceedings against the petitioner.

10. In the aforesaid backdrop of the facts, where the inquiry officer has also recorded finding in favour of the petitioner and even Board of Revenue had gave finding that there is no infirmity with the order passed by the petitioner, the matter was considered by the State Government and surprisingly by means of order dated 31.07.2019, the inquiry officer was asked to give his report specifically stating that on what facts guilt of the petitioner could not be proved during the said inquiry.

11. Learned counsel for the petitioner has submitted that said order on the face of it speaks of malafide on the part of respondents as the said order on the face of it is without jurisdiction and once inquiry officer has passed an order he becomes functus officio and only in case of direction for re-inquiry, he cannot have any jurisdiction in his capacity as inquiry officer, to submit a fresh inquiry report. Such a exercise of jurisdiction is alien to the service jurisprudence.

12. In view of the order of the State Government, the inquiry officer again submitted his report to the State Government, where he slightly deferred from his earlier opinion and now he stated that order passed by the petitioner was erroneous. Even in the second inquiry report there is no allegation that the petitioner has either misconducted himself or there was any extraneous consideration for deciding the said application. In the said report it was also recorded that all aspects of the matter which have been considered by the inquiry officer there are various judgments of Hon'ble Supreme Court and High Court and therefore, it was stated that

legal opinion in this regard be taken by the Law Department of the State Government.

13. In pursuance to the second inquiry report, opportunity of hearing was given to the petitioner and consequently, impugned order dated 02.12.2021, has been passed imposing minor punishment of 'censure' to the petitioner.

14. It has been informed by learned counsel for the petitioner that letter of the State Government dated 31.07.2019, requiring the inquiry officer to submit his opinion, was subjected to challenge before this Court by filing Writ Petition No. 2091 of 2021, which was disposed of by means of order dated 18.02.2021, with direction to the respondents to conclude disciplinary proceedings within two months.

15. Learned counsel for the petitioner has assailed the impugned order on the ground that firstly that the petitioner was discharging quasi judicial functions and he had decided the application which was filed before him under Section 33/39 of the Land Revenue Act for converting non ZA land to ZA land.

16. The petitioner had followed due process of law and he infact invited objections and also report from the Tehsildar. It is only after perusal of entire material available on record that he has proceeded to pass order dated 17.11.2009. While passing the said order the petitioner has also relied upon the judgment of Full Bench in the case of State of U.P. Vs. Satish Chandra Sharma, 2008 LRT 71.

17. It is also submitted by learned counsel for the petitioner that any order passed by judicial or quasi judicial authority may be incorrect or otherwise, but merely on the basis of passing of incorrect order, disciplinary proceedings cannot be initiated against the petitioner.

18. In the entire material either in the inquiry report, charge sheet, second inquiry report, there is not even an iota of allegation that petitioner's misconducted himself or there was any overt act or omission, which may entail initiation of disciplinary proceedings. It is submitted that law in this regard has been settled in series of judgments of Apex Court and most of them have been considered in the recent judgment of Apex Court in the case of **Abhay Jain Vs. High Court of Judicature of Rajasthan and Another, 2022 SCC OnLine Supreme Court 319,** wherein the Court has held as under :

"71. We concur with the view of this Court in the aforesaid case that merely because a wrong order has been passed by the appellant or the action taken by him could have been different, this does not warrant initiation of disciplinary proceedings against the judicial officer.

.....

74. In light of the above judicial pronouncements, we hold that the appellant may have been guilty of negligence in the sense that he did not carefully go through the case file and did not take notice of the order of the High Court which was on his file. This negligence cannot be treated to be misconduct. ....."

19. Heard learned counsel for the parties and perused the record.

20. From entire proceedings it cannot be seen from any material that there was any extraneous consideration while passing the said order by the petitioner. The petitioner had exercised his jurisdiction

under Section 33/39 of the Land Revenue Act, it may be a case that appear to decide the said application specifically in view of the fact that the said land was non ZA land and its conversion to ZA land may not be permissible under the jurisdiction held by the petitioner, but this fact in itself cannot be the sole basis for initiation of disciplinary proceedings against the petitioner.

21. Hon'ble Apex Court in the case of **Zunjarrao Bhikaji Nagarkar Vs. Union of India and Others, (1999) 7 SCC 409, in para 29** has observed as under :

"29. In State of Punjab v. Ex-Constable Ram Singh this Court referred to the definition of "misconduct" as given in Black's Law Dictionary and Aiyar's Law Lexicon and said as under :

"6. Thus it could be seen that the work 'misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behavious, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the terms occurs, regard being had to the scope of the stature and the public purpose it seeks to serve.""

22. Considering various judgments of the Apex Court as stated above, present case is squarely covered by the aforesaid judgment of Apex Court and hence inquiry proceedings could not have been initiated against the petitioner considering the fact that he passed the said order in exercise of his quasi judicial functions.

23. In the light of above observations, the order of punishment sated 02.12.2021 is clearly illegal and arbitrary and is hereby quashed.

24. Writ petition stands **allowed.**

(2022) 8 ILRA 1066
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.07.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ B No. 247 of 2022

Udayvir & Ors. ...Petitioners
Versus
Board of Revenue, U.P. at Prayagraj & Ors. ...Respondents

Counsel for the Petitioners:
Dharm Raj Mishra, Ratnesh Singh

Counsel for the Respondents:
C.S.C., Ashok Kumar Singh, Pankaj Gupta, Rahul Kumar Singh, Vijai Bahadur Verma

Civil Law - Uttar Pradesh Zamindari Abolition and Reforms Act, 1950 - Issue - whether after dismissal of the appeal u/s 331 (3) of of the Act, 1950, whether one should file a second appeal u/s 331(4) of Act, 1950 or a revision before the Board of Revenue u/s 333 of the Act, 1950 ? - Held - where an appeal has been preferred u/s 331 (3) of the Act, 1950, the forum of filing of a revision u/s 333 of the Act, 1950 would not be available - statue, in its wisdom has specifically mandated u/s 331 (4) of the Act, 1950 for filing of second

appeal by use of the word "shall" - S. 333 is to be availed only in those circumstances where against an order or judgment rendered by the subordinate Court either no appeal lies or where an appeal lies but it has not been preferred - once an appeal has been preferred u/s 331 (3) then in such a case the revisional power could not be invoked by the Board either at the instance of a party or by the Board itself suo moto - intention of legislature cannot be to make two forums available to a litigant at his own choice merely because s. 333 of the Act, 1950 has only used the word "Appeal" and not second appeal (Para 21, 23, 24)

Petitioner filed suit u/s 229-B, which was dismissed - petitioners filed a first appeal under the provisions of Section 331 (3) of the Act, 1950 – Appeal also dismissed - petitioners filed a Revision u/s 333 of the Act, 1950 - Held - Petitioners wrongly filed revision & the Board patently erred in entertaining the same - Petitioners were permitted to file a second appeal (Para 27, 28)

Dismissed. (E-5)

List of Cases cited:-

1. Lachman Das Vs Santosh Singh 1996 All Civil Journal 324

2. Mirza Kishwar Beg Vs Board of Revenue ors. RD (1975) 373

3. Prema Devi Vs Mathura Dutt Pandey AIROnline 2019 Utr 564

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Mohd. Arif Khan, learned Senior Advocate assisted by Sri Dharm Raj Mishra, learned counsel appearing for the petitioner, Sri Abhinav Narain Trivedi, learned Chief Standing counsel assisted by Sri Hemant Kumar Pandey, learned counsel appearing for the State-respondents, Sri Vijay Bahadur Verma, learned counsel appearing for the respondents no. 4 to 12 and Sri Pankaj Gupta, learned counsel appearing for the respondent no. 14.

2. Instant petition has been filed praying for the following main reliefs:-

(i) Issue a writ, order or direction in the nature of certiorari quashing the judgment and order dated 21.04.2022, contained in Annexure No. 1, passed by the Opposite Party No. 1, judgment and order dated 05.07.2018/31.08.2020, contained in Annexure No. 2, passed by the Opposite Party no. 2 and judgment and order dated 25.05.1988, contained in Annexure No. 3, passed by the Opposite Party No. 3 with all consequential benefits.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the Opposite Parties to restrain the private respondents from creating any third party right or changing the nature of land in dispute without reference to the judgments and orders, contained in Annexure Nos. 1 to 3 impugned in the petition, with all consequential benefits and allow the relief claimed in the suit in favour of the petitioner.

3. The case set forth by the petitioner is that a suit under Section 229-B of the Uttar Pradesh Zamindari Abolition and Reforms Act, 1950 (hereinafter referred to as "Act, 1950") was filed by the father of the petitioners no. 1 & 2 and father-in-law of the petitioner no. 3. The said suit was dismissed vide order dated 25.05.1988. Being aggrieved, the petitioners filed a first appeal under the provisions of Section 331 (3) of the Act, 1950 which was dismissed vide order dated 05.07.2018 as corrected on

31.08.2020. Still being aggrieved, the petitioners filed a Revision No. 119 of 2021 under Section 333 of the Act, 1950 which has been dismissed vide impugned order dated 21.04.2022, a copy of which is annexure 1 to the writ petition and hence the writ petition.

4. A preliminary objection was raised by Sri Hemant Kumar Pandey, learned Standing counsel as well as Sri Vijay Bahadur Verma, learned counsel appearing for the respondents no. 4 to 12 that taking into consideration the specific provision of Section 331 (4) of the Act, 1950, the petitioners ought to have filed a second appeal and the revision itself was not maintainable under Section 333 of the Act, 1950. The same was opposed by the learned Senior Advocate by contending that there is no specific bar under Section 333 of the Act, 1950 per which the revision would not be maintainable.

5. Considering the same, this Court vide order dated 05.07.2022 had passed an order framing a question which for the sake of convenience is reproduced below:-

"Supplementary affidavit filed today be kept on record.

Heard Mohd. Arif Khan, learned Senior Advocate assisted by Mohd. Aslam and Sri Dharam Raj Mishra, learned counsel appearing for the petitioners, Sri Hemant Kumar Pandey, learned counsel appearing for the State, Sri Pankaj Gupta, learned counsel appearing for the Gaon Sabha and Sri Vijay Bahadur Verma, Advocate who files his Vakalatnama on behalf of respondents no. 5 to 12.

The question which needs to be gone into at the first instance is as to whether after dismissal of the appeal by the Commissioner vide order dated 05.07.2018/31.08.2020 which was filed by the petitioners under the provisions of Section 331 (3) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as "Act, 1950"), the petitioner correctly filed a revision before the Board of Revenue under the provisions of Section 333 of the Act, 1950 or he should have filed a second appeal under the provisions of Act, 1950.

All the learned counsels would come prepared with this question tomorrow i.e 06.07.2022.

Put up this case tomorrow i.e 06.07.2022 for further hearing at 0215 P.M.

Till tomorrow, status quo as of today shall be maintained by all the parties pertaining to land in dispute."

6. All the learned counsels have been heard on the question as to whether the revision filed by the petitioners was correctly filed under the provisions of Section 333 of the Act, 1950 or whether the petitioners ought to have filed a second appeal under the provisions of Section 331 (4) of the Act, 1950.

7. Learned Senior Advocate while supporting the filing of the revision petition by the petitioners under Section 333 of the Act, 1950 argues that (a) it is the choice of the petitioners regarding the forum i.e to file a second appeal under the provisions of Section 331 (4) of the Act, 1950 or to file a revision under Section 333 of the Act, 1950. He contends that as both the forums are available to the petitioners, consequently they chose to avail the remedy of revision under Section 333 of the Act, 1950 and as such, there is no infirmity in having chosen to file a revision & (b) bare reading of Section 333 of the Act, 1950 would indicate that there is no

bar in filing of a revision even after the appeal has been decided inasmuch as and once the legislature in its wisdom has not used a word "Second Appeal" under Section 333 of the Act, 1950, as such the said provision cannot be read in a restrictive manner so as to restrain or restrict filing of the revision under the provisions of Section 333 of the Act, 1950 after having filed an appeal under Section 331 (3) of the Act, 1950.

8. In support of his arguments, learned Senior Advocate has placed reliance on a judgment of the Apex Court in the case of **Lachman Das Vs. Santosh Singh** reported in **1996 All Civil Journal 324**. No other ground has been urged by the learned Senior Advocate.

9. On the other hand, Sri Vijay Bahadur Verma, learned counsel appearing for the respondents no. 4 to 12 has placed reliance on a judgment of this Court in the case of **Mirza Kishwar Beg Vs. Board of Revenue and Ors** reported in **RD (1975) 373** to contend that this Court has categorically held that once an appeal has been filed then the revisional jurisdiction cannot be invoked either at the instance of a party or by the Board itself suo moto.

10. Elaborating the same, Sri Verma argues that Section 333 of the Act, 1950 itself stipulates that the power of revision can be invoked either where no appeal lies or where an appeal lies but has not been preferred meaning thereby that the power of revision under Section 333 of the Act, 1950 could only be invoked by the petitioners in case they had not filed an appeal under the provisions of Section 331 (3) of the Act, 1950 and once the petitioners had filed an appeal, they could not subsequent thereto be permitted to invoke the power of revision of the Board under Section 333 of the Act, 1950.

11. Sri Hemant Kumar Pandey, learned Standing counsel has adopted the arguments of Sri Vijay Bahadur Verma, Advocate and further argues that once the petitioners having themselves chosen to invoke Section 331 (3) of the Act, 1950 while challenging the order passed under Section 229-B of the Act, 1950, consequently in case of being aggrieved by the order passed in the first appeal dated 05.07.2018/31.08.2020, the only remedy available to them was to have filed the second appeal under the provisions of Section 331 (4) of the Act, 1950. He argues that keeping in view the provisions of Section 333 of the Act, 1950 and the petitioners having themselves filed a first appeal as such, the power of revision was not available to them and they could only have filed a second appeal.

12. Heard learned counsel appearing for the contesting parties and perused the records on the question which has been framed by this Court vide order dated 05.07.2022.

13. From a perusal of the records it is apparent that against the dismissal of the suit filed under Section 229-B of the Act, 1950, an appeal was filed under Section 331 (3) of the Act, 1950 which was dismissed vide order dated 05.07.2018 as corrected on 31.08.2020. The petitioners thereafter filed a revision under Section 333 of the Act, 1950 before the Board of Revenue which has been dismissed vide impugned order dated 21.04.2022 against which the instant petition has been filed.

14. The question is as to whether the petitioners had a remedy of filing of a

revision under Section 333 of the Act, 1950 more particularly when their first appeal had already been dismissed and it was the petitioners who were aggrieved against the order of the dismissal of the first appeal.

15. For this purpose, the Court would have to consider the provisions of Section 331 read with Schedule II & Section 333 of the Act, 1950 which for the sake of convenience are reproduced below:-

*"**331. Cognizance of suits, etc. under this Act.** - (1) Except as provided by or under this Act no court other than a court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application, or proceedings mentioned in Column 3 thereof [,] [or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application :]*

[Provided that where a declaration has been made under Section 143 in respect or any holding or part thereof, the provisions of Schedule II insofar as they relate to suits, applications or proceedings under Chapter VIII shall not apply to such holding or part thereof.]

[Explanation. - If the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court would have granted.]

[(1-A) Notwithstanding anything in sub-section (i), an objection, that a court mentioned in Column 4 of Schedule II, or, as the case may be, a civil court, which had no jurisdiction with respect to the suit, application or, proceeding, exercised jurisdiction with respect thereto shall not be entertained by any appellate or revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.]

(2) Except as hereinafter provided no appeal shall lie from an order or [decree] passed under any of the proceedings mentioned in Column 3 of the Schedule aforesaid:

[(3) An appeal shall lie from any decree or from an order passed under Section 47 or an order of the nature mentioned in Section 104 of the Code of Civil Procedure, 1908 (V of 1908) or in Order 43, Rule 1 of the First Schedule to that Code passed by a court mentioned in Column No. 4 of Schedule II to this Act in proceedings mentioned in Column 3 thereof to the court or authority mentioned in Column No. 5 thereof.

(4) A second appeal shall lie on any of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (V of 1908) from the final order or decree, passed in an appeal under sub- section (3), to the authority, if any, mentioned against it in Column 6 of the Schedule aforesaid.]

***333. Power to call for cases** (1) The Board or the Commissioner or the Additional Commissioner may call for the record of any suit or proceeding [other than proceeding under sub-section (4-A) of Section 198] decided by any court subordinate to him in which no appeal lies or where an appeal lies but has not been preferred, for the purpose of satisfying himself as to the legality or propriety of any order passed in such suit or proceeding and if such subordinate court appears to have;*

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested, or

(c) acted in the exercise of jurisdiction illegally or with material irregularity;

the Board or the Commissioner or the Additional Commissioner, as the case may be, may pass such order in the case as he thinks fit.

(2) If an application under this section has been moved by any person either to the Board or to the Commissioner or to the Additional Commissioner, no further application by the same person shall be entertained by any other of them.]

16. A perusal of Section 331 of the Act, 1950 would indicate that except as provided under the Act, 1950 no Court other than a Court mentioned in Column 4 of Schedule II shall take cognizance of any suit, application or proceedings mentioned in Column 3 thereof or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any suit or application.

17. Sub Section (3) of Section 331 of the Act, 1950 provides that an appeal shall lie from any decree or from an order passed under Section 47 or an order of the nature mentioned in Section 104 of the Code of Civil Procedure or in Order 43, Rule 1 of the First Schedule to that Code passed by a Court mentioned in Column 4 of Schedule II to the Act in proceedings mentioned in Column 3 thereof.

18. Sub Section (4) of Section 331 of the Act, 331 provides that a second appeal shall lie on any of the grounds mentioned in Section 100 of the Code of Civil Procedure, 1908 from the final order or decree passed in an appeal under Sub Section (3) to the authority, if any, mentioned against it in Column 6 of the Schedule.

19. Schedule II, so far as it pertains to Section 331 of the Act, 1950 specifically provides at Serial No. 34 that under Section 229, 229-B and 229-C i.e suit for declaration of rights, the Court of original jurisdiction would be Assistant Collector Ist Class while a first appeal would lie to the Commissioner and a second appeal shall lie to the Board of Revenue. Thus, when Section 331 (4) is read along with Schedule II it is apparent that a second appeal against an order passed in first appeal shall lie to the Board of Revenue.

20. Section 333 of the Act, 1950, so far as it is relevant for the facts of the instant case, provides that the Board may call for the record of any suit or proceedings decided by any Court subordinate to him in which no appeal lies or where an appeal lies but has not been preferred. Thus, it is apparent that a revision under Section 333 of the Act, 1950 would be available only in those cases either in which no appeal lies or though an appeal lies but had not been preferred.

21. In the instant case, it is admitted that an appeal against the order passed under Section 229-B of the Act, 1950 was filed by the petitioners under Section 331 (3) of the Act, 1950 and thereafter they have filed a revision under Section 333 of the Act, 1950. However, keeping in view the specific provisions of Section 331 (4) of the Act, 1950 which uses the word "shall", it was mandatory for the petitioners, if aggrieved against the order passed under Section 331 (3) of the Act, 1950, to have filed a second appeal. It is settled proposition of law that an appeal is creation

of statue. Once the statue, in its wisdom has specifically mandated under Section 331 (4) of the Act, 1950 for filing of second appeal by use of the word "shall", as such, in case the petitioners were aggrieved against the order passed under Section 331 (3) of the Act, 1950 they could only have filed a second appeal and no revision under Section 333 of the Act, 1950 was maintainable. This would also be clear from the words used in Section 333 of the Act, 1950 wherein it has been provided that the Board may call for the records of any suit or proceedings decided by any Court subordinate in which either no appeal lies or where an appeal lies but has not been preferred. Thus, the revision under Section 333 of the Act, 1950 can only be filed either where the petitioners had no remedy of filing an appeal (which is not the case) or where they had not filed the appeal which is also not the case inasmuch as the petitioner admittedly filed an appeal under Section 331 (3) of the Act, 1950. Thus, the revision under Section 333 of the Act, 1950 was clearly not maintainable and was wrongly preferred by the petitioners.

22. The arguments of learned Senior Advocate that as Section 333 of the Act, 1950 does not quantify or define "Appeal" as first appeal or and second appeal, as such he would be empowered to file a revision under Section 333 of the Act, 1950 as per litigants choice of choosing the forum, is clearly misconceived inasmuch as there cannot be two forums open to a litigant at his choice to either file a second appeal or a revision for in case the said argument of the learned Senior Advocate is accepted then Section 333 of the Act, 1950 would be treated as an alternative forum to Section 331 (4) of the Act, 1950, which would be absolutely a wrong interpretion of law. The reason is that the statutory scope and purpose of Section 333 is to be availed only in those situations or legal circumstances where against an order or judgment rendered by the subordinate Court either no appeal lies or where an appeal lies but it has not been preferred. However, those cases in which the statute provides the forum of second appeal, the power of revision can never be treated to be synonymous to power of appeal as it would defeat the very purpose of creation of the different forum.

23. The matter can also be looked from another perspective inasmuch as obviously the intention of legislature cannot be to make two forums available to a litigant and that too, at his own choice and thus merely because Section 333 of the Act, 1950 has only used the word "Appeal" and not second appeal, the same has to be reasonably interpreted to mean that where an appeal has been preferred under Section 331 (3) of the Act, 1950, the forum of filing of a revision under Section 333 of the Act, 1950 would not be available.

24. In this regard, the Court may refer to a judgment of this Court in the case of **Mirza Kishwar Beg (supra)** wherein this aspect of the matter has been considered and it was categorically held that once an appeal has been preferred then in such a case the revisional power could not be invoked by the Board either at the instance of a party or by the Board itself suo moto.

25. This aspect of the matter has also been considered by Uttrakhand High Court in the case of **Prema Devi Vs. Mathura Dutt Pandey** reported in **AIROnline 2019 Utr 564** wherein the Court has held as under:-

6. The learned counsel for the petitioners submits that being aggrieved against the Appellate Court's order passed in an statutory appeal, no revision will lie

under the Act, because once a special statute provides a Forum of Second Appeal under Section 331(4) to be read under II Schedule of U.P.Z.A. & L.R. Act, 1950, in that eventuality, the person, who is aggrieved by the First Appellate Court's order, is bound to invoke the Forum, which has been statutorily created of preferring a Second Appeal under sub Section (4) of Section 333 of U.P.Z.A. & L.R. Act, 1950, which has to be decided in the light of the provisions contained under Section 100 of the Code of Civil Procedure, which has been made applicable over the second appellate proceedings under the Act, by reference. Even otherwise, this Court is of the view that once the statutory appeal has been decided, any judgement rendered by the appellate Court would not be revisable as appellate judgements are not revisable.

7. While on the other hand, the argument which has been extended by the learned counsel for the plaintiffs/respondents is that the provisions contained under Section 333 of the U.P.Z.A. & L.R. Act, though it apparently seems to be a revisional power given under the Act, which has been vested with the Board or the Commissioner, as the case may be, hence, it would be amounting to exercise the same powers as contemplated under Section 331(4) of the Act could be treated as to be para materia provision and a forum to challenge the First Appellate Court's order. This Court is not in agreement with the argument as extended by the learned counsel for the plaintiffs/respondents the reason being that if his argument as extended is accepted then the provisions contained under Section 333 as to be treated as an alternative Forum to Section 331(4), it would be absolutely a wrong interpretation of law for the reason being that the statutory scope and purpose of Section 333, is to be availed in those situations or legal circumstances where any order or a judgement rendered by any subordinate Court could be subject to revision at the behest of the party aggrieved or even the revisional Court can suo moto take its call and initiate the proceedings of a revision. But in these cases where the Statute is providing a forum of second appeal, the powers of revision can never be treated to synonyms to powers of appeal, as it would defeat the very purpose of creation of the different forum.

8. But, if we compare the powers conferred to the second appellate Court under Section 331(4) of the Act, it does not provide that the Second Appellate Court can ever suo moto exercise the powers and take cognizance of an order passed under Section 331(1) of the Act until and unless the aggrieved party files a second appeal, like that provided in Revisional Power under Section 333.

9. Secondly, if the scope of revisional power, which is vested under Section 333 of the Act, would be confined in its application within the scope as provided therein the 3 clauses of the provisions under Section 333 of the Act, which is para materia to the provisions contained under Section 115 of the Code of Civil Procedure. It happens to be absolutely distinct to the appellate power where the provision of Section 100 of the Code of Civil Procedure has been made applicable by reference, under Section 331(4)

10. If the argument as extended by the counsel for the plaintiffs/respondents is accepted, it will run contrary to the intention of the legislation itself the reason being that if Section 333 is to be read as a substitute or a synonymous to the provisions contained under Section 331(4) of the Act, it would rather limit the

jurisdiction of interference by the Revisional Court as against the First Appellate Court's order within the scope of its interference provided under Section 3 clauses contained therein under Section 333, whereas on the other hand, the provisions contained under Section 331(4) is wide enough to enable the parties to place there case both on facts and law and thus the argument, which has been extended by the learned counsel for the plaintiffs/respondents is not accepted.

11. There is another logic as to why the argument of the learned counsel for the revisionist to treat the proceedings under Section 333 as to be the proceedings of the same parlance as that provided under Section 331(4) is not acceptable from the viewpoint that if this logic is accepted, then there was no need for the legislature to provide for a specific Forum for redressal of the grievance by a party, who is aggrieved by a First Appellate Court's judgement by preferring a second appeal that too within the ambit of Section 100 of the C.P.C. Hence, there was no necessity for the legislature to contemplate different provisions under the Act itself for redressal of the grievance as against the First Appellate Court's order because if the argument as extended is accepted then it will have an adverse effect as it would be leaving the forum to be chosen by the choice of the party, which is aggrieved by first appellate Court's order, selection of a forum cannot be made available by choice of a litigant to invoke a forum which suits to his convenience which is not the intention of the legislature.

26. As regards the judgment cited by learned Senior Advocate in the case of **Lachman Das (supra)** the same pertains to the distinction between appeal and revision. There cannot be any quarrel to the settled proposition of law inasmuch the scope of appeal and revision are clearly different. As such, the said judgment would have no applicability in the facts of the instant case.

27. Keeping in view the aforesaid discussion as well as the judgment of this Court in the case of **Mirza Kishwar Beg (supra)** and the judgment of **Uttrakhand High Court in the case of Prema Devi (supra)** the Court holds that the revision which was filed by the petitioners was wrongly filed and the Board patently erred in entertaining the same.

28. Considering the aforesaid, the writ petition is partly allowed. The impugned order dated 21.04.2022 passed by the Board of Revenue, a copy of which is annexure 1 to the writ petition is set aside. It is provided that it would be open for the petitioners to file a second appeal within a period of two weeks from today.

29. Sri Vijay Bahadur Verma, learned counsel appearing for the respondents no. 4 to 12 fairly submits that in case the appeal is filed within the aforesaid time then he would not be raising the plea of limitation before the Board of Revenue. It is thus provided that in case the second appeal is filed within the aforesaid time period then the Board of Revenue shall proceed to decide the same on merits.

30. It would be open for the petitioners to file an application for stay which will be considered by the Board of Revenue expeditiously.

31. The Court records the valuable assistance given by Sri Abhinav Narain Trivedi, learned Chief Standing counsel and Ms. Vaishnavi Bansal, Law Clerk Trainee of this Court.

(2022) 8 ILRA 1075
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.08.2022

BEFORE

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

Appeal U/S 37 of Arbitration And Conciliation Act 1996 No. - 4 of 2022

M/S Sri Sai Nath Associates ...Appellant
Versus
Babasaheb Bhimrao Ambedkar University & Ors. ...Respondents

Counsel for the Appellant:
Nilaya Gupta

Counsel for the Respondents:
Dr. V.K. Singh, Dr. V.K. Singh

Civil Law - Arbitration Act, 1996-Section 9-Application u/s 9 for interim protection rejected-contract for providing manpower services by the Appellant firm-contract extended from time to time-contract terminated by Respondent University and security deposited was forfeited-giving reason that work of the Appellant firm was not satisfactory-ad-interim injunction sought to the extent it holds Appellant firm guilty of unsatisfactory performance till disposal of arbitral proceedings-Grant or refusal of interlocutory injunction rest in judicial discretion-Learned Court below has not determined whether a prima-facie case is made out-which is not dependent upon any consequential or resultant event-Appropriate determination/ consideration of three cardinal principles of Stay is not reflected.

Appeal allowed. (E-9)

List of Cases cited:

1. Hindustan Petroleum Corporation Ltd. Vs Sriman Narayan & anr., reported in (2002) 5 Supreme Court Cases, 760

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

1. Heard Sri Nilaya Gupta, learned counsel representing the appellant and Sri Rajesh Tiwari, learned counsel appearing on behalf of the respondent-University.

2. By instituting these proceedings of appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (herein after referred to as "1996 Act'), the appellant has laid a challenge to an order dated 11.03.20022, passed by the Commercial Court, Lucknow in Arbitration Case No. 03 of 2022, whereby the application made by the appellant under Section 9 of the 1996 Act praying grant of interim protection/order has been rejected.

3. A contract was entered into between the appellant-firm and respondent-University on 16.11.2017 for providing manpower services by the appellant-firm to the respondent-University. As per Clause 4 of the said agreement period of contract was initially for one year which was extendable upto 3 years on year to year basis at the discretion of the respondent-University and basis of such extension, as spelt out in the contract, was requirement and performance of the manpower and the Agency.

4. The contract entered into on 16.11.2017 was extended from time to time, however, by means of an order dated 07.01.2022, passed by the Registrar of the respondent-University, the contract

between the parties was terminated w.e.f. 11.01.2022 and consequently the security deposit made by the appellant-firm was also forfeited giving the reason that work of the appellant-firm was not satisfactory.

5. The contract between the parties contains an arbitration clause which provides that in the event of any dispute or difference arising between the parties in respect of or under the agreement, the same shall be referred to the Vice Chancellor of the respondent-University whose decision shall be binding on the parties, however, if the appellant-firm is still not satisfied, then arbitration shall be conducted in accordance with the provisions of 1996 Act.

6. On passing of the order dated 07.01.2022 terminating the contract, the appellant-firm instituted a petition under Section 9 of 1996 Act before the Commercial Court at Lucknow seeking interim injunction against the respondent-University. The prayer made in the said petition under Section 9 of 1996 Act was that an ad interim/interim injunction may be granted to stay the operation and implementation of the order dated 07.01.2022 to the extent that it holds the appellant-firm guilty of unsatisfactory performance in respect of the agreement dated 16.11.2017, till disposal of the arbitral proceedings. It was further prayed that an ad interim/interim injunction may be granted to the appellant-firm restraining the respondent-University from taking any adverse action and also from rejecting the bid of the appellant-firm on the basis of the order dated 07.01.2022 in case the appellant participates in any future tender process.

7. The appellant-firm before the learned trial court pleaded, *inter alia*, that the order dated 07.01.2022 was passed on the basis of some report by some Committee and such a procedure was not envisaged in the contract. It was further pleaded by the appellant-firm before the learned court below that the Committee, pursuant to whose report the order dated 07.01.2022 has been passed, was constituted by the respondent-University and since such a Committee has not been envisaged in the contract entered into between the parties, hence it did not have any legal sanctity and accordingly the findings based on such a Committee's report cannot supersede the contractual obligation between the parties. It was also pleaded that the order dated 07.01.2022 could not have been passed by the respondent-University and in fact it has been passed only to restrain the appellant-firm from participating in future tender process. Further submission of the appellant before the learned court below was that the order dated 07.01.2022 is stigmatic and that the same has been passed with malafide on the ground of unsatisfactory performance.

8. On the basis of the aforesaid and other submissions, the interim injunction was prayed for by the appellant, however, prayer made by the appellant was contested by the respondent-University on the ground, *inter-alia*, that despite several opportunities having been given the appellant-firm did not appear before the Committee and in fact there are enough material which established that the appellant-firm had violated certain clauses of the contract and further on the basis of such material, it can be inferred that the performance of the appellant-firm had not been satisfactory.

9. The learned court below after discussing the case of the respective parties

has refused the prayer made in the petition moved by the appellant-firm under Section 9 of the 1996 Act by stating that the documents available on record clearly establish that the appellant-firm was given notice by the Enquiry Committee and despite service of notice, the appellant-firm did not appear before the Committee. It has also been observed by the learned trial court that the issue as to whether services rendered by the appellant-firm were satisfactory or not, is to be determined by the Arbitrator and as such in proceedings under Section 9 of the 1996 Act this inference cannot be drawn as to whether the services of the appellant-firm were satisfactory or not and accordingly there does not appear to be any justification for staying the operation of the order dated 07.01.2022 during pendency of the Arbitration proceedings.

10. The learned court below has further stated in the order dated 11.03.2022 that, *prima-facie*, no ground for grant of interim protection is made out in favour of the appellant-firm for the reason that the the respondent-University has already appointed a new Agency and as such in case the order dated 07.01.2022 is stayed, the same will result in irreparable loss to the respondent-University.

11. Giving the aforesaid reasons, the petition under Section 9 of 1996 Act moved by the appellant-firm has been rejected.

12. The question which falls for our consideration in this case is as to whether while passing the order dated 11.03.2022, which is under appeal herein, the learned Commercial Court below has exercised its jurisdiction vested in it under Section 9 of the 1996 Act on the well settled legal parameters and principles which are applicable for considering a prayer for grant of interim injunction.

13. It is well settled principle of law that normal rules governing grant of interim orders are applicable to the proceedings drawn and conducted under Section 9 of 1996 Act as well. It is equally well settled that three necessary ingredients which are to be taken into consideration by any court for granting interim injunction under Order 39 Rules 1 and 2 of the Code of Civil Procedure are to be taken into account by the court while considering an application or petition under Section 9 of the 1996 Act. In other words, if a party seeks any interim measures for protection, the court needs to consider such an application or petition on the basis of three cardinal principles for grant of any relief in the nature of interim injunction i.e. a *prima-facie* case, irreparable loss or injury or prejudice and balance of convenience.

14. The purpose of grant of interlocutory order is primarily to preserve in *status-quo*, the right of parties which may appear to the court on the basis of *prima-facie* case. The object of grant of such temporary injunction is to mitigate the risk of injustice to the plaintiff during the period a suit or arbitration proceedings are pending i.e. till the period such proceedings are concluded.

15. Hon'ble Supreme Court in the case of **Hindustan Petroleum Corporation Ltd. Vs. Sriman Narayan and another, reported in (2002) 5 Supreme Court Cases, 760** has held that grant of an interlocutory injunction is a matter which requires exercise of discretion of the court, however, while exercising such discretion the court should normally apply the tests of (i) whether the plaintiff

has a *prima-facie* case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

16. Grant or refusal of an interlocutory injunction though rests in the judicial discretion of the court, however, such discretion is to be exercised in the facts and circumstances of the case and exercise of discretion is judicially regulated by observing the aforesaid three principles, namely, determination of *prima-facie* case, that of irreparable loss or injury and balance of inconvenience.

17. As to whether the learned court below in this case while passing the order under appeal has followed the aforesaid principles and thereafter exercised its judicial discretion while passing the order is, thus, now to be seen by the Court.

18. When we peruse the order dated 11.03.2022, passed by the learned court below, what we find is that after narrating the respective cases of the parties, the learned court below has only observed that the order dated 07.01.2022 has been passed by the respondent-University terminating the contract dated 16.11.2017 and forfeiting the security amount on the basis of the report submitted by the Enquiry Committee which had given notice to the appellant-firm, however, despite service of the notice, the appellant-firm did not appear before the Committee. The learned court below has also recorded in the order under appeal that the issue as to whether the services rendered by the appellant-firm were satisfactory or not, is an issue which can be determined only by the Arbitrator in the arbitration proceedings and not by the court in the proceedings under Section 9 of the 1996 Act. Another reason recorded by the learned court below for refusing the grant of interim protection as prayed for by the appellant-firm is that since the respondent-University has appointed another Agency as such the claim for grant of stay of the order dated 07.01.2022 is not made out.

19. If we analyze the reasons given by the learned court below for refusing to grant the prayer made by the appellant-firm in its application/petition under Section 9 of 1996 Act, what we find is that the learned court below has not determined as to whether the appellant-firm was able to make out a *prima-facie* case. Merely by mentioning that since the respondent-University has appointed another Agency and, therefore, the appellant-firm does not have *prima-facie* case, in our considered opinion, does not qualify to be a justifiable reason for arriving at the conclusion that the appellant-firm had failed to establish *prima-facie* case. *Prima-facie* case in the context of grant of temporary injunction is not dependent upon any consequential or resultant event which is consequential or resultant to the action which forms the cause of action for taking any legal action such as instituting a suit or initiating the arbitration proceedings. The *prima-facie* case has to be inferred on the basis of pleadings and material available on record in respect thereof regarding the main subject matter of the proceedings and not in respect of any consequences.

20. The submission of the learned counsel for the appellant-firm is that so far as termination of the contract dated 16.11.2017 by means of order dated 07.01.2022 is concerned, whether it was bad or otherwise, is an issue which will be determined in the arbitration proceedings

finally, however, since the order dated 07.01.2022 also records that work of the appellant-firm was not satisfactory as such occurrence of such a phrase in the order dated 07.01.2022 would affect participation of the appellant-firm in any other tender process, if floated by not only the respondent-University but by other Government Departments /Institutions/ Agencies as well. It is in this context that the learned Court below was required to consider as to whether by not granting interim injunction, as prayed for by the appellant-firm, it would suffer irreparable loss and injury or prejudice. We do not see any such consideration/determination by the learned court below while it passed the order dated 11.03.2022.

21. As to whether balance of convenience lies in favour of grant of interim protection as prayed for or it lies in not granting the same is another issue, determination of which was required to be made by the learned court below while deciding the application/petition moved by the appellant-firm under Section 9 of the 1996 Act. Appropriate determination/ consideration even of this issue is not reflected from the order dated 11.03.2022, passed by the learned court below which is under appeal before us.

22. For the reasons aforesaid, we find that the appeal deserves to be allowed.

23. Accordingly, the instant appeal is allowed and the order dated 11.03.2022, passed by the learned Commercial Court, Lucknow in Arbitration Case No. 03 of 2022 is hereby set aside.

24. The matter is remitted to the learned Commercial Court, Lucknow for decision of the application/petition under Section 9 of the 1996 Act afresh in accordance with law.

25. It is further directed that the parties to the proceedings before the learned Commercial Court shall not seek any adjournment and adjournment shall be permissible only in exceptional circumstances, that too, with the leave of the court concerned.

26. It is further directed that the proceedings of the petition under Section 9 of the 1996 Act shall be expedited by the learned court below and shall be concluded within a maximum period of three months from the date certified copy of this order is produced before it.

27. We make it unequivocally clear that any observations made in this order shall not in any manner be construed to be observations on the merit of the claim of the respective parties and the Commercial Court while deciding the application /petition under Section 9 afresh shall not be influenced by these observations as these observations are confined only to decision of this appeal.

28. There will be no order as to costs.

(2022) 8 ILRA 1079
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2022

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Transfer Application (Crl.) No. 282 of 2021

Smt. Sunita Devi ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Om Prakash Singh

Counsel for the Opp. Party:
G.A., Sri Dileep Kumar Srivastava

Criminal Law - Transfer of case - Code of Criminal Procedure 1973, Section 407 - Power of High Court to transfer cases and appeals - 'Rules for Video Conferencing for Courts in the State of Uttar Pradesh, 2020', notified by notification dated 27th November, 2020 - Video conferencing facilities may be used at all stages of judicial proceedings and proceedings conducted by the Court - All proceedings conducted by a Court by way of video conferencing shall be judicial proceedings - Under Rule 6.1 any party to the proceeding or witness, may move a request for video conferencing, in the form prescribed in Schedule II - Under Rule 6.3, on receipt of such a request and upon hearing all concerned persons, the Court will pass an appropriate order - It was directed that all courts and authorities shall act in aid of the Rules for Video Conferencing for Courts in the State of Uttar Pradesh, 2020 (Para 7, 8)

Transfer application filed by wife for transfer of the Case u/s 125 Cr.P.C. pending before the Family Court, Bhadohi at Gyanpur to District Prayagraj - transfer sought on the ground of apprehension of danger of life of the applicant & on the ground of financial crisis - Transfer application disposed of with the liberty to the applicant to apply under 'Rules for Video Conferencing for Courts in the State of Uttar Pradesh, 2020' for video conference facility in judicial proceedings - concern court/authority was directed to pass an appropriate order in accordance with law at the earliest (Para 12)

Disposed Off. (E-5)

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard learned counsel for the parties.

2. The present transfer application has been filed for transfer of the Case No.115 of 2021 (Smt. Sunita Devi Vs. Ramesh Kumar Bharati), under Section 125 Cr.P.C. pending before the Principal Judge, Family Court, Bhadohi at Gyanpur to the court having competence jurisdiction in District Prayagraj.

3. It is submitted by learned counsel for the applicant that the applicant is wife, who has filed application under Section 125 Cr.P.C. The application was filed before the Principal Judge, Family Court, Bhadohi at Gyanpur. However, when the applicant visits the Court, opposite party no.2 and his family members physically assaulted the applicant. There is apprehension of danger of life of the applicant. The applicant has also sought transfer on the ground of financial crisis.

4. The country is witnessing a revolution in the digitalisation activity. The digitalisation is not only about implementation of technology. It encompasses the transformation of the courts and justice delivery system using technology in order to enable the experiences to be better, effective and within the reach of the ordinary citizens. The digitalisation is bridging the gap between the courts and the litigant. The process of digitalisation has enabled the litigant to approach the various forum of justice delivery system and the issue of distance of the courts and convenience of parties have been effectively addressed. The Courts has put in place various digitalisation processes including addressing the court through video conference. Further, with the advancement of technology and telecommunication including internet services the litigant is empowered to approach his counsel

through telecommunication/Internet. The process of digitalisation and technology advancement has further been accelerated during the pandemic. The digitalisation and technology are playing a crucial role in ensuring the efficient last mile delivery of services to citizens. Even during the pandemic, the courts have delivered justice to the citizens without the citizens being physically present at the place where the court is situated and in this respect the role of digital technology has been crucial. A citizen has all the means in place to approach the Court using the digital process and technology. The Internet, emails, e-filing and video conference have revolutionised the way a person can communicate and avail Justice. In the recent past, the country has witnessed "work from home" as an important tool for the working class and on the same footing various measures have been taken by the courts for enabling the citizens to get "justice at doorstep" and the distance between the citizen and the court is of no consequence as a result of the digital process.

5. The Apex Court has constituted an e-committee, Supreme Court of India for effective implementation of the Information and Communication Technology (ICT) by the Judicial system in India. The e-committee is the governing body charged with overseeing the e-courts project conceptualized under the National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in Indian Judiciary. The project is funded by the Government with the vision to transform the Judicial system of the country by ICT enablement of Courts.

6. Digital disruption is the change that occurs when new digital technologies and models affect the value proposition of existing services. The transformation of the legal services through information and technology is a big step to revolutionise legal services in India. The information and technology induction will enhance the Judicial productivity both qualitatively and quantitatively, making the justice delivery system accessible, reliable, cost effective and transparent.

7. One of the important object of the involvement of digital process in the judiciary is to bridge the gap between the courts and the litigants. A digital judiciary will enhance the capability of Justice Delivery system and further will bring "ease of Justice" to the litigant. One of the important aspect in the judicial system is that the litigant have to approach the court physically to participate in the proceedings of the court. The digitalisation process in order to facilitate the approach of the litigant to the courts have set up video conference facility as a tool for the litigant to participate in the court proceeding through virtual mode. A drastic step in this respect has been taken by Allahabad High Court by framing "Rules for Video Conferencing for Courts in the State of Uttar Pradesh, 2020" (for brevity herein after referred to as "Rules of 2020") which has been notified by notification dated 27th November, 2020. The principal object of the aforesaid rules is to consolidate, unify and streamline the procedure relating to the use of video conference for the Courts. The whole aim of the aforesaid rules is to provide the litigant access to the courts in the state through video conference. Rule 2(xv) of the above-mentioned rules defines "Video Conference" to mean and include court proceedings conducted by transmission of simultaneous audio and video signals in real-time between the

remote point and court point and vice versa over a wired or wireless network or combination thereof. It also includes transmission of the readable images of document.

8. The General Principles governing the video conference has been envisaged in Rule 3 of Rules of 2020, which are as follows:

"3. General Principles Governing Video Conferencing

(i) Video conferencing facilities may be used at all stages of judicial proceedings and proceedings conducted by the Court.

(ii) All proceedings conducted by a Court by way of video conferencing shall be judicial proceedings and all the courtesies and protocols applicable to a physical Court shall apply to these virtual proceedings. The protocol provided in Schedule I shall be adhered to for proceedings conducted by way of video conferencing.

(iii) All relevant statutory provisions applicable to judicial proceedings including provisions of the Code of Civil Procedure, 1908, Code of Criminal Procedure, 1973, Contempt of Courts Act, 1971, Indian Evidence Act, 1872 (abbreviated hereafter as the Evidence Act), and Information Technology Act, 2000 (abbreviated hereafter as the IT Act), shall apply to proceedings conducted through video conferencing.

(iv) Subject to maintaining independence, impartiality and credibility of judicial proceedings, and subject to such directions as the High Court may issue, Courts may adopt such technological advances as may become available from time to time.

(v) The Rules as applicable to a Court shall mutatis mutandis apply to a Commissioner appointed by the Court to record evidence and to an enquiry officer conducting an inquiry.

(vi) There shall be no unauthorized recording of the proceedings by any person or entity.

(vii) The person defined in Rule 2(xii) shall provide identity proof as recognised by the Government of India/State Government/Union Territory to the Court point coordinator via personal e-mail. In case identity proof is not readily available the person concerned shall furnish the following personal details: name, parentage and permanent address, as also, temporary address if any."

9. The procedure for applying for participation through video conference in the court proceedings is envisaged in chapter III of the Rules of 2020. Rule 6 of Chapter III provides for the procedure to be followed for applying for video conference. Rule 6 is quoted herein below :-

"6. Application for Appearance, Evidence and Submissions through Video Conferencing:

6.1 Any party to the proceeding or witness, save and except where proceedings are initiated at the instance of the Court, may move a request for video conferencing. A party or witness seeking a video conferencing proceeding shall do so by making a request in the form prescribed in Schedule II.

6.2 Any proposal to move a request for video conferencing should first be discussed with the other party or parties to the proceeding, except where it is not possible or inappropriate to do so, for example, extremely urgent cases/applications.

6.3 On receipt of such a request and upon hearing all concerned persons, the

Court will pass an appropriate order after ascertaining that the application is not filed

6.4 While allowing a request for video conferencing, the Court may also fix the schedule for convening the video conferencing.

6.5 In case the video conferencing event is convened for making oral submissions, the order may require the Advocate or party in person to submit written arguments and precedents, if any, in advance on the official email ID of the concerned Court.

6.6 Costs, if directed to be paid, by the order convening proceeding through video conferencing shall be deposited within the time specified in the said order."

10. Comprehensive rules have been put in place to adopt the technology in judicial proceedings in order to enable the litigants to approach the court through digital mode. The Rules of 2020 gives choice to the litigant to approach court using digital technology. Various checks and balances have been provided under the aforesaid Rules of 2020 to protect the sanctity of the judicial process.

11. The Rules of 2020 effectively address the concern of the litigants including the distance factor and threat perception. Once the Rules of 2020 have been notified in exercise of powers under Article 225 and 227 of the Constitution of India, for providing video conferencing to the litigant in the Courts and such an alternative channel will be able to address the concerns of the litigant as has been raised in the present transfer application. No ground for transfer of the case from one district to another is made out in view of the observations made hereinabove.

12. Under the circumstances, the present transfer application is ***disposed of*** with the liberty to the applicant to apply under Rules for Video Conferencing for Courts in the State of Uttar Pradesh, 2020 for video conference facility in judicial proceedings. It is hereby provided that in case any application is preferred by the applicant under the aforesaid Rules, the court/authority concerned shall be obliged under law to pass an appropriate order in accordance with law at the earliest. It is hereby directed that all courts and authorities shall act in aid of the Rules for Video Conferencing for Courts in the State of Uttar Pradesh, 2020.

(2022) 8 ILRA 1083
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters under Article 227 No. 8472 of 2017

Rahul Agarwal & Anr. ...Petitioners
Versus
Govt. of India Railway Ministry & Anr. ...Respondents

Counsel for the Petitioners:
Sri Pankaj Agarwal, Sri Sudhir Bharti

Counsel for the Respondents:
C.S.C.

A. Land Acquisition – Condonation of Delay – Application against arbitral award - Arbitration and Conciliation Act, 1996 - Sections 34, 34(3) & 43 - Railway Act, 1989 - Sections 20(A) & 20(E) - Railways Amendment Act, 2008 - Section 20H(6) - It is settled in law that provision of Section 5 of Limitation Act is not applicable in proceeding u/s 34 of the Act, 1996. There is no error in the finding of the court below that provisions of Limitation Act are not applicable to

proceeding u/s 34 of the Act, 1996 and application has to be filed within time prescribed u/s 34(3) of the Act, 1996. (Para 18, 19)

Limitation Act: Section 5 - The perusal of application u/s 5 does not reflect any plea as argued by the petitioners that copy of the award was not sent to the petitioners, and they came to know about the award for the first time on 03.03.2014, therefore, there was no delay in filing the objections u/s 34 of the Act, 1996 rather petitioners have admitted in para 3 of the application u/s 5 that they had obtained certified copy of the award, but on account of ignorance of provisions contained in S. 34 of the Act, 1996 w.r.t. limitation in filing the objection, they could not file the objections u/s 34 of the Act, 1996. (Para 17)

B. Arbitration and Conciliation Act, 1996 - Section 43 – It is submitted by the petitioners that in view of S.43 of the Act, 1996, provision of S.5 of Limitation Act is applicable to application u/s 34 of the Act, 1996. This Court does not find any merit in the said submission inasmuch as S.43 of the Act, 1996 refers to its applicability only with reference to S.3 of the Limitation Act which confers power upon the court to see as to whether the suit is within time as provided in Limitation Act, whereas **S.34 provides period of limitation for filing objections against an award, and S.34 being special provision incorporated in special act i.e. Act, 1996 shall prevail over the Limitation Act.** (Para 12, 21)

Writ Petition dismissed. (E-4)

Precedent followed:

1. St. of U.P. & ors. Vs M/s Harnam Singh, 2015 All. C.J. 1763 (Para 10, 18)

Precedent distinguished:

1. Project Director, National Highways Nos. 45E & 220, National Highways Authority of India Vs M. Hakeem & ors., AIR 2021 SC 3471 (Para 20)

Present writ petition assails order dated 12.09.2017, passed by District Judge, Aligarh.

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

1. Heard Sri Pankaj Agarwal, learned counsel for petitioners and learned Standing Counsel for respondent no.2.

2. The petitioners by means of the present writ petition have assailed the order dated 12.09.2017 passed by District Judge, Alilgarh in Arbitration Misc. Case No.10 of 2014 whereby he has rejected the application of the petitioners under Section 5 of Limitation Act for condoning the delay in filing the application under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996').

3. The facts in brief are that petitioners claim that they are the owner of Gata No.78/3 situated at village Padiyawali, Tehsil- Koil, District Aligarh. The land was acquired under Railways Act, 1989 as amended in 2008 and a notification was issued under Section 20 (A) and 20 (E) of the Act, 1989. Consequently, an award was made on 18.05.2012 in respect of land of petitioners respondent no.2-Competent Authority/Special Land Acquisition Officer (Joint Organisation), Aligarh.

4. It is stated that though it was mentioned in the award that copy of award shall be dispatched to the tenure holder, but at no point of time, petitioners were ever informed about the award dated 18.05.2012 or certified copy of award duly signed by the competent authority was ever sent or served upon the petitioners or to any of their family members. It is further stated that the petitioners never came to know about the award dated 18.05.2012 and came to know about the award through other villagers.

5. The petitioners, thereafter, on 03.03.2014 applied for certified copy of the

award which was made available to them on 12.03.2014. After obtaining certified copy of award, petitioners contacted their counsel who advised them to challenge the award under Section 34 of the Act, 1996. The petitioners, thereafter, filed an application under Section 34 read with Section 20 H (6) of the Railways Amendment Act, 2008 on 15.04.2014.

6. According to petitioners, application under Section 34 of the Act, 1996 was filed by them was within time from the date of receiving the certified copy of the award.

7. The application under Section 34 of the Act, 1996 was contested by respondents by filing objection stating therein that application under Section 34 of the Act, 1996 was barred by limitation and hence, deserves to be dismissed.

8. According to petitioners, though objection with regard to limitation raised by the respondents was frivolous, but as abandoned caution, they moved an application under Section 5 of the Limitation Act for condoning the delay in filing the application under Section 34 of the Act, 1996. The application was filed on the ground that the petitioners were not aware about the legal provision that under the new Arbitration Act, 1996, limitation of filing application under Section 34 is 90 days with one month grace period. It is stated that petitioners filed application under Section 34 of the Act, 1996 within time after obtaining certified copy of the award dated 18.05.2012.

9. The respondents filed objection to the said application contending inter alia that Act, 1996 is a special act and provisions contained therein are special provisions, therefore, provisions of limitation act are not applicable. The further objection raised by the respondents was that ignorance of law is not an excuse to condone the delay in filing the application.

10. The court below vide order dated 12.09.2017 dismissed the application under Section 5 of limitation act holding that in view of the judgement of this Court in the case of ***State of U.P. and Others Vs. M/s Harnam Singh*** reported in ***2015 All. C.J. 1763***, provisions of Limitation Act are not applicable in proceeding in application under Section 34 of the Act, 1996. Accordingly, the court below found that as the application under Section 34 of the Act, 1996 was to be filed maximum within 120 days i.e. 90 days plus 30 days grace period as provided in Section 34 (3), but the same has been filed after the period of limitation as provided under Section 34(3) of the Act, 1996 has expired, the court below found that it has no power to condone the delay if delay in filing the appeal is beyond the period provided in Section 34 (3) of the Act, 1996. Consequently, it dismissed the same.

11. Challenging the aforesaid order, learned counsel for the petitioners has contended that though it is specifically mentioned in the award that copy of the award shall be sent to all the land owners, but it was never sent or dispatched to the petitioners, and petitioners for the first time came to know about the award on 03.03.2014 and application was filed on 15.04.2014, therefore, application under Section 34 of the Act, 1996 was in time, and court below has erred in holding that there is delay in filing the application under Section 34 of the Act, 1996. It is further contended that the limitation for filing the

award commences from the date the certified copy of the award had been received by the petitioners as provided under Section 34 (3) of the Act, 1996, therefore, order passed by the court below is based upon misinterpretation of law.

12. It is further submitted that in view of Section 43 of the Act, 1996, provision of Section 5 of Limitation Act is applicable to application under Section 34 of the Act, 1996, and thus, the approach adopted by the court below ignoring Section 43 of the Act, 1996 suffers from manifest error of law and requires interference by this Court in its supervisory jurisdiction under Article 227 of Constitution of India.

13. On the other hand, learned Standing Counsel would contend that it is settled in law that limitation provided under Section 34 of the Act, 1996 for filing objection against the award shall prevail over the Limitation Act being special act. He further submits that there is no pleading in the application under Section 5 of Limitation Act of the petitioners that certified copy of the award was never sent to them, and since no such plea had been taken by the petitioners in Section 5 of the Limitation Act, therefore, such plea cannot be allowed to be taken for the first time in writ petition.

14. I have considered the rival submissions of the parties and perused the record.

15. Before appreciating the controversy in hand, it would be apposite to reproduce application under Section 5 of the Limitation Act filed by the petitioner dated 09.08.2017:-

"In the Court of District Judge, Aligarh

Misc. Arbitration Case No.10 of 2015

Rahul Agrawal and another V/s Govt. of India and another

Application under Section 05 of Limitation Act:

Sir,

1. That the applicants have filed objections against award dated 18.5.2012 under Section 34 of Arbitration and Reconciliation Act.

2. That, objectors received compensation under protest on 1.2.2013 and certified copy of award was made available on 12.3.2014.

3. That from the date of obtaining certified copy, the objections were filed within time, but the O.Ps have taken defence that objections should have been filed within three months from the date of award and there is relaxation period of one month and such objections are barred by time.

4. That, objectors were not aware with the amended provisions of Section 34 of Arbitration Act and were under the impression that objections can be filed after obtaining certified copy of award.

5. That, delay in filing objections was not deliberate but on account of ignorance of said legal provision.

6. That, objectors have been advised to move this application for condonation of delay in filing objections.

PRAYER

It is, therefore, respectfully prayed that Hon'ble Court may be pleased to condone the delay in filing objections and treat the objections as is filed within time."

16. The perusal of the application under Section 5 of the Limitation Act,

extracted above, reveals that petitioners have stated in paragraph 3 of the application that objections were filed within time, but respondents have taken defence that objections should have been filed within three months. In paragraph 5 of the said application, it is stated that petitioners could not file objections within time after obtaining the award and delay in filing the objections occurred due to ignorance of relevant provision, therefore, delay in filing the objections deserves to be condoned.

17. The perusal of application under Section 5 of the Limitation Act does not reflect any plea as argued by the learned counsel for the petitioners that copy of the award was not sent to the petitioners, and the petitioners came to know about the award for the first time on 03.03.2014, therefore, there was no delay in filing the objections under Section 34 of the Act, 1996 rather petitioners have admitted in paragraph 3 of the application under Section 5 of the Limitation Act that they had obtained certified copy of the award, but on account of ignorance of provisions contained in Section 34 of the Act, 1996 with respect to limitation in filing the objection, they could not file the objections under Section 34 of the Act, 1996.

18. This Court in the case of ***M/s Harnam Singh (supra)*** has held that provision of Section 5 of Limitation Act is not applicable in a proceeding under Section 34 of the Act, 1996. Paragraph 10 of the said judgement is reproduced herein below:-

"10. The issue having been settled by the decision of the Hon'ble Apex Court in M/s. Popular Construction Co (supra), the argument advanced by the learned Standing Counsel for the appellant that the provisions of the Limitation Act will be applicable in proceedings under Section 34 of the Act, 1996 is rendered without any force and are not liable to be accepted. We find no illegality in the impugned order passed by the District Judge rejecting the application of the appellant for setting aside the arbitral award as barred by limitation."

19. Since, it is settled in law that provision of Section 5 of Limitation Act is not applicable in proceeding under Section 34 of the Act, 1996, this Court does not find any error in the finding of the court below that provisions of Limitation Act are not applicable to proceeding under Section 34 of the Act, 1996 and application has to be filed within time prescribed under Section 34 (3) of the Act, 1996.

20. Now, so far as the judgement of Apex Court in the case of ***Project Director, National Highways Nos.45E and 220, National Highways Authority of India Vs. M. Hakeem and Others*** reported in ***AIR 2021 SC 3471*** relied upon by the learned counsel for the petitioner is concerned, the said judgement is not applicable in the facts of the present case inasmuch as in the said judgement, Apex Court has considered the question as to whether power of Court under Section 34 of the Act, 1996 to set aside the award of an Arbitrator would include the power to modify such award, and the question raised therein is not involved in the instant case.

21. Now, coming to the other submission of learned counsel for the petitioners that in view of Section 43 of the Act, 1996, provision of Limitation Act is applicable, this Court does not find any merit in the said submission inasmuch as Section

43 of the Act, 1996 refers to its applicability only with reference to Section 3 of the Limitation Act which confers power upon the court to see as to whether the suit is within time as provided in Limitation Act, whereas Section 34 provides period of limitation for filing objections against an award, and Section 34 being special provision incorporated in special act i.e. Act, 1996 shall prevail over the Limitation Act.

22. Thus, for the reasons given above, the writ petition lacks merit and is accordingly, ***dismissed*** with no order as to costs.

(2022) 8 ILRA 1088
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2022

BEFORE

THE HON'BLE SIDDHARTH, J.

Writ A No. 7114 of 2022

Gitanjali Pandey ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri P.K. Upadhyay, Sri Rahul Kumar Pandey, Sri R.K. Ojha (Senior Adv.)

Counsel for the Respondents:
A.S.G.I., Sri Kshitij Shailendra, Sri Dhananjay Awasthi

A. Civil Law - Constitution of India,1950 - Art. 226 - Interference in the report of the expert committee - whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject, it is not for the High Court to address questions of comparative merit of the candidates - courts have very limited discretion to interfere, in the report of the expert committee - Only where malafides are proved or violation of any regulation is proved or if there is patent material irregularity in the Constitution of the Committee or its procedure vitiaties the selection, the court may interfere but it cannot enter into roving and fishing inquiry on the basis of irrelevant considerations - Principles of Natural Justice - principles of natural justice do not require an administrative authority or a Selection Committee or an examiner to record reasons for the selection or non-selection of a person in the absence of statutory requirement - function of the Selection Committee is neither judicial nor adjudicatory, it is purely administrative - selection committee is not under obligation to record reasons for its decision (Para 18, 19, 20 24)

B. Civil Law - University Grants Commission Act, 1956 - UGC Regulations On Minimum Qualifications For Appointment Of Teachers And Other Academic Staff In Universities And Colleges And Measures For The Maintenance Of Standards In Higher Education, 2018 - as per Regulation 6 the selection procedure is to be conducted in accordance with the Appendix II, Table 1, 2, 3-A, 3B, 4, 5 and 6 of the UGC regulations - Short listing of candidates for interview is to be done as per Apendix II, Table 3-A, of UGC regulations 2018 - Table 3-A provides for two marks for one year each of teaching experience and maximum 10 marks are to be granted for teaching experience - regulation 10 (e) provides that the previous appointment of such a candidate *should not have been as guest lecturer for any duration* - regulation 10(f)(3) provides that any previous adhoc or temporary or contractual services by the candidates for direct recruitment would be counted towards his / her experience of teaching only if the incumbent was drawing total emoluments equal to monthly gross salary of a regularly appointed teacher as monthly gross salary - regulation 13 provides that where the incumbent was appointed on contract his / her salary

should not be less than monthly gross salary of a regularly appointed Assistant Professor - Held - Regular Lecturer / Part Time Lecturer / Guest Lecturer, all differ significantly in terms of quality, quantity and various other aspects - Experience of a person working as a Lecturer in regular capacity or as part time or Guest Lecturer cannot be equated - Lecturer regularly appointed is not supposed to only take lectures in the College but he has to perform various other duties also - A part time Lecturer discharge duties for a smaller length of period in a day, whereas a Guest Lecturer is required to take lectures in the classes and nothing more than that

Petitioner was appointed as a Lecturer in self finance scheme in duly recognized institution under the provision of University Grants Commission – However, appointment of the petitioner was as guest lecturer & on contractual basis - Petitioner applied for the post of Assistant Professor, department of Sanskrit - petitioner was denied 10 marks against the experience - University informed that no marks have been awarded to the petitioner by the screening committee for a teaching experience because of regulation 10(e) which provides that the experience of working as lecturer shall not be relevant and working as lecturer on contractual basis shall only be considered if the requirement of regulation 13 are fulfilled by the incumbent – pointing out to any violation of any regulation of UGC wanting an interference by this court - No Interference -

Dismissed. (E-5)

List of Cases cited:-

1. Basavaiah (Dr.) Vs Dr. H.L. Ramesh & ors. (2010) 8 SCC 372

2. B.C. Mylarappa @ Dr. Chikkamylarappa Vs Dr. R. Venkatasubbaiah & ors. (2008) 14 SCC 306.

3. Dalpat Abasaheb Solunke Vs B.S. Mahajan, AIR 1990 Supreme Court 434.

4. Baidyanath Yadav Vs Aditya Narayan Roy & ors., MANU / SC /1586 / 2019.

5. Ram Darash Yadav Vs St. of U.P. & ors., MANU/UP/5319/2018

6. Ram Darash Yadav (Dr.) Vs St. of U.P & ors., MANU/SCOR/60031/2019

7. National Institute of Mental Health and Neuro Sciences Vs K. Kalyana Raman & ors., MANU/SC/0342/1992

8. Dr. Deepak Bhatiya Vs St. of U.P & ors., 2010(5) ESC 3498 (All)

9. Dr. Madhulika Singh Vs St. of U.P. & ors., 2013 0 Supreme (All) 1440

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri R.K. Ojha, learned Senior Counsel assisted by Sri P.K. Upadhyay, learned counsels for the petitioner; Sri Kshitij Shailendra, learned counsel for the Allahabad University and Sri Dhananjay Awasthi, learned counsel for University Grants Commission.

2. This writ petition has been filed praying for direction to the Allahabad University to grant marks on teaching experience of the petitioner of discharging duty as Lecturer in department of Sanskrit in P.G. College affiliated to Deen Dayal Upadhyay, Gorakhpur University on contractual basis after following statutory criteria. Further prayer has been made to permit the petitioner to participate in interview for the post of Assistant Professor, department of Sanskrit scheduled to be held from 17.05.2022 to 22.05.2022 in the Allahabad University in pursuance of Advertisement No. 01 of 2021.

3. The petitioner claims that the University is proceeding with the

recruitment process in accordance with UGC regulations 2018. Short listing of candidates for interview is to be done as per Apendix II, Table 3-A of the aforesaid regulations subject to fulfilment all essential eligibility criteria, as mentioned, for direct recruitment for the post of Assistant Professor. The petitioner is possessing essential academic qualifications as per the regulations. Table 3-A of UGC regulations 2018 provides for two marks for one year each of teaching experience and maximum 10 marks are to be granted for teaching experience. There is no rider that teaching experience of particular nature shall only be considered for granting two marks per year. The petitioner has been getting appointments after passing rigours of statutory provisions of UGC Regulations, 2018 and has imparted teaching in P.G. College affiliated to Deen Dayal Upadhyay, Gorakhpur University.

4. Learned counsel for the University, Sri Kshitij Shailendra, has stated that no counter affidavit can be filed on behalf of University on account of the insistence of the counsels for the petitioner to permit the petitioner to participate in on going interview for the post in dispute, which is not in accordance with the Regulations.

5. Learned Senior counsel for the petitioner has submitted that the controversy in the present case is regarding providing marks for work done as a teacher. Regulation 6 provides for performance of candidates on grading system proforma based on Appendix - II, Table - 1, 2, 3-A, 4 and 5. The experience as mentioned in Regulations is different for the purpose of counting of past services for direct recruitment and promotion under Career Advancement Scheme (CAS) as give in Rule 10, though counting of past services for direct recruitment does not relate with respect to the experience as provided in Regulation 6. Regulation 6 provides for grading for the purpose of short listing in which experience is one of a component for providing certain marks for screening purposes and not for the counting of the services. The petitioner was appointed in the self finance scheme wherein; (a) petitioner had a qualification as provided by UGC (b) petitioner was selected as per procedure provided by the Government Order dated 13.03.2020; (c) Government order has been issued by the State Government under the State Universities Act read with the direction given by the UGC; (d) Payment to the teachers are being given out of total fee realized in which 70% is used for disbursing the salary of the staff. Therefore, as per concurrence of the UGC as well as State of U.P., petitioner has been appointed as a Lecturer in self finance scheme in duly recognized institution by the State of U.P in college affiliated to the University which is also duly recognized under the provision of University Grants Commission, therefore, appointment of the petitioner is absolutely as per rule of UGC, therefore, his experience of working in the self finance scheme should have been considered by the screening committee. The relevant judgments of counting the services rendered by the petitioner in self finance scheme, either for intermediate or for the Degree Colleges, has been considered in the judgment reported in 2010 (5) ESC 3498 (All) and in 2013 Vol-4 UPLBEC 2330. Hence, the petitioner has wrongly been denied 10 marks against the experience and only 81 marks has been awarded and if 10 marks had been given then petitioner would have got 91 marks and the minimum cut off is 87.17 marks

only. Therefore, petitioner is entitled to be called for interview.

6. Learned counsel for the University has submitted that the argument of learned Senior Counsel made on behalf of the petitioner are not in accordance with UGC Regulations, 2018. He has submitted that as per Regulation 6 the selection procedure is to be conducted in accordance with the Appendix II, Table 1, 2, 3-A, 3B, 4, 5 and 6 of the UGC regulations. As per regulation 10, the previous regular service for direct recruitment and promotion of teacher as Assistant Teacher is subject to regulation 10 (e) which provides that the previous appointment of such a candidate should not have been as guest lecturer for any duration. Appointment of the petitioner was as guest lecturer in Allahabad Degree College in the year 2001 and 2017-2018 and in Allahabad University in the year 2016-2017. Her experience also includes working as lecturer on contractual basis in Ishwar Sharan Degree College in the year 2020-2021 and in Imambada Girls Post Graduate College, Gorakhpur on contractual basis in the year 2004-2010.

7. He has further relied upon regulation 10(f)(.3) and has stated that any previous adhoc or temporary or contractual services by the candidates for direct recruitment would be counted towards his / her experience of teaching only if the incumbent was drawing total emoluments equal to monthly gross salary of a regularly appointed teacher as monthly gross salary. He has pointed out that the regulation 13 also which is to the same effect and provides that where the incumbent was appointed on contract his / her salary should not be less than monthly gross salary of a regularly appointed Assistant Professor.

8. The petitioner had claimed that she was drawing Rs. 50,000/- as salary while working as guest lecturer in Allahabad Degree College from 02.08.2021 to 15.12.2021; Rs. 25,000/- while working as lecturer in Ishwar Sharna Degree College from 12.09.2020 to 28.02.2021; Rs. 25,000/- while working as guest faculty in Allahabad Degree College from 01.09.2017 to 28.02.2018; Rs. 25,000/- while working as guest lecturer in Sanskrit department of Allahabad University from 05.08.2016 to 30.04.2017 and Rs. 5,000/- as monthly salary while working as Imambara Girls P.G. College Gorakhpur from 16.10.2001 to 31.10.2010. In the report of the expert committee for the purpose of short listing of the candidates for interview, no marks have been awarded to the petitioner by the screening committee for a teaching experience because of regulation 10(e) which provides that the experience of working as lecturer shall not be relevant and working as lecturer on contractual basis shall only be considered if the requirement of regulation 13 are fulfilled by the incumbent.

9. He has submitted that the recommendation of expert committee, in the absence of any allegation of malafide, cannot be challenged before the court. He has relied upon number of judgments which are as follows :-

1) Basavaiah (Dr.) vs. Dr. H.L. Ramesh and Others (2010) 8 SCC 372. 2) B.C. Mylarappa alias Dr. Chikkamylarappa vs. Dr. R. Venkatasubbaiah and others (2008) 14 SCC 306. 3) Dalpat Abasaheb Solunke vs. B.S. Mahajan, AIR 1990 Supreme Court 434. 4) Baidyanath Yadav vs. Aditya Narayan Roy and others, MANU / SC /1586 / 2019. 5) Ram Darash Yadav vs.

State of U.P and others, MANU/UP/5319/2018 6) Ram Darash Yadav (Dr.) vs. State of U.P and others, MANU/SCOR/60031/2019 7) National Institute of Mental Health and Neuro Sciences vs. K. Kalyana Raman and others, MANU/SC/0342/1992.

10. After hearing the rival contentions, this court finds it relevant to refer to Regulation 6 (relevant part), 10 and 13 of the UGC Regulation 2018 which are as follows:-

" 6.0 SELECTION PROCEDURES:

I. The overall selection procedure shall incorporate transparent, objective and credible methodology of analysis of the merits and credentials of the applicants based on weightages given to the performance of the candidate in different relevant dimensions and his/her performance on a grading system Performa, based on the Appendix III,Tables 1, 2, 3 A, 3 B, 4 and 5.

In order to make the system more credible, universities may assess the ability for teaching and/or research aptitude through a seminar or lecture in a classroom situation or discussion on the capacity to use latest technology in teaching and research at the interview stage. These procedures can be followed for both direct recruitment and CAS promotions wherever selection committees are prescribed in these Regulations.

II. The Universities shall adopt these Regulations for selection committees and selection procedures through their respective statutory bodies incorporating Appendix III,Table 1, 2, 3 A, 3 B, 4 and 5at the institutional level for University Departments and their Constituent colleges/ affiliated colleges (Government/Government-aided/Autonomous/ Private Colleges) to be followed transparently in all the selection processes. The universities may devise their own self-assessment cum performance appraisal forms for teachers in strict adherence to the Appendix III,Table 1, 2, 3 A, 3 B, 4 and 5prescribed in these Regulations.

10.0 COUNTING OF PAST SERVICES FOR DIRECT RECRUITMENT AND PROMOTION UNDER CAS

Previous regular service, whether national or international, as Assistant Professor, Associate Professor or Professor or equivalent in a University, College, National Laboratories or other scientific/professional Organizations such as the CSIR, ICAR, DRDO, UGC, ICSSR, ICHR, ICMR, DBT, etc., should be counted for direct recruitment and promotion under CAS of a teacher as Assistant Professor, Associate Professor, Professor or any other nomenclature these posts are described as per Appendix III Table 1 to 5 provided that:

(a) The essential qualifications of the post held were not lower than the qualifications prescribed by the UGC for Assistant Professor, Associate Professor and Professor as the case may be.

(b) The post is/was in an equivalent grade or of the pre-revised scale of pay as the post of Assistant Professor (Lecturer) Associate Professor (Reader) and Professor.

(c) The concerned Assistant Professor, Associate Professor and Professor should possess the same minimum qualifications as prescribed by the UGC for appointment to the post of Assistant Professor, Associate Professor and Professor, as the case may be.

(d) The post was filled in accordance with the prescribed selection

procedure as laid down in the Regulations of University/State Government/Central Government/ Concerned Institutions, for such appointments.

(e) The previous appointment was not as guest lecturer for any duration.

(f) The previous ad-hoc or Temporary or contractual service (by whatever nomenclature it may be called) shall be counted for direct recruitment and for promotion, provided that:

(i) the essential qualifications of the post held were not lower than the qualifications prescribed by the UGC for Assistant Professor, Associate Professor and Professor, as the case may be

(ii) the incumbent was appointed on the recommendation of a duly constituted Selection Committee / Selection Committee constituted as per the rules of the respective university;

(iii) the incumbent was drawing total gross emoluments not less than the monthly gross salary of a regularly appointed Assistant Professor, Associate Professor and Professor, as the case may be; and

(g) No distinction should be made with reference to the nature of management of the institution where previous service was rendered (private/local body/Government), was considered for counting past services under this clause.

13.0 APPOINTMENTS ON CONTRACT BASIS

The teachers should be appointed on contract basis only when it is absolutely necessary and when the student-teacher ratio does not satisfy the laid down norms. In any case, the number of such appointments should not exceed 10% of the total number of faculty positions in a College/University. The qualifications and selection procedure for appointing them should be the same as those applicable to a regularly appointed teacher. The fixed emoluments paid to such contract teachers should not be less than the monthly gross salary of a regularly appointed Assistant Professor. Such appointments should not be made initially for more than one academic session, and the performance of any such entrant teacher should be reviewed for academic performance before reappointing her/him on contract basis for another session. Such appointments on contract basis may also be resorted to when absolutely necessary to fill vacancies arising due to maternity leave, child-care leave, etc."

11. Learned Senior counsel for the petitioner has heavily and repeatedly relied upon the judgments of this court in the case of ***Dr. Deepak Bhatiya vs. State of U.P and others, 2010(5) ESC 3498 (All),*** the relevant paragraphs of the aforesaid judgment being paragraph nos. 2, 3, 7 and 8 are quoted hereinbelow :-

" 2. Petitioners had been working as full time teacher in institutions which are affiliated from the Central Board for Secondary Education, New Delhi, is recognised Intermediate Colleges which have been granted recognition under self-finance.T he petitioners have made applications for being.considered for the post of Principal available in various High School and Intermediate Institutions recognised by the Madhyamik Shiksha Parishad in terms of the advertisement published by U.P. Secondary Education Services Selection Board established under U.P. Act No. 5/1982. The application of the petitioners have not been considered by the Selection Board because the petitioners have been working in self financing institution and hey were not being giVing salary from the State exchequer.

3. Counsel for the petitioner has placed reliance upon the judgment of the Apex Court in the case of Mohd. Altaf and others v: Public Service Commission and another, in C.A. No. 961-962 of 1999 as also upon the judgment of the Apex Court in Contempt Petition (c) No. 372/20O02 In G.A. No. 962/1999, Shamim Khanam v. K.B. Pandey and another, it is submitted that teachers working in self-financed institution cannot, as a class, be excluded from consideration. Relevant portion of the order of the Supreme Court relied upon by the petitioner is quoted herein below

"Part time teachers would be excluded from consideration. However, it is made clear hat there cannot be a class of exclusion of teachers who are working in self-financed institutions. Any exclusion of a candidate on the basis that he or she is a part time teacher must be made only in individual cases after proper verification."

.....

7. So far as teachers working in recognized Intermediate Colleges having recognition under section 7A of the Intermediate Education Act are-concerned; this Court may notice that since 1986 all Intermediate and High Schools have been granted recognition under self finance only i.e., under Section 7A. The teachers are appointed for such institutions under Section 7AA read with Government order dated 16.4.2004. Although termed as part time hey in fact are required to work as full time, teachers. Therefore, their claim also cannot be excluded en masse.

8. This Court holds that the Commission has not justified in excluding such teachers who are working in self finance institutions en masse. The Board must scrutinize the application of the candidates concerned working in such self-financed recognized institutions and satisfy itself as to whether they are part time teachers or full part time teachers. All full time teachers appointed in accordance with rules applicable to such institution are within the zone of consideration and the Selection Board shall take appropriate action accordingly.

12. Second reliance has been placed on the judgment in the case of ***Dr. Madhulika Singh vs. State of U.P. and others, 2013 0 Supreme (All) 1440,*** which is as follows :-

" A perusal of the said appointment order indicates that the petitioner was appointed on a fixed honoraria basis after approval of the Vice Chancellor of the University. In such circumstances, the said appointment cannot be said to be an appointment either de-hors the rules or not in accordance with law so as to disentitle the petitioner to get the said period of experience counted for the purpose of selection.

The petitioner has described herself as a full time teacher supported by a certificate from the institution. Payment of a fixed honoraria is not necessarily an indicator of full time or part-time experience. Receipt of emoluments are not a substitute for experience.

A teacher getting a fixed salary at times is more devoted towards performance than those who have secured permanent berths. The experience of a teacher in a particular subject can be gauged by performance and the status of involvement in the institution. and not on some subjective assumption. However the genuineness of such experience. like in the present case, would also have to be assessed by the nature of engagement. In the present case the petitioner claims her

status of a teacher in a degree college upon approval by the Vice Chancellor of a recognized University.

So far as her experience as a teacher in an Intermediate College is concerned, that experience has also to be examined in accordance with the modes of appointment in an unaided Inter College.

In both cases payment of honoraria cannot be the criteria of rejection of experience. Merely because a teacher has received lower emoluments, though working on an equivalent post, cannot be the ground to reject a candidature. The judgments referred to hereinabove have to be taken into account that relies on the Apex Court decision in the case of ***Mohd. Altaf and others Vs. U.P. Public Service Commission and another reported in 2008(14) SCC 139; 2008 (14) SCC 144; 2008 (14) SCC 146and 2002 (93) FLR 1208."***

13. A perusal of the aforesaid judgment in the case of Dr. Deepak Bhatiya (Supra) shows that it has nothing to do with application of regulation 10 and 13 of the UGC Regulation 2018 nor it has been pointed out how the provisions regarding the U.P. Intermediate Education Act, 1921 would be relevant for consideration of compliance of the requirements of UGC Regulations aforesaid.

14. The judgment in the case of ***Dr. Madhulika Singh (Supra)*** is also not relevant for deciding the present controversy. Since in that case a teacher appointed on fixed honorarium was held to be entitled for consideration for appointment by Porvanchal University, a State University. In this case also the application of UGC Regulations was not involved.

15. The judgments cited on behalf of University clearly proves that the court should show deference to recommendation of expert committee and should not sit over appeal on such decision.

16. In the case of ***Dr. Basavaiah (Supra)*** the Supreme Court disapproved the conduct of the High Court in sitting over appeal over the recommendations made by the expert committee in paragraph 25 to 37 which are as follows :-

" 25. The teaching experience of foreign teaching institutions can be taken into consideration if it is from the recognized and institution of repute. It cannot be said that the State University of New York at Buffalo, where appellant no.2 served as an Assistant Professor would not be an institution of repute. The experts aiding and advising the Commission mustbe quite aware of institutions in which the teaching experience was acquired by him and this one is a reputed University. According to the experts of the Selection Board, both the appellants had requisite qualification and were eligible for appointment. If they were selected by the Commission and appointed by the Government, no fault can be found in the same. The High Court interfered and set aside the selections made by the experts committee. This Court while setting aside the judgment of the High Court reminded the High Court that it would normally be prudent and safe for the courts to leave the decision of academic matters to experts. The Court observed as under:

"7. ....When selection is made by the Commission aided and advised by experts having technical experience and high academic qualifications in the specialist field, probing teaching research experience in technical subjects, the Courts should be slow to interfere with the opinion expressed by experts unless there are

allegations of mala fides against them. It would normally be prudent and safe for the Courts to leave the decision of academic matters to experts who are more familiar with the problems they face than the Courts generally can be..."

26. In ***Dr. J. P. Kulshrestha & Others v. Chancellor, Allahabad University & Others (1980) 3 SCC 418,*** *the court observed that the court should not substitute its judgment for that of academicians:*

"17. Rulings of this Court were cited before us to hammer home the point that the court should not substitute its judgment for that of academicians when the dispute relates to educational affairs. While there is no absolute ban, it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies. ... ..."

27. In ***Maharashtra State Board of Secondary and Higher Secondary Education & Another v. Paritosh Bhupeshkumar Sheth & Others (1984) 4 SCC 27,*** *the court observed thus:*

"29. ... As has been repeatedly pointed out by this Court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. .. .."

28. In ***Neelima Misra v. Harinder Kaur Paintal & Others (1990) 2 SCC 746,*** *the court relied on the judgment in University of Mysore (supra) and observed that in the matter of appointments in the academic field, the court generally does not interfere. The court further observed that the High Court should show due regard to the opinion expressed by the experts constituting the Selection Committee and its recommendation on which the Chancellor had acted.*

29. In ***Bhushan Uttam Khare v. Dean, B.J. Medical College & Others (1992) 2 SCC 220****, the court placed reliance on the Constitution Bench decision in University of Mysore (supra) and reiterated the same legal position and observed as under:*

"8. ... the Court should normally be very slow to pass orders in its jurisdiction because matters falling within the jurisdiction of educational authorities should normally be left to their decision and the Court should interfere with them only when it thinks it must do so in the interest of justice. ... ..."

30. In ***Dalpat Abasaheb Solunke & Others v. Dr. B.S. Mahajan & Others (1990) 1 SCC 305,*** *the court in some what similar matter observed thus:*

"... ... ...It is needless to emphasis that it is not the function of the court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material

before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the court, the High Court went wrong and exceeded its jurisdiction."

31. In ***Chancellor & Another etc. v. Dr. Bijayananda Kar & Others (1994) 1 SCC 169,*** *the court observed thus:*

"9. This Court has repeatedly held that the decisions of the academic authorities should not ordinarily be interfered with by the courts. Whether a candidate fulfils the requisite qualifications or notis a matter which should be entirely left to be decided by the academic bodies and the concerned selection committees which invariably consist of experts on the subjects relevant to the selection...."

32. In ***Chairman J&K State Board of Education v. Feyaz Ahmed Malik & Others(2000) 3 SCC 59,*** *the court while stressing on the importance of the functions of the expert body observed that the expert body consisted of persons coming from different walks of life who were engaged in or interested in the field of education and had wide experience and were entrusted with the duty of maintaining higher standards of education. The decision of such an expert body should be given due weightage by courts.*

33. In ***Dental Council of India v. Subharti K.K.B. Charitable Trust & Another (2001) 5 SCC 486,*** *the court reminded the High Courts that the court's jurisdiction to interfere with the discretion exercised by the expert body is extremely limited.*

34. In ***Medical Council of India v. Sarang & Others (2001) 8 SCC 427,*** *the court again reiterated the legal principle that the court should not normally interfere or interpret the rules and should instead leave the matter to the experts in the field.*

35. In ***B.C. Mylarappa alias Dr. Chikkamylarappa v. Dr. R. Venkatasubbaiah & Others (2008) 14 SCC 306,*** *the court again reiterated legal principles and observed regarding importance of the recommendations made by the expert committees.*

36. In ***Rajbir Singh Dalal (Dr.) v. Chaudhari Devi Lal University, Sirsa & Another (2008) 9 SCC 284,*** *the court reminded that it is not appropriate for the Supreme Court to sit in appeal over the opinion of the experts.*

37. In ***All India Council for Technical Education v. Surinder Kumar Dhawan & Others (2009) 11 SCC 726,*** *again the legal position has been reiterated that it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies."*

17. Similarly in the case of ***B.C Mylarappa alias Dr. Chikkamylarappa (supra),*** the Apex Court disapproved the interference of the High Court in the decision of the expert committee in the absence of any malafide in paragraph nos. 21, 24, 26, 27, 28 and 29 which are as follows :-

" 21. Before we go into the two grounds, we may keep it on record that it was the stand of the University before the High Court as well that the appellant was duly qualified for appointment to the post of Professor. The learned Single Judge while allowing the writ petition of the respondents, however, reckoned the service of the appellant as Lecturer, but ignore to consider the experience of the appellant as Research Assistant. It cannot be disputed that these two experiences, namely, experience as Lecturer and experience as Research Assistant, if counted, the eligibility of the appellant for appointment

to the post of Professor could not be questioned. In Dr. Kumar Bar Das (supra), this court in detail had considered this aspect of the matter and in the said decision, this Court observed that the opinion of experts in the Selection Committee must be taken to be that the appellant's teaching and Research experience satisfied the above conditions of 10 years as mentioned for appointment to the post of Professor. In that case, this Court at para 27 at page 462 observed as follows :

" 27. In our view, having regard to the high qualifications of the experts and the reasons furnished by the Syndicate as being the obvious basis of the experts' opinion, the Chancellor ought not to have interfered with the view of the experts. The expert's views are entitled to great weight as stated in University of Mysore's case."

In Para 28 of the said decision, this Court also observed :

"28. In our opinion, the Chancellor cannot normally interfere with the subjective assessment of merit of candidates made by an expert body unless mala fides or other collateral reasons are shown. In Neelima Misra case above-referred to, this Court observed, referring to the powers of the Chancellors in matters of appointment of Professors/Readers as being purely administrative and not quasi-judicial."

24. There is another aspect of this matter which is also relevant for proper decision of this appeal. We have already indicated earlier that the Board of Appointment was constituted with experts in this line by the University Authorities. They have considered not only the candidature of the appellant and his experience as a Lecturer and Research Assistant along with others came to hold that it was the appellant who was the candidate who could satisfy the conditions for appointment to the post of Professor. Such being the selection made by the expert body, it is difficult for us to accept the judgments of the High Court when we have failed to notice any mala fides attributed to the members of the expert body in selecting the appellant to the said post.

26. Admittedly, there is nothing on record to show any mala fides attributed against the members of the Expert Body of the University. The University Authorities had also before the High Court in their objections to the writ petition taken a stand that the appellant had fully satisfied the requirement for appointment. In this view of the matter and in the absence of any mala fides either of the expert body of the University or of the University Authorities and in view of the discussions made herein above, it would be difficult to sustain the orders of the High Court as the opinion expressed by the Board and its recommendations cannot be said to be illegal, invalid and without jurisdiction.

27. Again in ***M.V.Thimmaiah & Ors. vs. Union Public Service Commission & Ors. [2008 (2) SCC 119],*** *this Court clearly held that in the absence of any mala fides attributed to the expert body, such plea is usually raised by an interested party (in this case the unsuccessful candidate) and, therefore, court should not draw any conclusion on the recommendation of the expert body unless allegations are substantiated beyond doubt. That apart, the challenge to the selection made by the expert body and approved by he University Authorities was made by the respondent Nos. 1 and 2 who were unsuccessful candidates and were not selected for appointment to the post of Professor in the Department of Sociology.*

28. In National Institute of Mental Health & Neuro Sciences vs.

Dr.K.Kalyana Raman & Ors. *[1992 Supp (2) SCC 481], this Court considered in detail the role of an expert body in deciding the candidature for selection to a particular post. While doing so, this Court at Para 7 at P. 484 of the said decision observed as follows:*

"7. ..... In the first place, it must be noted that the function of the Selection Committee is neither judicial nor adjudicatory. It is purely administrative. The High Court seems to be in error in stating that the Selection Committee ought to have given some reasons for preferring Dr. Gauri Devi as against the other candidate. The selection has been made by the assessment of relative merits of rival candidates determined in the course of the interview of candidates possessing the required eligibility. There is no rule or regulation brought to our notice requiring the Selection Committee to record reasons. In the absence of any such legal requirement the selection made without recording reasons cannot be found fault with. The High Court in support of its reasoning has, however, referred to the decision of this Court in Union of India v. Mohan Lai Capoor. That decision proceeded on a statutory requirement. Regulation 5(5) which was considered in that case required the Selection Committee to record its reasons for superseding a senior member in the State Civil service. The decision in Capoor case was rendered on 26 September, 1973. In June, 1977, Regulation 5(5) was amended deleting the requirement of recording reasons for the supersession of senior officers of the State Civil services. The Capoor case cannot, therefore, be construed as an authority for the proposition that there should be reason formulation for administrative decision. Administrative authority is under no legal obligation to record reasons in support of its decision. Indeed, even the principles of natural justice do not require an administrative authority or a Selection Committee or an examiner to record reasons for the selection or non-selection of a person in the absence of statutory requirement. This principle has been stated by this Court in R. S. Dass v. Union of India in which Capoor case was also distinguished."

Keeping this observation in our mind and considering the facts and circumstances of the present case, we find that there was no dispute in this case that the selection was made by the assessment of relative merit of rival candidates determined in the course of the interview of the candidates and after thoroughly verifying the experience and service of the respective candidates selected the appellant to the post of the Professor in the said Department.

29. It is not in dispute that there is no rule or regulation requiring the Board to record reasons. Therefore, in our view, the High Court was not justified in making the observation that from the resolution of the Board selecting the appellant for appointment, no reason was recorded by the Board. In our view, in the absence of any rule or regulation requiring the Board to record reasons and in the absence of mala fides attributed against the members of the Board, the selection made by the Board without recording reasons cannot be faulted with."

18. In the case of ***Dalpat Abasaheb Solunke vs. B.S. Mahajan,*** Apex Court held in the paragraph 9 that court cannot decide relative merits of candidates for selection as follows :-

" It will thus appear that apart from the fact that the High Court has rolled

the cases of the two appointees in one, though their appointments are not assailable on the same grounds, the Court has also found it necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasis that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the Candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the Constitution of the Committee or its procedure vitiating the selection, or proved malafides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the Court, the High Court went wrong and exceeded its juris diction."

19. In the case of ***Baidyanath Yadav vs. Aditya Narayan Roy and Ors.***, Apex Court held in the paragraph nos. 4.1, 4.2, 5.1, 5.3 and 9.2 that the High Court cannot direct the screening committee to recommend the name of any candidate to the U.P. Public Service Commission as follows:-

" 4.1 Learned Senior Counsel for the Appellant, Mr. Huzefa Ahmadi, argued that the High Court erred in giving weight to the serial order in which the names of the officers were placed before the State Screening Committee; non-disclosure of reasons by a selection committee does not vitiate their decision, unless required by rules or administrative instructions (relying on National Institute of Mental Health & Neuro Sciences v. Dr. K. Kalyana Raman, 1992 Supp (2) SCC 481, and Union Public Service Commission v. Arun Kumar Sharma, (2015) 12 SCC 600), which was not the case here; there was no direction by the departmental minister to keep Respondent No. 1's name at the top; and the direction for reconsideration of his name alone, rather than of all the recommended candidates, was beyond the jurisdiction of the High Court.

4.2 Learned Counsel for the State of Bihar, Mr. P. S. Patwalia, took us through the Indian Administrative Service (Appointment by Selection) Regulations, 1997 ("the 1997 Regulations"), and submitted that the departmental Selection Committee and the State Screening Committee had undertaken a fair and objective assessment of the service records under the Regulations. He also pointed out that in the absence of any allegation of mala fides or bias, it could not be held that there was any undue influence on the committee members. He ended by referring to the decision of this Court in Union Public Service Commission v. M. Sathiya Priya, (2018) 15 SCC 796, emphasising that the High Court could not have reassessed the findings of the committees on merit.

5.1 It is by now well-settled that the scope of such review is limited, and the Tribunal or Court cannot re-assess the merit of the individual candidates. As observed by a 2-Judge Bench of this Court in ***M.V. Thimmaiah v. UPSC, (2008) 2 SCC 119:***

"21. Now, comes the question with regard to the selection of the candidates. Normally, the recommendations

of the Selection Committee cannot be challenged except on the ground of mala fides or serious violation of the statutory rules. The courts cannot sit as an Appellate Authority to examine the recommendations of the Selection Committee like the court of appeal. This discretion has been given to the Selection Committee only and courts rarely sit as a court of appeal to examine the selection of the candidates nor is the business of the court to examine each candidate and record its opinion..."

5.3 It can be concluded from the above that it was not for the High Court to address questions of comparative merit of the candidates, and neither is it appropriate for us to do the same. All we may look into is whether there was any serious violation of statutory rules, or any bias, mala fides or arbitrariness in the entire selection process. To address this question, it is essential to revisit the process prescribed for the selection of non-SCS officers to the IAS.

9.2 Moreover, we find ourselves in disagreement with the conclusion of the High Court that the decision of the State Screening Committee was arbitrary for nondisclosure of reasons. A catena of decisions of this Court has established that even the principles of natural justice do not require a duly constituted selection committee to disclose the reasons for its decision, as long as no rule or regulation obliges it to do so. In this regard, we may refer to the decision of this Court in National Institute of Mental Health (supra), which has also been subsequently affirmed in several cases, includingUnion Public Service Commission v. Arun Kumar Sharma(supra). In National Institute of Mental Health (supra), the Court, following the decision inR.S. Dass v. Union of India, (1986) Supp SCC 617, observed as follows:

"7. ... In the first place, it must be noted that the function of the Selection Committee is neither judicial nor adjudicatory. It is purely administrative... Administrative authority is under no legal obligation to record reasons in support of its decision. Indeed, even the principles of natural justice do not require an administrative authority or a Selection Committee or an examiner to record reasons for the selection or non-selection of a person in the absence of statutory requirement. This principle has been stated by this Court in R.S. Dass v. Union of India [1986 Supp SCC 617 : (1987) 2 ATC 628] in which Capoor Case [(1973) 2 SCC 836 : 1974 SCC (L&S) 5 : (1974) 1 SCR 797] was also distinguished.

8. ... we may state at the outset that giving of reasons for decision is different from, and in principle distinct from, the requirements of procedural fairness. The procedural fairness is the main requirement in the administrative action. The "fairness' or "fair procedure' in the administrative action ought to be observed. The Selection Committee cannot be an exception to this principle. It must take a decision reasonably without being guided by extraneous or irrelevant consideration..."

20. In the case of ***Ram Darash Yadav (Supra)*** Apex Court held in the paragraph nos. 34, 35 and 40 that teaching experience contemplates an experience in composite form which is to be performed by a teacher, where he is working as lecturer or in any other capacity as follows :-

" 34. Experience of a person working as a Lecturer in regular capacity or as part time or Guest Lecturer cannot be equated since it all differ in quality, quantity and various other aspects. A Lecturer regularly appointed is not supposed to only take lectures in the College but he has to perform various other duties also in the capacity of his appointment as Lecturer on regular basis.

A part time Lecturer discharge duties for a smaller length of period in a day and a Guest Lecturer is required to take lectures in the classes and nothing more than that. The term "Teaching Experience" contemplates an experience in composite form which is to be performed by a Teacher whether he is working as Lecturer or in any other capacity.

35. In ***Tulsi Ram v. State of U. P., 1998 (3) ESC 1617,*** *it has been held that teaching experience of part-time teachers would not make them eligible for appointment. Above decision has been followed by another Division Bench in* ***Ayodhya Prasad vs. Public Service Commission and another, 2002(3) AWC 2468 as follows :-***

40. As a Guest Lecturer, petitioner was required to attend assigned lectures. For each lecture prescribed amount was payable. As per G.O. dated 4.7.1998, Rs. 150/- per lecture was payable, subject to maximum payment of Rs. 3000/- per month. Meaning thereby, no person could have been engaged to deliver more than 20 lectures in a month. Petitioner actually delivered 1307 lectures in a period of about 6 years i.e. about 18 lectures per month were delivered by him. It is not pleaded anywhere in the entire writ petition that a Lecturer regularly appointed in a Medical College is supposed to deliver only 18 or 20 lectures in a month and not more than that. It is also not pleaded that teaching work of a regularly appointed "Lecturer" is confined only to deliver lecturers and nothing more than that. When experience is talked in terms of "period", it cannot be equated with certain number of Lectures rendered in certain period for the reason that such an interpretation if accepted, even if a Guest Lecturer may have delivered or engaged for delivering one or two lectures in a month but has continued so engaged for a length of time, he can also claim to have gained requisite "Teaching Experience". This interpretation would be clearly a travesty and mockery to the purpose of which requirement of "Teaching Experience" has been provided. When Rules contemplate "Teaching Experience" of a particular period, it means that experience must be in a post held for full time. Experience acquired by rendering requisite "Teaching work" which a regular teacher is required to perform. It cannot be equated with occasional or fortuitous engagement of a person to deliver lectures otherwise it would also amount to treating unequals as equal. Moreover, requirement under advertisement is consistent with requirement of such "experience" under Regulations, 2013. We are inclined to give an interpretation in favour of the qualification advertised and not as contemplated by petitioner. Hence it cannot be said that petitioner has been wrongly held ineligible for consideration for appointment to the post of Principle SHMC pursuant to advertisement under challenge."

21. In the case of ***Ram Darash Yadav (Dr.) (Supra)*** the special leave petition was dismissed by the Apex Court upholding the judgment of this court in ***Ram Darash Yadav (Dr.) vs. State of U.P. and Others*** passed by this court.

22. In the case of ***National Institute of Mental Health & Neuro Sciences (Supra)*** the Hon'ble Supreme Court held that the selection committee is not under obligation to record reasons for its decision and there is no role to this effect. Reliance has been placed on paragraph nos. 7 and 8 as follows:-

" 7. We will first consider the second point. In the first place, it must be noted that the function of the Selection Committee is neither judicial nor

adjudicatory. It is purely administrative. The High Court seems to be in error in stating that the Selection Committee ought to have given some reasons for preferring Dr. Gauri Devi as against the other candidate. The selection has been made by the assessment of relative merits of rival candidates determined in the course of the interview of candidates possessing the required eligibility. There is no rule or regulation brought to our notice requiring the Selection Committee to record reasons. In the absence of any such legal requirement the selection made without recording reasons cannot be found fault with. The High Court in support of its reasoning has, however, referred to the decision of this Court inUnion of India v. Mohan Lai Capoor. That decision proceeded on a statutory requirement. Regulation 5(5) which was considered in that case required the Selection Committee to record its reasons for superseding a senior member in the State Civil service. The decision in Capoor case was rendered on 26 September, 1973. In June, 1977, Regulation 5(5) was amended deleting the requirement of recording reasons for the supersession of senior officers of the State Civil services. The Capoor case cannot, therefore, be construed as an authority for the proposition that there should be reason formulated for administrative decision. Administrative authority is under no legal obligation to record reasons in support of its decision. Indeed, even the principles of natural justice do not require an administrative authority or a Selection Committee or an examiner to record reasons for the selection or non-selection of a person in the absence of statutory requirement. This principle has been stated by this Court inR. S. Dass v. Union of Indiain which Capoor case was also distinguished.

8. As to the first point we may state at the outset that giving of reasons for decision is different from, and in principle distinct from, the requirements of procedural fairness. The procedural fairness is the main requirement in the administrative action. The 'fairness' or 'fair procedure' in the administrative action ought to be observed. The Selection Committee cannot be an exception to this principle. It must take a decision reasonably without being guided by extraneous or irrelevant consideration. But there is nothing on record to suggest that the Selection Committee did anything to the contrary. The High Court however, observed, that Dr. Kalyana Raman did not receive a fair and reasonable consideration by the Selection Committee. The inference in this regard has been drawn by the High Court from the statement of objections dated 18 February, 1980 filed on behalf of the Selection Committee. It appears that the Selection Committee took the stand that Dr. Kalyana Raman did not satisfy the minimum requirement of experience and was not eligible for selection. The High Court went on to state that it was some what extraordinary for the Selection Committee after calling him for the interview and selecting him for the post by placing him second, should have stated that he did not satisfy the minimum qualifications prescribed for eligibility the High Court the stand taken by the Selection Committee raises serious doubts as to whether the deliberations of the Selection Committee were such as to inspire confidence and re-assurance as to the related equality and justness of an effective consideration of this case. It is true that selection of the petitioner and the stand taken by the Selection Committee before the High Court that he was not eligible at all are, indeed, antithetical and cannot co-

exist. But the fact remains that the case of Dr. Kalyana Raman was considered and he was placed second in the panel of names. It is not shown that the selection was arbitrary or whimsical or the Selection Committee did not act fairly towards Dr. Kalyana Raman. The fact that he was placed second in the parcel, itself indicates that there was proper consideration of his case and he has been treated fairly. It should not be lost sight of that the Selection Committee consisted of experts in the subject for selection. They were men of high status and also of unquestionable impartiality. The Court should be slow to interfere with their opinion."

23. Finally, in the case of ***Dr. Ramesh Kumar Yadav and another vs. University of Allahabad and Others 2012 (4) ADJ 724 (DB)***, this court held that central government had no authority to disagree with the recommendation of UGC. Exemption granted by UGC to the candidates who were awarded P.hd degrees prior to the cut of date was in accordance with UGC guidelines prevailing at that time and central government had no right to direct otherwise.

24. After considering the rival submissions, this court finds that the petitioners have miserably failed to prove their case before this court by pointing out to any violation of any regulation of UGC wanting an interference by this court. None of the Regulations have been challenged when arguments have been advanced against the express Regulations of UGC. The petitioner's working as guest faculty was not relevant as per Regulation 10(e) and her contractual appointment was also not in accordance with Regulation 13 of the U.G.C. Regulation as clear from the submissions made on behalf of the learned counsel for the University. From the above consideration it is also clear that in the report of the expert committee the courts have very limited discretion to interfere. Where malafides are proved and violation of any regulation is proved the court may interfere but it cannot enter into roving and fishing inquiry on the basis of irrelevant considerations.

25. In view of the above, the writ petition fails and is accordingly, ***dismissed.***

26. However, there shall be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.08.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

Writ A No. 26204 of 2021
with
Writ A No.26228 of 2021
with
Writ A No. 26577 of 2021

Nirbhay Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Mr. Santosh Kumar Yadav "Warsi"

Counsel for the Respondents:
Mr. Manjive Shukla, Addl. C.S.C. for Respondent Nos. 1,2,4,5 & 6, Mr. Rahul Shukla Advocate for Respondent No. 3, Mr. O.P. Srivastava, Senior Advocate with Mr. Kaushlendra Yadav, Advocate for Respondent No. 7

Civil Law - Constitution of India, 1950 - Art. 324 - Right of Children to Free and Compulsory Education Act, 2009 - Assistant Teachers of Basic Shiksha Parishad Schools deployed for revision of electoral roll - Challenge to the same - S. 27, Prohibition of deployment of teachers for non educational purposes - Section 27 of the 2009 Act, prohibits the deployment of teachers for non-educational purpose - However following exceptions have been carved out: decennial population census, disaster relief duties, duties relating to elections to the local authority or the St. Legislatures or Parliament – `*duties relating to elections*` - exception as craved out in S. 27 of the 2009 Act, cannot be limited to only polling of votes for election rather it will encompass within all the works relating to election, which includes revision of electoral roll as the same has direct relation with the election - Section 27 Act, 2009 permit the deployment of teachers for election duty even before issuance of the notification relating to election to a Local Body, a St. Assembly or the Parliament - preparation of electoral rolls is included in duties relating to elections - however, the teachers cannot be deployed during teaching days or teaching hours but can be deployed on non-teaching days and non-teaching hours. (Para 22, 24, 29)

Disposed Off. (E-5)

List of Cases cited:-

1. Kanika Banshiwal & ors. Vs St. of U.P. & ors.; 2021 SCC OnLine All 755

2. Sunita Sharma Advocate High Court Vs St. of U.P. & ors.; 2015 (3) ALJ 519

3. Election Commission of India Vs St. Mary's School (2008) 2 SCC 390

4. Sudhir Kumar Sharma Vs St. of U.P. & ors. Writ-C No.34551 of 2015 decided on July 9, 2015

5. Uttar Pradeshiya Prathmik Shikshak Sangh & ors. Vs St. of U.P. & ors. Public

6. PIL No.36449 of 2016 dt. 08.08.2016

7. Kuldip Singh Vs St. of U.P. & ors. Writ-A No.8516 of 2021 dt 24.08.2021

8. Ramji Mishra Vs St. of U.P. & ors. Service Single No. 16754 of 2021 dt 05.08.2021

9. U.P. Pradeshiya Prathmik Shikshak Sangh & ors. Vs St. of U.P. & ors. 2018 (11) ADJ 393

10. Satyendra Kumar Sandilya Vs The St. of Bihar & ors. 2011 (59) BLJR 2269

11. Umakant Ramkrushan Mahure Vs The St. of Mah. & ors. W.P. No. 6718 of 2019 dt 18.02.2020

13. Mahesh Swami & ors. Vs The St. of Raj. & ors. CWP No. 17945 of 2021 16.03.2022

14. The Executive Engineer, Gosikhurd Vs Mahesh & ors., (2022) 2 SCC 772

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. The matter has been placed before this Bench for considering the following questions referred by the learned Single Judge vide order dated November 11, 2021:

"(1) Whether the provisions of Section 27 of the Right of Children to Free and Compulsory Education Act, 2009 permit the deployment of teachers to do any kind of duties relating to elections before the issue of an election notification relating to a Local Body, a State Assembly or the Parliament under appropriate provisions of the law?

(2) Whether before or after the issue of notifications relating to elections to a Local Body, a State Assembly or the Parliament, can teachers be deployed to any kind of election-related work on teaching days or during teaching hours?"

2. The matter was referred to larger Bench for the reason that the learned Single

Judge was of the opinion that the view expressed by the learned Single Judge in **Kanika Banshiwal and others v. State of U.P. and others1** runs contrary to the view expressed by the Division Bench in **Sunita Sharma Advocate High Court v. State of U.P. and others2.**

3. The petitioners in the writ petitions claim that they are working as Assistant Teachers in various Basic Shiksha Parishad Schools in district Barabanki. They have been directed to work as Booth Level Officer by the Sub Divisional Officer of the Tehsils concerned in terms of the direction issued by the District Magistrate, Barabanki, who is the District Electoral Officer. It was claimed that the petitioners are engaged in teaching children of the age group of 6 to 14 years, for whom right to education is fundamental right as guaranteed under Article 21A of the Constitution3. In terms thereof, the 2009 Act4 was enacted. The protection is sought under Section 27 of the 2009 Act.

4. Learned counsel for the petitioners submitted that Section 27 of the 2009 Act clearly provides that the teachers cannot be deployed for non educational purposes. However, this provision has three exceptions, namely, deployment in decennial population census, disaster relief duties or duties relating to elections to the local authority or the State Legislatures or Parliament. The census is normally held after a gap of 10 years. A disaster though can be at any time but it is not a regular feature. However, the elections for different bodies at the District, State and Central level are the repeated exercise. The term "election" as given in Section 27 of the 2009 Act has to be given restrictive meaning by holding that it is limited to election duty which starts after notification otherwise study of the students in the age group of 6 to 14 years will suffer. The same will be in violation of the mandate as provided under Article 21A of the Constitution.

5. On the other hand, learned counsel for election commission submitted that the Government of India, Ministry of Human Resources and Development vide letter dated September 13, 2010 had issued specific guidelines in exercise of power conferred under Section 35(1) of the 2009 Act, which are in terms of the guidelines issued by Hon'ble the Supreme Court in **Election Commission of India v. St. Mary's School5**. In terms thereof, the need for electoral duty is to be balanced with the education of the children and as far as possible, the duties are to be assigned on holidays or during non teaching hours and non teaching days. He further submitted that the facts in **Sunita Sharma's case (supra)** are distinguishable, as in the aforesaid case duties assigned to the teachers were for verification of card holding families for inclusion and exclusion under the National Food Security Act, 2013, which was not falling in each of the exceptions carved out in Section 27 of the 2009 Act. It was distinguished in **Sudhir Kumar Sharma v. State of U.P. and others6.** He further submitted that judgment of Hon'ble the Supreme Court in **St. Marys' case (supra)** holds the field in which comprehensive guidelines have been issued for assigning the election duties to the teachers. The same are being followed. As the issue raised is covered by the judgment of Hon'ble the Supreme Court in **St. Marys' case (supra)**, the reference itself is bad. He further submitted that in some cases, different types of directions have been issued. It is for the reason that the election commission was not impleaded

as party, hence correct view point could not be placed before the Court.

6. Learned counsel for the State submitted that as far as teaching to Classes 1 to 5 is concerned, there are total 200 working days and 800 hours in a year. As far as Classes 6 and 7 are concerned, teaching days are 226 with 1000 hours. By deploying the teachers, in the case in hand, for carrying out duties in connection with election, Section 27 of the 2009 Act is not being violated. The words used in Section 27 of the 2009 Act are "relating to elections" and not simply "election duties". Revision of electoral roll will certainly be a duty which is related to the election. As the election process is quite important in a democracy as is evident from preamble of the Constitution. Right to vote is fundamental. Unless the electoral roll is revised periodically especially before the election, many may be deprived to exercise their right to vote. Balance has to be struck. The mandate of Hon'ble the Supreme Court in **St. Marys' case (supra)** is being followed. The questions referred to by learned Single Judge has infact been answered in **Sudhir Kumar Sharma's case (supra)**. The teaching work of the students is not being affected as, as far as possible, deployment is being made either on holidays or during non teaching hours. Revision of electoral roll is not such a frequent exercise, as the teachers remain on this duty repeatedly. It is fundamental duty of all the citizens to aid the State for holding free and fair election. Unless all the voters are registered, free and fair elections are not possible. The conduct of the petitioners shows that while challenging their deployment for revision of electoral roll, they are seeking to escape from their responsibility towards the nation. Election is an integral part of the democratic process.

7. Heard learned counsel for the parties and perused the relevant record.

8. Section 27 of the 2009 Act, which requires interpretation by this Court, is extracted below:

"27. Prohibition of deployment of teachers for non-educational purposes.- No teacher shall be deployed for any non-educational purposes other than the decennial population census, disaster relief duties or duties relating to elections to the local authority or the State Legislatures or Parliament, as the case may be."

VIEW OF THIS COURT THAT TEACHERS CAN BE DEPLOYED FOR DUTIES RELATING TO ELECTION

9. In **Uttar Pradeshiya Prathmik Shikshak Sangh and others v. State of U.P. and others7** the issue before the Division Bench of this Court was with reference to the duty sought to be assigned to the teachers to perform duties as Booth Level Officers and for preparation, revision, maintenance and duplication of the electoral roll/voter list. The Division Bench disposed of the petition in terms of the statement of learned counsel for the respondents that they shall put the teaching staff on duty on non-teaching days and within non-teaching hours as observed by Hon'ble the Supreme Court in **St. Marys' case (supra)**.

10. In **Kanika Banshiwal's case (supra)**, the Single Bench of this Court

while considering the earlier judgments of this Court opined that in terms of Section 27 of the 2009 Act, the teaches can be deployed for the purposes relating to election. In the said case, the teachers were deployed to work as Booth Level Officer for the purposes of conduct of duties relating to election.

11. A Division Bench of this Court in **Sudhir Kumar Sharma's (supra),** considered the import of Section 27 of the 2009 Act and opined that the teachers can be deployed for revision of electoral roll as the said work is part and parcel of on-going election process. Direction was issued keeping in mind the observations of Hon'ble the Supreme Court in **St. Marys' case (supra)**. Earlier judgment of this Court in **Sunita Sharma's case (supra)** was distinguished, as in that case duty assigned was different and had no relations with the elections.

VIEW OF THIS COURT THAT TEACHERS CAN NOT BE DEPLOYED FOR DUTIES RELATING TO ELECTION

12. In a short order passed in **Kuldip Singh v. State of U.P. and others8**, a Single Bench of this Court while referring to earlier Division Bench judgment of this Court in **Sunita Sharma's case (supra)** opined that teacher cannot be deployed for election work. Reliance was wrongly placed upon Division Bench judgement in **Sunita Sharma's case (supra)** which in fact was distinguishable where duty sought to be assigned was for verification of card holding families. There is no discussion in detail on the issue raised and arguments advanced by the learned counsel for the parties. The said writ petition was disposed of with the consent of both the parties stating that the same is covered by the judgment of this Court in **Sunita Sharma's case (supra)**.

13. The Single Bench of this Court in **Ramji Mishra v. State of U.P. and others9** while considering the submission of the counsel for the petitioners that revision of voter list does not fall in any of the categories as carved out in Section 27 of the 2009 Act, vide interim order directed that they shall not be forced to perform duties as Booth Level Officer.

14. In **Sunita Sharma's case (supra)**, the issue under consideration before this Court was deployment of teachers for verification of card holding families on the basis of criteria for inclusion and exclusion under the National Food Security Act, 2013. While considering the import of Section 27 of the 2009 Act, the opinion expressed was as under:

".....Section 27 specifically contains a prohibition on the deployment of teaches for non-educational purposes. Under Section 27, no teacher shall be deployed for any non-educational purposes other than the decennial population census, disaster relief duties or duties relating to elections to the local authority, or to the State Legislatures or Parliament, as the case may be. In view of this statutory prohibition, it is clearly unlawful and ultra vires on the part of the State to requisition the services of teachers for carrying out the verification of eligible car holding families."

15. In the aforesaid case, the teachers were not being deployed for any work relating to election rather for verification of the eligible card holding families.

16. In **U.P. Pradeshiya Prathmik Shikshak Sangh and others v. State of U.P. and others10,** the issue under consideration before the Single Bench of this Court was deployment of teachers for verification of Ration Cards. Section 27 of the 2009 Act was considered and the opinion was expressed was "they could not be deployed for such a duty which is not in conformity with the provisions of Section 27 of the 2009 Act".

VIEW OF OTHER HIGH COURTS THAT TEACHERS CAN BE DEPLOYED FOR DUTIES RELATING TO ELECTION

17. A Division Bench of Patna High Court in **Satyendra Kumar Sandilya v. The State of Bihar and others11** while considering the issue as to whether the teachers can be deployed for non educational purposes such as election and census duties, while relying upon the judgment of Hon'ble the Supreme Court in **St. Marys' case (supra)** opined that there is no bar for such deployment and the authorities are required to act in terms of the provisions of Section 27 of the 2009 Act and keeping in view the directions given by Hon'ble the Supreme Court in **St. Marys' case (supra)**.

18. A Division Bench of Bombay High Court in **Umakant Ramkrushan Mahure v. The State of Maharashtra and others12** also considered the issue with reference to Section 27 of the 2009 Act as to whether teachers could be deployed for work relating to election of the Legislative Assembly or the Parliament. While referring to the instructions issued by the Election Commission of India in conformity with the judgment of Hon'ble the Supreme Court in **St. Marys' case (supra)**, following directions were issued:

"(i) The petitioners, who are Teachers, are covered by the provisions of section 27 of Right of Children to Free and Compulsory Education Act, 2009, can be called to perform election duty including updating of electoral rolls on holidays and in non-teaching hours.

(ii) If F.I.R. is lodged against any of the petitioners, for refusal to perform the duty during school hours, the same shall not be prosecuted. However, if the petitioners refuse to work in accordance with the instructions of Elections Commission of India, it shall be open for the respondents to continue with such actions."

19. Similar view was expressed by Single Bench of Rajasthan High Court in **Mahesh Swami and others v. The State of Rajasthan and others13.**

DISCUSSIONS

20. To answer the questions, we need to consider the import of Section 27 of the 2009 Act, which prohibits the deployment of teachers for non-educational purpose. However following exceptions have been carved out:

- decennial population census

- disaster relief duties

- duties relating to elections to the local authority or the State Legislatures or Parliament

21. The words used in Section 27 of the 2009 Act are "duties relating to elections'. Article 324 of the Constitution of India deals with the superintendence,

direction and control of the preparation of the electoral rolls for and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution treating them to be vested in a commission referred to in this Constitution as the Election Commission.

22. Use of word "and', between control of the preparation of electoral rolls for and the conduct of all elections in Article 324(1) means that preparation of electoral rolls is a prelude to conduct of elections. Thus, when given comprehensive and inclusive meaning preparation of electoral rolls is included in duties relating to elections.

23. As to what will include in the "duties relating to election' need to be examined. The term "relating to' was examined in detail by Hon'ble the Supreme Court in **The Executive Engineer, Gosikhurd v. Mahesh and others14,** wherein while referring to various judgments on the issue, it was opined that the expression "relating to' has to be given expansive and wider meaning. Relevant para 16 thereof is extracted as under :

"16. We begin by examining the phrasing of clause (a) to Section 24 (1) of the 2013 Act. We would prefer to read the words "all the provisions relating to determination of compensation" in Section 24(1)(a) as including the period of limitation specified in Section 25 of the 2013 Act. To elaborate, the word `all' and the expression "relating to" used in Section 25 are required to be given a wide meaning to ensnare the legislative intent. The expressions "relating to" or "in relation to" are words of comprehensiveness which may have a direct as well as indirect significance depending on the context. Similarly, interpreting Section 129C of the Customs Act, 1962, this Court while giving the phrase `in relation to' a narrower meaning of direct and proximate relationship to the rate of duty and to the value of goods for purpose of assessment, did observe that ordinarily the phrase `in relation to' is of a wider import. Several cases assigning a wider import to the expression `relating to', in view of the contextual background, find reference in **Gujarat Urja Vikas Nigam Limited v. Amit Gupta and Others, 2021 SCC Online SC 194. In Renusagar Power Co. Ltd. v. General Electric Company and Another, (1984) 4 SCC 679,** this Court held that the term `in relation to', when used in the context of arbitration clause, is of widest amplitude and content. In **Mansukhlal Dhanraj Jain and Others v. Eknath Vithal Ogale, (1995) 2 SCC 665** the expression `relating to' in the context of Small Causes Court Act, 1887 has been held to be comprehensive in nature that would take in its sweep all types of suits and proceedings which are concerned with recovery of possession. Broad and wider interpretation was again preferred in **M/s. Doypack Systems Pvt. Ltd. v. Union of India and Others, (1988) 2 SCC 299** observing that the expression "in relation to" is a very broad expression which presupposes another subject matter. In M/s. Doypack Systems Pvt. Ltd. (supra), in the context of Section 3 of Swadeshi Cotton Mills Company Limited (Acquisition and Transfer of Undertakings) Act, 1986, the expression "relating to" was held to mean `bring into association or connection with'. The words are comprehensive and might have both direct as well as indirect significance. The decision in Gujarat Urja Vikas Nigam Limited (supra) refers to

Corpus Juris Secundum, wherein the expression "relating to" has been held to be equivalent to or synonymous with as to "concerning with" and "pertaining to". It has been observed that the expression "pertaining to" is an expression of expansion and not of contraction. The expression "relating to" when used in legislation normally refers to "stand in some relation, to have bearing or concern, to pertain, to refer, to bring into association with or connection with". Therefore, the expression `relating to' when used in legislation has to be construed to give effect to the legislative intent when required and necessary by giving an expansive and wider meaning. Given this trend in interpretation, the words "all the provisions of this Act relating to the determination of compensation" must not be imputed a restricted understanding of the word `relating' only to the substantial provisions on calculation of compensation, that is, Sections 26 to 30 of the 2013 Act. Rather, the expression should be given an expansive meaning so as to include the provision on limitation period for calculation of compensation, that is, Section 25 of the 2013 Act." ***(emphasis supplied)***

24. If the aforesaid opinion on the term "relating to' is considered, the exception as craved out in Section 27 of the 2009 Act, which allows deployment of teachers for election duty, cannot be limited to only polling of votes for election rather it will encompass within all the works relating to election, which includes revision of electoral roll as the same has direct relation with the election.

25. Prior to the enactment of the 2009 Act, the issue with reference to assignment of election duty to teachers was considered by Hon'ble the Supreme Court in **St. Marys' case (supra)**. The duty sought to be assigned in the aforesaid case was for non-educational purposes. The matter was examined in detail and it was opined that all teaching staff can be put on the duties of roll revisions and election works on holidays and non-teaching days. Para 33 thereof reads as under:

"33. We would, however, notice that the Election Commission before us also categorically stated that as far as possible teachers would be put on electoral roll revision works on holidays, non-teaching days and non-teaching hours; whereas non-teaching staff be put on duty any time. We, therefore, direct that all teaching staff shall be put on the duties of roll revisions and election works on holidays and non-teaching days. Teachers should not ordinarily be put on duty on teaching days and within teaching hours. Non-teaching staff, however, may be put on such duties on any day or at any time, if permissible in law."

26. In compliance of the aforesaid judgment, even the Election Commission of India has issued guidelines in detail. The same are reproduced as under:

1. Wherever teaching staff is put on duties of roll revision, the DEOs/EROs shall prescribe holidays and non-teaching days and not teaching hours as duly period for this work. Such appointees may be asked to avoid teaching days and teaching hours for undertaking the roll revision work. During roll revision, wherever the teachers are appointed as designated officers to make various Forms (Form-6, 7 etc) available to the voters and to receive the Forms from the voters, the DEOs/EROs shall prescribe a specific time during non-

teaching hours for the purpose of providing and receiving such Forms. Preferably, minimum of one hour time immediately after the closure of teaching hours can be earmarked for this purpose. Depending on the prevailing teaching hours, the DEOs/ERO shall issue specific instruction and bring the same to the knowledge of all political parties and to the public well in advance.

2. Wherever special campaign dates are prescribed during the revision period, such complaint shall invariably be held on holidays only.

3. When an intensive revision is to be ordered, the schedule for revision shall be devised keeping the availability of holidays in mind. If the door-to-door verification has to be done on teaching days, such verification may be asked to be done after teaching hours and on holidays.

4. Whenever the teachers are used as Booth Level Officer for the purpose of door-to-door verification, for finding out cases of photo mismatches in the photo roll etc, the same exercise shall be done during non-teaching hours and on holidays.

5. Whenever needed, the period for enumeration work may be extended for this purpose so that the enumeration work is carried out without hampering the teaching hours."

27. It was pleaded that the aforesaid guidelines are being followed.

28. In our view, the judgement of Single Bench of this Court in **Kuldip Singh v. State of U.P. and others, Writ-A No.8516 of 2021 decided on August 24, 2021** does not lay down the correct law and must, as we do, be overruled.

ANSWERS TO QUESTIONS

29. **Question No.1** is answered in positive holding that the teachers can be deployed for election duty even before issuance of the notification relating to election to a Local Body, a State Assembly or the Parliament which includes work for revision of electoral roll.

Question No.2 is answered in negative holding that the teachers cannot be deployed during teaching days or teaching hours but can be on non-teaching days and non-teaching hours.

30. While answering the questions referred to by the larger Bench, let the present writ petition be now placed before the Single Bench as per roster on August 29, 2022.
